

K. D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ORANGE SHIPBUILDING COMPANY, INCORPORATED	)	DATE ISSUED: 02/27/2007
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Award of Attorney's Fees Pursuant to Section 28 of the Act of Chris John Gleasman, District Director, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Patrick E. O'Keefe and Scott R. Hymel (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Award of Attorney's Fees Pursuant to Section 28 of the Act (Case No. 08-116420) of Chris John Gleasman 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). 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).

Claimant sustained injuries to her neck and lower back while working for employer on February 23, 1999. She returned to light-duty work for employer on February 24, 1999, but continued to experience pain predominantly in her lower back and legs, which along with her efforts to seek treatment thereof, resulted in lost time at work. Employer ultimately terminated claimant, on May 19, 1999, for failing to call and report her absences. She subsequently procured other work with other employers and thereafter filed a claim under the Act seeking disability and medical benefits for the work-related injuries she sustained on February 23, 1999.

The administrative law judge determined that while claimant's present condition is the result of her February 23, 1999, work accident she is not entitled to disability benefits because the light-duty position she held for employer as of February 24, 1999, constituted suitable alternate employment and her inability to perform that job on or after May 19, 1999, was due to her own misfeasance in violating a company rule. The administrative law judge however awarded claimant medical benefits for the treatment of her February 23, 1999, work-related injuries. The Board affirmed the administrative law judge's decision. *See Duhon v. Orange Shipbuilding Co., Inc.*, BRB No. 04-0202 (Nov. 10, 2004) (unpub.).

Claimant's counsel then filed a fee petition with the district director requesting an attorney's fee of \$2,337.50, representing 8.9 hours of attorney time at an hourly rate of \$250, and .5 hours of attorney time at an hourly rate of \$225.<sup>1</sup> The district director determined that a reduced fee is appropriate based upon claimant's limited success, and thus, awarded claimant's counsel an attorney's fee of \$1,000, payable by employer.

On appeal, employer challenges the district director's award of an attorney's fee. Claimant responds, urging affirmance.

Employer contends that the district director did not fully consider its objections to counsel's fee petition and that his award of a flat attorney's fee of \$1,000 without further explanation is arbitrary and capricious. Employer specifically asserts that the district director did not consider the effect of its "tender" of compensation pursuant to Section

---

<sup>1</sup> Claimant's counsel also filed an attorney's fee petition with the administrative law judge seeking \$31,962.50 for services rendered, plus an additional \$3,235.56 in expenses. The administrative law judge made several reductions in the fee petition including, most significantly, an across-the-board reduction of 65 percent based on claimant's limited success, which resulted in an awarded attorney's fee, payable by employer, of \$7,394.84, plus \$3,159.65 in expenses.

28(b), 33 U.S.C. §928(b),<sup>2</sup> nor did he attempt to quantify the award of medical benefits in order to take it into consideration in deciding the amount of an attorney's fee to be awarded.

The district director acknowledged employer's "numerous objections" but did not specifically address them in rendering his award of an attorney's fee. District Director's Order dated March 22, 2006 (DDO), at 1. Instead, he summarized the administrative law judge's decision awarding an attorney's fee in this case, finding that the administrative law judge "declined employer's request that no fee be awarded," but determined that the attorney's fee award "should be reduced as a result of counsel's limited request [*sic*]." DDO at 2. The district director then, without further explanation, "likewise conclude[d] that a reduced fee is appropriate based upon counsel's limited success," and thus awarded "a fee in the amount of \$1,000." *Id.*

Where, as in the instant case, claimant has prevailed on the issue of causation, entitling her to medical benefits, there has been successful prosecution and claimant's counsel is entitled to an attorney's fee. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5<sup>th</sup> Cir. 1995). Nonetheless, the fee award to which claimant's counsel is entitled must be considered in terms of claimant's limited success. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5<sup>th</sup> Cir. 2003); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999). While the district director's award of an attorney's fee in this case has taken claimant's limited success into account, it is not in compliance with the requirements of Section 28 of the Act. 33 U.S.C. §928; 20 C.F.R. §702.132.

In particular, the district director's award of an attorney's fee generally under Section 28 is flawed as he did not specify whether employer's liability falls under Section 28(a) or Section 28(b) of the Act, nor did he evaluate the requirements for liability under those provisions.<sup>3</sup> 33 U.S.C. §928(a), (b); *see generally Marks v. Trinity Marine Group*,

---

<sup>2</sup> Employer maintains that by correspondence dated February 22, 2000, its carrier made claimant "a settlement offer [of] \$200 plus the payment of outstanding medical" expenses. Carrier's Exhibit 2. While employer offered to pay "outstanding" expenses in its "tender," the administrative law judge additionally awarded future medical benefits.

<sup>3</sup> Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney. An attorney's fee can be levied against an employer only if the conditions of Section 28(a) or Section 28(b) are met. 33 U.S.C. §928(a), (b).

37 BRBS 117 (2003). Additionally, we note that the district director did not fully discuss and render adequate findings regarding employer's numerous objections to the fee petition. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Despite reviewing employer's objections, the district director provided no particular discussion of them. For instance he did not address the hourly rate, or employer's assertions that certain entries were repetitive and/or excessive. Additionally, the district director did not adequately and independently discuss the reasons for his reduction of the requested attorney's fee. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001). In this regard, the district director did not specify an hourly rate, he did not state which hours were compensable, *Keith v. General Dynamics Corp.*, 13 BRBS 404 (1981); *Adams v. Brady-Hamilton Stevedore Co.*, 10 BRBS 174 (1979), nor did he provide reasons for any disallowances or reductions, other than generally noting claimant's limited success. See *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981); *Nicholson v. Intercounty S & M*, 9 BRBS 466.2 (1978).

We must therefore vacate the district director's award of an attorney's fee of \$1,000 in this case, and remand the case for a complete and thorough consideration of claimant's fee petition and employer's accompanying objections in accordance with the statutory and regulatory criteria. 33 U.S.C. §928(a), (b); 20 C.F.R. §702.132.

Accordingly, the district director's Award of Attorney's Fees Pursuant to Section 28 of the Act is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge