

BRB No. 03-0756

THOMAS E. HOLSWORTH)
)
 Claimant-Respondent)
)
 v.)
)
 LOGISTEC, USA) DATE ISSUED: July 28, 2004
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Compensation Order Awarding of Attorney Fees of Richard Robilotti, District Director, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Christopher J. Field (Field Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, 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 (OWCP No. 01-154696) of District Director Richard Robilotti 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related fracture of his left ankle on December 23, 2001. Following an open reduction/internal fixation and post-operative conservative care, Dr. Kramer released claimant to return to light duty work on March 25, 2002, and then to resume his normal, pre-injury work duties, as of October 13, 2002. Employer voluntarily paid temporary total disability benefits from December 24, 2001, until March 24, 2002, temporary partial disability benefits from March 25, 2002, to October 13, 2002, and a non-scheduled award of permanent partial disability benefits from October 14, 2002, until March 16, 2003.

Claimant filed a claim under the Act on August 14, 2002, and by letter to employer dated January 14, 2003, sought permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. § 908(c)(2), based on Dr. Kramer's assessment, dated December 13, 2002, that claimant has a 15 percent permanent impairment to his left lower extremity. Employer replied by scheduling a medical evaluation with Dr. Luchini, who, on January 22, 2003, likewise opined that claimant had a work-related 15 percent permanent impairment of the left lower extremity. On March 19, 2003, employer paid claimant permanent partial disability benefits under the schedule for a 15 percent loss of use of his left lower extremity. *See* 33 U.S.C. §908(c)(2), (19).

Claimant's counsel subsequently submitted a petition for an attorney's fee for work performed before the district director, requesting \$2,510.20, representing 9.75 hours of attorney services at an hourly rate of \$200, and 9.5 hours of paralegal services at an hourly rate of \$55, plus \$37.70 in costs. Employer responded, objecting to its liability for a fee on the basis that it paid all benefits voluntarily. The district director summarily awarded the amount requested after reviewing "the fee application taking into consideration the complexity of the case, the issues involved and the results obtained, the actual necessary work performed and other factors including the expertise of the attorney." Order at 1.

On appeal, employer challenges the legal sufficiency of 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 asserts that the district director's order cannot stand, as it does not set out the applicable statutory and regulatory criteria and does not address any of employer's specific objections to the fee petition. Employer reiterates its objection that there is no statutory basis for its liability for an award of an attorney's fee in this case under Section 28(a) or Section 28(b), 33 U.S.C. §928(a), (b), as it voluntarily paid all benefits without any informal conference. In response, claimant avers that the facts of this case establish employer's liability for an attorney's fee under Section 28(a) or, alternatively, under Section 28(b).

In its objection to the fee petition before the district director, employer “contest[ed] the award of attorney fees based on [its] voluntary payment,” of a scheduled award of permanent partial disability benefits based a 15 percent loss of use of the left lower extremity, and further suggested that “any fee that might be awarded should be a lien on claimant’s scheduled award.” *See* 33 U.S.C. §928(c). As employer correctly argues, the district director in this case did not address employer’s objections to the attorney’s fee petition, nor did he provide the statutory basis for his award of an attorney’s fee payable by employer.¹ We must therefore vacate the district director’s award of an attorney’s fee and remand this case to the district director for reconsideration of claimant’s counsel’s fee petition in light of employer’s objections. *See generally Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). On remand, the district director must address employer’s contentions that it cannot be held liable for claimant’s attorney’s fee. If the district director determines that employer is liable for claimant’s attorney’s fee, he must delineate the statutory basis for the award, *i.e.*, whether employer’s liability results from the applicability of Section 28(a) or Section 28(b). *See generally Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). If, however, the district director determines that employer cannot be held liable for claimant’s attorney’s fee, he must consider whether the fee may be assessed against claimant as a lien on his compensation. 33 U.S.C. §928(c). The district director must take into account claimant’s financial circumstances in assessing a fee against claimant. 20 C.F.R. §702.132(a).

¹In light of our decision to vacate the fee award and remand the case to the district director, we need not address employer’s remaining contentions.

Accordingly, the Compensation Order Awarding of Attorney Fees of the district director is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge