BRB No. 92-1675

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| KENNETH GLICK | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONTAINER STEVEDORING COMPANY | ) | DATE ISSUED: |
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| and | ) | |
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| SEALAND SERVICES, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION AND ORDER |

Appeal of the Compensation Order-Award of Attorney Fees and Decision upon Reconsideration of D.L. Oppenheim, District Director, United States Department of Labor.

Dorsey Redland, San Francisco, California, for claimant.

Ronald H. Klein (Emard & Perrochet), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order-Award of Attorney Fees and Decision upon Reconsideration (OWCP No. 130086969) of District Director D.L. Oppenheim 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).

On May 18, 1990, claimant was driving a tractor hauling a trailer with a loaded container when the container and trailer tipped over, causing the tractor to fall on its side. Claimant was pinned in the cab of the tractor. Claimant suffered orthopedic injuries in the accident, and later claimed resulting psychological injuries. Employer filed a notice of controversion on May 30, 1990. However, on June 13, 1990, employer began voluntary payment of compensation for claimant's internal pelvic injury effective retroactively to the date of injury. On June 18, 1990, claimant filed a claim for compensation under the Act, stating as the nature of injury: "Severe shock, fear and emotional injuries. Severe injuries to back, spine, hips, left hand, legs, and other injuries. Internal injuries and injury to the right hip." Compensation Order at 2. Employer filed a second notice of controversion on November 9, 1990, objecting to the necessity of claimant's request for psychotherapy. Based on a medical opinion that claimant was able to return to work on November 8, 1990, employer terminated benefits on November 28, 1990. Claimant sought continuing compensation from November 28, 1990, medical benefits for his psychological condition, penalties, and interest.

Employer rejected the recommendations at the informal conference that psychological care be authorized and that temporary total disability benefits be reinstated from November 29, 1990, and continuing, with interest and penalties. Thus, the case was referred to the Office of Administrative Law Judges. However, on March 29, 1991, the parties settled all outstanding issues, and employer agreed to resume payment of temporary total disability benefits effective November 29, 1990 and agreed to pay for claimant's medical and psychological treatment.

Subsequently, claimant's counsel filed a fee petition for work performed before the district director, requesting $15,263.93 representing 84.95 hours of attorney services at the rate of $150 per hour, 24.45 hours of legal assistant services at the rate of $40 per hour, and $1,543.43 in expenses. Employer thereafter submitted objections. After considering employer's objections, the district director awarded claimant's counsel the full $15,263.93 fee requested, plus costs of $1,543.43. The district director summarily reaffirmed the compensation order on reconsideration.

On appeal, employer contends that the district director erred in awarding an attorney's fee payable by employer pursuant to Section 28(a), 33 U.S.C. §928(a), of the Act inasmuch as employer paid compensation within thirty days of the date of the accident. In addition, employer contends that it is not liable for claimant's counsel's fee pursuant to Section 28(b), 33 U.S.C. §928(b), of the Act as there was no award of compensation in this case. Alternatively, employer contends that the amount of the fee is excessive and should be reduced.

Employer contends that the district director erred in assessing claimant's counsel's fee against employer. Specifically, employer first argues that it is not liable for an attorney's fee under Section 28(a) since it voluntarily accepted liability of the claim and began voluntary payment of benefits on June 13, 1990, within thirty days of the date of the accident. We agree. Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosection of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C.

§928(a); *see Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990). In the present case, although employer initially filed a notice of controversion, it began voluntary payment of compensation benefits on June 13, 1990, before a claim for benefits under the Act was filed. Employer continued to voluntarily pay temporary total disability benefits until November 28, 1990, thereby precluding employer's liability under Section 28(a), contrary to the district director's finding. *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Employer, however, is liable for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b). Although employer voluntarily paid benefits for the pelvic injury, in the claim filed on June 13, 1990, claimant sought additional benefits for psychological injury resulting from the work-related accident on May 18, 1990. Employer contested this claim by filing a notice of controversion on November 8, 1990, and suspending compensation on November 28, 1990. After the case was transferred to the Office of Administrative Law Judges, the parties agreed that claimant was entitled to temporary total disability benefits effective November 29, 1990, as well as to medical and psychological treatment. Therefore, inasmuch as a controversy remained even after employer voluntarily paid benefits and claimant was successful in obtaining additional benefits over that which employer voluntarily paid, we affirm the district director's finding that claimant's attorney is entitled to a fee for work performed before the district director assessed against employer.[1] *See* 33 U.S.C. §928(b); *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995). However, as employer is not responsible under Section 28(b) for any attorney's fees incurred prior to the date a controversy developed over the amount of additional compensation to which claimant seeks entitlement, we vacate the district director's award and remand the case for a determination of the date the controversy arose in this case. *See Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986).

[1]Moreover, we reject employer's contention that Section 28(b) requires a formal award of additional benefits in order to assess claimant's attorney's fee against employer. It is well-settled that legal services rendered on behalf of claimant in anticipation of litigation which result in a favorable settlement or agreement are compensable under the Act. *See Thornton v. Beltway Carpet Service, Inc.*, 16 BRBS 29 (1983); *Revoir v. General Dynamics Corp.*, 12 BRBS 525 (1980).

Employer also contends that the amount of the fee awarded is unreasonable. Specifically, employer contends that fees should not be awarded for work done after the settlement. We disagree; the district director could reasonably view the services in question as necessary to "wind up" the case, and he did not abuse his discretion in awarding fees for these services performed after March 29, 1991. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). We also reject employer's contention that various entries in counsel's fee petition were unnecessary to the issues contested. Employer contends that some of the fees relate to an investigation of the facts in the case for an apparent third-party claim and were unnecessary to prove the contested issues in the claim. The district director found that employer claimed to have "no medical verification of injuries" in the first notice of controversion, and thus the injury was in dispute. The district director concluded that given the claim for a psychological condition, and employer's initial controversion, investigation may very well have been needed to successfully prosecute the case. The district director considered employer's objections and found the services rendered by claimant's counsel to be reasonable and necessary at the time they were performed. We decline to disturb this rational determination. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer also contends that the amount of benefits claimant received as a result of the attorney's intercession does not warrant such a large fee. *See* 20 C.F.R. §702.132(a). However, the settlement the parties agreed to while the case was before the Office of Administrative Law Judges provided that claimant would receive continuing temporary total disability compensation and continuing medical and psychological treatment. Thus, the amount of benefits is not finite. As claimant received continuing compensation and medical benefits pursuant to the settlement agreement, we reject employer's contention that the fee award should be limited by the amount of compensation obtained by claimant. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

However, as employer correctly asserts, we note that the district director has compensated claimant's counsel twice for costs incurred in this case. The sum requested by claimant's counsel of $15,263.93 included costs of $1,543.43; however, the district director awarded an additional $1,543.43 for costs. Therefore, on remand, the district director is instructed to adjust the fee award accordingly.

Accordingly, the Compensation Order-Award of Attorney Fees awarding claimant's counsel a fee pursuant to Section 28(a) of the Act is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge