

BRB No. 98-0493

DEBRA A. PENISTON)
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 Claimant-Respondent)
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 v.)
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 NAVY EXCHANGE SERVICE) DATE ISSUED: May 12, 1999
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 and)
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 CRAWFORD AND COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fee and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Kathleen Coleman Tytla, New London, Connecticut, for claimant.

Richard F. van Antwerp (Robinson, Kriger & McCallum), Portland, Maine, and Francis M. Womack III (Weber, Goldstein, Greenberg and Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fee and Decision on Motion for Reconsideration (95-LHC-0286) of Administrative Law Judge David W. Di Nardi 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 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. See, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related injuries in the course of her covered employment in October 1993. Employer voluntarily paid periods of temporary partial disability benefits. Claimant thereafter filed her claim seeking temporary total disability benefits as a result of her injuries. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from October 29, 1993, through November 28, 1994, and then continuing from April 10, 1995, as well as temporary partial disability benefits, and medical benefits. In addition, the administrative law judge awarded claimant's counsel an attorney's fee.

On June 26, 1997, after an unsuccessful attempt to obtain payment of alleged outstanding medical bills via an informal conference before the district director, claimant sought a hearing on this issue before an administrative law judge. In response, employer filed a motion for summary judgment, in which it acknowledged responsibility for all reasonable and necessary medical expenses and alleged, through the affidavit of the carrier's claims examiner, Terry Schroeder, that all of claimant's medical bills had either been paid or were currently being processed for payment. Following a conversation between claimant's attorney and Ms. Schroeder, claimant notified the Office of Administrative Law Judges on August 22, 1997, that she would not object to employer's motion for summary judgment as payment of the outstanding bills had been resolved.

Claimant's counsel thereafter filed an application for an attorney's fee with the administrative law judge for services rendered between June 26, 1997, and August 22, 1997. Specifically, counsel requested a fee totaling \$1,250, representing 6.25 hours of attorney time at an hourly rate of \$200. In his Supplemental Decision and Order Granting Attorney Fee, the administrative law judge awarded the requested fee in its entirety, assessed against employer. Employer requested reconsideration of the administrative law judge's supplemental decision, which was denied by decision issued November 25, 1997.¹

¹Employer filed its appeal on December 22, 1997. By Order dated November 9, 1998, the Board dismissed employer's appeal and remanded the case to the district director for reconstruction of the record, or alternatively, to the Office of Administrative Law Judges for a new hearing. By Order dated February 24, 1999, the Board, upon noting receipt of the

On appeal, employer challenges the administrative law judge's assessment of the attorney's fee against it. Claimant responds, urging affirmance.

Employer argues that as there was never any valid claim pending with regard to unpaid medical bills, claimant's counsel did not engage in any "successful prosecution," as required for entitlement to an award of an attorney's fee under Section 28, 33 U.S.C. §928. Employer specifically maintains that the claim was brought before the Office of Administrative Law Judges and then withdrawn without the actual presentation of any specific medical bills upon which relief could have been granted and therefore there was never any prosecution of the claim, let alone a successful one. In response, claimant argues that employer never timely objected to the attorney's fee petition, or alternatively that it has not shown that the administrative law judge's award of an attorney's fee is not in accordance with law.

As an initial matter, the administrative law judge properly found that employer did not file objections to counsel's fee petition in a timely fashion. In his Supplemental Decision and Order, the administrative law judge awarded the requested attorney's fee in its entirety based on "the nature and extent of the legal services rendered to claimant by her attorney, the amount of compensation obtained for claimant and *the Respondents' lack of comments on the requested fee.*" Supplemental Decision and Order Granting Attorney Fee at 1 [emphasis added]. Upon reconsideration the administrative law judge again noted that employer did not file a response to claimant's attorney's fee petition. In fact, employer, in its letter to the Board dated February 19, 1999, explicitly acknowledges that it "did not file an objection to [counsel's] fee petition." Thus, employer did not properly preserve the issue of its liability for an additional attorney's fee for purposes of appeal. *See generally Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *Monahan v. Portland Stevedoring Co.*, 8 BRBS 653 (1978).

reconstructed record on January 26, 1999, reinstated the appeal and stated that the one-year review period commenced from the date of receipt of the record.

In addition, the administrative law judge properly held employer liable for claimant's attorney's fee. Claimant sought payment of certain covered medical bills by employer through its carrier on a number of occasions,² but each time did not receive a positive response. In light of this fact, claimant made a request for an informal conference in order to obtain payment of these outstanding bills. At the informal conference, employer denied claimant's claim that any bills were outstanding, thus prompting claimant to take the additional step of seeking a hearing before the Office of Administrative Law Judges to resolve the controversy as to the existence and/or liability of these alleged outstanding bills. It was only after these steps had been taken, prior to any formal hearing, that the disputed bills were paid by employer's carrier. Specifically, payments were made on July 1, 1997, and July 30, 1997, prompting claimant to drop any additional pursuit of the claim. Consequently, inasmuch as there was a controversy over the amount of additional benefits owed to claimant, and claimant, through pursuit of the administrative process, was ultimately successful in obtaining payment of outstanding medical bills, the administrative law judge properly found that claimant's counsel is entitled to a reasonable attorney's fee payable by employer for work related to this matter. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *see also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). The administrative law judge's award of an attorney's fee payable by employer is therefore affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fee and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

²The documents in the administrative file show that claimant's counsel wrote to employer's carrier on three separate occasions, February 5, 1997, April 2, 1997, April 22, 1997, seeking payment of the outstanding bills for medical services rendered as far back as January 1994, prior to requesting an informal conference on the matter.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge