U.S. Department of Labor

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

BRB No. 23-0403

JUAN SOSA VERA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 01/10/2025
NATIONAL STEEL & SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of Order Approving Attorney Fee of Marco A. Adame, II, District Director, Western District, United States Department of Labor.

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

Alex M. Oberjuerge (England Ponticello & St. Clair), San Diego, California, for Self-Insured Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Director Marco A. Adame, II's Order Approving Attorney Fee (OWCP No. LS-18304349) 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim alleging he suffered a traumatic back injury in the course of his employment on December 14, 2015, and also alleging cumulative work-related trauma to his back and left knee through repetitive kneeling, crawling, climbing, and squatting.[1] *See* Form LS-203 dated September 29, 2016. He sought treatment from Dr. Sidney Levine, who recommended lumbar surgery in January 2016; however, Claimant did not wish to proceed with surgery at that time. *See* Memorandum of Informal Conference dated March 9, 2017 (Memo I) at 3; Employer's Exhibit (EX) A at 5. Claimant continued to work full duty, and Dr. Levine continued to recommend lumbar surgery. Memo I at 3.

In September 2016, Employer had Claimant evaluated by a physician of its choosing, Dr. Larry Dodge, who opined Claimant was "functioning much too well…to justify surgery and only if his symptoms become unbearable or [he] develops a neurological problem in the lower extremity would surgery be mandatory." EX A at 9. Dr. Dodge reiterated his opinion in November 2016, opining Claimant was not "symptomatic enough to warrant a fusion surgery." EX B at 4. Conversely, Dr. Levine continued to recommend surgery. Memo I at 3.

Claimant requested an informal conference seeking authorization of the back surgery Dr. Levine recommended. Memo I at 2. The claims examiner issued a Memorandum of Informal Conference on March 9, 2017. Employer argued the recommended surgery was neither reasonable nor necessary, but if Claimant was alleging his condition had worsened, it would send Claimant back to Dr. Dodge for re-evaluation and also schedule Claimant's deposition. *Id.* The claims examiner noted Dr. Dodge had indicated surgery could be warranted if Claimant's condition worsened, but Dr. Dodge had not evaluated Claimant in almost six months, during which time Claimant complained of worsening symptoms. *Id*. at 3. As a result, she found Employer had failed to show Dr. Levine's surgical recommendation was unreasonable. *Id.* The claims examiner recommended Employer authorize the surgery or, in the alternative, the parties send Claimant to an "agreed medical examiner" to "address the lumbar surgery question." *Id.*

Shortly thereafter, Claimant was laid off from his light-duty position with Employer due to lack of work. Employer's Petition for Review (Emp. PR) at 3. On March 20, 2017,

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his alleged injuries 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).

he requested referral of his claim to the Office of Administrative Law Judges (OALJ), and a Notice of Docketing was issued on May 8, 2017. *Id*.; Claimant's Attorney/Paralegal Fee and Cost Petition (Fee Petition) at 3.

In April 2017, Employer sent Claimant back to Dr. Dodge for re-evaluation. EX C. In a report dictated and transcribed in June 2017, after the claim had already been referred to the OALJ, Dr. Dodge agreed surgery was warranted, and Employer formally authorized the procedure on June 30, 2017. EX C at 16-17; EX D. Claimant underwent surgery in September 2017, and Employer voluntarily instituted temporary total disability (TTD) benefits at that time. *See* Form LS-206 dated October 3, 2017.

Despite resolution of the medical authorization issue, the claim remained with the OALJ as Claimant sought past-due TTD benefits from the date he was laid off in March 2017 through the date of his surgery. Emp. PR at 3. However, on May 4, 2018, the ALJ issued an Order Vacating Hearing and Remanding Case based upon the parties' stipulations indicating Employer had agreed to pay the past-due TTD benefits from March 2017 through the date of surgery and continuing. EX E; *see* Form LS-208 dated May 7, 2018.

Employer continued to pay weekly benefits, but a dispute subsequently developed over the extent of Claimant's lumbar spine disability. In August 2019, Employer converted Claimant's benefits from total to partial disability benefits based on a labor market survey it obtained showing the availability of suitable alternate employment which paid approximately $460 per week.[2] *See* Form LS-208 dated August 19, 2019. Claimant, however, maintained he continued to be entitled to total disability benefits.[3] Memorandum of Informal Conference dated May 7, 2020 (Memo II).

An informal conference was held on May 5, 2020, after which a claims examiner found Claimant established a maximum medical improvement (MMI) date of September 7, 2018, for his back condition, as per Dr. Levine, and Employer established available suitable alternate employment on August 15, 2019, rendering Claimant's disability partial rather than total from that date forward. Memo II at 2-5.

[2] Employer reduced Claimant's benefits from $777 per week in total disability benefits to $470.33 per week in partial disability benefits. *See* Form LS-208 dated August 19, 2019.

[3] The parties also disagreed as to the date that Claimant's work-related back condition reached maximum medical improvement (MMI), although they agreed it had reached permanency. *See* Memo II.

The claims examiner noted that during the conference Claimant asserted a right knee sequela injury resulting from his work-related left knee injury. As the case file did not include any medical treatment records for either of Claimant's knees, the claims examiner declined to provide any recommendation on this issue but instead advised Claimant to produce supporting medical evidence. Memo II at 4.

Claimant again requested referral of his claim to the OALJ. *See* Form LS-18 dated May 28, 2020. Employer continued paying Claimant permanent partial disability (PPD) benefits in the amount of $470.33 per week. *See* Form LS-208 dated January 3, 2023.

In August 2022, while Claimant's claim was pending before the OALJ, he filed an amended claim for compensation to include a right knee sequela injury. *See* Form LS-203 dated August 3, 2022. On December 27, 2022, the ALJ issued a Decision and Order Approving Stipulations and Remanding Case, indicating the parties had resolved all existing disputes. He incorporated by reference the parties' signed stipulations, where they agreed Employer accepted only the December 2015 back injury, outlined the periods of Claimant's temporary disability due to his back injury, and agreed his back condition reached MMI on June 27, 2018. EX H at 1-2. The parties agreed Claimant was thereafter permanently and totally disabled from June 27, 2018, through June 9, 2019, at which point he became permanently partially disabled through the present and continuing. *Id*. at 2. In addition, the parties stipulated Employer had provided all past-due compensation with respect to Claimant's lumbar spine injury, was entitled to a credit for overpayment of benefits,[4] and would continue paying weekly PPD benefits at the current rate of $470.33 per week until such time as liability shifted to the Special Fund.[5] *Id*. at 2-3; *see* 33 U.S.C. §908(f). Finally, Employer agreed to continue providing ongoing reasonable and necessary medical care for Claimant's lumbar spine. *Id*. at 2.

[4] Specifically, the parties agreed Employer overpaid $2,760.03 in disability benefits from June 10, 2019, through August 11, 2019. EX H at 2.

[5] The parties stipulated Employer was entitled to Special Fund relief and that the Special Fund would assume payment of PPD disability benefits after 104 weeks, as well as reimburse Employer for all payments it may have made beyond 104 weeks. EX H at 3. In the Decision and Order Approving Stipulations and Remanding Case, the ALJ noted the Director, Office of Workers' Compensation Programs, did not oppose Employer's request for Special Fund Relief and submitted a position statement agreeing to accept the parties' stipulated MMI date and average weekly wage so long as the ALJ approved the stipulations.

The Stipulation Order noted, however, that Employer continued to deny Claimant's claims for bilateral knee injuries, either through a cumulative work-related injury or as a result of the December 2015 incident. EX H at 2. Nevertheless, the stipulation resolved these claims through Employer's payment of a lump sum intended to settle Claimant's claims for indemnity and medical benefits for his work-related bilateral knee injuries, subject to the credit for overpayment of benefits.[6] *Id*.

District Director's Order Approving Attorney Fee

Claimant's Counsel, Jeffrey M. Winter, submitted a fee application to the district director on November 9, 2022, requesting an attorney's fee totaling $14,396.60 (representing 23.6 hours of work at a rate of $556 per hour for himself and 8.5 hours of work at a rate of $150 per hour for his paralegal Diamela Lacina) for the two separate periods of time Claimant's case was pending before the Office of Workers' Compensation Programs (OWCP).[7] Fee Petition (Fee Pet.) at 4, 14-15. He also requested $301.94 in costs. *Id*. at 15.

The district director issued an Order Approving Attorney Fee (Fee Order) on June 20, 2023, awarding counsel an attorney's fee of $13,500.90. Fee Order at 12. He found the relevant market for purposes of establishing an hourly rate was San Diego and awarded the requested market rates of $556 per hour for Mr. Winter and $150 per hour for Ms. Lacina. *Id*. at 7-9. But he reduced or disallowed 0.95 hour of work performed by Mr. Winter and 2.54 hours of work performed by Ms. Lacina, finding the associated tasks excessive, vague, unsupported, duplicative, or clerical. *Id*. at 11. He disallowed all costs requested, finding them to be overhead expenses. *Id*. The district director also rejected Employer's argument that Counsel's award should be denied or reduced to account for only partial success. *Id*. at 3-5.

Employer appeals the district director's fee award, arguing Counsel is not entitled to an employer-paid fee under Section 28(b) of the Act, 33 U.S.C. §928(b), because

[6] The parties settled Claimant's bilateral knee claims for a lump sum of $40,000, minus the $2,760.03 credit for the overpayment of benefits, resulting in a net amount of $37,239.97 to Claimant. EX H at 2.

[7] Counsel's itemized fee petition shows he requested a fee for 8.4 hours of his own time for the period when the claim was first before the OWCP. Fee Pet. at 9-11. For the second time the claim was before the OWCP, counsel requested a fee for 13.8 hours of his own work, and 6.0 hours for his paralegal. Fee Pet. at 11-15. Counsel also requested 0.5 hour for himself and 2.5 paralegal hours for preparation of the fee petition. Fee Pet. at 13, 15.

Claimant's claim was not successful at the OWCP level. Emp. PR at 5-10. Alternatively, if any fee is due, Employer asserts the district director erred in failing to reduce the award to account for Claimant's partial success. *Id*. at 10-17. Specifically, Employer acknowledges Claimant's Counsel had some degree of success before the ALJ in obtaining past-due TTD benefits and settlement of the bilateral knee claims; however, because these issues did not arise until after referral to the OALJ, it asserts no amount of Counsel's work before the OWCP was related to this success. Emp. PR at 7. Finally, Employer contends the district director erred in approving Mr. Winter's hourly rate. *Id*. at 13-14. Counsel responds, urging affirmance.

Entitlement to Fees Under Section 28(b) and Partial Success Reduction

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.[8] It states:

> 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 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. If a claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with

[8] According to Employer's Form LS-206 dated October 3, 2017, and Form LS-208 dated May 7, 2018, Employer paid TTD benefits to Claimant for the week immediately following the December 2015 accident and instituted continuing TTD payments immediately following the September 2017 lumbar surgery. Although Employer subsequently converted these benefits from total to partial disability, and later reduced the rate based on its identification of suitable alternate employment, it continued paying weekly benefits for the lumbar spine injury through the date of the parties' stipulation in 2022. *See* Form LS-208 dated October 9, 2018; Form LS-208 dated August 19, 2019; Form LS-208 dated January 3, 2023.

> the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

Under this section, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this claim arises, has held that if a claimant successfully obtains additional compensation following the informal conference using the services of an attorney, the employer is responsible for payment of the claimant's attorney's fee. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993); *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 882-883 (9th Cir. 1979).[9] Moreover, in the Ninth Circuit, 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. *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 50 (2011); *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061 (9th Cir. 1998); *Davis v. Eller & Co.*, 41 BRBS 58, 60 (2007).

The district director found Counsel entitled to fees for work performed before the OWCP for both time periods that the claim was pending at that level. He found all requirements of Section 28(b) were met: Employer voluntarily paid compensation, a controversy subsequently developed regarding Claimant's entitlement to additional benefits, a claims examiner issued written recommendations following informal conferences, a dispute remained following the conferences, and Claimant utilized the services of an attorney and ultimately obtained additional benefits "greater than the amount paid or tendered." Fee Order at 4; *see* 33 U.S.C. §928(b); *McDonald*, 45 BRBS at 50.

Employer contends the district director erred in finding Claimant met Section 28(b)'s requirements, arguing there is no entitlement to a fee for either time period when this case was pending before the OWCP. Emp. PR at 4. As to the first period when this claim was before the OWCP, Employer maintains it never denied authorization for the lumbar surgery, and it accepted the claims examiner's recommendation by sending Claimant back to Dr. Dodge for re-evaluation. *Id.* at 6,11. Likewise, when the case returned to the OWCP on remand, Employer maintains Claimant failed to succeed or obtain "additional compensation" within the meaning of Section 28(b) on the only issue that was

[9] Although the effect of the decision in *National Steel* was to decrease the amount the claimant was entitled to recover in the form of a 10% assessment on his compensation, the claimant was for the most part successful in otherwise obtaining benefits and, therefore, the court concluded the claimant was entitled to an employer-paid attorney's fee under Section 28(b). *National Steel & Shipbuilding Co.*, 606 F.2d at 883.

presented at the second informal conference. *Id*. at 7. In both instances, Employer agues the issues presented at the informal conferences were different from the issues on which Claimant ultimately succeeded, so it asserts Counsel is not entitled to an employer-paid fee. At the very least, Employer contends the district director should have reduced the fee award to account for Claimant's partial success. *Id*. at 4, 10, 14-19. We will separately address each period when this claim was before the OWCP.

First Period Before the OWCP (September 28, 2016, through May 10, 2017)[10]

Employer argues the district director erred in finding it denied authorization for surgery, as it notes Claimant had previously declined it. Emp. PR at 5, 11. In essence, Employer suggests there was no controversy, as it did not withhold authorization for the surgery but merely requested additional time for Claimant to be re-evaluated by its expert, Dr. Dodge. Employer explains the delays inherent in scheduling the re-evaluation and awaiting Dr. Dodge's report in turn delayed its authorization. Employer asserts it should not be penalized merely because Claimant asked for referral of the case to the OALJ while awaiting Dr. Dodge's opinion. *Id.*

Employer's argument is undermined by the Memorandum of Informal Conference, which noted Employer "d[id] not believe the surgery proposed by Dr. Levine is reasonable or necessary." Memo I at 2. Moreover, Employer's insistence that Claimant be re-evaluated by Dr. Dodge and be deposed indicates its authorization was conditional on both Dr. Dodge's opinion and Claimant's testimony. *Id*. Thus, Employer, if not explicitly, at least implicitly denied authorization for the recommended surgery, thereby satisfying Section 28(b)'s requirement that a dispute remained after the informal conference. 33 U.S.C. §928(b).

Employer also maintains a fee is precluded under Section 28(b) because it accepted the claims examiner's written recommendation following the informal conference by sending Claimant to Dr. Dodge for re-evaluation. *Id*. at 5-6, 9, 11. The recommendation, phrased as an alternative suggestion to an outright authorization, encouraged the "*parties* [to] have the claimant evaluated by an *agreed* medical examiner, and have him address the lumbar surgery question." Memo I at 3 (emphasis added). The claims examiner was aware Employer intended to have Claimant re-evaluated by its expert, Dr. Dodge, *id*. at 2, yet the

[10] September 28, 2016, is the first dated time entry on Counsel's itemization of fees, which the district director awarded absent any objection from Employer. Fee Petition at 9; Fee Order at 9-11. We note, however, the district director's first reduced time entry was incorrectly dated September 26, 2019 (*see* Fee Order at 9-10); the time entry in question was actually dated September 29, 2016 (*see* Fee Petition at 9).

recommendation suggested that the parties work together to obtain an independent medical opinion from a jointly selected physician, *id.* at 3. By sending Claimant back to its own physician, Employer implicitly rejected the written recommendation. 33 U.S.C. §928(b); 20 C.F.R. §702.134(b); s*ee Rivera v. Director, OWCP*, 22 F.4th 460, 466 (5th Cir. 2021) (a lack of acceptance within fourteen (14) days of the written recommendation constitutes a rejection).

Ultimately, however, because this case arises in the Ninth Circuit, it does not matter whether Employer accepted or rejected the claims examiner's recommendation. *Matulic*, 154 F.3d at 1061; *McDonald*, 45 BRBS at 50. In the Ninth Circuit, the employer is liable for an attorney's fee under Section 28(b) if a controversy or dispute remains following the informal conference and the claimant successfully obtains increased compensation, regardless of whether the employer accepted or rejected any written recommendation. *Id*.; *cf. Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 421 (5th Cir. 2009); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 266 (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005).

Here, Employer's actions following the informal conference – sending Claimant back to its expert for re-evaluation and scheduling Claimant's deposition[11] – demonstrate a controversy remained as to the reasonableness and necessity of the recommended lumbar surgery. Claimant subsequently obtained additional compensation when Employer authorized surgery and instituted TTD benefits. Therefore the requirements of Section 28(b) have been met, and Employer is liable for an attorney's fee for work Counsel performed for the period when this claim was first before the OWCP.[12] 33 U.S.C. §928(b); *Matulic*, 154 F.3d at 1061; *McDonald*, 45 BRBS at 50*; see also Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 299 (1984) (even if the parties agree to the additional compensation before the hearing in front of the ALJ, the employer is liable for any attorney's fee incurred before the agreement is reached.). Consequently, we affirm the award of an employer-paid

[11] Counsel's fee petition indicated he received a Notice of Deposition for Claimant on March 15, 2017. Fee Petition at 10.

[12] As the requirements of Section 28(b) are met as to the dispute over authorization of lumbar surgery, the fact that Claimant's ultimate success before the ALJ involved an issue that was never presented to the OWCP is irrelevant and goes to Employer's fee liability before the OALJ.

attorney's fee for work performed before the OWCP between September 28, 2016, and May 10, 2017.[13]

Second Period Before the OWCP (May 4, 2018, through June 9, 2020)[14]

The district director also awarded Counsel an employer-paid attorney's fee for work he performed during the second period this claim was before the OWCP. He found the requirements of Section 28(b) were met because issues remained in dispute following the May 2020 informal conference (i.e., the extent of Claimant's back disability and his alleged work-related knee injury), and the subsequent stipulation order resulted in Claimant obtaining additional benefits (the lump sum of PPD benefits for his bilateral knee injuries). *Id*. at 3-4. The district director found no support for Employer's "argument that fees do not shift to the employer for work performed before the OWCP level, when additional benefits were solely obtained before the OALJ," and he declined to reduce the fee award for partial success. Fee Order at 3-5.

Employer contends the district director erred in holding it liable for an attorney's fee for work Counsel performed during the second period this claim was before the OWCP because Claimant did not succeed or obtain additional compensation on the only issue that was before the district director, i.e., the extent of his lumbar spine disability. Emp. PR at 7. It asserts Claimant's ultimate success is confined to his alleged work-related knee condition. As that issue was not developed until the claim was before the OALJ, Employer argues it cannot be held liable for an attorney's fee for work before the district director. *Id.* at 8-10, 15. Alternatively, if Counsel is entitled to a fee under Section 28(b), Employer

[13] We note an employer's fee liability under Section 28(b) does not begin until a controversy develops. 33 U.S.C. §928(b); 20 C.F.R. §702.134(b); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469, 471 (1983). The district director did not make a specific finding regarding the date Employer's fee liability began but simply awarded a fee for Counsel's first claimed time entry, dated September 28, 2016. As Employer did not object to this entry before the district director and does not raise the issue on appeal, it is affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66, 69 n.3 (1992) (it is "well-settled that errors not raised by a party will not be addressed," and to raise issues *sua sponte* "would serve to abolish the doctrine of waiver…[and] would undermine the adversary system and jeopardize the appearance of impartiality which is crucial to the administration of justice").

[14] Counsel's itemizations indicate he reviewed the Department of Labor referral letter on June 9, 2020. Fee Petition at 13.

maintains the district director erred in not reducing the fee award to account for Claimant's partial success. *Id*. at 14.

If an attorney is ultimately successful in procuring compensation for a claimant, he is entitled to a fee for all necessary work performed at all levels leading to that success, even if he was originally unsuccessful at a particular level. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 773-774 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 8 (2001) (en banc); *see also Hensley v. Eckerhart*, 461 U.S. 424, 435-436 (1983) (fee awards must be assessed based on the litigation as a whole and the overall relief obtained); *In re Schwartz-Tallard*, 803 F.3d 1095, 1099 (9th Cir. 2015) (fee-shifting statutes award attorney's fees based on the context of the action as a whole rather than discrete proceedings) (citing *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015)). The Board has also held that a claim for total disability incorporates a claim for any lesser extent of disability, meaning a claimant's failure to succeed on a claim for total disability does not preclude an employer's fee liability if he was successful in obtaining benefits for a lesser disability. *Anderson v. Associated Naval Architects*, 40 BRBS 57, 60 (2006) (citing *Rambo v. Director, OWCP*, 81 F.3d 840, 843 (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985)). Ultimately, if the claimant demonstrates the work his attorney performed before the OWCP was necessary, i.e., that it could reasonably be regarded as necessary to establish entitlement, liability for the attorney's fee shifts to the employer. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 252 (1991).

In this case, Claimant originally sought and obtained total disability benefits for his accepted lumbar spine injury. He belatedly sought benefits for an alleged injury to both knees, and his ultimate success before the ALJ was in obtaining partial disability benefits for the disputed injury to his knees. While a claim for total disability benefits generally encompasses a lesser claim, in this case Claimant was pursuing two different types of benefits for two distinct injuries: total disability benefits for his back under 33 U.S.C. §908(b) and PPD benefits for his knees under 33 U.S.C. §908(c)(2). Evidence of one does not necessarily include evidence of the other. It does not follow that the necessary work performed to establish permanent and total disability for the work-related lumbar spine injury would be the same necessary work performed for establishing both the work-relatedness and extent of an alleged bilateral knee injury. Thus, the district director erred in finding Claimant succeeded in obtaining additional benefits because Counsel would have performed the same work before the OWCP in pursuing both claims. Fee Order at 5. We therefore vacate the district director's findings regarding Claimant's success and Employer's liability for a fee for work Counsel performed before the OWCP from May 4, 2018, through June 9, 2020.

Had this case arisen within the jurisdictions of the United States Courts of Appeals for the Fourth, Fifth, or Sixth Circuits, which strictly interpret Section 28(b), Counsel would not have been able to recover an attorney's fee for the second period that this claim was before the OWCP because the issue on which Claimant ultimately obtained additional compensation was not the subject of a written recommendation following the informal conference. *Andrepont*, 566 F.3d at 421; *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 266; *Edwards*, 398 F.3d at 318; 33 U.S.C. §928(b). However, the Ninth Circuit requires only that a dispute exists following the informal conference and that the claimant obtains additional compensation. *Matulic*, 154 F.3d at 1061; *McDonald*, 45 BRBS at 50. The Board has previously stated, in dicta, that because "the Ninth Circuit does not follow a strict interpretation of Section 28(b), it is not dispositive whether the issues raised before the district director are the same issues on which the claimant succeeded before the administrative law judge." *McDonald*, 45 BRBS at 51 n.14. Nevertheless, the claimant must demonstrate the work his attorney performed before the OWCP was necessary, i.e., that it could reasonably be regarded as necessary to establish entitlement. *Snowden*, 25 BRBS at 252.

On remand, in evaluating Claimant's fee entitlement and overall success for the second OWCP period, the district director should differentiate between the two disparate types of benefits Claimant sought, not merely because one was addressed at the second informal conference and one was not, but because they encompassed two distinct theories of recovery. Work performed on a theory unrelated to the theory on which there was success should not be compensated. *Hensley*, 461 U.S. at 434. Further, the district director should address the fact that the issue on which Claimant obtained additional compensation was not ripe and, therefore, not discussed at the informal conference, not necessarily as a requirement of Section 28(b) but as an indicator of whether the work Counsel performed at the OWCP level was necessary for Claimant's ultimate success. *Id*. Finally, should the district director find Claimant achieved only partial success, he should adjust any fees for necessary work performed by considering the significance of the overall relief Claimant obtained in relation to the hours reasonably expended on litigation while the claim was before the OWCP from remand on May 4, 2018, through the date of referral on June 9, 2020. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 325-326 (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988).

Hourly Rate

Finally, Employer contends the district director erred in awarding Counsel his requested hourly rate. Rather, it maintains the district director disregarded its evidence of prior fee awards and should not have relied on Ronald L. Burdge's declaration, which was based on Los Angeles rates. Emp. PR at 13-14. Counsel asserts substantial evidence

supports the awarded hourly rate, and Employer presented no market evidence to the contrary.

The Supreme Court of the United States has held the lodestar method, in which the number of hours reasonably expended in preparing and litigating a case is multiplied by a reasonable hourly rate, represents a "reasonable attorney's fee" under federal fee-shifting statutes such as the Longshore Act. *See Perdue v. Kenny A*, 559 U.S. 542, 551-553 (2010); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The Court also has held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. Once the district director accepted the parties' agreement that San Diego, California, is the relevant community for determining counsel's hourly rate, *see* Fee Order at 7, it was Counsel's burden to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1053 (9th Cir. 2009). The factfinder has discretion to determine the prevailing market rate so long as he provides adequate justification for his conclusion. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1087 (9th Cir. 2015).

To meet his burden, Counsel provided a declaration detailing his Longshore practice experience over the past thirty-four years. *See* Cl. Fee Petition at 4; Claimant's Exhibit (CX) 1. He also submitted evidence of his accolades and regional and national accomplishments. CX 2. Further, Counsel submitted a declaration from Mr. Burdge discussing the U.S. Consumer Law Attorney Fee Survey showing attorneys in the San Diego area earn an hourly rate between $525 and $763, along with letters from attorneys Paul Herman, James McElroy, Philip Weiss, and Timothy Brictson, all supporting an hourly rate between $400 to $600. CXs 3-5, 8. Mr. Winter also provided a United States Attorney's Office Attorney's Fees Matrix (USAO Matrix) along with a 2018 Real Rate Report for Partners and Associates (Real Rate Report) in San Diego. CXs 9-10. Finally, he provided copies of a 2018 Ninth Circuit fee order and a 2019 Benefits Review Board fee order wherein he was awarded hourly rates of $445 and $515, respectively. CXs 6-7.

The district director reviewed this evidence and determined Claimant's Counsel satisfied his burden of proof. Fee Order at 8. Addressing Employer's objections, he analyzed the evidence Counsel submitted in its entirety and determined the USAO Matrix, Real Rate Report, and various declarations were sufficient to support Mr. Winter's requested hourly rate. *Id.* at 8-9. Conversely, he concluded Employer did not proffer any evidence that Mr. Winter's current rate was inaccurate; rather, it provided only older decisions where Mr. Winter was awarded between $335 and $400 per hour. *Id.*

Employer asserts the district director erroneously rejected its submitted evidence of recent awards demonstrating a reasonable fee rate, while instead crediting Counsel's evidence, which Employer describes as "primarily consist[ing] of declarations from colleagues suggesting they should be paid at much higher rates than prior awards." Emp. PR at 13. Employer points to two cases where the court rejected the same or similar fee surveys Counsel submitted and argues Mr. Burdge's declaration applies to the Los Angeles, as opposed to the San Diego, legal market. *Id*. It urges the Board to consider an updated list of ALJ fee awards issued from 2017 through 2021 wherein Counsel's market rate was found to be between $355 and $460 per hour. *Id*. at 14.

We reject Employer's assertions. At the outset, the Board is not permitted to accept or consider new evidence on appeal. 20 C.F.R. §802.301(b). Although Employer did not attach new evidence, it specifically urges the Board to consider additional evidence purporting to establish a reasonable hourly rate – in the form of other, more recent fee awards – that the district director did not consider. Only the record developed before the factfinder may be considered on appeal; no new evidence may be considered, nor may the Board conduct a de novo review. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29, 33 (2005); *Hansley v. Bethlehem Steel Corp.*, 9 BRBS 498.2, 499 (1978).

Further, contrary to Employer's assertions, the charts attached to Mr. Burdge's affidavit address specific median fee rates for San Diego. CX 3 at Exs. B, C. As the district director considered all relevant rate evidence before him and adequately explained his rationale for assessing a proxy market rate, we affirm his hourly rate of $556 for Mr. Winter. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67, 68 (2010); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999); *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404, 406 (1981).

Accordingly, we vacate the district director's Order Approving Attorney Fees with respect to his assessment of an employer-paid attorney's fee for the second period that the claim was pending before the OWCP, from May 4, 2018, through June 9, 2020, and remand

the case for reconsideration of that issue in accordance with this opinion. In all other respects, we affirm the district director's Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge