



BRB No. 24-0123

LEWIS COTTON

Claimant-Respondent

v.

CONTAINER STEVEDORING COMPANY,
INCORPORATED

Self-Insured
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Respondent

NOT-PUBLISHED

DATE ISSUED: 08/21/2025

DECISION and ORDER

Appeal of the Order Awarding Attorney Fee and Denial of Request for Reconsideration of Marco A. Adame II, District Director, Western Compensation District, United States Department of Labor.

Patrick B. Streb (Weltin, Streb & Weltin LLP), Oakland, California, for Claimant.

Collin D. Seipel and Spencer P. Landry (Brown Sims), Houston, Texas, for Employer.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Order Awarding Attorney Fee and Denial of Request for Reconsideration (OWCP No. LS-13083717) of District Director Marco A. Adame II (district director) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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, based on an abuse of discretion, or not in accordance with law.¹ *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952 (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272, 273 (1980).

Claimant sustained a back injury while working for Employer on April 4, 1988. Employer voluntarily paid benefits from April 1988 until February 1996, when the Employer's application for relief under Section 8(f) of the Act was granted and liability shifted to the Special Fund, 33 U.S.C. §908(f). In June 2009 and again in November 2011, the parties submitted a joint stipulation that Claimant was permanently and totally disabled and requested modification pursuant to Section 22 of the Act, 33 U.S.C. §922.² The district director approved these stipulations on November 1, 2012.

Despite the Special Fund's continued payment of permanent total disability benefits, Claimant requested informal conferences regarding his entitlement to, and Employer's liability for, medical benefits under Section 7 of the Act, 33 U.S.C. §907. The parties attended informal conferences in April 2016, January 2022, and November 2022 regarding Claimant's requests for authorization of a new mattress, compression socks, medication, a home health aide, and another new mattress. *See* Claimant's Mot. for an Award of Atty Fees (Fee Pet.); Claimant's Exhibits (CXs) 3-7.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in San Francisco, California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

² Claimant asserts an informal conference on this issue was convened on June 7, 2011, although there is no evidence of it in the record. *See* Fee Pet. at 2.

On May 16, 2023, Claimant's Counsel (Counsel) submitted a fee petition under Section 28(b), 33 U.S.C. §928(b), for work performed before the district director from May 3, 2004, through May 12, 2023. Fee Pet.; CXs 20-22. Counsel requested a total fee of \$43,682.³ Fee Pet.; CXs 20-22. Employer responded to the fee petition, objecting to both Counsel's entitlement to an attorney's fee under Section 28(b) and the requested hourly rates. *See* Employer's Objs. and Resps. to Claimant's Pet. for Att'ys Fees and Expenses (Employer's Resp.) at 6-38.

On October 20, 2023, the district director issued an Order Awarding Attorney Fee (Order). He stated Employer did not object to Counsel's entitlement to a fee, reduced the

³ The requested fee represents the following:

- A) \$6,984.50 for services performed between May 3, 2004, and November 7, 2007, including \$5,637.50 for 20.50 hours of legal services performed by attorney Patrick Streb at an hourly rate of \$275 and \$1,325 for 10.60 hours of legal assistant services performed by Rose Stout at an hourly rate of \$125, plus \$22 in costs;
- B) \$2,732.50 for services performed between March 28, 2009, and May 1, 2009, including \$2,722.50 for 9.9 hours of legal services performed by attorney Patrick Streb at an hourly rate of \$275 and \$10 for 0.1 hour of legal assistant services performed by Laura Powers at an hourly rate of \$100; and
- C) \$33,965 for services performed between June 16, 2009, and May 12, 2023, including \$31,590 for 54 hours of legal services performed by attorney Patrick Streb at an hourly rate of \$585; \$1,525 for 6.1 hours of legal services performed by attorney Susan Chow at an hourly rate of \$250; \$500 for 2 hours of legal assistant services performed by Laura Powers at an hourly rate of \$250; \$200 for 0.8 hour of legal assistant services performed by Paola Mendez-Ruiz at an hourly rate of \$250; \$75 for 0.3 hour of legal assistant services performed by Christina Park at an hourly rate of \$250; and \$75 for 0.3 hour of legal assistant services performed by Evan Park at an hourly rate of \$250.

requested hourly rates⁴ and reduced Counsel's itemized time entries,⁵ resulting in a fee award of \$28,642.50. Order at 4, 8-13 (unpaginated). The district director denied Employer's Request for Reconsideration on December 8, 2023.

On appeal, Employer contends the district director erred in failing to consider its objection to Counsel's entitlement to a fee under Section 28(b) and seeks reversal of the fee order based on the absence of any controversy following each informal conference. Counsel responds in support of the fee award. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with Employer's argument but urging the Benefits Review Board to remand the case for the district director to reconsider Counsel's entitlement to a fee under Section 28(b), as he did not address the issue. Employer filed separate reply briefs to Counsel and the Director, respectively, reiterating its arguments on appeal.

