

BRB No. 07-0419

R.S.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARINE INDUSTRIES NORTHWEST, INCORPORATED)	DATE ISSUED: 11/26/2007 <u>2007</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED)	
)	
Employer/Carrier-Petitioners)	
)	DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee Application
and the Denial of Employer's Motion for Reconsideration of Karen P.
Staats, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Craig K. Connors (Bauer Moynihan & Johnson, LLP), Seattle, Washington,
for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Approval of Attorney Fee Application
and the Denial of Employer's Motion for Reconsideration (Case No. 14-0142647) of
District Director Karen P. Staats rendered on 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, a marine boilermaker/shipfitter, sought compensation for back injuries sustained on September 4 and 5, 2003, which continued to be aggravated through September 28, 2004. The parties reached a settlement which was approved under Section 8(i), 33 U.S.C. §908(i), on December 8, 2005.¹

Subsequently, the parties agreed that claimant's attorney was to receive a fee of \$23,000 representing services and costs in connection with the claim at both the Office of Administrative Law Judges (OALJ) and the Office of Workers' Compensation Programs (OWCP) levels. The order awarding this attorney's fee was filed and served on employer on January 26, 2006. On February 13, 2006, claimant's attorney sought a default order against employer for failure to pay the attorney's fee within 10 days of January 26, 2006. Counsel received full payment of the fee on February 17, 2006. On February 21, 2006, the OWCP denied claimant's motion for a default order stating that there is no provision of the Act requiring payment of an awarded attorney fee within 10 days. *See* 33 U.S.C. §914(f) (requiring payment of *compensation* payable under an award to be made within 10 days of the due date in order to avoid a penalty).

Following the denial of his default motion, claimant's counsel filed, apparently with the OALJ, a supplemental fee petition for time spent seeking the default order. Informed that the OALJ was not the proper forum, claimant's counsel re-filed the fee petition on September 26, 2006, with the OWCP, seeking \$800 for work performed between February 6 and 21, 2006, in pursuit of the default order. In an Order filed on November 9, 2006, the district director observed that employer had not submitted any objections to the fee petition and she therefore summarily awarded the requested fee, payable by employer. Employer filed a motion for reconsideration, objecting to the fee petition on the grounds, *inter alia*, that counsel is not entitled to a fee because his motion for a default order was unsuccessful. The district director denied employer's motion for reconsideration on the ground that employer failed to object to the fee petition in a timely manner.

Employer appeals the district director's fee award. Claimant responds that employer cannot raise on appeal arguments it failed to timely raise before the district director.

¹ Under the terms of the agreement, claimant received \$35,606.90 in compensation plus \$914.87 in interest. Employer timely paid the benefits due under the approved settlement.

Any attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928. *See also* 20 C.F.R. §§702.132, 702.134. Fundamental to the award of any fee is that the claimant obtain some benefit from the proceedings, and it is the duty of the district director or administrative law judge to determine in the first instance whether any attorney's fee is awardable under the Act. Fee liability pursuant to Section 28(a) is premised, *inter alia*, on the "successful prosecution" of the claim. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Fee liability pursuant to Section 28(b) is premised, *inter alia*, on the claimant's obtaining greater compensation than employer paid or tendered. 33 U.S.C. §928(b); *Nat'l Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). Claimant's liability for his attorney's fee, in instances when Sections 28(a) or (b) are inapplicable, is conditioned on the existence of an "award" of compensation against which the attorney's fee can be made a lien. 33 U.S.C. §928(c); *Director, OWCP v. Hemingway Transport, Inc.*, 1 BRBS 73 (1974).

In this case, as employer properly contends, claimant was wholly unsuccessful in obtaining a default order, the services for which counsel sought an attorney's fee. Under such circumstances, no attorney's fee can be awarded pursuant to Section 28 of the Act. *See generally* *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004); *see also* *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); 20 C.F.R. §702.372. Therefore, we reverse the district director's award of an attorney's fee payable by employer.²

² As the fee award in this case is contrary to law, we need not address the parties' specific contentions concerning any objections employer did or did not make before the district director. *See generally* *Monaghan v. Portland Stevedoring Co.*, 11 BRBS 190 (1979).

Accordingly, the district director's Approval of Attorney Fee Application and the Denial of Employer's Motion for Reconsideration are reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge