

BRB No. 03-0310

BEVERLY BROWN)
)
 Claimant-Petitioner)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent)

DATE ISSUED: Jan. 12, 2004

DECISION and ORDER

Appeal of the Order Denying Attorney's Fees of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-2543) of Administrative Law Judge Richard E. Huddleston 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a work-related injury to her back on October 29, 1999. She sought benefits under the Act, and, on December 18, 2000, the district director issued a compensation order approving a settlement under Section 8(i) of the Act, 33 U.S.C. §908(i). Employer was to make payment to claimant within fourteen days of the compensation order, but claimant did not receive the payment until January 5, 2001.

Claimant sought a penalty for untimely payment pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f). The claims examiner reviewed the parties' allegations and recommended against imposition of a Section 14(f) penalty. Claimant then filed a pre-hearing statement, and the district director forwarded the case to the Office of Administrative Law Judges. The administrative law judge found that he did not have jurisdiction to consider the case as the district director had not issued any decision concerning the applicability of Section 14(f). He stated further that if there are no facts in dispute, the district director's decision would be directly appealable to the Benefits Review Board. Thus, the administrative law judge remanded the case to the district director. On remand, the district director found that employer's payment to claimant was untimely, and he thus imposed on employer a penalty pursuant to Section 14(f) and held that employer was in default for the amount of the Section 14(f) penalty and interest.¹

Subsequently, claimant filed a fee petition for work performed before the administrative law judge in the amount of \$1,326.75, representing 3.18 hours of legal services at the hourly rate of \$200, 2.57 hours of legal services at the hourly rate of \$225, and 1.5 hours of paralegal services at the hourly rate of \$75. The administrative law judge found that although claimant was found to be entitled to a Section 14(f) penalty on remand, he did not have jurisdiction to award an attorney's fee because he never had jurisdiction over the case in the first instance. Therefore, the administrative law judge denied claimant's request for an attorney's fee for work performed at that level.

On appeal, claimant contends that the administrative law judge erred in finding that she is not entitled to an attorney's fee for work performed before the administrative law judge as claimant was ultimately successful in obtaining additional benefits on remand before the district director. Employer responds, urging affirmance of the administrative law judge's decision.

Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney. Claimant's attorney is entitled to a fee only upon successful prosecution of a claim. As claimant correctly asserts, claimant's ultimate success entitles his attorney to a fee for all necessary work performed at each stage of the adjudicatory process. See *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Terrell v. Washington Metropolitan Transit Authority*, 36 BRBS 133 (2002)(McGranery, J., concurring), *modifying in part on recon.* 36 BRBS 69 (2002).

¹ Employer appealed the district director's Supplemental Order Declaring Default to the Board. In an Order dated March 21, 2003, *Brown v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0593 (Mar. 21, 2003), the Board dismissed employer's appeal for lack of jurisdiction. See *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985).

We affirm the administrative law judge's denial of an attorney's fee. In the present case, the claims examiner issued a letter stating that she was recommending that a Section 14(f) penalty not be imposed in this case. As a contested issue remained regarding the applicability of Section 14(f), the next step required the district director to investigate the request. *See Patterson v. Tidelands Marine Serv.*, 15 BRBS 65 (1982), *rev'd on other grounds*, 719 F.2d 126, 16 BRBS 10(CRT)(5th Cir. 1983). However, on May 16, 2001, claimant submitted a LS-18 form, which is a pre-hearing statement, and the case was transferred by the district director to the Office of Administrative Law Judges prior to any decision by the district director. As the administrative law judge observed, this action was premature in that neither the parties nor the district director identified any fact finding that the administrative law judge needed to undertake.² *See Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000). Thus, the administrative law judge correctly found that the case was not properly before him at that juncture, and he did not err in denying an attorney's fee on the facts presented.

Nonetheless, it appears that claimant's counsel engaged in services during the period when the case was transferred to the Office of Administrative Law Judges that ultimately may have been necessary to establish claimant's entitlement to a Section 14(f) penalty before the district director. Thus, the district director is in a position to determine the necessity of the services performed. Counsel, therefore, should make application to the district director for these services. The district director should award a fee for all reasonable and necessary legal services performed to obtain the Section 14(f) penalty regardless of whether the case was referred to the administrative law judge level at the time they were performed. 20 C.F.R. §702.132. *See generally Roach v. N.Y. Protective Covering*, 16 BRBS 114 (1984)(counsel may recover for services performed in a collateral action which are necessary to establishing entitlement under the Act).

² Moreover, the Board has held that a district director's decision under Section 14(f) which involves only a legal dispute is to be appealed directly to the Board. 20 C.F.R. §802.201(a); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

Accordingly, the administrative law judge's decision denying claimant's counsel an attorney's fee is affirmed. Counsel may apply to the district director for an attorney's fee for necessary services.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge