BRB No. 92-1747

RONNIE PITTMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
UNITED STATES ARMY NAF/ OUTDOOR RECREATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Yancey White (White, Huseman, Pletcher & Powers), Corpus Christi, Texas, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order - Award of Attorney's Fee (No. 5-73687) of District Director B.E. Voultsides 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The district director's fee 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 the law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant injured his left big toe on January 19, 1990, during the course of his employment, and employer voluntarily paid compensation from February 8, 1990.[1] Exh. A. Employer also paid medical benefits for claimant's treatment with Dr. Moien. Thereafter, employer ceased paying disability benefits because of a lack of medical evidence supporting such payment.[2] Emp. Brief at 2-

[1]The notice of payment without an award indicates that employer began paying permanent partial disability benefits on February 6, 1990. Exh. A. However, employer's brief states that it voluntarily paid both temporary total and permanent partial disability benefits. There is no evidence in the record regarding the payment of temporary total disability benefits.

[2]Dr. Moien was convicted of insurance fraud and was unavailable to report on claimant's medical

3. On March 4, 1991, claimant filed a claim for compensation, and on March 19, 1991, employer received formal notice of the claim from the district director. *Id.* at 2.

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condition. Emp. Brief at 3.

The district director conducted an informal conference on March 27, 1991, wherein the parties agreed that Dr. Williamson would be claimant's new treating physician and that benefits would resume based upon Dr. Williamson's reports. *Id.* at 3. On March 28, 1991, claimant's counsel drafted a letter to employer summarizing the conference. Order at 1; Exh. M. In it, she indicated that: claimant received a compensation check; employer agreed to continue bi-weekly payments; the district director declined to address claimant's Section 49, 33 U.S.C. §948a, claim; claimant accepted Dr. Williamson as his treating physician; claimant sought mileage reimbursement for treatment by both Drs. Moien and Williamson;[3] and counsel requested a fee for services performed. Order at 1; Exh. M. According to employer, on May 1, 1991, the district director awarded claimant's counsel a fee of $830, over its objections. Emp. Brief at 3.

On October 31, 1991, claimant's counsel informed the district director that employer had not paid claimant's mileage for travel to and from Dr. Moien's office. Therefore, she requested a "hearing" and an attorney's fee for services performed on this matter. On November 20, 1991, the district director scheduled an informal conference for December 4, 1991, and on November 27, the claims examiner discussed the mileage issue with employer. The memorandum of the conversation states that employer did not receive the list of travel dates and that employer could not verify nine of the 24 dates, but was willing to pay mileage for the remainder. Order at 1-2; Exh. J-L. In a letter dated November 27, 1991, employer agreed to reimburse claimant's mileage costs in full, despite its inability to verify all the dates because of Dr. Moien's incarceration. Exh. I. On the same day, claimant's counsel asked the district director to include claimant's request for another doctor, counsel's request for an additional fee, and the mileage issue as issues to discuss at the informal conference. Exh. H. However, when employer informed the district director it had paid all mileage, the district director cancelled the December 4, 1991 conference. Emp. Brief. at 4.

Claimant's counsel filed a fee petition on December 20, 1991, for services performed in connection with the mileage request, and employer filed objections thereto. Employer challenged the district director's authority to award a fee in this case as no compensation order had been issued, stated that any fee is contrary to the Act, as neither Section 28(a) nor 28(b), 33 U.S.C. §928(a), (b), applies, and maintained that there were disputed issues to be resolved at a formal hearing. Employer also objected to the amount of the fee requested as being excessive, unreasonable, and unnecessary. Objections; *see also* Exhs. D, F. Despite employer's request for a formal hearing, the district director noted that payment of claimant's benefits had not ceased and that there were no disputed issues remaining to be resolved. Order at 3. Consequently, the district director awarded counsel a fee of $375. Order at 3-4. Employer now appeals both fees awarded by the district director and moves for a summary decision.[4] Claimant's counsel has not responded to the appeal.

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[3]An attachment to counsel's summary lists 24 dates claimant visited Dr. Moien for which he sought mileage reimbursement. Exh. N.

[4]Employer asks the Board to vacate the April 17, 1992 fee award and to hold that the May 1, 1991 fee award was "void at its inception. . . ." Emp. Brief at 14.

Employer contends the district director had no authority under the Act to assess a fee against it, as Section 28 does not apply because there was no controversy over the payment of mileage expenses. An employer may be held liable for an attorney's fee under Section 28(b) when it voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Section 28(b) authorizes payment of a fee only if the employer refuses to pay the amount of compensation recommended by the claims examiner after an informal conference and the claimant is thereafter successful in obtaining additional benefits. *See generally Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991).

Initially, we reject employer's request to nullify the 1991 fee award. A notice of appeal must be filed within 30 days after a decision has been filed in the office of the district director. 33 U.S.C. §§919(e), 921(a); 20 C.F.R. §§702.393, 802.205. As employer did not file a timely appeal of the district director's 1991 fee award, the award is final. 20 C.F.R. §702.350.

The 1992 fee award in this case concerns services rendered between October 22 and December 2, 1991, in obtaining the payment of expenses related to travel to and from Dr. Moien's office. Employer voluntarily began paying compensation benefits prior to the filing of the claim and to receiving formal notice of the claim from the district director. *See* Exh. A. Claimant made the request for mileage reimbursement at the informal conference. Employer did not pay the mileage, however, and claimant pursued this issue seven months later. After claimant raised the issue in October 1991, but before any other administrative action occurred, employer agreed to pay the mileage expense claimant sought. Despite employer's assertion that it did not "refuse" to pay the requested amount, the district director found that it did not timely reimburse claimant's mileage costs after the first informal conference.[5] *See* 33 U.S.C. §928. The district director rationally considered employer's inaction indicative of a refusal to pay after the informal conference. As a controversy remained between the parties after which counsel succeeded in obtaining employer's agreement to pay the requested mileage expense, and claimant gained additional benefits beyond which employer was voluntarily paying, the district director acted within his authority in awarding counsel an attorney's fee pursuant to Section 28(b) of the Act.[6] *See generally Brown v. General Dynamics*

[5]The district director stated:

> [A]lthough the employer never controverted the payment of mileage expense, they (sic) simply did not pay either thirty (30) days from when the claim was received or within fourteen (14) days from the date of the [first] informal conference. In fact, the employer's claim service simply did nothing until the claimant's attorney requested a conference seven (7) months after making the initial claim.

Comp. Order at 3; *see also* 33 U.S.C. §928.

[6]Employer's argument that there must be a compensation order to substantiate the award of a fee is

Corp., 12 BRBS 528 (1980). Consequently, we affirm his fee award.[7]

Accordingly, the district director's fee award is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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incorrect. Although Section 28(b) specifically requires the district director to write a recommendation regarding the disposition of the controversy, the Board and the courts have held that the failure to make a written recommendation will not preclude the assessment of an attorney's fee against the employer. *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Director, OWCP v. Jacksonville Shipyards, Inc.*, 1 BRBS 26 (1974).

[7]Employer also contends the district director erred in awarding a fee as there was no agreement at that level of the proceedings and as it requested a formal hearing to resolve disputed issues. Any controversy which may remain in this case has no bearing on the mileage dispute.