BRB No. 08-0659

C.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/MCCS	)	DATE ISSUED: 06/12/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order on Remand – Denial of Attorney Fees of Eric L. Richardson, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for Diane L. Middleton, claimant's former attorney.

James M. Mesnard (Seyfarth Shaw, L.L.P.), Washington, D.C., for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel appeals the Order on Remand – Denial of Attorney Fees (No. 18-78528) of District Director Eric L. Richardson rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalites Act, 5 U.S.C. §8171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This is the second time this case has come before the Board, and the facts are not in dispute. Claimant injured her low back on May 23, 2002. Shortly thereafter, she returned to limited duty work. On April 11, 2003, claimant returned to her usual work with no restrictions. Employer voluntarily paid temporary total disability benefits from

June 4, 2002, through May 17, 2003, at a rate of $138.45 per week.[1] On August 29, 2003, claimant filed a claim for additional temporary total disability benefits and requested pertinent case documentation from employer. After communicating with employer, claimant's counsel, on March 11, 2004, agreed that claimant had been properly compensated; however, she requested mileage reimbursement, sought a change of treating physician, and asked for the medical payment ledger to assess the potential value of future medical benefits. By January 2005, counsel sought $45,000 to settle the case and requested that Dr. Loddengaard be authorized as claimant's physician. Comp. Order at 1-2. Employer sent counsel a choice of physician form in February 2005, counsel returned the completed form in April 2005, and employer authorized an initial evaluation with Dr. Loddengaard in either May or July 2005. At that time, it also offered claimant $5,000 to settle the claim. In August 2005, claimant requested an informal conference. The district director scheduled one but then cancelled it, determining there were no factual disputes. After claimant failed to attend her November 2005 appointment with Dr. Loddengaard and her January 2006 appointment with Dr. Hasday, counsel withdrew from the case on March 23, 2006, and she requested that a lien for her attorney's fee be placed on claimant's benefits. In April 2006, employer informed the Department of Labor and claimant's former counsel that the parties agreed to settle the case for $5,000, and they submitted their Section 8(i), 33 U.S.C. §908(i), settlement documents. Comp. Order at 3. Counsel filed a petition for an attorney's fee with the district director in May 2006, requesting a total of $8,437.50, representing 33.75 hours at an hourly rate of $250. The district director approved the parties' settlement request as well as counsel's request for an attorney's fee. With regard to the fee, he approved $6,693.75 payable by employer and $900 payable by claimant. Comp. Order at 6; *see C.W. v. United States Marine Corps/MCCS*, BRB No. 07-0185 (Nov. 7, 2007); Comp. Order – Approval of Agreed Settlement.

Employer appealed the district director's award of an employer-paid fee.[2] The Board held that claimant's obtaining employer's authorization for the requested change in physician alone could not constitute a "successful prosecution" on the facts in this case, as there was no evidence that a dispute existed against the parties. The Board vacated the fee awarded against employer and remanded the case for consideration of whether there was any successful prosecution pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Specifically, the Board required the district director to address whether the receipt of mileage expenses, an alleged delay in payment of medical expenses, and/or the $5,000

[1]Employer considered payments made between April 11 and May 17, 2003, to be overpayments.

[2]Claimant did not challenge the finding that she is liable for an attorney's fee in the amount of $900. *C.W.*, slip op. at 3 n.2.

settlement served as alternate rationales for finding that claimant successfully prosecuted this claim. The Board further stated that the district director should consider the fee request in view of the amount of benefits obtained and whether the expenditure of attorney time warranted the fee requested. *C.W.*, slip op. at 5-6.

On remand, the district director determined there was no dispute between the parties at the time of the request for an informal conference regarding change of physicians. As the issue had "dissipated," the district director found that there was no need to make any recommendation on the issue, and it cannot be construed to have been found in claimant's favor. Order at 3. The district director also concluded there was no dispute regarding the request for mileage reimbursement because employer paid the request therefor relatively promptly, and there is no documentation supporting any claim for delayed payment of medical bills. Further, the district director determined that counsel proposed $45,000 and then $15,000 to settle the claim, and employer consistently offered $5,000, which was rejected by counsel. Because counsel rejected the offer that was ultimately accepted by claimant, the district director concluded that counsel's services cannot be seen as a "successful prosecution." Order at 4. In the absence of a successful prosecution, the district director denied a fee payable by employer. *Id.* at 5. Counsel contends the district director erred in denying her a fee. Employer responds, urging affirmance.

Counsel contends that the "successful prosecution" provision of Section 28(a) requires only that employer be held liable, acknowledge liability for benefits, or pay a settlement, after having denied further liability. She asserts that, because employer did not pay any benefits within the 30 days following the filing of the claim, any money or relief claimant received thereafter, including the change of physician approval, the mileage reimbursement, the payment of medical bills, and/or the $5,000 settlement, constitutes a "successful prosecution" of the case entitling her to an employer-paid fee.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation. 33 U.S.C. §928(a);[3] *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS

[3]Section 28(a) provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an

15(CRT) (6th Cir. 2008); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *A.M. v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Since the Board issued its last decision in this case, Section 28(a) has been further construed. *See Day*, 518 F.3d 411, 42 BRBS 15(CRT); *A.M*, 42 BRBS 30; *see also Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, __ F.3d __, __ BRBS __(CRT) (5th Cir. Mar. 17, 2009) (2009 WL 1124246). Specifically, once the 30-day period has expired without the payment of any benefits to the claimant, fee liability shifts to the employer, and Section 28(a) applies to the entire claim, regardless of whether any benefits had been paid prior to the filing of the claim or following the expiration of the 30-day period. *Day*, 518 F.3d 411, 42 BRBS 15(CRT);[4] *W.G.*, 41 BRBS 13. Thus, it is irrelevant that there may have been no dispute over any additional benefits sought after the expiration of the 30-day period. *A.M.*, 42 BRBS at 33-34. To the extent the district director, and the Board in its prior opinion, relied on the lack of a dispute, the decisions must be vacated.

Accordingly, employer is liable here for an attorney's fee under Section 28(a) for reasonable and necessary attorney services if there has been a "successful prosecution" of the case. 33 U.S.C. §928(a); 20 C.F.R. §702.132. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that a claimant "successfully prosecutes" his claim when he obtains "some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in

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> attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

[4]In *Day*, the employer voluntarily paid benefits at the time of the injury but declined to pay any benefits within 30 days after it received written notice of the claim. It later paid additional benefits for various periods, and the administrative law judge awarded continuing permanent total disability benefits. The United States Court of Appeals for the Sixth Circuit concluded, "consistent with the tide of appellate authority," that liability for work involving all benefits due must be determined based on whether the employer paid on the claim during the 30-day period after it received notice of the claim from the district director. *Day*, 518 F.3d at 420, 42 BRBS at 20(CRT); *see A.M.*, 42 BRBS at 32-33.

a way that directly benefits the plaintiff.'" *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)). "Actual relief" is not limited to the receipt of additional money. *See Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT).

Based on this construction of Section 28(a), we agree with claimant that there has been a successful prosecution of this case. It is undisputed that claimant filed a claim for benefits on August 29, 2003, and that employer paid claimant nothing during the 30 days following its receipt of the claim from the district director's office on October 22, 2003. It is also undisputed that, thereafter, claimant obtained approval for a change of physician, received reimbursement for mileage expenses, and settled the claim with employer for $5,000. This constitutes "actual relief" benefitting claimant. *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Employer is thus liable for an attorney's fee in this case. *Day*, 518 F.3d 411, 42 BRBS 15(CRT); *A.M*, 42 BRBS 30.

The fact that employer is liable for a fee does not mean counsel is entitled to payment for all services claimed. She is entitled to, and employer is liable for, only fees for reasonable and necessary attorney services. In this regard, we reject counsel's argument that her services were instrumental in claimant's obtaining either medical benefits or the $5,000 settlement,[5] and the district director properly denied a fee for services rendered on these issues. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). With regard to medicals, the district director stated that counsel did not provide any documentation of any late or denied payment of medical bills. As counsel thus did not establish her services were necessary to claimant's obtaining these benefits, we affirm the denial of a fee for services in this regard.

Similarly, counsel's services were not necessary to claimant's receipt of the $5,000 settlement. Employer contacted claimant about settling the claim before she retained counsel. Subsequently, counsel proposed settlements for $45,000 and $15,000, and she rejected employer's consistent offer of $5,000. After counsel's withdrawal from the case, claimant settled for $5,000. As counsel rejected employer's offer and the settlement was reached when counsel was no longer involved in the case, it was rational for the district director to find that counsel's services did not lead to the settlement between the parties. As the services performed by counsel in this regard were not

[5]As claimant's counsel conceded that the temporary total disability benefits paid prior to the claim had been properly paid in full, counsel is not entitled to a fee for any services rendered on that issue. *C.W.*, slip op. at 4 n.4; *see West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

necessary to the achievement of the settlement, we affirm the district director's finding that counsel is not entitled to a fee for these services. *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT); *West*, 21 BRBS 87.

We vacate the denial of all fees for the remaining services and remand this case for reconsideration. The district director must consider whether claimant's counsel's work was reasonable and necessary for the results obtained with regard to claimant's receipt of mileage expenses and a change of physician.[6] Claimant may also be compensated for any related, necessary routine services, such as contact with her client. On remand, the district director must determine a reasonable fee commensurate with claimant's success. Employer is liable for that fee. *Day,* 518 F.3d 411, 42 BRBS 15(CRT); *A.M.*, 42 BRBS 30.

Accordingly, the district director's Order on Remand is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALLL
Administrative Appeals Judge

[6]According to the record, claimant moved a number of times, thereby needing a new doctor. The Act requires a written request for such a change. 20 C.F.R. §702.406.