

PHILIP FERRO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIP SYSTEMS,)	DATE ISSUED: 10/13/2010
INCORPORATED/)	
AVONDALE INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 07-183967) of District Director David A. Duhon 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 fee award of the district director must be affirmed unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant underwent an audiometric evaluation on August 14, 2008. On September 12, 2008, he filed a claim for a 20.9 percent binaural work-related hearing loss. Claimant's counsel served employer with a copy of the claim when it was filed and employer filed a notice of controversion on September 25, 2008. Subsequently, the district director served employer with formal notice of the claim on October 8, 2008. On October 23, 2008, employer accepted liability and commenced payment for a 20.9 percent binaural impairment, based on an average weekly wage of \$1,053.70 with a corresponding compensation rate of \$702.47. On April 6, 2009, employer completed payment of compensation in the amount of \$29,363.25.

On November 19, 2008, claimant disagreed with employer's average weekly wage calculation and sought additional benefits based on an average weekly wage of \$1,118.20. By letter dated June 8, 2009, the district director stated he had reviewed claimant's wages and he recommended that employer pay benefits based on an average weekly wage of \$1,095.84. Employer disputed the district director's recommendation. Nonetheless, on January 13, 2010, claimant withdrew his challenge and agreed that employer had voluntarily paid the correct amount. Therefore, claimant did not obtain any benefits greater than those employer had voluntarily paid.

Claimant's counsel filed an application for an attorney's fee for work performed before the district director between August 20, 2008, and January 18, 2010. Counsel sought a fee of \$2,623 representing 9.375 hours of attorney services at \$250 per hour, plus \$279.25 in costs. Employer responded that it is not liable for claimant's counsel's fee under either Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b), and alternatively, that the hourly rate requested was too high. Employer contended that it had paid benefits within 30 days of its receipt of formal notice of the claim from the district director, that no informal conference was held, and that claimant did not secure an award of compensation greater than employer paid voluntarily.

The district director awarded counsel a fee payable by employer under Section 28(a) of the Act. The district director stated that as employer had controverted the claim

on September 25, 2008, its subsequent payment on October 28, 2008, was without legal consequence. The district director alternatively found that an informal conference was held by correspondence and that employer rejected the district director's written recommendation such that employer would be liable for claimant's fee under Section 28(b). The district director reduced counsel's hourly rate from \$250 to \$225 and disallowed various itemized entries. The district director agreed with employer that it should not be liable for fees incurred after April 6, 2009 because claimant was unsuccessful in obtaining additional benefits after that date. Accordingly, the district director awarded counsel an employer-paid fee of \$1,656.25, representing 6.25 hours at an hourly rate of \$225, plus \$250 in expenses.

On appeal, employer contends that the district director erred in finding it liable for claimant's attorney's fee under Section 28(a) as it voluntarily paid compensation to claimant within 30 days after receiving formal notice of the claim from the district director. Alternatively, employer argues that the district director erred in finding it liable under Section 28(b) because there was no informal conference and claimant failed to obtain a greater award than employer had voluntarily paid. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer's contention that it cannot be held liable for claimant's attorney's fee. The Director contends the case should be remanded to the district director for consideration of whether claimant may be liable for a fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant has not responded to this appeal.

Employer may be held liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), only if employer declines to pay any compensation on or before the thirtieth day after receiving from the district director written notice of a claim for compensation, and claimant is thereafter successful in obtaining benefits. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table). We agree that the district director incorrectly found Section 28(a) applicable in this case. On September 12, 2008, claimant filed his claim seeking compensation for hearing loss. On October 8, 2008, the district director, in accordance with 33 U.S.C. §919(b), formally served the claim on employer. Employer had 30 days from this date to pay compensation in order to avoid liability for an attorney's fee pursuant to Section 28(a). *Id.* Employer notified claimant on October 23, 2008 that it would voluntarily accept liability and made its first payment on October 24, 2008. Therefore, employer's notice of controversion, filed on September 25, 2008, does not impose fee liability on employer, as it did not "decline to pay any compensation" within 30 days of receiving the claim from the district director. *Cf. Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002) (employer controverted the claim before it received notice from the district director; employer is

liable for fee pursuant to Section 28(a) because it did not pay benefits in the 30 days after receipt of notice). As employer paid benefits to claimant within the statutory 30-day time frame, we reverse the district director's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(a). *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

With regard to Section 28(b), we agree with the Director that the district director held an informal conference by correspondence, *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); 20 C.F.R. §702.311, that the district director issued a written recommendation for a higher average weekly wage, and that employer refused this recommendation.¹ However, because claimant withdrew his claim for an increased average weekly wage, he did not obtain any compensation greater than that paid by employer. *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). Therefore, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b), and we reverse the district director's alternative finding in this regard. *Id.*

As employer cannot be held liable for counsel's attorney's fee, claimant may be liable for a fee as a lien on his compensation. We remand this case to the district director to determine whether claimant is liable for an attorney's fee to his counsel pursuant to Section 28(c) of the Act, 33 U.S.C. §928, and 20 C.F.R. §702.132(a).² *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

¹ The following are prerequisites to employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

² Section 702.132(a) states, in pertinent part, that "when the fee is to be assessed against the claimant, [the adjudicator] shall also take into account the financial circumstances of the claimant."

Accordingly, the Compensation Order Award of Attorney's Fees of the district director is reversed. The case is remanded to the district director for further consideration in accordance with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge