

BRB No. 92-2220

ROBERT L. CRAFT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JACKSONVILLE SHIPYARDS,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

John C. Taylor, Jr. (Taylor, Day & Rio), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fees (Case No. 6-72134) of District Director N. Sandra Ramsey 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). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

On April 30, 1986, an administrative law judge issued a Decision and Order, wherein he

found that claimant is entitled to an award of permanent total disability compensation as a result of an injury arising during the course of claimant's employment with employer. 33 U.S.C. §908(a). In addition, the administrative law judge found that employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On June 16, 1989, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending that there had been a change in claimant's condition. Employer withdrew its motion for modification on September 17, 1991. On November 15, 1991, Administrative Law Judge George A. Fath issued an order wherein he cancelled the scheduled hearing on the petition for modification and remanded the case to the Office of the District Director.

Claimant's counsel thereafter submitted a fee petition for work performed regarding the modification proceedings. Employer filed objections to the fee petition. In her Compensation Order, the district director denied claimant's counsel a fee payable by employer pursuant to Section 28 of the Act, 33 U.S.C. §928, since claimant received no additional benefits as a result of employer's withdrawal of its motion for modification.

On appeal, claimant challenges the district director's denial of his request for an attorney's fee payable by employer, contending that the successful defense of employer's petition for modification constituted a successful prosecution under Sections 28(a) and (b) of the Act, 33 U.S.C. §928(a), (b). Asserting that the district director did not have jurisdiction to rule on his attorney's fee petition, claimant requests that the case be remanded to the Office of Administrative Law Judges. Employer responds, urging affirmance of the denial of an attorney's fee.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer shall 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); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Inasmuch as it is uncontroverted that first employer, and then the Special Fund, were paying claimant benefits prior to the filing of employer's petition for modification, the case at bar is governed by Section 28(b). Specifically, when employer filed its petition for modification on June 16, 1989, it is accurate to state that a controversy developed over additional compensation due claimant, since employer was effectively controverting claimant's entitlement to future, ongoing permanent total disability benefits. Claimant, thereafter, was forced to utilize the services of an attorney in order to ensure that his compensation was not reduced. Therefore, counsel's services resulted in claimant's successful defense of his permanent total disability award.

The situation presented in the instant case is analogous to the situation which occurs when an

employee, having been awarded compensation benefits by an administrative law judge, is required to utilize the services of counsel in order to defend against an appeal of the award of benefits filed by an employer with the Board. It is well-established that where claimant's counsel is successful in defending such an appeal, employer is liable for claimant's attorney's fee for work performed before the Board. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. Indeed, in *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980), the Board held that where the employer was still disputing the extent of the claimant's disability in an additional hearing, and the legal services provided at this additional hearing were necessary to protect the claimant's interest, the employer was liable for the claimant's attorney's fee for work performed at the second hearing. *See also Landrum v. Air America, Inc.*, 1 BRBS 268 (1975). We therefore hold that since claimant's counsel's services were necessary to protect claimant's entitlement to ongoing payments of permanent total disability compensation, and those services resulted in the successful defense of employer's petition for modification which sought to reduce those benefits, employer is liable for claimant's attorney's fee under Section 28(b) of the Act. The district director's denial of an attorney's fee payable by employer is thus reversed, and the case is remanded to the district director for consideration of counsel's fee request for services performed before the Office of the District Director. 20 C.F.R. §702.132; 33 U.S.C. §928(c). Additionally, counsel may apply to the administrative law judge for work performed at that level.

Accordingly, the Compensation Order Award of Attorney's Fees is reversed, and the case is remanded for the district director to consider claimant's counsel's fee request consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge