BRB No. 11-0422

MICHAEL REYNOLDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC USA, INCORPORATED	)	DATE ISSUED: 01/27/2012
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of David B. Groeneveld, District Director, United States Department of Labor.

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

Peter D. Quay (Law Office of Peter D. Quay, LLC), Taftville, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Awarding of Attorney Fees (Case No. 01-0166543) of District Director David B. Groeneveld 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 award 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained a back injury in the course of his work for employer on August 8, 2007. In his Decision and Order dated May 7, 2009, Administrative Law Judge Donald W. Mosser found claimant entitled to a continuing award of temporary total disability benefits from August 8, 2007, as well as all reasonable and necessary medical benefits. In particular, Judge Mosser instructed employer to provide claimant with "an evaluation by an orthopedic specialist assuming [claimant's] treating physician deems a referral is still necessary." Decision and Order at 9. Claimant sought and ultimately obtained authorization from employer to treat with Dr. Mastroianni, a neurosurgeon, who examined claimant on August 10, 2009, and again on November 16, 2009, and recommended, based on the results of an MRI, that claimant undergo a lumbar discectomy. A delay in the payment for Dr. Mastroianni's services, and in authorization for the recommended surgery, prompted claimant, by letter dated February 10, 2010, to request an informal conference before the district director. Employer responded on March 16, 2010, stating that Dr. Mastroianni's bills "have either been paid or are currently in the payment process," and that it has been in compliance with Judge Mosser's decision. Additionally, employer sought a postponement of any informal conference until such time that its physician, Dr. Kramer, could re-examine claimant to assess his need for future medical treatment.[1]

An informal conference, however, was held on March 29, 2010, resulting in recommendations from the district director that employer authorize the surgical procedure proposed by Dr. Mastroianni on November 16, 2009, and pay any outstanding medical bills and interest owed claimant pursuant to Judge Mosser's decision. Claimant was examined by Dr. Kramer on April 20, 2010, who recommended that claimant undergo a series of lumbar injections prior to consideration of surgery. On May 3, 2010, the case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing to address the issues of claimant's need for surgery and future medical benefits. On June 3, 2010, employer wrote a letter to Dr. Mastroianni stating that it had authorized the lumbar surgery, which claimant stated that he no longer wanted, and that it was also authorizing the series of lumbar injections recommended by Dr. Kramer. On August 5, 2010, employer contacted claimant's counsel to inform him that claimant "failed to comply with the authorized lumbar surgery scheduled for 6/11/10," that claimant missed a scheduled appointment with Dr. Mastroianni to discuss the epidural injections

[1]Dr. Kramer, a Board-certified orthopedic surgeon, initially examined claimant on August 8, 2008, at which time he noted some abnormality and limitation of claimant's lumbar spine. He opined at that time that claimant was not a surgical candidate, that no additional formal treatment was required, and thus, that claimant had reached maximum medical improvement with regard to his work-related back condition with permanent restrictions of 20 pounds lifting, and no repetitive lifting or bending. *See* Mosser Decision and Order at 3-4.

recommended by Dr. Kramer, that another appointment with Dr. Mastroianni was scheduled for August 23, 2010, and that it would not pay any "no show" fees incurred by claimant's failure to attend those scheduled appointments. As a result of his August 23, 2010, examination, Dr. Mastroianni stated that he was now recommending a series of epidural injections in place of the surgery,[2] prompting the parties to file on September 14, 2010, a joint motion to remand the case from the OALJ to the district director. The record indicates that claimant underwent the first of these epidural steroid injections on September 8, 2010.

Claimant's counsel filed a petition for an attorney's fee totaling $6,376, representing 19 hours of attorney work at an hourly rate of $315, and 4.6 hours of legal assistant work at an hourly rate of $85, for work performed before the district director between June 22, 2009, and September 8, 2010. Employer filed objections to the fee petition. After summarily considering employer's objections, the district director reduced the hourly rates requested by claimant's counsel and awarded an attorney's fee totaling $5,317.20,[3] payable by employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a).

On appeal, employer challenges the district director's award of an attorney's fee. Claimant responds, urging affirmance of the district director's award of an attorney's fee. Employer has also filed a reply brief reiterating its position on appeal.

Employer argues that claimant's counsel is not entitled to any attorney's fee for work performed before the district director as there was never any real dispute between the parties. Employer maintains that although the district director applied Section 28(a) apparently because he believed carrier declined to pay medical benefits within 30 days, the district director did not consider that claimant had not requested approval for the change of physician to Dr. Mastroianni, that employer did not refuse to authorize any care, and that claimant's counsel did not produce medical reports or bills relating to claimant's treatment with Dr. Mastroianni in a timely fashion. Additionally, employer argues that the district director did not explain how the work performed was reasonably

[2]Dr. Mastroianni's August 23, 2010, note states that claimant was having second thoughts regarding his surgery and elected to try other non-operative approaches instead.

[3]The district director found the following hourly rates to be reasonable in this case: $250 (attorney) and $77 (paralegal) for services rendered prior to December 30, 2009; $260 (attorney) and $80(paralegal) for services performed from February 8, 2010, to February 22, 2010; and $270 (attorney) and $85 (paralegal) for services performed after March 10, 2010. These findings are affirmed as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

commensurate with the work necessary to obtain a benefit. Employer maintains that the facts in this case demonstrate that the actions of claimant's counsel delayed, rather than aided, the delivery of medical benefits to claimant.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. 33 U.S.C. §928. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation and claimant subsequently prosecutes his claim successfully. 33 U.S.C. §928(a); *A.M.* [*Mangiantine*] *v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G.* [*Gordon*] *v. Marine Terminals Corp.*, 41 BRBS 13 (2007). The district director, citing *Gordon*, 41 BRBS 13, found that employer's liability for an attorney's fee falls under Section 28(a) of the Act. Compensation Order at 1. We reject employer's contention that the district director erred in holding it liable for claimant's attorney's fee pursuant to Section 28(a). Employer's liability under Section 28(a) in this case rests on whether employer paid claimant any compensation within 30 days of its receipt of the original claim from the district director's office.[4] The administrative file shows that claimant filed his claim on September 12, 2007, that the district director notified employer of the claim by letter dated September 28, 2007, that employer agreed, by correspondence dated March 4, 2008,[5] to pay temporary total disability benefits for the period from August 9 to August 22, 2007, and that employer thereafter issued claimant a check for $227.78 on March 5, 2008. Moreover, claimant was successful in obtaining medical benefits after he sought treatment in 2009 and 2010. As employer did not pay any benefits within 30 days after it received written notice of the claim from the district director in October 2007, and claimant successfully prosecuted his claim, we affirm the district director's determination that employer is liable for an attorney's fee under Section 28(a), as it is in accordance with law. *Mangiantine*, 42 BRBS 30; *Gordon*, 41 BRBS 13.

[4]We reject employer's contention that the 2009/2010 "claim" for medical benefits controls the operation of Section 28(a), as it is employer's action after its receipt of the initial claim for benefits that governs all subsequent fee liability. *See Gordon*, 41 BRBS at 15, *citing Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied* 546 U.S. 960 (2005).

[5]Employer controverted the claim on January 8, 2008, alleging the lack of any employer/employee relationship. An informal conference held on January 22, 2008, resulted in the recommendation that employer pay claimant temporary total disability benefits from August 8 to August 23, 2007.

We, however, agree with employer that the district director's fee award must be vacated and the case remanded for reconsideration of the amount of the fee payable to claimant' counsel. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Employer contended that if it is liable for a fee, it should be less than that requested. Specifically, employer contended below that the delay in its acceptance of liability for medical benefits was attributable to claimant's counsel's delay in producing the necessary medical release. Additionally, employer cites counsel's failure to provide it contact information for claimant and claimant's missed appointments, as well as claimant's inability to arrive at a decision regarding surgical or conservative treatment, as the primary reasons for the delayed resolution of this case. While the district director's compensation order encapsulates employer's objection and generally rejects it by stating that "active participation by the claimant's attorney was required to secure medical/treatment benefits," a more detailed discussion of employer's objection is warranted on the facts presented. Therefore, we vacate the district director's fee award. On remand, the district director should address employer's objections with more specificity and award a fee that is reasonably commensurate with the necessary work counsel performed in obtaining medical benefits. *See generally Steevens*, 35 BRBS at 135-136; *Jensen*, 33 BRBS at 101; *see also* 20 C.F.R. §702.132(a).

Accordingly, the district director's fee award is vacated, and the case is remanded for further consideration consistent with this decision.

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