BRB No. 04-0274

CAMERON I. REID	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE	)	DATE ISSUED: Nov. 15, 2004
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
GARY WEST and ROBERT MACBETH	)	
	)	
Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM

Employer appeals the Attorney Fee Order (2002-LHC-2030) of Administrative Law Judge Richard E. Huddleston 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*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case involves the question of whether claimant's former legal representatives are entitled to a fee because they were discharged prior to the resolution of the case.[1] As background, employer voluntarily paid benefits to claimant between November 15, 2000, and February 10, 2002, ceasing when claimant was able to return to work. Claimant's first attorney, Mr. MacBeth of the firm Rutter, Walsh, Mills & Rutter, L.L.P. (Rutter), filed a claim and sought additional temporary partial disability benefits for claimant due to a loss of wage-earning capacity. He filed a request for an informal conference on April 17, 2002. The district director responded to the request by asking for evidence of this loss. Mr. MacBeth sent evidence in the form of pay stubs to the district director on April 26 and May 16, 2002. On May 16, he also included a letter requesting payment or the scheduling of an informal conference. Four days later, with no opportunity for action by either employer or the district director, Mr. MacBeth filed an LS-18 pre-hearing statement, requesting the case be transferred to the Office of Administrative Law Judges. The case was transmitted on May 29, 2002.

In October 2002, Mr. West, also of Rutter, replaced Mr. MacBeth, and he continued to represent claimant's interests, until claimant discharged the Rutter firm on December 12, 2002, and retained the services of Mr. Montagna, of Montagna, Klein & Camden, L.L.P. Prior to the formal hearing, the parties reached agreement as to claimant's entitlement to additional benefits and, in January 2003, the administrative law judge remanded the case to the district director's office. Employer voluntarily paid additional benefits to claimant and an attorney's fee to Mr. Montagna pursuant to the agreement.

On December 12, 2002, Mr. West filed a fee petition for services performed by the Rutter firm in this case. The petition included services performed before both the district director and the administrative law judge. In April 2003, Mr. West inquired about the status of the Rutter fee petition, and the parties conducted a telephone conference to clarify the matter. On April 14, 2003, Mr. West filed an amended fee petition, adjusted to exclude services performed before the district director, requesting a total of $3,440, representing 14.75 hours of services between June 6, 2002, and April 9, 2003, at a rate of $250 per hour, plus $62.25 in expenses. Employer filed objections.

[1]Claimant's former attorneys, Robert MacBeth and Gary West, are the appropriate respondents in this case; however, they have not responded to the appeal filed by employer.

The administrative law judge denied a fee for any services performed after counsel were discharged in December 2002, he reduced the hourly rate and separated the attorney rate from the paralegal rate, and he denied the amount requested for costs. Accordingly, the administrative law judge awarded the Rutter firm a fee in the amount of $2,195, payable by employer. Employer appeals the fee award. Neither Rutter nor claimant has responded.

Employer first argues that the fee petition is insufficient and does not comply with Section 702.132(a) of the regulations, 20 C.F.R. §702.132(a). In pertinent part, that section requires fee petitions to be "supported by a complete statement of the extent and character of the necessary work done. . . ." *Id.* Specifically, employer asserts that, although the administrative law judge may be correct in stating that the entries are minimally acceptable in their compliance, Order at 2, its true argument is based on the absence of an explanation or justification regarding why Rutter is entitled to a fee. Employer avers that, as Rutter was not representing claimant when the parties reached an agreement and as Mr. MacBeth prematurely requested the case be transferred for formal hearing, something more definitive should be in this fee petition to show claimant's former counsels' entitlement to an attorney's fee. We reject employer's contention.

Section 702.132(a) provides that the fee application must be supported by "a complete statement of the extent and character of the necessary work done[,]" but the regulation explains that the statement should be "described with particularity as to the professional status . . . of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work." 20 C.F.R. §702.132(a). The administrative law judge determined that the fee application was sufficient because the tasks could be identified from their descriptions, the initials next to each task identified the person performing that work, and simple division established the hourly rate requested. Order at 2-3. The administrative law judge's conclusion is rational: the fee petition contains the necessary information. 20 C.F.R. §702.132(a). Moreover, the Board has held that the fee petition need not be sworn to, *McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979), but if an affidavit is attached, it should be considered sound evidence, *Cuevas v. Ingalls Shipbuilding Corp.*, 5 BRBS 739 (1977). Therefore, we reject employer's contention that the fee petition is insufficient because it lacks an affidavit giving further explanation of the necessity and reasonableness of the work performed, and we affirm the administrative law judge's finding on this matter.

Next, employer argues that Rutter is not entitled to a fee because it did not obtain a benefit for claimant. Specifically, employer asserts that Mr. MacBeth prematurely sought a formal hearing and that agreement was not reached while Rutter represented claimant;

therefore, Rutter's work failed to contribute to claimant's ultimate success.[2] Further, employer argues that the administrative law judge improperly placed the burden on employer of showing that Rutter's work was unreasonable rather than placing the burden on Rutter to show it is entitled to a fee.

The Act and regulations require a party seeking a fee to file a complying fee petition, and they require the administrative law judge to consider various factors in awarding the fee. 33 U.S.C. §928; *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978). One of the criteria necessary for invocation of Section 28 of the Act is that the claimant be successful in obtaining benefits as a result of the services of his attorney. In this case, there is no doubt that claimant ultimately obtained benefits by using the services of an attorney. Discharge of Rutter prior to the agreement does not render the work of attorneys MacBeth and West unreasonable. As the administrative law judge found, the actions listed in the fee petition are consistent with normal practice under the Act, and Mr. Montagna was given the case in the posture left by the Rutter attorneys; thus, he did not have to begin anew. In this vein, it was rational for the administrative law judge to require employer to object and to identify any deficiencies or reasons why Rutter should not be awarded a fee for the work it performed, and employer did not show that the work performed was unnecessary. Ultimate success by a claimant renders an employer liable for a fee for all work performed leading to that success. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 8 (2001) (*en banc*). Therefore, we reject employer's argument that the work performed by Rutter attorneys did not obtain a benefit for claimant.

Finally, employer contends that a fee is not appropriate under Section 28(b), 33 U.S.C. §928(b), which controls any fee awarded in this case, because the elements of Section 28(b) have not been satisfied. In particular, employer asserts that the absence of an informal conference prevents the award of a fee under Section 28(b), *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), and that the same law should apply to this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), however, the Board has held that an informal conference is not a prerequisite to an employer's liability for a fee under Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986). The administrative law judge acknowledged the Board's continued adherence to this

[2]Employer argues that this conclusion is evident because Rutter attorneys were claimant's representatives for ten months with no outcome, but Mr. Montagna was claimant's counsel for one month and the case resolved.

precedent.[3] The absence of an informal conference is, therefore, not controlling in this case arising in the Fourth Circuit. *National Steel*, 606 F.2d 875, 11 BRBS 68; *Caine*, 19 BRBS 180. As employer voluntarily paid benefits, and claimant then obtained additional benefits by using the services of an attorney, employer is liable for an attorney's fee pursuant to Section 28(b) of the Act.[4] *Brown v. General Dynamics Corp.*, 12 BRBS 528 (1980); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980).

[3]Employer correctly states that the administrative law judge's reference to *Jacobs v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-1180 (Sept. 14, 2001), is mistaken. *Jacobs* does not involve an attorney's fee issue. Rather, as did employer, we infer that he must have meant to refer to *Hucks v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-168 (September 29, 2003). Further, we note that the administrative law judge erroneously stated that the United States Court of Appeals for the Ninth Circuit agrees with the Fifth Circuit's opinion that a fee is only appropriate under Section 28(b) if there has been an informal conference. Rather, in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991), the court held that a fee could not be awarded against the employer because it did not refuse to pay the recommended benefits following an informal conference, but rather agreed to pay benefits leaving only the fee in dispute. The court did not hold that the absence of an informal conference was a bar to a fee award under Section 28(b), as, indeed, that question was not before it.

[4]Employer is correct in arguing that Section 28(a) of the Act, 33 U.S.C. §928(a), is not applicable. Although the claim for compensation is absent from the record before us, we infer from the initial attorney's fee application that the claim for additional compensation was filed prior to October 31, 2001, when Rutter received employer's notice of controversion. At that time, employer had been paying benefits to claimant, so Section 28(a) would not apply.

Accordingly, the administrative law judge's Attorney's Fee Order is affirmed.

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 HALL
Administrative Appeals Judge