

BRB No. 09-0536

ANTHONY P. VILLANO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC USA, INCORPORATED	)	DATE ISSUED: 01/28/2010
	)	
and	)	
	)	
SIGNAL INDEMNITY INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Robert B. Keville (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Neil J. Ambrose (Letizia, Ambrose & Falls), New Haven, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 01-161571) of District Director David Groeneveld 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained an injury to his right knee while working for employer as a crane operator on September 17, 2004. Claimant continued to perform his regular work until February 3, 2005, when he underwent arthroscopic surgery. Dr. Maletz released claimant to return to regular work with no restrictions as of September 15, 2005.<sup>1</sup> Claimant returned to work; however, he continued to experience discomfort in his right knee, and he developed symptoms in his left knee, prompting his return to Dr. Maletz on September 22, 2006. Dr. Maletz stated that while he found no instability in claimant's right knee, there is a clear association between claimant's left knee symptoms and his work-related right knee injury, surgery, and the subsequent healing process. Dr. Maletz added that he could not address the permanency of claimant's right knee condition or the condition of claimant's left knee without first obtaining MRI scans of both knees. On May 21, 2007, Dr. Ruwe diagnosed claimant with patella femoral syndrome in both knees. Dr. Ruwe, however, stated that he did not believe that claimant's left knee condition was related to his right knee condition, and accordingly, he did not believe that MRI scans were medically necessary.

Three separate disputes arose between the parties regarding reimbursement of certain medical bills. The first was resolved by the parties' stipulation, at an informal conference held before the district director on November 29, 2006, that employer would reimburse claimant "a total of \$51.00" for an outstanding medical insurance co-payment and travel expenses associated with claimant's procurement of medical care. The second and third disputes involved claimant's request for an MRI of his right knee, as well as for medical benefits relating to his alleged work-related left knee injury. These disputes resulted in an informal conference on September 5, 2007. On October 18, 2007, the district director referred the case to the Office of Administrative Law Judges with the recommendation that "medical expenses, including diagnostic testing, related to the left leg injury, as a result of the original right knee injury, shall be paid by the employer."

The administrative law judge found employer liable for all medical care, including the MRIs requested by Dr. Maletz, relating to claimant's right and left knee conditions. The administrative law judge subsequently awarded claimant's counsel an attorney's fee, which employer paid "without objection." Claimant's counsel also sought an attorney's fee from the district director, totaling \$3,207.50, plus \$142.51 in expenses, for work performed at that level between April 28, 2005, and the date of the most recent informal

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<sup>1</sup>Employer voluntarily paid temporary total disability benefits for the period during which claimant was out of work as a result of his right knee surgery, *i.e.*, from February 3, 2005, through September 19, 2005. ALJ X 6.

conference on September 5, 2007.<sup>2</sup> Employer filed objections to this fee petition. The district director made reductions in the requested hours, as well as in the requested hourly rate for paralegal work, but otherwise awarded the attorney's fee, as requested, finding employer liable pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Employer was, therefore, ordered to pay claimant's counsel an attorney's fee totaling \$3,150.01.

On appeal, employer challenges the district director's award of an attorney's fee for work performed by claimant's counsel prior to the date on which the controversy concerning medical benefits arose. Claimant responds, urging affirmance.

Employer argues that the district director erred by finding it liable for an attorney's fee for work performed by claimant's counsel in this case prior to August 9, 2006, the date on which employer alleges that the controversy arose over claimant's entitlement to medical benefits for his left knee. Employer additionally argues that the district director erroneously awarded the expenses requested by claimant's counsel since the fee petition did not delineate the specific reason for these expenses, and thus, it appears as though these costs may be for issues entirely unrelated to the controverted issues in this case. Employer thus argues that the district director's compensation order should be modified to reflect an attorney's fee of \$885, representing the work performed by claimant's counsel commencing August 9, 2006, on the relevant issues successfully resolved on claimant's behalf in this case. Claimant argues, in his response brief, that employer is liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a).

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation. 33 U.S.C. §928(a); *see generally* *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). In this case, employer was paying temporary total disability benefits at the time claimant filed his claim on May 13, 2005, and continued to pay claimant these benefits until his return to work for employer on September 19, 2005. Claimant's counsel is, therefore, not entitled to an attorney's fee under Section 28(a). *Id.*; *see also Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5<sup>th</sup> Cir. 2009).

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<sup>2</sup>Claimant's counsel's fee petition consisted of 7.7 hours of attorney work at an hourly rate of \$200, 21.6 hours of paralegal work at an hourly rate of \$75, and another 1.9 hours at an hourly rate of \$25. Additionally, the fee petition identified expenses for "copy charges" and three separate "records fee[s]" totaling \$142.51.

Section 28(b) applies where an employer pays or tenders payment of compensation without an award, and thereafter a conflict arises over additional compensation. 33 U.S.C. §928(b). In this case, a controversy arose regarding claimant's entitlement to medical benefits for his right and left knee conditions. An informal conference was held on September 5, 2007, culminating in the district director's recommendation that "medical expenses, including any diagnostic testing, related to the left leg injury, as a result of the original right knee injury, shall be paid." Employer refused to adopt this recommendation, and the administrative law judge ultimately resolved both issues in claimant's favor and ordered employer to "provide medical care for the claimant's right and left knee injuries" pursuant to Section 7(a). Decision and Order at 17. Based on these facts, claimant's counsel is entitled to, and employer is liable for, an attorney's fee in this case pursuant to Section 28(b) as all of the prerequisites for liability under that provision have been met. *See Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 474 F.3d 109, 40 BRBS 69(CRT) (4<sup>th</sup> Cir. 2006).

Nonetheless, in *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469, 471 (1983), the Board held that under Section 28(b), an "employer is not liable for the services of claimant's attorney which were performed prior to the date a controversy developed over the amount of additional compensation to which the claimant sought entitlement." In this case, employer claims a controversy did not arise until August 9, 2006, when it controverted claimant's entitlement to medical treatment for his alleged work-related left knee injury. In contrast, claimant maintains that the initial controversy arose on March 29, 2006, the point at which claimant first requested an informal conference on the issue of unpaid medical bills relating to his work-related right knee injury. Because the district director did not address the point at which a controversy developed in this claim in awarding attorney's fees, we must remand the case for him to reconsider this issue. *Trachsel*, 15 BRBS at 469. If employer is not liable for claimant's attorney's fee prior to the development of a controversy, the district director should consider claimant's liability for these fees, pursuant to 33 U.S.C. §928(c) and 20 C.F.R. §702.132.

Accordingly, we vacate the district director's award of an attorney's fee, and remand for the district director to reconsider the award in a manner consistent 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