BRB No. 02-0641

DAVID C. BOOKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE, n/k/a FRIEDE GOLDMAN HALTER, INCORPORATED	)	DATE ISSUED:JUN 4, 2003
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY, IN LIQUIDATION, BY AND THROUGH, THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and the Order Denying Employer's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, LTD.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees and the Order Denying Employer's Motion for Reconsideration (00-LHC-0078) of Administrative Law Judge Richard D. Mills 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 the law. *See, e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 16, 1998, claimant, while working for employer as a first-class electrician, twisted his back while positioning a power cable. Dr. Cooper, claimant's treating physician, took x-rays and diagnosed a lumbosacral strain. Although claimant was initially placed on light duty, Dr. Cooper subsequently released him for regular-duty work, allegedly for economic reasons. Dr. Cooper last examined claimant on December 30, 1998, and indicated at that time that he was going to seek authorization for an MRI. Although claimant then worked for various employers, he has not worked since October 1999. Dr. Millette examined claimant on June 8, 1998, in July 1998, and again in July 1999, and prescribed an MRI of claimant's lumbar spine which employer refused to authorize. Claimant was seen in the emergency room numerous times between March 6, 1998, and October 24, 1999. CX 8.

Following an informal conference, the case was forwarded to the Office of Administrative Law Judges (OALJ) on October 1, 1999. In his decision, the administrative law judge found that claimant reached maximum medical improvement on May 1, 1998, when he was released to return to full-duty work, that his injury was a temporary condition which had resolved by the time of that release, and that his later flare-ups were not related to his April 1998 accident. *See* Decision and Order Awarding Medical Benefits at 8. The administrative law judge also found that claimant suffered no loss of wage-earning capacity as a result of the work-related accident, and that he was therefore not entitled to disability benefits. Next, the administrative law judge determined that employer was liable for reasonable medical expenses associated with Dr. Cooper's treatment of claimant from April 16, 1998, until May 1, 1998, and for a single visit by claimant to Dr. Millette. He stated that although the visit to Dr. Millette took place after claimant reached maximum medical improvement, the parties agreed to this single examination. The administrative law judge did not award medical expenses for claimant's emergency room visits, as these occurred before the accident or after the date on which claimant reached maximum medical improvement. The administrative law judge denied claimant's motion for reconsideration, and he clarified his decision to reflect that although he awarded payment for the 1999 visit by claimant to Dr. Millette, he did not find employer liable for the MRI recommended by Dr. Millette or for future medical treatment with him.

Subsequent to the issuance of the administrative law judge's decision awarding claimant limited medical benefits, claimant's counsel submitted a fee

petition to the administrative law judge requesting a fee of $7,890.70, representing 38.25 hours of services rendered at $200 per hour, and $240.70 in expenses. Employer submitted objections to this fee petition. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge specifically agreed with the employer's position that "claimant had no success and received no compensation or additional benefits as a result of his prosecution of this claim, and any attorney fee should be reduced significantly to reflect that limited success." *See* Supplemental Decision and Order at 2. Accordingly, based upon his finding of claimant's limited success, the administrative law judge concluded that a 75 percent reduction in claimant's counsel's requested fee was proper; pursuant to this reduction, the administrative law judge declined to address employer's remaining objections to the requested fee. Thus, the administrative law judge awarded claimant's counsel a fee of $1,912.50, and $240.70 in expenses. The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge, asserting that as there was no successful prosecution in this case it should not be held liable for claimant's counsel's fee. Claimant responds, urging affirmance. Employer has filed a reply brief.

Pursuant to Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the deputy commissioner, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b) of the Act, when an employer voluntarily pays 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 agreed to by the employer. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)*; Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). If a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount which is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Establishing entitlement to medical benefits constitutes a successful prosecution of the claim, entitling counsel to a fee. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989). *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987).

We are unable to resolve the fee liability issue presented by employer on appeal because it is impossible to glean from the existing record whether claimant obtained

additional benefits while this claim was pending before the administrative law judge.[1] In support of its contentions on appeal, employer alleges that it voluntarily paid medical benefits on claimant's behalf for more than a year following his injury. The administrative law judge awarded claimant medical benefits for the period from April 16, 1998, until May 1, 1998 and the cost of the consultation with Dr. Millette in June 1999. Thereafter, in his Order Denying Employer's Motion for Reconsideration of his fee award, the administrative law judge summarily stated that he agreed with claimant that "the award [of a fee payable by employer] was proper because of the successful prosecution of a controverted issue regarding Claimant's medical benefits," Order at 1, without specifying the factual details underlying this finding. Although the parties stipulated that employer paid medical benefits of $2,476.62, *see* JX 1, Stipulation 7; Decision and Order Awarding Medical Benefits at 2, the record contains no evidence establishing when employer made these stipulated payments or what services those payments covered. Thus, it is impossible to verify whether by virtue of the administrative law judge proceedings claimant's counsel's services resulted in claimant's obtaining compensation in addition to that which employer agreed to pay while the case was before the district director. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997). Specifically, as this case was referred to the OALJ on October 1, 1999, employer's payment after that date of claimant's medical expenses may render it liable for claimant's counsel's fee. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Accordingly, we vacate the administrative law judge's award of an attorney's fee payable by employer, and we remand this case for the administrative law judge to explicitly consider all of the evidence as it pertains to Section 28 of the Act.[2] *See Baker*, 991 F.2d 163, 27 BRBS 14(CRT).

[1]Employer's exhibits include Dr. Cooper's medical records, EX 5, and the medical records of Dr. Millette, EX 6, but no bills or proof of payment. Claimant's exhibits include a list of allegedly unpaid medical bills; however, these charges appear to be for services rendered outside of the period of employer's liability found by the administrative law judge. CX 8.

[2]On remand, the administrative law judge may reopen the record for admission of additional evidence on this issue.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge