

BENJAMIN N. DUNCAN, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>April 17, 2002</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
RICHARD B. DONALDSON, JR.)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Order - Denial of Attorney's Fee of B.E. Voultides, District Director, United States Department of Labor.

Bryan H. Schempf (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for petitioner.

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

PER CURIAM:

Petitioner¹ appeals the Order - Denial of Attorney's Fee (Case No. 5-63470) of District Director B.E. Voultides 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

¹This appeal is brought by claimant's first attorney, Richard B. Donaldson, Jr., for services rendered on behalf of claimant while this case was pending before the district director. Claimant, following his dismissal of Mr. Donaldson, apparently retained the services of W. Mark Broadwell, who has not filed a response brief with the Board on claimant's behalf.

shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The following facts are gleaned from the brief and attachments filed with the Board by claimant's former counsel. Claimant suffered injuries to his knees on October 26, 1987. Following this work injury, employer apparently voluntarily paid claimant disability compensation. On February 12, 1993, claimant retained the services of Attorney Richard B. Donaldson, Jr. Thereafter, in 1995, counsel requested a hearing after employer reduced its payments to claimant. On June 28, 1996, claimant dismissed Mr. Donaldson as his legal representative.

On October 10, 1996, Mr. Donaldson submitted a fee petition to the district director documenting the services he allegedly rendered on claimant's behalf and requesting a fee totaling \$2,490. In a letter to counsel dated July 17, 2000, the district director declined to issue an order regarding counsel's fee request, stating that questions regarding successful prosecution, the explanation of the fee, the explanation of the issues and claimant's financial ability to pay the fee remained unresolved. In response, Mr. Donaldson's office wrote the district director on July 25, 2000, stating that claimant received temporary total disability benefits, as well as assistance in receiving medical benefits and job rehabilitation, during his representation by Mr. Donaldson. On August 14, 2000, the district director refused to impose liability for a fee on claimant, stating that he was unable to determine if claimant understood his counsel's representation, whether the services rendered by counsel were reasonable and necessary, whether or not there had been a successful prosecution, and claimant's ability to pay the fee. On April 5, 2001, the district director issued an Order stating that the outcome of the instant case does not constitute a successful prosecution and that, accordingly, claimant and employer are not liable to claimant's counsel for any attorney's fees. The district director concluded, however, that if claimant's counsel believes that a good faith claim exists for an attorney's fee, an appropriate petition should be filed with the office before which the services were performed.

On appeal, claimant's former counsel challenges the district director's refusal to hold claimant liable for an attorney's fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant has not responded to this appeal.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(a) of the Act, 33 U.S.C. §928(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)

of the Act, 33 U.S.C. §928(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 agreed to by the employer. 33 U.S.C. §928(b). If Section 28(a) or (b) does not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to 33 U.S.C. §928(c). *See generally Boe v. Dept. of the Army/MWR*, 34 BRBS 108 (2000). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132(a).

We agree with claimant's former counsel that the district director's Order cannot be affirmed. Specifically, the district director failed to adequately explain his decision in declining to award a fee in this case or to make the necessary findings regarding counsel's fee petition. *See Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 01-0504 (Feb. 14, 2002). Initially, the Order provides an inadequate explanation for denying a fee as it merely summarily states that the outcome of the case does not constitute a successful prosecution. The Order does not indicate, however, whether the district director considered counsel's assertions that claimant received temporary total disability compensation, medical benefits, and vocational rehabilitation during the period of time that he was represented by counsel, which could support a fee payable by claimant.² *See Boe*, 34 BRBS 108. Moreover, counsel asserts that employer reduced its payments, leading him to request a hearing, which he avers involved necessary work for claimant. As the district director's attorney's fee Order does not adequately explain or resolve the issues raised by counsel, it must be vacated and the case remanded for more specific findings in accordance with Section 28 of the Act and 20 C.F.R. §702.132. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988).

²Where counsel seeks a fee payable by employer, a "successful prosecution" is measured by claimant's success in view of the amounts paid or tendered by employer. *See* 33 U.S.C. §928(a), (b). In all other cases where benefits are paid, counsel may be awarded a fee for necessary work as a lien on claimant's compensation. In this regard, contrary to the district director's concerns, when addressing claimant's ability to pay the awarded fee as required by 20 C.F.R. §702.132(a), the official awarding the fee is not required to conduct discovery; as the fee is a lien on compensation this factor is considered in the context of the benefits received by claimant. Only where all benefits are denied is there no successful prosecution such that counsel is not entitled to a fee. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273, *aff'd on recon.*, 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44 (CRT)(6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996). However, counsel is entitled to a fee only for work the district director finds necessary to claimant's obtaining benefits.

In addition, as claimant's former counsel, in conformance with 20 C.F.R. §702.132, presented the district director with a documented fee petition itemizing the services which he allegedly rendered on behalf of claimant while this case was pending before the district director, the district director erred in not addressing the fee petition. Therefore, as in *Ferguson*, slip op. at 3-4, the case must be remanded for the district director to address whether the requested fee is reasonably commensurate with the necessary work performed, taking into consideration the quality of the representation, the complexity of the issues involved, the amount of benefits received by claimant and claimant's ability to pay the fee.³ See *Thompson*, 21 BRBS 94; 33 U.S.C. §928; 20 C.F.R. §702.132.

Accordingly, the district director's Order is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³In this regard, the district director has misinterpreted the Board's decision in *Sinclair v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1013 (Mar. 4, 1999)(unpub.). See Letter dated August 14, 2000. Contrary to the apparent understanding of the district director, that official is not required to institute contact with claimant prior to considering counsel's fee request. Rather, the Board's holding in *Sinclair* states that the district director must make adequate findings in his fee order to support the fee awarded. In particular, in that case, the district director held claimant liable for his counsel's fee without an explanation as to why employer was not liable for the fee, an issue which was raised by counsel, and with no indication that he considered the regulatory criteria; the Board therefore remanded the case for the district director to render specific findings in accordance with Section 28 of the Act and Section 702.132 of the regulations. See *Sinclair*, slip op. at 2. These requirements contained in *Sinclair* are thus consistent with those in any routine fee case.