BRB No. 91-1204

NEIL SANFORD	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
ELECTRO NAV., INCORPORATED	)	
	)	
and	)	
	)	
AETNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Glenn Robert Lawrence, Administrative Law Judge, United States Department of Labor.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-00012) of Administrative Law Judge Glenn Robert Lawrence 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational,

supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained injuries to his right knee, back and elbow as a result of an accident which occurred on September 18, 1981, in the course of his employment as an electronic technician for employer. By Decision and Order dated August 22, 1983, Chief Administrative Law Judge Nahum Litt awarded benefits for temporary total disability. On May 16, 1988, employer submitted an application with the district director requesting Section 8(f) relief, 33 U.S.C. §908(f), which was denied by letter dated September 27, 1988.[1] At employer's request, the case was subsequently transferred to the Office of Administrative Law Judges for a formal hearing on the request for Section 8(f) relief. In his Decision and Order dated April 9, 1991, Administrative Law Judge Glenn Robert Lawrence (the administrative law judge) concluded that claimant was permanently totally disabled and that employer was entitled to relief under Section 8(f) of the Act based upon claimant's manifest, pre-existing back disability.[2] The administrative law judge, however, determined that employer is responsible for claimant's attorney's fee under Section 28(b), 33 U.S.C. 928(b).

On appeal, employer argues that the administrative law judge improperly found it liable for claimant's attorney's fees. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance. Claimant has not responded to this appeal.

Employer contends that inasmuch as it did not dispute claimant's entitlement to permanent total disability benefits, the Special Fund, rather than employer, should be responsible for claimant's attorney's fees in this case. Specifically, employer argues that since the Director conceded that employer is entitled to Section 8(f) relief, it had no real economic interest in the outcome of this case on the primary issue litigated, notably the extent of claimant's permanent disability, particularly since the Special Fund was obligated to reimburse employer for payments of compensation made 104 weeks after October 11, 1984, the date of maximum medical improvement.

An attorney's fee can only be assessed against employer if the requirements of Section 28(a) or (b) are met; in other cases where claimant obtains an award, a fee may be a lien on his compensation. 33 U.S.C. §928(a), (b), (c). Since employer was making payments for temporary total disability on this claim, Section 28(a) does not apply, and employer is liable under Section 28(b) only if it controverted some aspect of the claim and claimant thereafter successfully obtained an award which employer contested. *See National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 883, 11 BRBS 68, 74 (9th Cir. 1979). The Board has consistently held that the pertinent inquiry in assessing liability for attorney's fees is the employer's

[1]Specifically, the district director's denial was issued on the grounds that a medical evaluation by an impartial physician, Dr. Magliato, revealed a moderate partial disability rather than the permanent total disability that employer had asked for in its Section 8(f) application. Director's Exhibit 6.

[2]As a result of an employment-related accident on October 18, 1974, claimant sustained a fractured vertebrae and lumbosacral and cervical strains, leaving claimant with a 7.5 percent disability rating.

level of interest and involvement in the part of the proceedings for which claimant's attorney is requesting fees. *Waganer v. Alabama Dry Dock & Shipbuilding Co.* 17 BRBS 43, 45 (1985); *Floyd v. Savannah Machine & Shipyard Corp.*, 11 BRBS 465 (1979). That employer is discharged of its liability for some compensation due to the operation of Section 8(f) does not affect its obligation for attorney's fees under Section 28(b). *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Moreover, it is well-settled that the Special Fund cannot be held liable for an attorney's fee under Section 28. *See, e.g., Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.* 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980).

In the instant case, the administrative law judge concluded that an open controversy existed between the parties as to the nature and extent of claimant's injury which required claimant to mount a defense. In so finding, the administrative law judge relied upon employer's letter dated August 14, 1990, in which it stated that it was "willing to join the Regional Solicitor's office in their position that the claimant has only a partial disability," as well as employer's statement at the hearing that it would accept the benefit of a determination that claimant was only partially disabled. Hearing Transcript (HT) at 8. The administrative law judge further premised his finding on the fact that it was employer's request to have a hearing on its Section 8(f) application that required claimant to defend against a possible determination that his disability was partial rather than total.

With the possible exception of the letter of August 14, 1990, the evidence of record supports employer's argument that there was no controversy between itself and claimant. First, in its Application for Section 8(f) relief dated May 16, 1988, employer refers several times to its position that claimant has a permanent total disability. Most notably employer indicated that "it is clear that claimant is suffering from degenerative disc disease which has rendered him permanently and totally disabled from his customary employment." In fact, the district director specifically noted that employer's "Section 8(f) Application asked for permanent total disability," and consequently, denied that request "based on failure to establish that claimant is totally disabled."

Secondly, employer noted in its Pre-Hearing Statement dated June 29, 1989, that all parties had reached agreement on "all issues except Section 8(f)," and thus, that employer was only presenting the "Application of Section 8(f)" for resolution at the formal hearing.[3] Perhaps more importantly, the letter upon which the administrative law judge's determination is primarily based, notably employer's pre-hearing "Response to Claimant's Discovery Demands" dated August 14, 1990, when taken in its entirety, shows employer's ambivalence towards contesting the extent of claimant's disability.[4]

Similarly, the hearing transcript indicates employer's intent not to separately pursue the issue regarding the extent of claimant's disability. Specifically, during the course of the hearing, employer noted that it conceded permanent total disability, was not controverting the claim and sought only Special Fund reimbursement pursuant to Section 8(f). HT at 7-10, 64-65. Employer's concession of the extent of disability issue is evidenced by the fact that its counsel declined at the hearing to cross-examine claimant and claimant's medical expert, Dr. Post, who both testified in support of claimant's assertion that he is permanently totally disabled. HT at 56, 80.

Moreover, in its closing argument submitted by letter dated October 2, 1990, employer reiterates its position that "the documents offered by the Director in support of his position that the claimant only has a partial disability are inadequate to demonstrate actual wage earning capacity. We will however, leave this to [claimant's counsel] to argue at length if he desires." Additionally, employer commented that "in summary however, the claimant's testimony as supported by all the medical reports in evidence as well as the testimony of his consultant Dr. Post would appear to support the claimant's claim that he has a total as opposed to a partial disability."

The record in this case, therefore, establishes that employer's primary interest was pursuing its application for Section 8(f) relief, and that employer did not actively participate in the Director's challenge regarding the extent of claimant's disability. Inasmuch as employer paid claimant total disability compensation at all times prior to the hearing, and did not dispute, before the administrative law judge, that claimant was permanently disabled, we hold that employer is not liable for claimant's attorney's fees under Section 28(b).[5] Furthermore, the instant case can be

[3]In contrast, the Director's Pre-Hearing Statement, Form LS-18, dated June 20, 1990 specifically lists the "extent of permanent disability, whether disability total or partial, and application of Section 8(f)" as the issues she sought to present for resolution at the formal hearing.

[4]In this letter, employer stated that "I wish to point out to claimant's attorney . . . that the employer and carrier have been paying the claimant temporary total disability pending resolution of the issue raised by the office of the Regional Solicitor that the claimant has only a permanent partial as opposed to a permanent total disability. While the employer and carrier are willing to join the Regional Solicitor's office in their position that the claimant has only a partial disability, the employer and carrier have not assigned any rehabilitation agency to prove this."

[5]In light of these factors, we note that the instant case is easily distinguished from other Board cases, notably *Waganer*, 17 BRBS 43, *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984), and

distinguished from the decision of the United States Court of Appeals for the Fifth Circuit in *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), as well as the Board's decisions in *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989), and *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988), wherein the employers were deemed liable for claimant's attorneys fees under Section 28(b) because, in addition to seeking Section 8(f) relief, they actively controverted another aspect of the claim. Unlike those cases, employer, in the instant case, merely sought Section 8(f) relief and at no time disputed claimant's entitlement to permanent total disability benefits, or any other aspect of this claim. Consequently, the administrative law judge's determination assessing employer for claimant's attorney's fees is reversed.

As employer is not liable for a fee under Section 28(a) or (b), and claimant's counsel was successful in maintaining an award of total disability benefits, a fee may be awarded to be assessed against claimant as a lien on his compensation. *See* 33 U.S.C. §928(c); *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990); *Ryan v. Newport News Shipbuilding & DryDock Co.*, 19 BRBS 208 (1987). In such cases, the regulations require consideration of claimant's financial circumstances. 20 C.F.R. §702.132(a); *Medrano*, 23 BRBS at 223; *Ryan*, 19 BRBS at 208. As the administrative law judge did not consider assessment of a fee against claimant, we remand this case for him to do so.

Accordingly, the administrative law judge's assessment of attorney's fees against employer is reversed and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

Floyd, 11 BRBS 465, wherein the Board affirmed the administrative law judge's determination that employer was liable for the claimant's attorney's fees, since employer herein did not controvert this claim and thus, had no real economic interest in the outcome.