



BRB No. 15-0029

RYAN CHEVALIER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FINCANTIERI MARINE GROUP, LLC)	
)	DATE ISSUED: <u>Aug. 5, 2015</u>
and)	
)	
SENTRY INSURANCE, A MUTUAL)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney’s Fees of David Widener, District Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Andrew Z. Schreck and Adrienne J. Gasser (Downs Stanford, P.C.), Sugar Land, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney’s Fees (Case No. 08-138624) of District Director David Widener 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 district director’s attorney’s fee award will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant alleged he sustained a work-related right knee injury in July 2012. Employer voluntarily paid claimant temporary total disability benefits for various periods. 33 U.S.C. §908(b). Employer suspended its payments on February 6, 2014, on

the ground that claimant's knee condition is not work-related. Thereafter, claimant filed a claim for compensation under the Act, which employer controverted.

The district director held an informal conference on June 24, 2014. The district director recommended that employer accept that claimant's knee condition is causally related to the July 2012 work accident, based on the opinion of claimant's treating physician. The district director also recommended that employer pay claimant's medical expenses, pursuant to Section 7 of the Act, 33 U.S.C. §907, although it was noted that claimant did not present any receipts for reimbursement. The district director further stated that Dr. Schock's report containing an impairment rating should be supplied to the Office of Workers' Compensation Programs (OWCP) within 14 days. The memorandum of informal conference concluded that if a party did not agree with the recommendation, that party should file an LS-18 pre-hearing form within 14 days. The memorandum stated that it will be assumed that disputed issues have been resolved if the OWCP is not notified to the contrary within 30 days. After receiving an extension, claimant filed with the district director Dr. Schock's impairment rating opinion.¹ It appears from the file before the Board that the district director did not issue either a written recommendation or a compensation order following claimant's submission of this medical report. *See* 20 C.F.R. §§702.314-316. There also is no indication that employer paid claimant any additional compensation.

On August 6, 2014, noting that neither party sought referral of the claim to the Office of Administrative Law Judges (OALJ), claimant's counsel filed a petition for an attorney's fee with the district director for work performed before the OWCP. Both claimant's counsel and the district director served the fee petition on employer's counsel; the district director afforded employer 30 days in which to file objections. Employer did not respond. Thus, on September 22, 2014, claimant's counsel wrote to the district director, asking him to issue a fee order. The district director issued a fee order on September 30, 2014, awarding claimant's counsel his requested attorney's fee of \$2,513.59, payable by employer.

Employer appeals the district director's fee award. Employer avers the fee award is premature because the claim has not been litigated and claimant has not yet successfully prosecuted his claim as employer did not accept the district director's written recommendation. Employer states that it has on "this date [December 17, 2014] requested referral to Formal Hearing on the issue of compensability of the claimant's

¹ Dr. Schock's report states that claimant has an eight percent lower extremity impairment under the Wisconsin workers' compensation guidelines and a two percent lower extremity impairment under the Sixth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*.

injury,” by filing an LS-18 pre-hearing statement. Emp. Pet. for Rev. at 1-2. Claimant has not responded to this appeal.

We cannot affirm the district director’s fee award, as there is no indication in the file forwarded to the Board that claimant obtained any additional benefits after he filed his claim. The district director’s fee order does not state that, or how, claimant successfully prosecuted his claim, *see* 33 U.S.C. §928(a),² or that claimant obtained any additional compensation after employer refused the written recommendation of the district director, *see* 33 U.S.C. §928(b). *Devor v. Dep’t of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007); *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). We note that claimant’s claim remains open until it is adjudicated.³ *Intercountry Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). However, until such time as claimant obtains additional compensation, any fee award is premature. Therefore, the district director’s fee award is vacated. Claimant’s counsel may reapply for a fee award payable by employer when claimant obtains additional compensation. 33 U.S.C. §928.

² It appears that employer did not pay any benefits to claimant within 30 days of its receipt of the claim from the district director such that, if claimant successfully prosecutes his claim, any fee award would be employer’s liability pursuant Section 28(a), 33 U.S.C. §928(a). *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

³ In this respect, the Clerk of the Board contacted the Office of Administrative Law Judges, which advised that no claim is pending before that office, notwithstanding employer’s assertion that it has requested a formal hearing. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994).

Accordingly, the district director's Compensation Order Award of Attorney's Fees is vacated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge