

BRB No. 06-0407

JOHN MANCINI)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PROCUREMENT SERVICES)	DATE ISSUED: 12/18/2006
ASSOCIATES)	
)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

David C. Nolan, Walnut Creek, California, for employer.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 02-138673) of District Director Richard V. Robilotti 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 Defense Base Act, 42 U.S.C. §1651 *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).

On September 23, 2004, claimant was driving in Kuwait City, Kuwait, and was involved in an automobile accident. He sustained multiple injuries and was hospitalized. After a short stay in a Kuwaiti hospital, claimant returned to the United States and was hospitalized in Phoenix, Arizona. He convalesced until late-January 2005. Employer's carrier paid disability and medical benefits under the California State Workers' Compensation Act until November 2004 when it denied further coverage on

jurisdictional grounds.¹ Thereafter, claimant hired an attorney who states that he filed an LS-203 claim for compensation on December 6, 2004, attended an informal conference on January 14, 2005, and filed other documents on January 21, 2005. Employer paid claimant \$18,497 on March 18, 2005, representing compensation due under the Act from September 24, 2004, through February 28, 2005, minus the amounts paid previously by the carrier. Counsel continued to provide legal services for claimant until approximately October 19, 2005. On December 29, 2005, claimant's counsel filed a fee petition with the district director.² The district director awarded him an attorney's fee in the amount of \$4,812.50 on February 6, 2006.³ Employer appeals the attorney's fee awarded by the district director, and claimant's former counsel responds, urging affirmance.

Employer argues that the fee awarded to claimant's former counsel is "legally impermissible and unjustified" because the provisions for awarding attorney fees under Section 28(a) and (b), 33 U.S.C. §928(a), (b), have not been satisfied, as it never denied claimant's entitlement to benefits and the informal proceeding requirements of Section 28(b) were not followed. Employer alternatively argues that, if the provisions of Section 28 have been met, then the fee is out of proportion with counsel's degree of "success" in this case. Counsel responds, arguing that the fee award is appropriate under Section 28(a) and that to the extent employer is arguing that the fee is excessive, it did not raise that issue below. In its reply brief, employer argues that counsel's services did nothing to encourage or enforce employer's payment of benefits in March 2005.

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 benefits. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Section 28(b), in general, allows an employer-paid

¹Claimant's injury is covered by the Defense Base Act, therefore, the carrier was not liable for compensation under the state Act. As employer failed to obtain Defense Base Act coverage, it is an uninsured employer.

²Counsel requested an attorney's fee for 17.25 hours of work at an hourly rate of \$300, plus \$785 in expenses, for a total fee of \$5,980.

³The district director awarded the fee prior to the administrative law judge's October 26, 2006, award of medical and temporary total disability benefits. Employer's appeal of the administrative law judge's decision is currently before the Board, and on November 17, 2006, the Board granted employer's motion and issued a temporary stay of payments. BRB No. 07-0187.

attorney's fee if an employer pays or tenders compensation and thereafter a controversy develops over additional compensation owed, and a claimant successfully obtains additional compensation after following the procedures set forth in the Act. 33 U.S.C. §928(b); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000); *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999). Before the district director, employer objected to the fee petition on the ground that it cannot be held liable pursuant to either subsection 28(a) or (b) in this case.

In his Order, the district director stated only that counsel submitted an application for a fee of \$5,175, and he listed the "value of the attorney's services," the complexity of the case, the amount of time involved, the results achieved, and the professional expertise of the attorney as factors he considered. He then concluded that a reasonable fee should be paid by employer in accordance with Section 28, and he ordered that a "fee in the amount of \$4,812.50 (\$275/hour times 17.25 hours) is approved in favor" of counsel. Comp. Order at 1-2.

We agree with employer that the district director's fee award cannot stand. The Order does not address employer's objections to the fee petition, and although the district director stated that he considered the "provisions of Section 28," he did not state how the facts of this case support a finding of employer's liability for counsel's fee. Therefore, we vacate the district director's fee award, and we remand the case to him for further consideration. *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). On remand, the district director must address employer's objections to counsel's fee petition, apply the appropriate law to the facts of this case to determine employer's liability for an attorney's fee, and explain his rationale for awarding or denying the fee as requested.

Accordingly, the district director's Compensation Order Award of Attorney's Fees is vacated, and the case is remanded to the district director for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge