

ARTHUR KEE, III)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Denial of Attorney's Fee of Randolph L. Regula, District Director, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton, Weiss & Gabree, P.A.), Bath, Maine, for claimant.

Richard F. van Antwerp and Jeffrey W. Peters (Robinson, Kriger & McCallum), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Denial of Attorney's Fee (OWCP Nos. 1-118961, 1-116433) of District Director Randolph L. Regula 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., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related injuries on June 19, 1990 and September 25, 1990, and subsequently sustained a non-work-related injury on October 26, 1991, when he fell in a gravel pit. After initially contesting claimant's claims for compensation, employer voluntarily paid temporary total disability benefits from November 26, 1990 to April 14, 1991. Claimant sought benefits based on an aggravation of his work injuries resulting from the gravel pit accident for the period from October 26, 1991 to November 17, 1991. In a Decision and Order dated December 1, 1993, the administrative law judge denied the claim

for the October 26, 1991 to November 17, 1991, time period on the basis that any disability during that period was due to the gravel pit accident which was an intervening cause. The administrative law judge also denied claimant's attorney's fee request on the basis that there was no successful prosecution. Claimant appealed the administrative law judge's decision to the Board. *Kee v. Bath Iron Works Corp.*, BRB No. 94-750. While this appeal was pending before the Board, claimant apparently sustained additional work-related injuries, was out of work from August 8, 1995 to November 13, 1995, and sought compensation under the Act for this period of time. The parties thereafter reached an agreement whereby employer would voluntarily pay benefits and attorney's fees for the August 8, 1995 to November 13, 1995, period in exchange for claimant's withdrawal of his appeal to the Board and his claim for benefits for the October 26, 1991 to November 17, 1991, time period. See letter dated February 29, 1996.

Claimant's counsel subsequently filed an attorney's fee application with the district director, requesting 7.25 hours of services performed from July 12, 1993 through July 27, 1995, at an hourly rate of \$125, for a total fee of \$906. Employer filed objections to the fee petition on the basis that the claim had not been successfully prosecuted.¹ The district director, by letter dated November 8, 1996, denied claimant's attorney's fee request, noting that the claims for the September 25, 1990, injury were denied by the administrative law judge's December 1, 1993, Decision and Order and stating that the administrative file does not support a claim that any federal compensation was secured for claimant.

Claimant appeals the district director's denial of an attorney's fee, arguing that he successfully prosecuted the claim for benefits for the period October 26, 1991 to November 17, 1991, when he withdrew his claim and his appeal to the Board as consideration for the payment of benefits for the period from August 8, 1995 to November 13, 1995. Employer responds, urging that the Board affirm the district director's denial of an attorney's fee.

As an initial matter, we note that a district director's award or denial of an attorney's fee must be contained in a formal order. See, e.g., *Thornton v. Beltway Carpet Service*, 16 BRBS 29, 31 (1983). The district director in the instant case determined the issue of

¹Claimant's attorney also filed fee petitions with the administrative law judge and the Board, and employer filed objections. The Board granted the requested fee by Order dated September 12, 1996, rejecting employer's objection that the matter had not been successfully prosecuted. Similarly, in a Supplemental Decision and Order dated July 16, 1996, the administrative law judge granted the requested fee, rejecting employer's contention that the case was not successfully prosecuted.

claimant's entitlement to an attorney's fee by letter. The failure to issue a proper order requires remand of this case to the district director for reconsideration of counsel's fee petition and the issuance of a formal order. *Id.*, 16 BRBS at 31.

On remand, the district director must reconsider whether there was a successful prosecution of the instant claim. Counsel for claimant is entitled to an attorney's fee only if there is a successful prosecution of the claim and the work performed was necessary. See 33 U.S.C. §928. A successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 538, 24 BRBS 49 (CRT)(9th Cir. 1990); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987). The Board has held, in a case arising under the Black Lung Act, 30 U.S.C. §901 *et seq.*, that counsel's success in obtaining an award of benefits on modification afforded the claimant the economic benefit requisite to a successful prosecution of the claim. See *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993)(*en banc*). In *Brodhead*, the Board stated that although the claimant's appeal had been dismissed prior to a final disposition on the merits, counsel could have reasonably regarded the work performed before the Board as necessary for successful prosecution of the claim at the time the work was performed. We conclude that the reasoning in *Brodhead* is analogous to the instant case, in which the settlement agreement provided that the consideration for the payment of compensation of a later period of disability was the withdrawal of an active claim for the first injury. The economic benefit received by claimant in exchange for the withdrawal of the first claim could be considered to be the successful prosecution of the first claim. See *Brodhead*, 17 BLR at 1-138.

Additionally, we note that the record forwarded to the Board does not clearly establish which services performed by claimant's counsel relate to which claims, in which claims claimant prevailed, and in which claims attorney's fees have already been paid.² On remand, the district director must further determine whether the services itemized in the fee petition filed with him relate to a claim which was considered to have been successfully prosecuted by virtue of the economic benefit obtained by claimant in exchange for the withdrawal of the claim.

²Although claimant's brief in support of his Petition for Review states that the fee petition is limited to work performed in connection with the claim for the period from October 26, 1991 to November 17, 1991, the fee petition itself references four separate injuries: June 19, 1990, September 25, 1990, October 15, 1994, and November 21, 1994. The services itemized between October 26, 1994 and July 27, 1995 appear to relate exclusively to the injuries occurring after 1991, injuries that were the subject of claimant's requests for modification and remand.

In light of our decision to remand the case for the district director to reconsider counsel's fee petition, we need not address the arguments concerning the doctrines of law of the case, collateral estoppel, and *res judicata* advanced by claimant.

Accordingly, the district director's denial of an attorney's fee 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