BRB No. 97-326

MARK WICKERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEXCOM	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Randolph L. Regula, District Director, United States Department of Labor.

Richard F. van Antwerp (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for the 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 (01-133661) of District Director Randolph L. Regula rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act,, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (the Act).[1] 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).

[1]On December 6, 1996, employer filed a Motion to Supplement the Record to which it attached various documents. Employer's motion is denied as the Board has no authority to accept employer's evidence. *See Williams v. Hunt Shipyards, Geosource, Inc.,* 17 BRBS 32 (1985).

On March 30, 1995, claimant sustained a work-related back injury while working for employer as a service station manager at the Navy Exchange in Groton Connecticut. Although claimant did not lose any time from work as a result of this injury, he did experience persistent pain. Accordingly, he requested authorization from employer for chiropractic treatment. After employer provided the necessary authorization, claimant was seen by Dr. Robert Barnett on April 19, 1995. Dr. Barnett reported that x-rays taken at the Naval Hospital showed subluxations of L4-5 and recommended that CT or MRI imaging be performed to rule out a disc herniation if claimant's sciatic neuritis did not improve. Claimant thereafter underwent 30 chiropractic treatments with Dr. Barnett between April 19, 1995, and November 19, 1995, billed at $70 each; $22.38 of this amount was for manual manipulation of the spine to treat a subluxation and the remaining amount was for therapeutic massage, hot packs, and electrotherapy. On April 24, 1995, claimant filed a claim seeking medical benefits under the Act for Dr. Barnett's chiropractic treatment. On July 11, 1995, employer filed a Form LS-207, Notice of Controversion.[2] Dissatisfied with the speed at which employer was paying for Dr. Barnett's treatment, claimant requested an informal conference on the issue of medical benefits and the authorization of the treating physician.

In the Memorandum of Informal Conference dated August 9, 1995, the district director recommended that employer, who had only paid for two of claimant's chiropractic bills, pay all outstanding medical bills related to the treatment of claimant's March 30, 1995, work-related back injury.[3] Within 13 days of the informal conference, employer

[2]In this form, employer stated that claimant's entitlement to the claimed compensation was being controverted because: (1) claimant had exercised his option under Section 7, 33 U.S.C.§907, by previously selecting his doctor; (2) claimant's doctor stated that the date of claimant's accident was March 13, 1995, while the date of accident reported by claimant was March 30, 1995; and (3) Crawford and Company is not responsible for any other medical treatment claimant received.

[3] At the informal conference employer took the position that the conference was premature as the bills for chiropractic treatment were currently under review for reasonableness, it had not refused to pay for chiropractic treatment, and no evidence had

initiated payment of Dr. Barnett's medical expenses, although it paid only $22.38 for each visit, representing the portion of the $70 charged which related to spinal manipulation. On August 14, 1995, claimant, taking issue with employer's partial payment, requested a formal hearing . On August 19, 1995, employer filed a second notice of controversion. On August 21, 1995, the case was referred for a formal hearing.

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been submitted that the treatment in question was reasonable, necessary, or related to claimant's work injury.

In the interim, claimant continued to receive chiropractic care from Dr. Barnett through February 23, 1996. While the case was before the administrative law judge, claimant asserted entitlement to additional medical benefits. Claimant argued that he had requested an examination by a medical doctor but employer had refused to authorize this treatment because claimant had chosen Dr. Barnett as his physician. In addition, claimant asserted that employer was liable for Dr. Barnett's continuing chiropractic treatment. Employer disputed liability for the electrotherapy, hot packs and massage services Dr. Barnett had billed, arguing that under 20 C.F.R. §702.404 reimbursable chiropractic services are limited to spinal manipulation to correct a subluxation. In addition, employer argued that it was not responsible for any treatment subsequent to November 17, 1995, when claimant reached maximum medical improvement, because any treatment rendered after that date was merely palliative. Finally, employer argued that Dr. Barnett has actually been overpaid because its total liability for the 31 chiropractic treatments at $22.38 per visit was $693, and Dr. Barnett had already been paid $700 or $830.40 as the time of the hearing.

In his Decision and Order dated October 1, 1996, the administrative law judge found that Dr. Barnett's treatment of claimant was reasonable, necessary and appropriate as it enabled him to continue working and determined that claimant was entitled to continuing palliative treatment. The administrative law judge, however, agreed with employer that it was only liable for that portion of Dr. Barnett's charges which related to manual spinal manipulation which the parties stipulated was $22.38 per visit. In addition, he concluded that employer was responsible for an examination by an orthopedic physician selected by claimant and for appropriate diagnostic testing such as an MRI or CT scan of the lumbar spine. Finally, he determined that as claimant's counsel had successfully prosecuted the claim, he was entitled to a fee to be assessed against employer and awarded claimant's counsel a fee of $3,795.84.

Shortly thereafter, the district director took action on claimant's counsel's request for an attorney's fee for work performed at that level of the proceedings. Claimant's counsel requested a fee of $2,347.50, representing 11.05 hours of legal services at $185 per hour, 5.15 hours of paralegal services at $55 per hour, and $20 in expenses for work performed at that level. Employer filed objections. In a Compensation Order dated October 25, 1996, after considering counsel's fee request in light of the regulatory criteria of 20 C.F.R. §702.132, the district director reduced the requested fee and awarded claimant's counsel a fee of $1,637.30.

On appeal, employer contends that it should not be liable for claimant's attorney's fee before the district director because it instituted payment of claimant's chiropractic expenses within 14 days of the claims examiner's recommendation at the rate ultimately found to be applicable by the administrative law judge. While recognizing that the administrative law judge ordered employer to pay for an orthopedic examination, diagnostic testing, and continuing chiropractic treatment at the formal stage of the proceedings, employer maintains that these benefits cannot serve as a basis for imposing fee liability against employer because claimant's entitlement to these benefits was not in controversy

while the case was before the district director. Employer asserts that inasmuch as it followed the claimant's examiner's recommendation and claimant was not successful in obtaining more than employer had agreed to pay initially, no basis exists for imposing fee liability against employer under Section 28(b) of the Act, 33 U.S.C.§928(b).[4] Claimant has not responded to employer's appeal.

[4]In its brief, employer concedes that this provision governs the question of fee liability in this case. Petition for Review at 5.

We reject employer's argument that it is not liable for claimant's counsel's attorney's fee. Under Section 28(b), when an employer pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that voluntarily paid or agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990). In the present case, while the case was before the district director, employer initiated payment for Dr. Barnett's chiropractic treatment in accordance with the claims examiner's recommendation but at a reduced rate. Subsequent to referral, however, claimant, asserted entitlement to additional medical benefits. Although claimant did not prevail before the administrative law judge in establishing employer's liability for all of the services included in Dr. Barnett's bill, as a result of counsel's efforts before the administrative law judge,[5] employer was ultimately held liable for an orthopedic examination, diagnostic testing, and for continuing chiropractic treatment which it had previously refused to pay. Therefore, inasmuch as a controversy remained after employer voluntarily initiated compensation and claimant's counsel was successful in obtaining additional compensation over that which employer paid or agreed to pay, employer is liable for claimant's counsel's attorney's fees before the district director pursuant to Section 28(b) of the Act. Contrary to employer's assertions, the fact that the additional compensation claimant obtained involved issues not in controversy while the case was before the district director is irrelevant. Where, as here, claimant is ultimately successful in procuring additional compensation, he is entitled to a fee for all services rendered at each level of the adjudication process. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). Inasmuch as employer does not contest the amount of the fee awarded by the district director, the fee award is affirmed.

Accordingly, the Compensation Order Award of Attorney Fees of the district director is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5]Contrary to employer's assertions, the facts from the present case are distinguishable from those in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991). In that case unlike the present one, there was no dispute after the informal conference concerning the amount of compensation to be awarded as the employer stipulated during the conference that claimant Watts was entitled to the claimed permanent total disability benefits. In the present case, however, employer did not follow the district director's recommendation to pay the full amount of Dr. Barnett's outstanding chiropractic bills and the case proceeded to a formal hearing where claimant was successful in obtaining additional compensation.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge