BRB No. 07-0185

C.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/MCCS	)	DATE ISSUED: 11/07/2007
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award 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.

Kim M. Hoffman (Contract Claims Services, Inc.), Dallas, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case 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.* (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 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's counsel filed a claim for additional temporary total disability benefits and requested pertinent case documentation from employer. After several communications, 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 demanded $45,000 to settle the case and requested that Dr. Loddengaard be authorized as claimant's physician in the event there is no settlement within 30 days. Comp. Order at 1-2. According to employer, documentation establishes that it sent counsel a choice of physician form in February 2005, but counsel did not return the completed form until April 2005, and therein she suggested that any appointment be delayed pending settlement negotiations. Employer authorized an initial evaluation with Dr. Loddengaard in May 2005. The district director found that employer authorized an initial evaluation with Dr. Loddengaard in July 2005, and at that time it also offered $5,000 in settlement. 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. The district director did not approve the settlement, pending resolution of counsel's claim of a lien on the settlement proceeds.

Subsequently, counsel filed a petition for an attorney's fee with the district director in the amount of $8,437.50, representing 33.75 hours at an hourly rate of $250. Employer objected to the fee on the grounds that neither Section 28(a) nor (b), 33 U.S.C. §928(a), (b), applies to hold it liable for a fee in this case, that claimant did not successfully prosecute her claim, that the requested hourly rate is excessive, that billing in quarter-hour increments is impermissible, and that any fee awarded should be reduced pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The district director applied Section 28(a) to this case, found that claimant successfully obtained authorization for a change in physician, and awarded counsel an attorney's fee in the amount of $7,593.75, representing employer's liability for 29.75 hours of service at an hourly rate of $225, plus

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

claimant's liability for four hours of service at an hourly rate of $225.[2] Employer appeals the district director's fee award, and claimant's former counsel responds, urging affirmance.

Employer contends the district director erred in awarding counsel a fee because it voluntarily paid benefits and there was no successful prosecution in this case. Thus, employer asserts that it cannot be assessed an attorney's fee under either Section 28(a) or (b). Employer alternatively asserts that, if a fee is warranted, it must be reduced in accordance with *Hensley*, as claimant's success was limited. Claimant contends the district director properly applied Section 28(a) and that, in addition to obtaining a change of physician, she also obtained mileage expense reimbursement, payment of medical bills, and a settlement for $5,000, all of which constitute "successful prosecution." We agree with employer that the fee award cannot be affirmed on the basis provided by the district director.

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 benefits. 33 U.S.C. §928(a);[3] *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37

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[2]Because claimant did not cooperate with counsel by failing to attend her appointments with either doctor, the district director authorized $900 of the attorney's fee to be paid as a lien against claimant's compensation. Claimant has not challenged this finding; therefore, it is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986) (issues not raised by the parties will not be addressed by the Board). Employer and claimant correctly assert that there is a typographical error in the amount of the fee assessed to employer by the district director: $225 x 29.75 hours equals $6,693.75 not $6,243.75.

[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 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

BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). As the district director found, and contrary to employer's assertions, Section 28(a) is the potentially applicable section in this case because, although employer paid benefits voluntarily before a claim was filed, it paid nothing within 30 days after receiving the claim from the district director. *See Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), *citing Pool Co. v. Cooper*, 274 F.3d 543, 34 BRBS 19 (5th Cir. 2000). However, employer is liable under Section 28(a) only if there has been a "successful prosecution" of the case. 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 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)). Additionally, the court requires that a disputed issue be addressed and found in claimant's favor. *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989). Where there is no successful prosecution, an employer cannot be held liable for an attorney's fee. *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT); *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

In this case, the district director's finding of a "successful prosecution" rests on claimant's obtaining a change of physician.[4] Contrary to counsel's assertions in her response brief, however, the district director made no findings that any dispute existed between the parties over claimant's request for a change of physician. Although claimant filed a claim for temporary total disability benefits in August 2003, she did not request a change of physician at that time. Indeed, she did not request a change of physician until March 11, 2004, and she did not specify to whom she wished to change until a January 27, 2005 letter.[5] The district director found that authorization occurred in July 2005[6] and

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attorney for the claimant in a lump sum after the compensation order becomes final.

[4]Claimant's counsel conceded that the temporary total disability benefits paid prior to the claim had been properly paid in full; thus, there can be no "successful prosecution" on that basis. *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

[5]In discussing fee liability, the district director stated that claimant requested the change in writing on January 27, 2004, resulting in a delay of 18 months before employer's approval in July 2005. Order at 4. In fact, the letter requesting Dr. Loddengaard is dated January 27, 2005, as reflected in the district director's recitation of the facts. Order at 2.

further found that the Department of Labor denied claimant's request for an informal conference in August 2005 on the issue of medical benefits because there was no dispute over claimant's medical care as employer had authorized medical care including an evaluation with Dr. Loddengaard. Order at 2-3. As discussed, the Ninth Circuit requires that a "successful prosecution" comprise some "actual relief," which "alters the legal relationship" between the parties. On the facts presented, claimant's obtaining employer's authorization for the requested change in physician is not sufficient alone to meet this standard, as there is no indication that a dispute existed between the parties. We therefore vacate the district director's award of a fee against employer on this basis. *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT); *West*, 20 BRBS 162.

Claimant argues that employer's delay in paying the requested mileage expense and/or an allegedly delayed payment of medical benefits, as well as the $5,000 settlement serve as alternate rationales for awarding a fee under Section 28(a).[7] According to the district director, claimant requested reimbursement of mileage expenses in March 2004, and counsel questioned the status of the reimbursement claim in January 2005. Employer asserts it paid the expense in full in May 2004 and stated it provided counsel with a copy of the check in response to her inquiry.[8] The district director, however, did not address whether employer's payment of the mileage expense two months after the request was made could constitute a "successful prosecution" entitling counsel to a fee payable by employer. Moreover, the district director also did not discuss whether the settlement, if approved, provides any basis for employer's liability for a fee for claimant's counsel. Because the district director did not discuss these aspects of the case, we remand this case

[6]Employer asserts that it voluntarily authorized the change in May 2005 after claimant's counsel after a completed change of physician form it sent counsel in February was returned in April 2005, and it attached documents to its appellate brief which support that assertion.

[7]Contrary to employer's assertion, claimant need not file a cross-appeal to raise an issue that provides an alternate avenue of affirming the district director's decision. *See Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004). Contrary to claimant's assertions, however, there are no documents in the file or any findings by the district director discussing any delay in the payment of any medical expenses. Thus, this allegation is not supported by the record.

[8]A copy of the check is attached to claimant's brief herein, and it verifies that employer paid the mileage expense in May 2004.

to him for further consideration of the parties' arguments on these issues.[9] *See generally Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT); *Palmer Coking Coal*, 867 F.2d 552; *West*, 20 BRBS 162. In awarding any fee in this case, the district director must consider the amount of benefits claimant was successful in obtaining and whether the expenditure of attorney time warranted the fee requested. *Hensley*, 461 U.S. 424. In addition, the district director should address the regulation at 20 C.F.R. §702.132(a), which requires that a fee award be "reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded."

Accordingly, the district director's attorney's fee award is vacated, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9]Employer attached documents to its appellate brief which were not discussed by the district director. As these documents provide evidence of part of the chronology of events in this case, the district director should consider them on remand.