BRB No. 04-0246

DAVID L. CLARK Claimant-Respondent v. CHUGACH ALASKA CORPORATION and ACE USA INSURANCE COMPANY Employer/Carrier-Petitioners	))))))))))))))	 DATE ISSUED: NOV 30, 2004 DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee and the Denial of Reconsideration of Karen P. Staats, District Director, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston, Bunnell & Stone, L.L.P.), Portland, Oregon, for claimant.

Matthew H. Ammerman and Thomas C. Fitzhugh III (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Approval of Attorney Fee and the Denial of Reconsideration (Case No. 02-133507) of District Director Karen P. Staats 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim under the Defense Base Act, alleging that he injured his right hand on May 20, 2003, when he tripped and fell during the course of his employment on Kwajalein Atoll. Claimant continued to work for another month, but then resigned and returned to his home in Oregon. Employer filed a notice of controversion on July 3, 2003. Claimant then obtained legal counsel and sought disability and medical benefits. At the informal conference on September 17, 2003, employer conceded the work-relatedness of claimant's injury and his need for surgery, and it conceded claimant's entitlement to temporary total disability benefits. The recommendation following the conference was that employer pay temporary total disability benefits from July 15, 2003, until claimant is released to return to work, and medical benefits. The recommendation did not mention the rate of compensation because claimant's W-2 forms had not yet been received. On September 29, 2003, the claims examiner issued a supplement to the recommendation, addressing the average weekly wage and compensation rate; however, prior to receipt of this portion of the recommendation, employer had begun to pay benefits at a higher rate, $394.64, than that eventually computed, $338.15. In a letter dated October 17, 2003, employer advised the Office of Workers' Compensation Programs (OWCP) that it accepted the informal conference recommendation, and it enclosed an LS-208 form and an LS-206 form indicating that payments to claimant had been made.[1]

Thereafter, claimant's counsel filed an application for an attorney's fee for work performed before the district director. Counsel requested a fee in the amount of $1,696.25, plus an additional $643.75 to defend the fee petition following employer's objections. The district director addressed each objection, made some reductions, and awarded a fee of $2,115.63, payable by employer. The district director denied employer's motion for reconsideration, and employer now appeals the fee award to the Board. Claimant responds, urging affirmance.

Employer contends the district director erred in awarding a fee. It raises three arguments in support of its contention. First, employer argues that if a fee is permitted, it is currently unknown which party should be held liable for that fee, as there has been no adjudication of the claim. Next, employer argues that the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), prohibits a fee from being awarded in this case. Finally,

[1]Contrary to employer's statement in its brief that it considered the payment to be "provisional" and "subject to its controversion," Emp. Brief at 2, the record contains no evidence of the payment being conditional upon the resolution of the issues in the previously filed notice of controversion. Rather, the October 17, 2003, letter, to which employer apparently refers, stated only that employer had begun payments "at a *provisional* compensation rate of $394.64. . . ." (emphasis added).

employer asserts that if a fee is permitted and it is held to be the liable party, then the fee awarded is excessive, reiterating its specific objections below. Each argument will be discussed in turn.

Employer first argues that if claimant's counsel is entitled to a fee, then the district director erred in holding employer liable this early in the proceedings. Specifically, it argues that because there has been no adjudication of the claim and no award of benefits, it should not be presumed that employer is liable for an attorney's fee. Employer's argument in this regard lacks merit.

Initially, it is correct that no fee award is enforceable until the determination of a claimant's entitlement to benefits becomes final. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). Additionally, if a claimant does not succeed in establishing entitlement to benefits, then the claimant's counsel is not entitled to a fee under the Act. 33 U.S.C. §928; *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); 20 C.F.R. §702.134(a). However, neither situation applies to this case. While there has been no adjudication of the claim, employer neglects to mention that no party has sought formal adjudication. Therefore, although employer insists that disputed facts remain, it has not requested that the case be referred to the Office of Administrative Law Judges (OALJ) to resolve any issues of disputed facts. Employer accepted the claims examiner's recommendation and paid benefits. Because claimant seeks no additional benefits, the case is not in a posture to progress beyond the district director level.

As employer declined to pay any benefits initially and timely controverted the claim, 33 U.S.C. §914(d), and claimant thereafter hired an attorney, obtaining payment of the benefits sought pursuant to the recommendation of the claims examiner, claimant met the plain language requirements for employer's liability under Section 28(a) of the Act.[2] The application of Section 28(a) mandates that employer, not claimant, is liable for the

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[2]Section 28(a) states in pertinent part:

> 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, . . . 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, . . . a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier. . . .

attorney's fee. *See Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *cf.* 33 U.S.C. § 928(c) (if neither Section 28(a) nor 28(b) apply, then a fee may be obtained as a lien against a claimant's compensation).

Employer, however, argues that the Act is a fee-shifting statute and that, pursuant to case precedent, the Supreme Court's decision in *Buckhannon* applies to federal fee-shifting statutes, including the Act. Specifically, employer avers that the "voluntary" payments it made to claimant while the case was before the district director were neither the result of an award nor a settlement and cannot be considered the enforceable "alteration of the legal relationship between the parties" required by *Buckhannon* so as to warrant the award of a fee. Claimant asserts that *Buckhannon* does not apply to this case. The district director agrees with claimant. Comp. Order at 2.

In *Buckhannon*, an assisted living residence had been ordered to close because the fire safety marshal determined that residents were incapable of "self-preservation" in the event of an emergency as defined by state law. The corporation and residents brought suit seeking declaratory and injunctive relief.[3] The respondents agreed to a stay pending resolution of the case; meanwhile, the state legislature eliminated the "self-preservation" requirement from the fire code. The district court granted the respondents' motion to dismiss the case as moot, and the petitioners filed an application for an attorney's fee, arguing they were the "prevailing party" and were entitled to a fee under the "catalyst theory."[4] *Buckhannon*, 532 U.S. at 600-601. The Supreme Court construed language under the relevant statutes providing that only a "prevailing party" may obtain an attorney's fee, holding that in order to be a "prevailing party," there must be a "material alteration of the legal relationship of the parties[;]" a voluntary change in conduct lacks the "necessary judicial *imprimatur*[.]" *Id.* at 604-605. Thus, the Court held that prevailing as a catalyst is not a sufficient basis for an attorney's fee award under either

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[3]The petitioners wanted a declaration that the "self-preservation" clause violated the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990, and they wanted to prevent the home from closing.

[4]The "catalyst theory" posits that the plaintiff is the "prevailing party" if he "achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601. The "three thresholds" test for determining whether a lawsuit was a catalyst are: a) whether the claim was colorable rather than groundless; b) whether the lawsuit was a substantial cause for the defendant's change in conduct; and c) whether the defendant's change in conduct was motivated by the threat of plaintiff's victory rather than the threat of expense. *Id.* at 610; *Sierra Club v. Environmental Protection Agency*, 322 F.3d 718, 727 (D.C. Cir. 2003).

the Fair Housing Amendments Act or the Americans with Disabilities Act.[5] *Id.* at 604-605, 610.

The district director concluded that employer's reliance on *Buckhannon* is misplaced in this case because "claimant's counsel does not seek fees under the 'catalyst theory' or as a 'prevailing party' . . . but rather under a specific section of the [Act,]" and there is substantial authority under the Act for such an award. Comp. Order at 2. The district director noted that Section 28(a) does not use the term "prevailing party" but, rather, permits an attorney fee if the employer denies any compensation and the claimant uses an attorney thereafter who engages in "successful prosecution" of the claim. As employer in this case controverted claimant's entitlement to disability benefits and refused to authorize medical treatment until after claimant retained counsel and there was an informal conference, a period of more than two months, she determined that counsel's efforts were the impetus for employer to investigate further and to ultimately authorize surgery and pay benefits. Comp. Order at 2-3. Therefore, she held employer liable for the attorney's fee.

Employer argues that the "voluntary" payment it made is insufficient to legally alter the parties' positions and cannot justify a fee award under *Buckhannon*. Moreover, it argues that the district director cannot issue a final order on the merits of the claim, thereby binding the parties, because its notice of controversion proves there are disputed facts in need of resolution.[6] Absent a compensation order, employer argues that there is no "prevailing party" and, thus, claimant is not entitled to a fee. Contrary to employer's argument, its liability for claimant's counsel fee is grounded in the plain language of Section 28 and the applicable administrative procedures under the Act.

Under the plain language of Section 28(a), an employer is liable for a fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in a

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[5]The Court stated that the catalyst theory would allow "an award where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. The majority could not agree with the dissenters that "the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Buckhannon*, 532 U.S. at 605.

[6]Despite employer's claim of a continuing dispute, claimant notes that no party has sought a referral of the case to the OALJ for a hearing. Claimant also states that employer has paid benefits in full. Cl.'s Brief at 2, 8.

successful prosecution of the claim. 33 U.S.C. §928(a). The Board has held consistently that where employer did not pay benefits within the 30-day period, but ultimately did so at the district director level, a claimant's counsel is entitled to a fee under Section 28(a) regardless of the entry of a formal compensation order. *See, e.g., Thornton v. Beltway Carpet Serv., Inc.*, 16 BRBS 29 (1983); *Taylor v. Cactus Int'l, Inc.*, 13 BRBS 458 (1981); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980). The issue before us, therefore, is whether this precedent is affected by the Supreme Court's ruling in *Buckhannon*. According to employer, the decision in *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), establishes that *Buckhannon* applies and the absence of the term "prevailing party" in Section 28 is insignificant. Employer asserts that *Brooks* clearly requires the provisions of the Act be interpreted in accordance with Supreme Court law on federal fee-shifting statutes. The court in *Brooks* specifically stated:

> To be sure the Act does not, as claimant emphasizes, use the term "prevailing party" anywhere in §928(b). However, it is a vain project to rely, as claimant does, on the absence of this particular verbiage to prove *Hensley*'s irrelevance. The thrust of the *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983),] opinion is devoted not to the use of the words "prevailing party," but to the concept encompassed within those words. This Circuit has already held that the *Hensley* rationale applies to statutes not containing the "prevailing party" formulation, but requiring a degree of success as a requisite to the award of counsel fees.

Brooks, 963 F.2d at 15362, 25 BRBS at 165(CRT). Extending this rationale, employer avers that, because *Buckhannon* concerned a federal fee-shifting statute, the directives therein must be applied to the Act.

When *Brooks* is analyzed, however, employer's argument loses its force. In *Brooks*, in light of the claimant's partial success and despite the lack of the term "prevailing party" in the Act, the United States Court of Appeals for the D.C. Circuit concluded that the *Hensley* rationale should be used to determine the *amount* of the fee to be paid.[7] Reasoning that it had held *Hensley* applicable to the fee recovery provision of

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[7]In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court espoused its two-pronged test for assessing attorney's fees in cases where the plaintiffs obtained limited success. The Court first stated that unsuccessful, unrelated claims are to be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on these claims. Second, where claims involve a common core of facts, or are based on related legal theories, the factfinder should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the case. *Hensley*, 461 U.S. at 434-435. If the plaintiff achieves only a partial or limited success, the product of the

the Clean Air Act, which permits a fee to be awarded whenever a court determines it is appropriate, the D.C. Circuit stated that the provisions of the Act present a stronger case for the application of *Hensley*, as they require a showing of success before any fee may be awarded.[8] *Brooks*, 963 F.2d at 1536, 25 BRBS at 165(CRT). The decision in *Brooks* thus addresses the application of *Hensley* in determining the amount of a fee award, an issue which is common to fee-shifting statutes in general. This case, however, involves construing a specific statutory provision stating the basis for holding an employer liable, and *Brooks* is not on point as it does not hold that general fee-shifting decisions apply to determinations regarding whether employer is liable in the first instance under Section 28(a) or (b), without regard to the specific language of those provisions. *See Clinchfield Coal Co. v. Harris,* 149 F.3d 307 (4th Cir. 1998) (*Hensley* holding regarding the amount of a "reasonable fee" in federal fee-shifting statutes is inapposite to construction of the term "thereafter" in Section 28(a) of the Act).

In this regard, while holdings under fee-shifting statutes containing language similar to the Act could apply, as the district director found the Act does not contain the "prevailing party" language of *Buckhannon.* In a D.C. Circuit case, involving the question of whether *Buckhannon* should apply to the provisions of the Clean Air Act, the court held:

> the Clean Air Act, unlike statutes that authorize fee awards only to 'prevailing parties,' permits awards to so-called catalysts – parties who obtain, through settlement or otherwise, substantial relief prior to adjudication on the merits.

Sierra Club v. Environmental Protection Agency, 322 F.3d 718, 719 (D.C. Cir. 2003). The court therefore agreed with two other circuits that *Buckhannon* is limited to "prevailing party" statutes. *Id.* at 725-726; *Loggerhead Turtle v. The County Council of Volusia County, Florida*, 307 F.3d 1318, 1326-1327 (11th Cir. 2002) (Endangered Species Act not a "prevailing party" statute so *Buckhannon* does not apply); *Center for*

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hours expended on litigation as a whole times a reasonable hourly rate may result in an excessive award. Therefore, the factfinder should award a fee only in an amount which is reasonable in relation to the results obtained. *Id.*, at 436, 440.

[8]Unlike the current case, *Brooks* dealt with Section 28(b), 33 U.S.C. §928(b), which the court specifically noted is not a "prevailing party" provision, but which conditions employer's liability on claimant's success in obtaining greater compensation than that which employer tenders or pays voluntarily.

Biological Diversity v. Norton, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (same).[9] While the D.C. Circuit thus applied *Hensley* to the Clean Air Act for the purpose of determining the amount of the fee in light of the success obtained, it did not apply *Buckhannon* to that same statute for the purpose of determining fee liability. This distinction is logical, as questions concerning the amount of a fee are common to all fee-shifting statutes, while liability determinations turn on the specific requirements of the respective statutes.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has relied on language similar to that in *Buckhannon* in discussing the term "successful prosecution" in Section 28(a). In *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), the court affirmed the Board's denial of a fee due to the claimant's failure to successfully prosecute his claim for benefits for both a back and a knee injury. The employer voluntarily paid benefits for both injuries, terminating benefits for the knee injury upon completion of payments due under the schedule and ceasing payments for the back injury upon concluding the claimant was fabricating it. The claimant filed a claim for benefits and, nearly two years later, the employer offered to settle the claim for $5,000. The claimant refused and sought a consolidated hearing on the claims for both injuries. Ultimately, the claimant was entitled to $932 more for his knee injury, but, although the contention that he fabricated the back injury was rejected, the administrative law judge found it had resolved and claimant was entitled to nothing more. *Richardson*, 336 F.3d at 1104-1105, 37 BRBS at 81-82(CRT). Counsel sought a fee, and the fee was denied.

The Ninth Circuit determined that Section 28(a) of the Act applies to the back injury portion of the case because, although the employer voluntarily paid compensation, it did not timely pay after receiving the claim for benefits, as the "relevant time period . . . begins with receiving notice of the claim, and ends thirty days after." *Id.*, 336 F.3d at

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[9]In a case involving an action seeking a declaration that amendments to a pension plan violated ERISA and deletion of those amendments, the First Circuit determined that the case was not rendered moot by the employer's decision to grant full pre-amendment pensions to the affected employees, and it remanded the case for further consideration of the issues. However, it stated:

> Whether the plaintiffs can recover attorney's fees does not necessarily depend on whether a formal judgment has been entered. The Supreme Court did require a judgment under one statute, [citing *Buckhannon*], but the ERISA statute is differently phrased and conceivably the result could be different.

Adams v. Bowater, Inc., 313 F.3d 611, 615 (1st Cir. 2002).

1105, 37 BRBS at 81(CRT) (citing *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)). Although the employer declined to pay and the claimant satisfied that provision, the court determined that the claimant did not "successfully prosecute" his claim for benefits for his back injury. Specifically, in addressing whether or not there was a "successful prosecution," the court stated:

> We are unaware of case law thoroughly discussing the "successful prosecution" requirement of section 928(a) and none was cited to us. We therefore look for guidance to similar fee-shifting statutes that require a party to "prevail," such as 42 U.S.C. §1988(b) [the Civil Rights Act]. While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000), 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.' *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

Richardson, 336 F.3d at 1106, 37 BRBS at 82(CRT). Thus, the relief obtained must be something of substance. In *Richardson*, the court held it was not enough for the claimant to obtain the "possibility of future relief." Because he did not obtain any actual relief, "nominal, injunctive, or otherwise[,]" his counsel was entitled to no fee for work on the back injury claim.[10] *Id.*

Although *Richardson* discussed "successful prosecution" by referring to the need for a party to prevail, it did not cite or refer to *Buckhannon*. Moreover, it is clear that claimant here has prevailed as required by *Richardson.* In discussing what constitutes "successful prosecution," the Ninth Circuit stressed that there needs to be some "actual" relief. In *Richardson*, there was no actual relief; there was only the potential for future relief if the back injury recurred. In contrast, in the case at bar, claimant actually obtained the disability and medical benefits he sought. Claimant filed a claim and employer declined to pay benefits within 30 days; claimant hired an attorney and thereafter obtained a tangible result in the form of the payment of the benefits sought. Therefore, under Section 28(a), which does not refer to a "prevailing party" or require a formal "Order," claimant achieved full success upon the payment of benefits by

[10]Counsel was not entitled to a fee for work on the knee injury claim because the $932 awarded was less than the $5,000 settlement tendered and there was no evidence of how the $5,000 was apportioned. *Richardson*, 336 F.3d at 1106-1107, 37 BRBS at 82(CRT); *see* 33 U.S.C. §928(b).

employer.[11] To require something more, such as an order or settlement, which employer argues is unobtainable in this case because of the notice of controversion on file, exceeds the requirements of the Act and is not consistent with Congressional intent of securing prompt and voluntary payments.[12] Thus, as claimant was successful in obtaining benefits after engaging the services of an attorney, he satisfies the requirements of Section 28(a) for a "successful prosecution." *See generally Ford Aerospace & Communications Corp. v. Boling,* 684 F.2d 640 (9th Cir. 1982). In the absence of the "prevailing party" language, we hold that *Buckhannon* does not apply to require a formal Order before employer may be held liable under Section 28(a) of the Act.

This construction of the term "successful prosecution" is consistent with the statutory framework as well as the plain language of Section 28(a). Employer's argument that it made a "voluntary" payment overlooks the fact that it did not pay within the specified time period, *see* 33 U.S.C. §§914(a), (b), 928(a), but in fact controverted the claim, and paid only after claimant obtained an attorney and followed the statute's administrative procedures. *See generally Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). In effect, employer would have us read out the timeliness requirements for making a true "voluntary" payment and then read in a formal Order requirement which the Act does not contain. We decline to rewrite the statute in this manner.

Thus, even if Section 28(a)'s "successful prosecution" terminology is considered equivalent to a "prevailing party," we reject employer's argument that such application requires a reversal of the fee awarded herein. Under the statutory framework, a "material alteration" of the parties' relationship occurred when employer paid the benefits sought. Claimant's claim was paid, and no order of approval or dismissal was necessary in the

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[11]Other examples of success include: establishing entitlement to disability and/or medical benefits, *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 289 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 15(CRT), 24 BRBS 49(CRT) (9th Cir. 1990), establishing coverage, *Brattoli v. Int'l Terminal Operating Co.*, 2 BRBS 57 (1975), and obtaining funeral expenses, *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

[12]We reject as specious employer's implication that a notice of controversion acts as a perpetual bar to a district director's authority to issue a compensation order, *see* 20 C.F.R. §702.315, when the parties later agree to the terms of the claims examiner's recommendation and, effectively, resolve their differences. Under such circumstances, claimant would have to seek referral to the OALJ, who can issue an order regardless of employer's agreement, merely to secure payment of a fee. This additional step would alter nothing in employer's liability or the parties' relationship, as the claim was resolved when employer agreed to pay.

administrative forum to effect this result. In contrast, the lawsuit in *Buckhannon* was filed in the judicial forum, in an Article III court, and then rendered moot by subsequent legislative action. Thus, there was no success in the judicial forum, there was no "judicially sanctioned" alteration of the parties' relationship, and there was no prevailing party. In the administrative context provided by the Act, both informal and formal procedures resolving claims are set forth. 33 U.S.C. §919; *see also* 33 U.S.C. §914; 20 C.F.R. §§702.221–702.262, 702.311-702.319, 702.331-702.351, 702.391-702.394. Once an employer declines to pay compensation within the specified time, the informal process begins, giving the district director the authority to resolve the dispute using tools available to her, including the informal conference and consent orders. 20 C.F.R. §§702.311-702.315. If the dispute cannot be resolved at this level, the district director must, if requested, refer the case to the OALJ for formal administrative proceedings. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994); 20 C.F.R. §702.317. If the dispute is resolved at the informal level, then no further proceedings are necessary. In this context, claimant has prevailed when he is fully successful in obtaining the benefits sought.[13] Therefore, even if *Buckhannon* were to apply to cases arising under the Act, its requirement that there be a material change in the legal relationship between the parties has been satisfied, as claimant obtained a sanctioned result when the claim was resolved via the Act's informal procedures. This result also satisfies the specific requirements of Section 28(a), which does not require a formal order or any particular procedure, other than claimant's success in obtaining benefits previously denied. As claimant successfully prosecuted his claim under the plain language of Section 28(a), his attorney is entitled to an attorney's fee payable by employer. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 289 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 15 (CRT), 24 BRBS 49(CRT) (9th Cir. 1990).

In the event that it is liable for claimant's attorney's fee, employer also appeals the amount of the fee awarded. It challenges the hourly rates awarded, the award of a fee for clerical tasks, the award for allegedly excessive time spent and the use of minimum billing increments, and it argues that the district director reduced the fee by .75 hour but failed to implement that reduction when calculating the fee award. We reject employer's contentions. The district director addressed each of employer's specific objections and gave reasons for rejecting or approving each one. Employer's arguments do not establish an abuse of discretion. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Moreover, contrary to employer's assertion that the district director failed to calculate her reductions into the fee award, the district director clearly explained

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[13]We note that even voluntary payments result in a "material alteration," and employer cannot recoup its payment. The Act limits an employer to a credit against benefits paid or an offset against future payments, and neither situation applies to this case. 33 U.S.C. §§903(e), 914(j), 933(f).

that although she reduced the original request by .75 hour, she approved .75 hour requested in the supplemental petition. Comp. Order at 4-5. Thus, there is no computation error, and we affirm the amount of the fee awarded.

Accordingly, the district director's fee award is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge