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| SIDNEY ROBERTSON |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| AVONDALE INDUSTRIES, |) | DATE ISSUED: <u>Nov. 21, 2000</u> |
| INCORPORATED |) | |
| |) | |
| Self-Insured Employer- |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Compensation Order-Award of Attorney's Fees of Chris John Gleasman, District Director, United States Department of Labor.

Scott O. Nelson (Nelson & Boswell, P.A.), Pascagoula, Mississippi, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metarie, Louisiana, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees (Case No. 07-128572) of District Director Chris John Gleasman 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts underlying the fee award in this case are sketchy, and are gleaned from attachments to the parties' briefs. Claimant filed a claim for a 24.7 percent work-related binaural hearing loss on December 21, 1992. On December 29, 1992, employer filed a document entitled "Notice of Controversion of Right to Compensation." On this form, employer wrote that the right to compensation is controverted on the grounds of "Causation/Nature & Extent of Disability." Employer also wrote, however, "Employer

voluntarily beginning weekly ppd benefits while awaiting results of IME, etc.” On March 30, 1993, employer wrote a letter to claimant stating that it had received a report from Dr. French, who determined that claimant had an 11.6 percent binaural impairment. Employer stated that it had paid claimant \$655.92 to date, leaving a balance due of \$6,952.75.¹ On April 1, 1993, employer filed a form stating it had made full and final payment to claimant. The fee petition contains items after April 1, 1993, relating to claimant’s attempt to obtain authorization for a hearing aid. The last entry, on April 21, 1994, is a letter from claimant’s counsel to claimant stating that Dr. French is of the opinion that claimant does not need a hearing aid. The case apparently ended at this juncture.

Claimant’s counsel thereafter filed a fee petition for work performed before the district director. The fee request was for 5.37 hours, at \$125 per hour for services rendered before September 1, 1993, and at \$150 per hour thereafter. Costs of \$73.25 also were requested. Employer objected to its fee liability, stating that it commenced payment of benefits upon receipt of the claim, that it agreed to be bound by the report of an independent medical examiner, and that it paid benefits in full based on this physician’s finding.

The district director reduced the hourly rate for all services to \$125. He stated that time claimed before 30 days after the claim was filed on December 22, 1992, cannot be assessed against employer, citing *Jones v. Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff’d mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980). He stated that as all disputed issues were resolved by April 1, 1993, all time requested after that date cannot be the liability of employer. The district director awarded a fee for the .375 hours requested between February 1, 1993 and March 31, 1993, payable by employer, but reduced the fee for these .375 hours (\$46.87) to \$20 based on the amount of benefits obtained. With regard to the services before 30 days after the claim was filed and after benefits were paid on March 31, 1993, the district director found them to be the liability of claimant as a lien on his compensation. 33 U.S.C. §928(c). He awarded claimant’s counsel a fee of \$200 for this work, stating he was taking into consideration the amount of benefits obtained.²

¹11.6 percent x 200 weeks = 23.2 weeks of compensation x compensation rate of \$327.96 = \$7,608.67 - \$655.92. See 33 U.S.C. §908(c)(13).

²Counsel claimed 5 hours for these two time periods. At the hourly rate of \$125 awarded by the district director, the fee requested would amount to \$625.

On appeal, claimant contends that the district director erred in not holding employer liable for fees incurred prior to the 30th day after the claim was filed, based on the Board's decision in *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (*en banc*) (Smith and Dolder, JJ., dissenting). Claimant further contends the district director erred in not holding employer liable for a fee after April 1, 1993, as services necessary to "wind-up" the claim have been held to be the liability of employer. Lastly, claimant contends that a fee of only \$220 is not reasonable given that the "award" of benefits was \$7,600. In response, employer contends that *Liggett* is not applicable in this case, as it arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has spoken on this issue, albeit in an unpublished decision, *Watkins v. Ingalls Shipbuilding, Inc.*, 12 F.3d 209 (table), No. 93-4367 (5th Cir. 1993). Employer also contends that this case is controlled by Section 28(b) of the Act, 33 U.S.C. §928(b), and that therefore it is not liable for any attorney's fee, as it paid benefits, first voluntarily, and then in accordance with the recommendation of Dr. French.

We decline to address the specific contentions raised by claimant, inasmuch as the district director's failure to determine if employer's fee liability rests on Section 28(a) or Section 28(b) renders the Board unable to assess the validity of the arguments asserted. Thus, we must vacate the district director's fee award and remand the case for this threshold determination. Employer may be held liable for an attorney's fee under Section 28(a) only if employer "declines to pay" any compensation, and claimant is thereafter successful in obtaining benefits. See *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). If employer pays some benefits voluntarily, and a controversy develops over additional benefits, employer may be held liable for an attorney's fee under Section 28(b). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the present case arises, has held that employer's liability under Section 28(b) is predicated on employer's refusal to follow the recommendation of the district director following informal proceedings and on claimant's thereafter obtaining greater compensation than employer voluntarily paid. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); see also *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). If employer pays all benefits due without resort to informal proceedings, it may not be held liable for claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164(CRT); *Boe*, 34 BRBS at 110-111. Moreover, an employer can avoid liability for an attorney's fee under Section 28(b) if a controversy develops relating to the degree of a claimant's impairment, and the employer agrees, in advance, to be bound by the rating of an independent physician. 33 U.S.C. §928(b); see *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d

608, 9 BRBS 326 (3^d Cir. 1978). If employer cannot be held liable for claimant's attorney's fee under either Section 28(a) or (b), claimant may be held liable for an attorney's fee as a lien on his compensation award. 33 U.S.C. §928(c); *see* 20 C.F.R. §702.132(a).

On remand, therefore, the district director must determine employer's liability for claimant's attorney's fee in accordance with Section 28(a), (b) of the Act. In relation to the specific issues raised by claimant, we note that if employer is properly held liable for claimant's attorney's fee pursuant to Section 28(b), the Board's decision in *Liggett* is wholly inapplicable, as its holding rests on an employer's declining to pay any compensation under Section 28(a). *See* 31 BRBS at 137-139. Under Section 28(b), employer's liability cannot commence until a controversy arises between the parties. *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). With regard to "wind-up" services, the Board has held that an employer may be held liable for reasonable services provided by counsel to "wind-up" the case, such as reading the decision and calculating the benefits due, after employer has paid all benefits. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). This rationale only applies, however if fee liability has shifted to employer under Section 28(a) or (b).

Finally, we note that the "amount of benefits" obtained is a factor to be considered by the district director in determining if the requested fee is reasonable, and in awarding the attorney's fee. *See* 20 C.F.R. §702.132(a); *see generally Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978); *Brown v. Marine Terminals, Inc.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., dissenting on other grounds). The amount of compensation obtained in this case is over \$7,600.³ When assessing an attorney's fee against claimant's compensation award, the district director also must take into account claimant's ability to pay the fee award. 20 C.F.R. §702.132.

³Thus, we are at a loss to explain the district director's reduction of employer's liability from \$46.87 to \$20.

Accordingly, the district director's fee award is vacated, and the case is remanded for a threshold determination of employer's liability for claimant's attorney's fee under Section 28(a), (b) of the Act. The remainder of the district director's findings should be re-evaluated in light of this initial determination.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge