



BRB No. 14-0429

DARREN HUGGINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MASSMAN TRAYLOR JOINT)	
VENTURE)	DATE ISSUED: <u>June 29, 2015</u>
)	
and)	
)	
ST. PAUL GUARDIAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney’s Fees and the Order Denying Claimant’s Request for Reconsideration of Prior Order on Attorney’s Fees of David A. Duhon, District Director, United States Department of Labor.

Quentin McColgin, Ridgeland, Mississippi, for claimant.

Elton A. Foster (Waller & Associates), Metairie, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney’s Fees and the Order Denying Claimant’s Request for Reconsideration of Prior Order on Attorney’s Fees (OWCP No. 07-177025) of District Director David A. Duhon 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 fee award of the district director must be affirmed unless it is shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24

(1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

In 2009, following an award of benefits to claimant by the administrative law judge, claimant's counsel filed fee petitions with the administrative law judge and the district director for work performed before them in this case. Counsel requested a fee of \$21,525, representing 71.75 hours at an hourly rate of \$300, for work performed before the district director between July 3, 2006, and March 31, 2009, and he requested a fee of over \$150,000 for work performed before the administrative law judge.¹ The administrative law judge first acted on counsel's fee petition in July 2011, and, following an appeal to the Board on the fee issues,² ultimately awarded claimant's counsel an employer-paid fee of over \$80,000, plus over \$10,000 in expenses for work performed

¹ Claimant was injured in April 2005. Although employer initially paid medical benefits and compensation, after claimant filed a claim for additional compensation, employer disputed the claim in its entirety. The parties disputed whether claimant's injuries were covered by the Act, as well as the cause, nature, and extent of claimant's disability. The administrative law judge found that claimant's injury is covered by the Act. The administrative law judge remanded the case to the district director so that the parties could develop their claims with respect to the cause of claimant's injuries and the nature and extent of any disabling conditions. 2006-LHC-1830 (Sept. 18, 2007). After the parties developed the evidence, and the district director held an informal conference, the case was referred to the administrative law judge. On the merits, the administrative law judge found that claimant's knee and back injuries were work-related but his psychological condition was not. He also found that claimant could not return to his usual work and that employer did not establish the availability of suitable alternate employment. He awarded claimant temporary total and permanent total disability benefits. 2009-LHC-978 (Nov. 16, 2010; Dec. 29, 2010 (recon. denied); Jan. 10, 2011 (errata)).

² The Board affirmed the administrative law judge's award of an hourly rate of \$250 and reductions to itemized entries, but remanded the case for the administrative law judge to readdress the degree of claimant's success, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Huggins v. Massman Traylor Joint Venture*, BRB No. 11-0792 (June 27, 2012).

before the administrative law judge.³ *Huggins v. Massman Traylor Joint Venture*, BRB No. 11-0792 (June 27, 2012), BRB No. 13-0223 (Jan. 28, 2014), However, the district director did not act on the fee petition filed with his office in 2009.

On May 27, 2011, employer filed a motion for modification of claimant's award of benefits. 33 U.S.C. §922. In 2012, the parties settled the modification claim, agreeing to a \$295,000 lump-sum payment to claimant and to attorney's fees for claimant's counsel for his work before the administrative law judge (\$25,170.74) and the district director (\$2,000). 33 U.S.C. §908(i). The administrative law judge approved the parties' settlement on October 19, 2012; in his order, he awarded the agreed-upon fee for work performed by counsel before him in the modification proceeding.

Meanwhile, the district director still had not acted upon counsel's fee petition filed in 2009. Following the Board's January 2014 affirmance of the administrative law judge's decision awarding an attorney's fee to claimant's counsel based on an hourly rate of \$250 and a 30 percent overall reduction of the requested fee due to claimant's partial success on the disability issues, counsel submitted a revised fee petition to the district director. In his revised petition, counsel reduced his fee request from \$21,525 to \$17,937.50, representing 71.75 hours at an hourly rate of \$250. With the revised request, he also submitted a supplemental fee petition for an additional \$562.50 for 2.25 hours of work related to his preparation of the original 2009 fee petition and the 2014 revised petition. Employer objected to the revised fee petition, stating that the fee agreed upon in the 2012 settlement accounted for all of counsel's work before the district director and nothing more is due him. Alternatively, employer asserted that if an additional fee is due, then it, like the administrative law judge's fee, should be reduced by 30 percent to account for claimant's partial success. Claimant's counsel, responding to an inquiry from the district director regarding the applicability of the 2012 settlement to the 2009 fee petition, explained that the language of the settlement did not discharge any pending, unresolved fee petitions. He stated that the \$2,000 fee agreed upon in the settlement represented work before the district director only on the modification issue, but did not include fees for services performed before the district director in the development of claimant's original claim. Moreover, counsel asserted that his fee should not be reduced by 30 percent because the majority of the services he performed before the district director were on successful issues.

³ In his Order dated January 30, 2013, the administrative law judge awarded counsel \$42,000 for services, plus over \$2,000 in expenses, for work performed in 2006-LHC-1830 (coverage issues) and over \$41,000 for services, plus over \$8,000 in expenses, for work performed in 2009-LHC-978 (disability issues). The Board affirmed this award. *Huggins v. Massman Traylor Joint Venture*, BRB No. 13-0223 (Jan. 28, 2014).

On May 20, 2014, the district director issued a letter to the attorneys accepting employer's position regarding its understanding that all fees for work before the district director were accounted for in the settlement, as the agreement did not indicate otherwise, and denying counsel any additional fees based on the 2009 fee petition. On June 5, 2014, the district director issued an order stating same. On July 17, 2014, the district director denied claimant's counsel's motion for reconsideration, stating that the specific reference to a fee before the OWCP in the settlement agreement precluded his awarding the fee requested for other work performed. Claimant's counsel appeals the district director's denial of a fee for services performed in the initial proceedings in this case. Employer responds, urging affirmance.

Claimant's counsel contends that the district director erred in denying a fee for the services identified in his 2009 fee petition. Employer responds, arguing that the agreed-upon fee in the 2012 settlement supplanted any other fee requests, as the language in the settlement agreement did not indicate that the agreed-upon fee was to supplement any other fees. We reverse the district director's denial of an employer-paid fee in this case.

The October 2012 settlement between the parties included a paragraph addressing counsel's fee, providing that claimant's counsel "will receive a fee in the amount of \$25,170.74 for services and costs before OALJ and an additional amount of \$2,000.00 before OWCP. . . ." ⁴ The fee petitions identified in the settlement agreement and attached thereto support the agreed-upon fee amounts. Specifically, the petition for a fee for work before the district director covered services provided between May 31 and September 6, 2011 and states that the petition is for services "before OWCP in the proceeding for a Sec. 22 modification." Based on the dates and descriptions of the services, it is clear that the settled fee amounts covered only the work related to the motion for modification and not to the coverage or disability issues disputed earlier and decided in claimant's favor. The Board noted such in its January 2014 decision on claimant's appeal of the administrative law judge's fee award. ⁵

⁴ Paragraph 16 of the settlement agreement stated:

Employee is currently represented by attorney Quentin McColgin. Mr. McColgin will receive a fee in the amount of \$25,170.74 for services and costs before OALJ and an additional amount of \$2,000.00 before OWCP, which will be paid by Employer and Carrier directly to Mr. McColgin, in addition to the settlement amount outlined above. Mr. McColgin attaches his fee petitions as an exhibit.

⁵ The Board stated: "The settlement agreement also provided for an attorney's fee for the work performed by claimant's counsel before the administrative law judge with respect to the modification and settlement proceedings (Case No. 2011-LHC-2186) in the

Section 28(a) of the Act provides that the claimant must utilize the services of an attorney in the “successful prosecution of his claim” for an employer to be held liable for the attorney’s fee. 33 U.S.C. §928(a); *Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); 20 C.F.R. §702.134(a). Claimant here engaged the services of an attorney and successfully prosecuted his claim by establishing that his injuries are covered by the Act and by obtaining awards of medical benefits and temporary total and permanent total disability benefits from the date of injury until the parties reached a settlement following employer’s motion for modification.⁶ Those awards were not challenged. Consequently, claimant successfully prosecuted his claim, and his attorney is entitled to an employer-paid fee for his services. 33 U.S.C. §928(a); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). That the parties’ settlement, arising from employer’s motion for modification, provided for an attorney’s fee for “services, fees and costs. . .” before the OWCP is insufficient, alone, to preclude the fee for services rendered before the district director previously in this case, for which counsel had submitted a fee petition that had yet to be acted upon. This is especially true when the fee petition referenced in and attached to the settlement agreement addressed only a limited set of services performed in conjunction with the modification proceedings; none of these services corresponded to the services identified in the 2009 fee petition. Accordingly, it was improper for the district director to deny counsel’s petition for an attorney’s fee for work provided in the earlier proceedings. The 2009 fee petition remained pending at the time of the parties’ settlement, and this agreement, by virtue of the attached fee petitions, did not purport to settle the attorney’s fee for the earlier services. Therefore, we reverse the district

amount of \$25,170.74 and an additional attorney’s fee for work performed before the Office of Workers’ Compensation Programs (OWCP) *related to the modification proceedings* in the amount of \$2,000.” *Huggins*, BRB No. 13-0223, slip op at 2 n.2 (emphasis added).

Moreover, it can be inferred that the administrative law judge interpreted the fee settlement as applying only to claimant’s counsel’s work on employer’s motion for modification. The administrative law judge awarded claimant’s counsel the fee agreed upon in the settlement for work before him. The administrative law judge, in a decision after remand by the Board and after his approval of the settlement, awarded claimant’s counsel a fee for the work in the initial proceedings, with no indication that a fee was somehow precluded by the parties’ settlement. *See n. 3, supra*.

⁶ Although claimant was unsuccessful in establishing that his work accident aggravated his pre-existing psychological condition, and this is the reason for the administrative law judge’s 30 percent overall reduction of the requested fee, claimant successfully established that his knee and back injuries rendered him totally disabled.

director's denial of an employer-paid attorney's fee for the services counsel performed before him in the initial proceedings in this case. We remand the case to the district director for him to address counsel's fee petitions and employer's responses thereto, and to award counsel a reasonable employer-paid fee pursuant to Section 28 of the Act and 20 C.F.R. §702.132.

Claimant's counsel has filed fee petitions for work performed before the Board. Counsel requests a total fee of \$3,812.50 for work on this appeal, representing 15.25 hours at an hourly rate of \$250, plus expenses of \$43.98.⁷ Employer responds, objecting only to its liability for any fee, as it asserts it is not liable for an additional attorney's fee before the district director or for any fee for services incurred after the parties' settlement. As we have held that employer is liable for counsel's attorney's fee for work performed before the district director for the initial proceedings in this case, and absent any specific objections to the fee requested in the petitions before us, we award counsel his requested fee for work before the Board, payable by employer, as we conclude it is reasonably commensurate with the necessary work done in successfully prosecuting this appeal. 33 U.S.C. §928; *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); 20 C.F.R. §802.203.

⁷ We have corrected counsel's erroneous calculations in his second and third supplemental petitions.

Accordingly, the district director's denial of an employer-paid attorney's fee is reversed. The case is remanded for the district director to address counsel's fee petitions and employer's objections, and to award counsel a reasonable attorney's fee, payable by employer. Additionally, employer is liable for an attorney's fee, payable directly to claimant's counsel, for work before the Board in this appeal in the amount of \$3,812.50, plus expenses in the amount of \$43.98.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge