

MAXINE A. SAUNDERS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: _____
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Denying Approval of Attorney's Fee of B.E. Voultides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for the claimant.

William C. Bell, Newport News, Virginia, for the self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Approval of Attorney's Fee (Case No. 5-57103) of District Director¹ B.E. Voultides 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered an injury while working for employer on January 21, 1986. On December 5, 1986, claimant filed a claim under the Act for temporary total and temporary partial disability compensation and unspecified medical benefits. At the same time, claimant's counsel apparently initiated proceedings before the Industrial Commission of Virginia under the state workers' compensation act. At the informal conference held on March 16, 1987, claimant requested reimbursement of \$26.41 in past prescription drug expenses. Employer agreed to pay the \$26.41 requested for prescription drug expenses but refused payment of the requested disability benefits.

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

Subsequently, claimant hired another attorney, Oldric J. LaBell, Jr., who successfully pursued her disability claim before the Industrial Commission of Virginia.

Attorney John H. Klein, claimant's initial counsel, thereafter submitted a fee petition for work performed before the district director, requesting \$1,396.25 representing 11 hours of attorney services at \$125 per hour, .25 hours of paralegal services at \$45 per hour, plus \$10 in photocopying costs. In an Order dated February 28, 1988, the district director denied counsel's fee request, stating that inasmuch as claimant chose to pursue simultaneous claims before the U.S. Department of Labor and the Industrial Commission of Virginia, and prevailed before the latter, claimant's counsel should submit his fee petition to the Industrial Commission of Virginia for a determination concerning his fee. Counsel appeals, arguing that as he was successful in prosecuting a claim for \$26.41 in past prescription drug expenses under the Act, employer is liable for a reasonable attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Employer responds that the district director acted within his discretion in denying a fee because claimant's success, if any, was limited to establishing her right to \$26.41 in past prescription drug expenses and was *de minimis* in relation to the original claim made.²

An attorney's fee must be awarded in accordance with Section 28 of the Act and the applicable regulation, 20 C.F.R. §702.132, which provides that attorney's fee must be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the benefits obtained. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee award payable by employer. 33 U.S.C. §928(a). Under Section 28(b), where an employer voluntarily pays or tenders benefits and thereafter a controversy develops over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b).

The denial of a fee award in this case is affirmed as claimant's counsel has failed to establish any reversible error committed by the district director. Claimant's counsel asserts that he is entitled to a fee because he succeeded in establishing claimant's entitlement to \$26.41 in prescription drug expenses at the informal conference. It is well-established that establishing claimant's right to past medical expenses can establish a basis for assessment of a fee against employer. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). In this case, however, the parties agree that claimant first requested the disputed \$26.41 in expenses at the informal conference and that employer agreed to pay these benefits at that time. On these facts, there can be no fee liability under Section 28(a) because employer never "declined to pay" the disputed medical benefits so as to trigger fee liability once the request for these benefits was made. There can also be no fee liability under Section 28(b) because under Section 28(b) employer is not

²Although employer asserts that no fee is due because there was no formal Order entered by the district director awarding medical benefits, the Act does not require that a formal award be entered in order for employer to be held liable for an attorney's fee. *See Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980).

liable for any fees incurred prior to the date a "controversy" develops over the amount of additional compensation due the claimant. In the present case, inasmuch as employer agreed to pay the prescription drug expenses when requested to do so at the informal conference, no "controversy" arose with regard to these expenses within the meaning of Section 28(b), and claimant's counsel was not successful in obtaining additional compensation greater than that voluntarily paid or tendered by employer.

While a claimant may be held liable for attorney's fees under Section 28(c) if the employer is found not to be liable under Section 28(a) or (b), under such circumstances the fee awarded is a lien on claimant's compensation award. In this case, however, because claimant obtained no disability compensation under the Act, choosing instead to pursue this claim before the Industrial Commission of Virginia, there is also no fee liability under Section 28(c).

Accordingly, the Order Denying Approval of the district director is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge