BRB No. 96-0951

WILLIAM WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MEEHAN SEAWAY SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
FRANK GATES/ACCLAIM	)	
	)	
Employer/Adjusting Service-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

Dennis O. Cochrane and Boad S. Swanson (Marcovich, Cochrane & Milliken), Superior, Wisconsin, for claimant.

Gregory P. Sujack (Garofalo, Hanson, Schreiber & Vandlik), Chicago, Illinois, for employer.

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

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 10-29961) of District Director Thomas C. Hunter 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, and abuse of discretion or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries on June 4, 1990, in the course of his employment.

Employer voluntarily paid claimant temporary total disability benefits until August 25, 1995, when it received a medical opinion that claimant was capable of returning to work.[1] During this five-year period several disputes arose as to employer's liability for various medical services. Employer filed notices of controversion on July 15, 1992, and October 28, 1992, contesting its liability for specific medical services already provided to claimant. Employer's objections to these services were upheld by the district director on the grounds that they were not related to claimant's work injury.

Employer again filed a notice of controversion on June 15, 1993, contesting its liability for specific medical services. An informal conference was held, and the district director recommended that employer pay all the contested medical bills. Employer noted it disagreed with the recommendation, but nonetheless paid the bills of approximately $12,000 pursuant to the recommendation.

Claimant also filed a third-party suit for damages arising out of his injury. This case was settled in 1994 for $65,000. Claimant's counsel negotiated with employer over obtaining its approval for the settlement and agreement to waive its compensation lien. Employer agreed to waive its entire lien, and claimant netted over $41,000 from the settlement.

Claimant's counsel filed a fee petition for work performed before the district director, requesting $40,025, representing 160.10 hours of services at $250 per hour. Employer's claims representative filed objections to the fee petition, contending that a fee award was premature because claimant's entitlement to permanent disability benefits was not established and it had paid benefits for temporary total disability from the time of injury. Employer noted that a dispute had arisen between the parties concerning employer's liability for some of claimant's medical bills, but that ultimately all outstanding bills were paid pursuant to the district director's recommendation. Employer concluded that if it was liable for a fee, the amount awarded should be significantly reduced.

In his Order awarding an attorney's fee, the district director awarded counsel a fee of $24,025 for 160.10 hours of services at $150 per hour, to be paid by employer. Employer thereafter obtained counsel who wrote a letter to the district director stating that he had failed to consider employer's objections to the fee petition. In response, the district director noted that he had not considered the objections when he issued the Order, and proceeded to address the objections. The district director stated that inasmuch as employer had suspended payments of temporary total disability, it was not premature of him to act on counsel's fee petition. He stated he agreed the fee request was excessive and that is why he reduced the hourly rate from $250 to $150; he noted in this regard that there were no specific objections to any of the itemized hours. Finally, he noted that although disability benefits had been paid throughout the period for which a fee was sought, it was necessary

[1]Claimant's response brief states that after employer suspended compensation in August 1995, the "controversy regarding suspension of payments was resolved without the requirement of an informal conference."

for claimant's counsel to be actively engaged in securing payment of the contested medical bills and employer's approval of the third-party settlement.

On appeal, employer challenges the district director's award of attorney's fees. Employer contends that it is not liable for claimant's attorney's fee; alternatively, employer contends that if it is liable for a fee, it is only liable for 5.7 of the hours requested for services rendered on the medical benefits issues, as the remaining hours pertain to services rendered in the third-party suit.[2] Claimant responds, urging affirmance of the award.

This case is governed by the provisions of Section 28(b) inasmuch as employer voluntarily paid temporary total disability benefits from the date of claimant's injury. Section 28(b) provides, in pertinent part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . .

33 U.S.C. §928(b). Employer contends that in this case it did not refuse to pay the medical benefits recommended by the district director, and at all relevant times paid disability benefits without an award, and therefore it is not liable for claimant's attorney's fee.

The literal language of Section 28(b) supports employer's contention that it is not liable for claimant's attorney's fee, and we therefore reverse the district director's assessment of the fee against employer. Initially, we reject the district director's reliance

---

[2]We reject employer's contention that a fee award is premature in this case as there is no indication in the administrative file or the parties' pleadings that further proceedings are contemplated. *See* n.1, *supra*.

on employer's controversion in August 1995 of claimant's continued entitlement to disability compensation. Employer voluntarily paid disability benefits at all times relevant to the fee at issue, as all services were performed prior to employer's notice of controversion. Thus, this controversion cannot be a basis on which to hold employer liable for the fee at issue here. *See Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983).

Moreover, the dispute over employer's responsibility for medical benefits also cannot suffice as a basis for holding employer liable for claimant's attorney's fee. During the period that employer was paying disability benefits, a dispute arose as to its liability for certain medical treatment. An informal conference was held, and employer did not refuse to pay the recommended medical benefits following the informal conference; in fact, employer paid claimant the benefits in question. Under such circumstances, the United States Court of Appeals for the Ninth Circuit has held that employer cannot be held liable for claimant's attorney's fee under Section 28(b). *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991). The court stated:

> Section 928(b) authorizes a payment of attorneys' fees only if the employer refuses to pay the amount of compensation recommended by the claims examiner following an informal conference . . . The record shows that [employer] conceded that [claimant] was entitled to permanent total disability benefits. Thus, Section 928(b) is inapplicable because [employer] did not refuse to pay permanent total disability payments.

950 F.2d at 610, 25 BRBS at 69 (CRT). In rejecting claimant's contention that counsel was necessary to protect his interests at the informal conference, the court stated that in enacting Section 28(b) Congress intended that employer will not be responsible for the payment of attorney's fees unless it rejects the district director's recommendation and claimant obtains additional benefits through a formal hearing. *Id.,* 950 F.2d at 611, 25 BRBS at 70 (CRT).

The facts of this case are similar. The file contains much correspondence between claimant's counsel and employer's adjusting service concerning the payment of medical

bills totaling over $12,000.[3] Nonetheless, following an informal conference, employer accepted the district director's written recommendation that it pay the contested bills, and the matter ended there. Under Section 28(b), employer therefore is not liable for claimant's attorney's fee for services performed in obtaining payment of these bills. *Watts*, 950 F.2d at 607, 25 BRBS at 65 (CRT).

Claimant contends in support of employer's liability for a fee that he obtained employer's consent to the third-party settlement and a waiver of its lien against the settlement proceeds. Although employer's consent to the settlement and waiver of its lien rights resulted in a benefit to claimant, we hold that, inasmuch as employer continued to pay disability benefits during the period in which claimant was seeking its consent to the settlement, this work also provides no basis for liability under Section 28(b). *See generally Trachsel*, 15 BRBS at 469. Employer therefore cannot be held liable for claimant's attorney's fee on the basis that claimant obtained employer's consent to the third-party settlement.

As claimant received benefits in this case, he may be liable for a reasonable attorney's fee under Section 28(c) as a lien on his compensation. The case therefore is remanded to the district director for consideration of the amount of the fee to be assessed against claimant. 33 U.S.C. §928(c); 20 C.F.R. §702.132(a). In this regard, we note that the fee petition seems to reflect billing for work performed in the third-party suit. Claimant's counsel received a fee of approximately $21,666 out of the gross proceeds of the third-party settlement, and a fee under the Act should not include work done in the third-party suit unless the services were necessary to the prosecution of the longshore claim. *Roach v. New York Protective Covering*, 16 BRBS 114 (1984). If, however, the work in the collateral action reduces the time the attorney would have had to spend on the longshore claim, this fact must be reflected in the fee award, as the attorney cannot be paid twice for the same work. *Id.*; *Luke v. Petro-Weld, Inc.*, 8 BRBS 369 (1978), *aff'd in pert. part*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). The district director should consider these factors on remand in setting claimant's liability for a fee.

[3]Claimant contends that his credit rating suffered during the period employer refused to pay the bills, as collection agencies were contacting him for payment. Claimant also notes that on several occasions his compensation checks failed to arrive, and that counsel's intervention was necessary. Employer responds that substitute checks were issued in each instance.

Accordingly, the district director's award of an attorney's fee against employer is reversed. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge