

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 24-0165

MIROSLAVA A. TOSCANO )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 NSC TECHNOLOGIES, INCORPORATED )  
 )  
 and )  
 )  
 AMERICAN LONGSHORE MUTUAL )  
 ASSOCIATION, LTD., c/o THE )  
 AMERICAN EQUITY UNDERWRITERS, )  
 INCORPORATED )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent )

**NOT-PUBLISHED**

DATE ISSUED: 02/26/2026

DECISION and ORDER

Appeal of the Order Approving Attorney Fee and Order Denying Motion for Reconsideration and Order Approving Attorney Fees of Marco A. Adame II, District Director, Western Compensation District, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi LLP), Sacramento, California, for Employer and Carrier.

Ann Marie Scarpino (Jonathan Berry, 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, JONES and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Approving Attorney Fee and the Order Denying Motion for Reconsideration and Order Approving Attorney Fees (OWCP No. LS-13307554) 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.<sup>1</sup> *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955 (9th Cir. 2007); *Roach v. N.Y. Protective Covering Co.*, 16 BRBS 114, 115 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272, 273 (1980).

On July 27, 2017, Claimant was injured in the course of her employment for Employer when a sheet of metal fell on her as she was working. Emp.'s Mot. for Recon., Ex. G. Employer provided medical treatment that same day, and Claimant was diagnosed with a left shoulder sprain with contusion, cervical strain, and mild traumatic brain injury. *Id.* She was released to return to modified duty work the following day. *Id.*, Ex. H. On July 28, 2017, Employer filed a First Report of Injury or Occupational Illness, and on August 2, 2017, Employer approved Claimant's request for left shoulder treatment, including an MRI of the left shoulder and physical therapy. *Id.*, Exs. I, J.

On August 24, 2017, Claimant's counsel Jeffrey M. Winter (Counsel or Mr. Winter) filed a Form LS-203, claim for compensation, on Claimant's behalf, alleging injuries to her head, neck, left shoulder, and back. Emp.'s Mot. for Recon., Ex. K. Employer filed a

---

<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant was injured in San Diego, 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).

Notice of Controversion on August 31, 2017, indicating it had offered Claimant light duty work but she had declined to accept it. *Id.*, Ex. L. On September 13, 2017, Claimant confirmed with Employer there were no longer any modified duty positions available. *Id.*, Ex. N. Consequently, on September 14, 2017, Employer began paying Claimant temporary total disability (TTD) benefits.<sup>2</sup> *Id.*, Ex. O.

On July 19, 2019, Counsel requested an informal conference seeking an order granting his withdrawal as Claimant's attorney, *see* Emp.'s Mot. for Recon., Ex. B at 1 (unpaginated), and simultaneously filed an Attorney/Paralegal Fee and Cost Petition.<sup>3</sup> He reported Claimant was unhappy with his representation and had communicated directly with Employer against his advice, but she had failed to return an executed substitution of attorney form.<sup>4</sup> *Id.* On August 7, 2019, the Office of Workers' Compensation Programs (OWCP) issued a Notice of Telephonic Informal Conference to all parties, advising them that a claims examiner would be calling Counsel and Claimant on September 6, 2019, to discuss an attorney's fee petition and withdrawal of representation. *Id.*, Ex. C. The informal conference proceeded as scheduled, but neither Claimant nor Employer were present.<sup>5</sup> *Id.*, Ex. D at 2 (unpaginated). The only issues discussed were Counsel's

---

<sup>2</sup> The district director's June 8, 2021 Order indicated these benefits stopped in March 2018, but nothing in the record indicates why. Fee Order I at 6 (unpaginated).

<sup>3</sup> Counsel sought a total of \$6,911.75 in fees and costs under Section 28(a) of the Act, 33 U.S.C. §928(a), representing \$6,592.00 for 12.8 hours of his own work at \$515 per hour, \$260.00 for 2 hours of work performed by his paralegal at \$130 per hour, and \$59.75 in costs.

<sup>4</sup> Attached to Counsel's request for an informal conference were three letters he sent to Claimant. The first, dated April 17, 2018, indicated he received a letter from Claimant and would provide her with her case file once she executed and returned an enclosed substitution of attorney form. Emp.'s Mot. for Recon., Ex. B at 5 (unpaginated). The second letter, dated May 30, 2018, noted he had been unable to reach her and requested she contact him as soon as possible. *Id.* at 4 (unpaginated). The final letter, dated July 5, 2018, again noted Claimant's non-responsiveness and indicated she "ignored" his advice and contacted "the carrier." *Id.* at 2 (unpaginated). He again enclosed a substitution of attorney form and requested Claimant execute and return it as soon as possible. *Id.* at 2-3 (unpaginated).

<sup>5</sup> The Memorandum of Informal Conference indicated Claimant could not be reached as she had changed her phone number. It is unclear whether there was any attempt to reach Employer. Emp.'s Mot. for Recon., Ex. D at 2 (unpaginated).

withdrawal as Claimant's attorney and the payment of his attorney's fee. *Id.*, Ex. D at 1 (unpaginated). The claims examiner removed Mr. Winter as Claimant's attorney and noted he had filed his fee petition and sent a copy to Employer. *Id.*, Ex. D at 2 (unpaginated). The claims examiner set a deadline of October 24, 2019, for Employer's objections to Counsel's fee petition but recommended the parties attempt to resolve the fee. *Id.*

Employer controverted the claims examiner's written recommendation on October 2, 2019,<sup>6</sup> *see* Emp.'s Mot. for Recon., Ex. E, and filed objections to Counsel's fee petition on October 28, 2019, *see* Emp.'s Obj. to Att'y/Paralegal Fee & Cost Pet. It argued Mr. Winter was not entitled to any fee under Section 28(a) as there had not been a successful prosecution of the claim; alternatively, Employer objected to the requested hourly rates and several itemized billing entries.

Almost one year later, on August 25, 2020, Mr. Winter submitted a Form LS-4, Request for Fees,<sup>7</sup> and on September 21, 2020, the OWCP notified Employer of the fee request and urged the parties to attempt a resolution or, if they were unable to agree, requested Counsel submit and serve a "full application for attorney fees." On February 10, 2021, the OWCP issued another Notice of Informal Conference on the issue of the attorney's fee. Emp.'s Mot. for Recon., Ex. F. Although the record does not contain a written recommendation issued as a result of that conference, on March 10, 2021, Mr. Winter submitted an updated itemization of time billed "[i]n follow [up] to our telephonic conference this morning," requesting a fee for an additional 1.7 hours of work he performed since the submission of his previous petition on July 19, 2019, and 0.3 hour of work performed by his paralegal during that same period.<sup>8</sup>

On June 8, 2021, the district director issued an Order Approving Attorney Fee (Fee Order I). The district director found Employer liable for Counsel's fee and costs under Section 28(a) of the Act, as Claimant received compensation and medical benefits on a disputed claim with Counsel's assistance. Fee Order I at 5, 6 (unpaginated). He further

---

<sup>6</sup> Employer "dispute[d] liability for attorney fees absent finding of liability per Section 28(a) and 28(b)" and indicated it had not received a copy of Counsel's fee petition. Emp.'s Mot. for Recon., Ex. E.

<sup>7</sup> This form repeated the fee request for 12.8 hours of services at an hourly rate of \$515 for Mr. Winter and 2 hours of paralegal services at an hourly rate of \$130 but rounded the amount of costs requested up to \$60. Counsel did not indicate which provision of Section 28 applied to his fee request.

<sup>8</sup> Unlike his prior fee petition, Counsel requested this additional time be awarded pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b).

found Counsel submitted sufficient evidence to support the requested rates of \$515 per hour for himself and \$130 per hour for his paralegal. *Id.* at 7 (unpaginated). The district director reduced 1.4 hours of itemized time entries attributed to Mr. Winter, finding them to be clerical in nature. *Id.* at 9 (unpaginated). Overall, the district director found Employer liable for \$6,746.50 for 13.1 hours of work performed by Mr. Winter at an hourly rate of \$515, and \$299 for 2.3 hours of work performed by Mr. Winter's paralegal at an hourly rate of \$130, for a total fee of \$7,045.50. *Id.* at 10 (unpaginated). He also awarded the requested \$59.75 in costs, for a total award of \$7,105.25. *Id.* at 10-11 (unpaginated).

Employer moved for reconsideration on June 18, 2021, contending the district director erred in finding Counsel entitled to a fee under Section 28(a) as it had accepted Claimant's claim and provided both disability and medical benefits within thirty days of receiving notice of the claim. Emp.'s Mot. for Recon. at 5. It further maintained it was not liable for a fee under Section 28(b), as no controversy developed following its payment of benefits, there was no informal conference on the issue of entitlement, and the OWCP never issued a recommendation that it pay benefits. *Id.* at 8. Alternatively, Employer argued any liability for an attorney's fee should be limited to the period between receipt of Claimant's claim and the filing of its Form LS-206 (Notice of Payment)<sup>9</sup> and the hourly rate awarded to Mr. Winter is excessive. *Id.* at 12-13, 15-18.

Counsel responded on August 3, 2021, maintaining Employer is liable for his fee under Section 28(a) because Claimant required his assistance to obtain compensation – including medical benefits. Employer objected to Counsel's response, arguing it was untimely and reiterating its arguments in favor of its motion for reconsideration.

Nearly one year later, on August 3, 2022, Counsel filed an Amended Comprehensive Attorney Fee and Cost Petition requesting a fee for an additional 3.3 hours of time he incurred from December 14, 2020, through August 3, 2022, an additional 0.5 hour of time incurred by his paralegal on August 3, 2022, and an additional \$2,750 in costs incurred on March 22, 2018, for Claimant's evaluation with Dr. Kamshad Raiszadeh of the Spine Institute of San Diego.<sup>10</sup> Employer filed an objection on August 9, 2022, reiterating

---

<sup>9</sup> Specifically, this was the period from September 5, 2017, through September 20, 2017.

<sup>10</sup> The Amended Comprehensive Attorney Fee and Cost Petition included all time expended and costs previously itemized in Counsel's two prior fee petitions, including the 1.4 hours disallowed by the district director in his June 8, 2021 Fee Order, for a fee request of \$9,531 (representing \$9,167 for 17.8 hours of Mr. Winter's time at \$515 per hour and

its previous arguments against its fee liability, objecting to several specific time entries, and objecting to the cost of Dr. Raiszadeh's evaluation.<sup>11</sup>

On April 29, 2023, the OWCP sent the parties a letter acknowledging receipt of all filings since issuance of the district director's June 8, 2021 Fee Order. On January 10, 2024, the district director issued an Order Denying Motion for Reconsideration and Order Approving Attorney Fees (Fee Order II). The district director denied Employer's Motion for Reconsideration because he "did not find any additional information that would warrant a change in the previous order." Fee Order II at 2. He found Employer offered no "additional objections" to Counsel's amended comprehensive fee petition other than to the inclusion of Dr. Raiszadeh's invoice. *Id.* However, finding "no distinction between the meaningfulness of the report with the obligation to pay for the care," the district director found Employer liable for Dr. Raiszadeh's medical services. *Id.* He therefore awarded the full \$12,340.75 Counsel requested.<sup>12</sup> *Id.*

Employer appeals, maintaining the district director improperly awarded Mr. Winter a fee pursuant to Section 28(a) of the Act despite the lack of a successful prosecution. Counsel responds, urging affirmance of the district director's fee award, asserting that Employer's refusal to authorize medical treatment for Claimant's alleged back injury triggered the application of Section 28(a). Cl.'s Resp. Br. at 2. The Director, OWCP (the Director), also responds, urging the Board to vacate the district director's fee award on the grounds that Section 28(a) was never triggered. Mr. Winter responds to the Director's brief, reiterating his contention that Employer's denial of authorization for medical treatment was sufficient to trigger application of Section 28(a). Employer replied to Counsel's arguments, agreeing with the Director's argument that all medical treatment requested was authorized and there were no disputed issues resolved in Claimant's favor.

---

\$364 for 2.8 hours of his paralegal's time at \$130 per hour), plus \$2,809.75 in costs, for a total request of \$12,340.75.

<sup>11</sup> Employer objected to Dr. Raiszadeh's November 28, 2018 invoice for his evaluation of Claimant because it had not received a copy of his medical report and because Counsel failed to include it with his original fee petition, despite it being available to him at that time.

<sup>12</sup> As previously noted, Mr. Winter's Amended Comprehensive Attorney Fee and Cost Petition included the 1.4 hours of itemized time the district director previously disallowed. Therefore, by granting the amended request in full on January 10, 2024, the Fee Order II awarded this previously disallowed time.

We agree with Employer’s and the Director’s contentions and vacate the district director’s Fee Orders because the facts and circumstances of this case fail to support an attorney’s fee award under Section 28(a) of the Act. 33 U.S.C. §928(a). 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 . . . .

33 U.S.C. §928(a) (emphasis added). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, explained as follows:

Section 928(a) imposes four conditions that must be satisfied in order to receive attorney’s fees: (1) the claimant must file a claim with the [district director]; (2) the employer must receive notice of the claim from the [district director]; (3) the employer must decline to pay compensation or not respond within 30 days; and (4) the claimant must “thereafter” utilize the services of an attorney to prosecute his claim.

*Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 1048 (9th Cir. 2009) (citing *Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008)).

In this case, Claimant filed a claim on August 24, 2017, with assistance of Counsel, and Employer received notice of that claim from the district director on September 5, 2017. Emp.’s Mot. for Recon., Ex. K. Employer authorized medical care – both the initial treatment Employer provided and subsequent treatment Claimant requested for her left shoulder from her chosen physician – and paid TTD benefits within thirty days of that date. *See* Emp.’s Mot. for Recon., Exs. G, J, O; *see also Dyer*, 563 F.3d at 1048; *Richardson v. Cont’l Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003); *see also Lincoln v. Director, OWCP*, 744 F.3d 911, 916-917 (4th Cir. 2014), *cert denied*, 574 U.S. 932 (2014) (an employer’s filing of a notice of controversion prior to its timely payment is not relevant to its fee liability under Section 28(a)).

We reject Counsel’s argument that Employer’s purported refusal to authorize medical treatment for Claimant’s back injury was sufficient to trigger the application of Section 28(a) despite the payment of TTD benefits and authorization of treatment for Claimant’s left shoulder within the thirty-day window. The term “compensation” in

Section 28(a) is properly read as “disability and/or medical benefits” and the precise meaning of the phrase “declines to pay any compensation” depends on what benefits are claimed and what benefits the employer declined to pay. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11, 14 (2017). “If any type of benefit is denied, and legal services are necessary to obtain the denied benefit, the claimant is entitled to an employer-paid fee because the employer’s denial caused the need for attorney involvement.” *Id.* Here, however, the record contains no evidence that Claimant specifically requested treatment for her back or that Employer denied any such request. Employer’s only Notice of Controversion bearing directly on Claimant’s entitlement did not controvert medical treatment but, rather, entitlement to disability compensation as a result of Claimant’s failure to show up for the offered modified duty work. Emp.’s Mot. for Recon., Ex. L; *see Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59, 61 (1990) (the employer’s payment or non-payment of compensation, rather than its filed “response,” dictates fee liability under Section 28(a)). Moreover, contrary to Counsel’s argument, the district director’s general and vague references to an existing dispute are insufficient to prove Claimant requested, and Employer denied, medical treatment for an alleged back injury. Fee Order I at 5; *see Cl.’s Resp. Br.* at 2-3; *Cl.’s Resp. to Dir.’s Br.* at 2-3.

Regardless, even if Claimant’s inclusion of “back injury” on the Form LS-203 is sufficient to constitute a request for medical treatment, *see Emp.’s Mot. for Recon., Ex. K*, there is no evidence Mr. Winter “successfully prosecuted” that issue, another necessary element for Section 28(a) fee liability. *See* 33 U.S.C. §928(a). The Ninth Circuit has defined “successful prosecution” as follows:

While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, he must obtain 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.” Succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant’s behavior to change for the benefit of the plaintiff.

*Richardson*, 336 F.3d at 1106 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)) (citations omitted). Although a formal adjudicatory hearing is not necessary to establish “successful prosecution,” a claimant must obtain something of substance and not just the possibility of future relief. *Clark v. Chugach Alaska Corp.*, 38 BRBS 67, 73 (2004). In this case, there is no evidence Claimant successfully obtained any back treatment she was allegedly seeking despite Employer’s purported refusal. The only benefits of substance Claimant obtained after retaining Counsel involved the payment of TTD benefits and

authorization for treatment of her left shoulder,<sup>13</sup> but that activity was due to Employer's action within thirty days of its receiving notice of the claim, thereby precluding the application of Section 28(a).<sup>14</sup> 33 U.S.C. §928(a). Consequently, the district director's award of an employer-paid fee under Section 28(a) is erroneous and must be vacated.<sup>15</sup>

Counsel alternatively argues the district director's application of Section 28(a) is harmless error as he is entitled to an employer-paid fee under Section 28(b) of the Act.<sup>16</sup> Cl.'s Resp. Br. at 2, 4; Cl.'s Resp. to Dir.'s Br. at 4, n.1. We note Counsel's fee petitions inconsistently asserted entitlement under both Sections 28(a) and 28(b), and Employer, in its objections to the fee petitions, raised potential liability under Section 28(c), 33 U.S.C.

---

<sup>13</sup> Significantly, the amount of Claimant's TTD benefits entitlement would have been the same whether it was provided with respect to only one or any combination of her claimed injuries to her head, neck, left shoulder, and back because all the alleged injuries arose out of the same incident. 33 U.S.C. §908(c)(21); *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850, 855 (1980) ("the concept of loss of wage-earning capacity encompasses all injuries caused by a single accident"); see Emp.'s Mot. for Recon., Ex. K.

<sup>14</sup> Likewise, although Employer declined to pay compensation for the approximately two weeks between Claimant's modified duty release and the date that modified duty became unavailable, see Emp.'s Mot. for Recon., Exs. H, L, N, there is no evidence Counsel sought or requested back payment of benefits for that period and no evidence Claimant received any additional compensation for that period through Counsel's efforts.

<sup>15</sup> Employer also appeals the district director's award of costs, specifically with respect to the cost of Dr. Raiszadeh's medical evaluation. Emp.'s Pet. for Rev. at 4. However, we need not address this argument as fee liability under either Section 28(a) or Section 28(b) is a prerequisite to liability for costs under Section 28(d), 33 U.S.C. §928(d). As Section 28(a) is not applicable, we also vacate the district director's award of costs. 33 U.S.C. §928(d); *Love v. Potomac Iron Works*, 16 BRBS 250, 251 (1984); see also *Richardson*, 336 F.3d at 1107.

<sup>16</sup> Fee liability under Section 28(b) is triggered when an employer voluntarily pays compensation but a dispute arises and an informal conference is held. 33 U.S.C. §928(b). In the Ninth Circuit, an employer is liable for an attorney's fee under Section 28(b) if, following the informal conference, it refuses to pay the amount of compensation recommended or if an unresolved controversy remains and the claimant thereafter obtains additional benefits with assistance of counsel. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061 (9th Cir. 1998); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 610-611 (9th Cir. 1991); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 50 (2011).

§928(c),<sup>17</sup> yet the district director only addressed liability under Section 28(a). Therefore, we remand the case for the district director to determine whether Counsel is entitled to an employer-paid attorney's fee under Section 28(b) or, if not and Counsel wishes to pursue it, under Section 28(c).<sup>18</sup> Only if the district director finds Employer liable for a fee under Section 28(b) should he readdress Employer's liability for costs under Section 28(d). 33 U.S.C. §928(d); *Love v. Potomac Iron Works*, 16 BRBS 250, 251 (1984); *see also Richardson*, 336 F.3d at 1107.

Accordingly, we vacate the district director's Order Approving Attorney Fee and Order Denying Motion for Reconsideration and Order Approving Attorney Fees and remand the case for reconsideration of the relevant issues consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

GLENN E. ULMER  
Administrative Appeals Judge

---

<sup>17</sup> If the employer is not liable for an attorney's fee under either Section 28(a) or 28(b), Section 28(c) provides the fee may be assessed against the claimant via a lien on the claimant's compensation. 33 U.S.C. §928(c); *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71, 73 (2010); *see also Portland Stevedoring Co. v. Director, OWCP [Loiselle]*, 552 F.2d 293, 294 (9th Cir. 1977).

<sup>18</sup> Although sufficient to determine the inapplicability of Section 28(a), the record before us was deficient in that it did not include the complete OWCP file; it included only select pleadings and Employer's exhibits. Therefore, the district director is in the best position, on remand, to review the entire administrative file for the requisite information needed to determine Employer's fee liability under Section 28(b), if any. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17, 19 (2002).