Section 28(b) of the Act, 33 U.S.C. §928(b), applies when an employer voluntarily pays or tenders benefits and then a dispute arises.⁶ It 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 [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within

⁴ The district director reduced the requested hourly rate of \$585 for attorney Patrick Streb for services performed between June 16, 2009, and May 11, 2023, to \$550, reduced the requested hourly rates of \$250 for legal assistants Laura Powers, Paola Mendez-Ruiz, and Evan Park to \$150 and for legal assistant Christina Park to \$175 per hour. Order at 7-9, 13 (unpaginated). The district director approved the requested hourly rate of attorney Susan Chow. *Id.* at 9, 13.

⁵ The district director found Counsel had previously received attorney fees for work performed on this claim from August 2, 2004, through May 1, 2009, and thus subtracted those hours from the total sum. Order at 7-8 (unpaginated). The district director also found 10.2 hours of legal services performed by Counsel were excessive, clerical, or part of overhead, and reduced them to 5 hours. *Id.* at 9-11. He further found some of the 8.2 hours of legal assistant services were clerical and reduced them to 7.9 hours. *Id.* at 12.

⁶ The parties do not dispute using Section 28(b) to assess whether Counsel is entitled to an attorney's fee in this case.

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).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this claim arises, has stated that liability for a fee under Section 28(b) is not dependent on a written recommendation from the district director but on the claimant obtaining additional benefits. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061 (9th Cir. 1998); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 50 (2011); *Davis v. Eller & Co.*, 41 BRBS 58, 60 (2007). Consequently, the Ninth Circuit has held an employer is liable for an attorney's fee under Section 28(b) if it refuses to pay the amount of compensation recommended following an informal conference or if an unresolved controversy remained after the informal conference, even absent a written recommendation, and afterwards the claimant successfully obtained additional benefits. *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 610-611 (9th Cir. 1991); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993). The Ninth Circuit stated:

The purpose of [Section 28(b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in *formal* proceedings in which he or she is represented by counsel.

Watts, 950 F.2d at 610 (citing *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor [Holtson]*, 606 F.2d 875, 882 (9th Cir. 1979)).

Before the district director, Employer expressly objected to Counsel's entitlement to a fee on the grounds that he failed to meet Section 28(b)'s requirements. Emp. Resp. to Fee Pet. at 6-13. Although the district director accurately noted the parties had attended "numerous informal conferences" and Claimant received "a favorable outcome for benefits," he failed to address Employer's argument that Counsel was not entitled to a fee under Section 28(b), but instead incorrectly stated Employer did not object to Counsel's entitlement to a fee. Order at 4 (unpaginated). It is the district director's responsibility to

review the fee petition to determine whether the fee requested is reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues and the amount of benefits, and to explain the fee award in terms of these criteria. *Sullivan v. St. John's Shipping Co.*, 36 BRBS 127, 130-131 (2002); 20 C.F.R. §702.132(a). The district director has the duty to state why the fee awarded is reasonable under the regulatory criteria. *See generally* 20 C.F.R. §702.132(a). Moreover, where the employer objects to the requested fee, the district director must address and provide explanations for granting or denying the objections. *Steevens v. Umpqua River Navigation*, 35 BRBS 129, 136 (2001); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999).

In this case, the district director instead erroneously stated Employer did not object to Counsel's entitlement to a fee and, therefore, failed to adequately address Employer's objection. *Steevens*, 35 BRBS at 136; *Jensen*, 33 BRBS at 101; Order at 4, 13 (unpaginated). Where a district director has not provided sufficient explanation for a fee award, the Board is unable to review the award to determine if it accords with law, is arbitrary, or is based on an abuse of discretion, and will remand the case for reconsideration. *See Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279, 288 (1990); *Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97, 99 (1981); *see also generally Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1054-55 (9th Cir. 2009) (adjudicator must fully explain fee awards). Consequently, we vacate the district director's fee award and remand the case to him for further consideration.

On remand, the district director must address Employer's objections to Counsel's fee petition and, specifically, its challenge to Counsel's entitlement to a fee under Section 28(b). He must consider whether Employer refused to follow recommendations, whether a controversy remained unresolved after each informal conference, and whether Claimant obtained additional benefits afterwards. 20 C.F.R. §802.405(a); *see* 33 U.S.C. §928(b); *Watts*, 950 F.2d at 610-11. If the district director determines none of those factors occurred, Employer cannot be held liable for Counsel's attorney's fee pursuant to Section 28(b). If he finds all those factors occurred, and Counsel is entitled to a fee, he may reinstate his fee award, as Employer has not challenged the amount of the fee on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

Accordingly, we vacate the Order Awarding Attorney Fee and Denial of Request for Reconsideration and remand the case to the district director for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge