BRB No. 01–0612

RAYMOND GERTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT	)	DATE ISSUED: April 22, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fee and the Supplemental Decision and Order Denying Motion to Reconsider of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fee and the Supplemental Decision and Order Denying Motion to Reconsider (2000-LHC-209) of Administrative Law Judge David W. DiNardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

This case was referred to the Office of Administrative Law Judges on October 4, 1999. Claimant submitted a pre-hearing statement on which the issue for resolution was

stated to be "full payment of medical bills." Pursuant to a motion by employer, the administrative law judge remanded the case to the district director on April 29, 2000, with instructions to add Dr. Lowlicht as a necessary party, finding that "the sole issue herein is the doctor's dental bill in the amount of $9,424.63." After remand, the parties appear to have reached an agreement and the case was not referred back to the administrative law judge. On January 24, 2001, claimant's counsel submitted a fee application, requesting $4,174, representing 18.20 hours of legal services performed before the administrative law judge between September 21, 1999 and May 12, 2000, at the hourly rate of $195, and 12.50 hours of legal assistant services at the hourly rate of $50. Employer objected that employer paid the full amount owed for Dr. Lowlitch's bill prior to referral to the Office of the Administrative Law Judges and that the only additional benefits claimant received were paid pursuant to the Connecticut Workers' Compensation Act.

In his Supplemental Decision and Order Denying Attorney Fee, the administrative law judge found that claimant's counsel did not obtain benefits for claimant under the Act other than those voluntarily paid by employer. Thus, the administrative law judge denied the requested fee. The administrative law judge denied claimant's motion for reconsideration as he found that claimant did not offer any evidence that he obtained additional benefits for claimant over those voluntarily paid by employer. The administrative law judge also denied claimant's request for a hearing on the issue of claimant's entitlement to an attorney's fee.

On appeal, claimant contends that the administrative law judge erred in refusing to hold a formal hearing on the attorney's fee request as there is evidence that claimant received benefits above those voluntarily paid by employer, including medical treatment that employer initially refused to pay. Employer responds, urging affirmance of the administrative law judge's decision.

Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b).

In the present case, claimant raised unpaid medical bills as the outstanding issue on his pre-hearing statement, *see* Claimant's LS-18, and listed a number of physicians as witnesses. However, in his remand order, the administrative law judge stated Dr. Lowlicht's

outstanding bill of $9,424.63 is the "sole issue" for resolution.[1] Order of Remand at 1. The Order of Remand also stated that employer paid $3,480.14 on March 1, 1999, before the case's referral to the Office of Administrative Law Judges. It also appears from a Connecticut Workers' Compensation Commission decision dated August 2, 2000, that at some point prior thereto, employer paid Dr. Lowlicht a total of $8,277.11 in accordance with the Longshore Act.[2]

In his attorney's fee request, claimant's counsel stated that "[t]his matter was referred to your office for dispute regarding the medical bills of Dr. Lowlicht. Through ongoing negotiations with the various representatives of the employer we have arranged a satisfactory settlement with Dr. Lowlicht being fully paid." Claimant's counsel also stated that "[d]uring the time the matter was referred to your office there were a number of other issues involved in medical management, authorization of physician, etc.," and that "having obtained the medical benefit payment for the claimant we would feel that we are entitled to an attorney's fee for work performed before your office." Letter dated January 22, 2001. In his petition for reconsideration, claimant's counsel stated that the "case has proven to be a very difficult one from a medical management point of view with multiple denials by the carrier of physicians and extensive negotiations to arrange the appropriate medical care for [claimant]." Letter dated March 12, 2001. Counsel also noted that claimant's treatment involved Dr. Katz, Dr. Abidor, Dr. Richard, Dr. Slepian, Audiologist Caldwell, Psychologist Gang and Dr. Tross. *Id.*

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[1]Claimant filed a motion for reconsideration of the Order of Remand, stating that the claim also presented issues of temporary total and partial disability benefits, as well as issues relating to medical benefits. Claimant sought to have the administrative law judge rescind his Order of Remand and allow the case to proceed before the administrative law judge. There is no indication in the file before us that the administrative law judge responded to this motion.

[2]Employer was ordered to a pay an additional $5,917.89 under the Connecticut Workers' Compensation Act.

As the record is unclear as to when employer paid the medical benefits sought, the case must be remanded for further findings.[3] *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Employer is liable for a reasonable fee for necessary work performed at the administrative law judge level if claimant successfully prosecuted the claim within the meaning of Section 28(a) or (b), by obtaining medical benefits that employer refused to pay. *See Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989); *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). The fact that the administrative law judge did not award additional benefits to claimant does not absolve employer of fee liability if the work claimant's counsel performed before the administrative law judge was necessary to claimant's receipt of additional benefits before the district director thereafter. *See generally Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981); *Brown v. Rothschild-Washington Stevedore Co.*, 8 BRBS 539 (1978). In the present case, a formal record is necessary to resolve a *bona fide* question of fact, *i.e.*, whether claimant obtained benefits that employer initially refused to pay or greater benefits than those voluntarily paid or tendered by employer. *See McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979). This is a question of fact in this case which we are not empowered to determine, and the administrative law judge erred in summarily stating claimant did not obtain greater benefits without the benefit of an evidentiary record. Therefore, we must remand the case to the administrative law judge to resolve this ambiguity and to make the necessary findings regarding employer's liability for the requested attorney's fee under Section 28(a) or (b). *See Tait*, 24 BRBS 59. The administrative law judge need not receive testimony on this issue if the parties waive their rights to an oral hearing, but should admit relevant documentary evidence into the record, and base his decision on this evidence. *See* 20 C.F.R. §702.346; *see also* 33 U.S.C. §919(d); 5 U.S.C. §§554, 557; 20 C.F.R. §§702.331-349. If the administrative law judge finds that employer is liable for claimant's attorney's fee, he should award claimant a reasonable fee for necessary work performed before him. 20 C.F.R. §702.132.

[3]We reject claimant's contention that the administrative law judge did not have the jurisdiction to address the attorney's fee petition in this case due to the remand to the district director. The administrative law judge retained jurisdiction to address the fee issue even though the case was remanded to the district director for further action. *See generally Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

Accordingly, the Supplemental Decision and Order Denying Attorney Fee and the Supplemental Decision and Order Denying Motion to Reconsider of the administrative law judge are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge