

BRB No. 90-1461

SCOTT A. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Francis R. Mahoney, District Director, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton & Weiss, P.A.), Bath, Maine, for claimant.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for employer/ carrier.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney Fees (1-97091) of District Director<sup>1</sup> Francis R. Mahoney 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 Longshore 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

The following sequence of events is undisputed by the parties. Claimant suffered a work-related injury to his right knee on June 3, 1987, and thereafter filed a claim for benefits under the Maine Workers' Compensation Act (the Maine Act). Claimant also filed a claim for temporary total disability benefits under the Longshore Act on September 29, 1987. Employer controverted the Longshore claim, contending that it was already paying temporary total disability benefits under the Maine Act. After an informal conference on December 17, 1987, the district director recommended that employer pay temporary total disability benefits to claimant from September 14, 1987 and continuing, as well as medical benefits and interest. Thereafter, employer paid claimant the sum of \$2,217.92, for the period of October 21, 1987, through January 20, 1988, which employer subsequently characterized as payments made under the Maine Act.

On February 1, 1988, claimant's counsel filed an application for an attorney's fee before the district director, pursuant to Section 28 of the Act, 33 U.S.C. §928, seeking a fee and costs in the amount of \$1,775.64. Thereafter, employer filed objections to the fee application. No action was taken regarding this request for a fee.

On June 14, 1989, claimant filed a second claim under the Longshore Act, seeking permanent partial disability benefits for his work-related knee injury. An informal conference was held on December 8, 1989, after which the district director recommended that employer pay to claimant \$7,965.65, in benefits for a 15 percent permanent partial disability to his right leg pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2). Employer paid this amount on January 17, 1990. Claimant's counsel thereafter filed two additional attorney's fee applications before the district director on January 4 and 24, 1990, seeking \$2,840.82 in fees and costs for services rendered in pursuit of both claimant's temporary total and permanent partial disability claims. Thereafter, employer filed an objection to these fee petitions.

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<sup>1</sup> Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

In his Order dated February 23, 1990, the district director awarded claimant's counsel a fee of \$819.98, stating that he had reduced the fee request for the following reason: "No benefits were obtained under the L.H.W.C.A. prior to 6/1/88." *See* Order at 1. Subsequently, the district director denied claimant's request that the case be transferred to the Office of Administrative Law Judges for a hearing with regard to the award of attorney's fees. On May 7, 1990, claimant filed a motion for trial with the Office of Administrative Law Judges; on the same day, claimant filed an appeal with the Board, BRB No. 90-1461, and employer subsequently moved to dismiss the appeal as untimely filed.

On June 27, 1990, Administrative Law Judge G. Marvin Bober issued an Order granting claimant's motion for trial before an administrative law judge. On July 27, 1990, the Director, Office of Workers' Compensation Programs (the Director) appealed the administrative law judge's Order to the Board. BRB No. 90-1920. Claimant subsequently moved to dismiss the Director's appeal as interlocutory.

In an Order *En Banc* dated December 28, 1990, the Board accepted claimant's appeal to the Board and vacated the administrative law judge's Order Granting Motion for Hearing Before an Administrative Law Judge. Consequently, the Board dismissed the Director's appeal as moot, but requested that the Director file a brief on the issues raised, specifically, claimant's assertion that the district director orally refused to forward the file to the Office of Administrative Law Judges and maintained that a direct appeal to the Board was appropriate.

On appeal, claimant challenges the district director's reduction of his requested fee, contending that he was entitled to file a claim for benefits under the Longshore Act concurrent with his state workers' compensation claim and that, since he did not choose to pursue his state claim, he did in fact receive benefits under the longshore Act prior to June 1, 1988. Thus, claimant urges the Board to reverse the district director's award of an attorney's fee, and award a fee in the amount of \$2,840.82. In the alternative, claimant requests that the case be remanded for a determination of the factual issues. Employer responds, urging affirmance of the district director's award or, in the alternative, should the Board determine that a more detailed explanation for the reduction in the requested fee be required of the district director, remand of the case to the district director for such purpose. The Director has also filed a response brief in support of claimant's contentions; specifically, the Director asserts that the district director's reason for reducing the fee request, *i.e.*, that no benefits under the Longshore Act were obtained prior to June 1, 1988, is premised on a mistake in law since, regardless of whether claimant filed a concurrent state claim, those payments were made under the Longshore Act. Thus, the Director states that the appeal was properly filed with the Board in this case. The Director asserts that the district director's fee order should be vacated, and the case remanded for an award of a fee for the time reasonably performed on the case before as well as after June 1988.

Initially, we note that all parties in this case concur that the Board does have jurisdiction to hear claimant's appeal of the district director's award of claimant's attorney's fee. *See Glenn v. Tampa Ship Repair & Dry Dock Co.*, 18 BRBS 205 (1986); *Mazzella v. United Terminals, Inc.*, 8 BRBS 755, *aff'd on reconsideration*, 9 BRBS 191 (1978). We therefore will address the merits of claimant's appeal.

Claimant challenges the district director's reduction in his requested attorney's fee, contending that the district director's action implicitly denied him of his opportunity to elect his remedy between the Longshore Act and the Maine Act and, in effect, allowed employer to make that election. The Board has held that a sufficient explanation for reductions in fee requests must be provided by the official reducing the fee. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds). Where a district director has not set forth a sufficient explanation of his reasons for reducing a requested fee, the Board is prevented from reviewing the award and will remand the case to the district director for an explanation. *See Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983).

In the instant case, although the district director recited the regulatory criteria of 20 C.F.R. §702.132, he failed to specifically discuss how these criteria apply to the case at bar. Specifically, the district director summarily reduced the requested fee to \$819.98, stating only that "No benefits were obtained under the L.H.W.C.A. prior to 6/1/88." Thus, in making this reduction, the district director neglected to state what hourly rate was used and whether the number of hours requested were reduced. We, therefore, conclude that the district director's award must be vacated and the case remanded for reconsideration. *See Devine*, 23 BRBS at 279; *Roach*, 16 BRBS at 114; *Speedy*, 15 BRBS at 448. On remand, the district director must specify any reductions and provide an explanation therefor.

Lastly, both claimant and the Director contend that the district director erred in stating that claimant's pre-June 1988 benefits were not obtained under the Longshore Act. We agree. It is well-established that claimant can obtain concurrent state and Federal awards payable by the same employer for the same injury, so long as employer receives a credit to avoid double payment to claimant. *See generally Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980); *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991). This proposition was codified in Section 3(e) of the Act, 33 U.S.C. §903(e)(1988). In the instant case, claimant, who filed his claim for benefits under the Longshore Act on September 29, 1987, alleges that he took no affirmative steps to pursue his concurrent claim under the Maine Act. Employer, while contending that its payment of benefits to claimant were made pursuant to the Maine Act, acknowledges that claimant, rather than having his claim administered under the Maine Act, pursued compensation under the Federal statute. *See* Employer's brief. Accordingly, we hold that, as a result of claimant's counsel's services, there has been a successful prosecution of the instant claim within the meaning of the Act. *See* 33 U.S.C. §928. Accordingly, on remand, the district director must consider claimant's counsel's fee petition in light of claimant's receipt of benefits under the Longshore Act.

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

and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge