

ROBERT E. CULPEPPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of Robert H. Bergeron, District Director, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Paul M. Franke, Jr. and Traci Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Employer appeals the Compensation Order - Award of Attorney's Fees (6-1026193) of District Director Robert H. Bergeron 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant has worked as a chipper, painter, and tank tester in employer's shipyard since 1973, where he has been exposed to loud workplace noise. An audiogram performed by Dr. K.D. McClelland on January 7, 1987, revealed a 21.4 percent binaural hearing loss. On February 5, 1987, claimant filed a claim for occupational hearing loss benefits under the

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Act based on the results of the January 7, 1987, audiogram. On March 10, 1987, employer filed a Response to [The] Claim. On May 20, 1987, employer received formal notice of the claim from the

district director. A subsequent audiogram performed on July 16, 1987, was interpreted by Dr. Douglas Lamppin as indicating a 12 percent binaural hearing loss. On September 1, 1987, employer initiated voluntary payment of compensation for a 12 percent binaural hearing loss based on the latter audiogram and an average weekly wage of \$451 pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B).

On September 4, 1987, claimant's counsel filed a fee petition for work performed before the district director, requesting \$2,380 for 23.50 hours of services at \$100 per hour plus \$30 in expenses. In a Compensation Order dated September 23, 1988, the district director reduced claimant's hourly rate to \$90 and disallowed 17.25 hours of the 23.50 claimed. Accordingly, he awarded claimant's counsel a fee of \$562.50 representing 6.25 hours of services at \$90 plus the requested expenses. Employer appeals the district director's fee award on various grounds, and claimant responds, urging affirmance.

Specifically, on appeal, employer contends that it is not liable for claimant's attorney's fees under Section 28(a), 33 U.S.C. §928(a), because it voluntarily accepted this claim as compensable pursuant to its March 10, 1987, "Response," filed three months prior to the date it received formal notice of the claim, and thereafter commenced voluntary payment of compensation for a 12 percent binaural hearing loss on September 1, 1987. Employer further contends that it is also not liable for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), inasmuch as it initiated voluntary payment of compensation for a 12 percent binaural hearing loss and claimant obtained no additional compensation over that which employer initially agreed to pay.

We reject employer's contention that it is not liable for claimant's attorney's fees under Section 28(a) because it accepted the compensability of the claim pursuant to its March 10, 1987, "Response." Under 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 district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. In *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990), the Board held that a similar response did not affect employer's liability under Section 28(a) and that as the employer did not make any payments until more than a year following its purported acceptance of the claim, it had effectively declined to pay compensation until that time. In the instant case, as in *Tait*, employer's "Response" to the claim was not explicit regarding such matters as when employer would make payment and the amount it would pay; the language of the document accordingly cannot be construed as any form of payment or tender of compensation. See *Tait*, 24 BRBS at 61. In the present case, as employer did not pay any compensation until September 1, 1987, *i.e.*, beyond 30 days from May 20, 1987, when employer received formal notice of the claim, the district director's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(a) is affirmed.

In the alternative, employer asserts that the fee awarded by the district director is excessive. Employer maintains that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a

substantial reduction of the fee awarded. The district director, however, did consider these factors in making the fee award and employer has not met its burden of establishing that the \$592.50 fee awarded was unreasonable.

We agree with employer, however, that consistent with the plain language of Section 28(a), it may only be held liable for those services rendered after 30 days from the date that employer received formal notice of the claim or, within the 30 day period after such notice, from the date it declined to pay benefits, whichever occurs sooner. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 177 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *see generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. February 26, 1980), *amended*, (D.C. Cir. March 31, 1980). Although the district director did substantially reduce the number of hours claimant's counsel requested, because he failed to identify the specific itemized entries reduced or disallowed, we are unable to ascertain whether his fee award included services performed prior to May 20, 1987. Accordingly, we must vacate the district director's fee award and remand for further consideration. On remand, the district director should specify and fully explain any reduction made consistent with the requirements of 20 C.F.R. §702.132 and enter a reasonable fee for those services performed after May 20, 1987, consistent with Section 28(a) of the Act.<sup>1</sup>

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<sup>1</sup>Claimant, however, may be held liable for those fees incurred prior to the time that employer's liability commences under Section 28(a), 33 U.S.C. §928(a), as a lien upon his compensation award. *See* 33 U.S.C. §928(c); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 177 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993). Where a claimant is deemed liable for an attorney's fee, the fee awarded must take into account the financial circumstances of the claimant. *See* 20 C.F.R. §702.132(a).

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is vacated and the case is remanded for reconsideration of the fee award in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge