

ROBERT C. KRUSE)
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 Claimant-Respondent)
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 v.)
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 OGLEBAY NORTON MARINE SERVICES) DATE ISSUED: 09/28/2006
)
 Self-Insured)
 Employer-Respondent)
)
 KIRK E. KARAMANIAN)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order Approving Settlement and the Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Kirk E. Karamanian (O'Bryan Baun Cohen Kuebler), Birmingham, Michigan, for petitioner.

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

PER CURIAM:

Petitioner¹ appeals the Decision and Order Approving Settlement and the Order (2005-LHC-0905) of Administrative Law Judge Daniel J. Roketenetz 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 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

¹ This appeal is brought by claimant's former attorney, Kirk E. Karamanian, for services rendered on behalf of claimant before the administrative law judge. Claimant, following his dismissal of Mr. Karamanian, accepted a settlement offer by employer, which was approved by the administrative law judge on August 31, 2005.

On January 25, 2004, claimant suffered a chemical burn to his skin during the course of his employment. Employer voluntarily paid a period of temporary total disability benefits, but an additional period of disability and ongoing medical treatment remained contested. On January 29, 2004, claimant retained the services of an attorney, Kirk Karamanian (the petitioner), to represent him in pursuing a claim under the Act. On March 1, 2004, the petitioner notified the district director of his representation of claimant, and filed a claim for benefits. The district director held an informal conference on October 14, 2004, after which the petitioner began settlement negotiations with employer. Claimant did not agree to the terms of the settlement which petitioner negotiated with employer,² and thereafter, on January 25, 2005, the case was referred to the Office of Administrative Law Judges.

On May 25, 2005, prior to the hearing, claimant discharged petitioner. The claim proceeded to a hearing before the administrative law judge on July 13, 2005, with the claimant appearing *pro se*. At the hearing, the claim was settled for an additional period of temporary total disability benefits in the amount of \$687 and medical expenses related to the injury. In the Decision and Order Approving Settlement, the administrative law judge found that the petitioner is not entitled to an attorney's fee as he did not successfully prosecute the claim. Petitioner filed a motion for reconsideration. In an Order dated November 1, 2005, the administrative law judge denied the motion, finding that "the successful prosecution of this case occurred in one hour on July 13, 2005. . ." and that petitioner's work did not lead to the successful prosecution because the case was ripe for adjudication when claimant and employer appeared for the formal hearing. Order at 3. Thus, the administrative law judge found that the petitioner did not engage in the successful prosecution of claimant's claim and is not entitled to an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928.

On appeal, the petitioner contends that the administrative law judge erred in finding that he did not engage in the successful prosecution of the claim based on the finding that he was discharged from service by claimant prior to the settlement of the claim. Neither employer nor claimant has responded to this appeal.

In order to be entitled to an attorney's fee under Section 28 of the Act, claimant's claim must be successfully prosecuted. *See, e.g., E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 34, 20 BRBS 79(CRT) (8th Cir. 1988); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). In the instant case, it is uncontested that claimant received a settlement in the amount of \$687, and past and future medical treatment for the work-related injury.

² This agreement was for \$829.43 in additional temporary total disability benefits and an assessment pursuant to Section 14(e), 33 U.S.C. §914(e).

Although claimant discharged petitioner prior to entering into a settlement agreement with employer, the ultimate success by a claimant entitles his attorney to a fee for all necessary work performed leading to that success. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*). The discharge of an attorney prior to a settlement agreement does not necessarily render the work of the attorney noncompensable. Rather, the inquiry concerns whether the attorney's services were necessary to establish the elements of the successful claim.

As claimant obtained an award of benefits via the settlement agreement, the administrative law judge erred in denying petitioner any attorney's fee on the sole basis that he did not successfully prosecute the claim. Therefore, we vacate the administrative law judge's denial of an attorney's fee award to the petitioner. We remand the case to the administrative law judge for him to determine, after consideration of counsel's fee petition and employer's objections thereto, whether counsel performed services necessary to the successful prosecution of the claim, including any services after referral to the Office of Administrative Law Judges that resulted in employer's agreeing to pay medical benefits, and award a reasonable fee for such services. *See generally Sullivan v. St. John's Shipping Co.*, 36 BRBS 127 (2002).

Accordingly, the Decision and Order Approving Settlement and the Order on reconsideration of the administrative law judge finding that the petitioner is not entitled to an award of an attorney's fee is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Approving Settlement is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge