

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0038

JON DAVIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SSA TERMINALS, LLC)	
)	
and)	
)	DATE ISSUED: 04/23/2020
HOMEPORT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Denying Attorney Fee Application of R. Todd Bruininks, District Director, United States Department of Labor.

V. William Farrington, Jr. (Farrington & Thomas, LLC), New Orleans, Louisiana, for claimant.

Alan J. Chang (Bruyneel Law Firm, LLP), San Francisco, California, for employer/carrier.

Stefan Babich (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denying Attorney Fee Application (OWCP No. 13-311691) of District Director R. Todd Bruininks rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The district director's order will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a hearing loss claim in March 2019. Employer received notice of the claim on March 18, 2019. On April 2, 2019, employer responded with a letter requesting the audiogram and supporting documentation. It did not file a notice of controversion. Nothing further happened until July 2019, when claimant's counsel provided employer a copy of claimant's audiogram dated January 19, 2019. Within 10 days, employer paid benefits in full;¹ additionally, employer paid claimant's counsel \$500 as a "courtesy fee." Counsel returned the fee check and filed a fee petition with the district director.

The district director found neither Section 28(a) nor 28(b) applies. 33 U.S.C. §928(a), (b). He found claimant did not initially provide an audiogram to employer or demand a certain amount of benefits. As the district director's office did not receive claimant's audiogram until July 2019, he concluded no controversy existed until employer knew of the full extent of claimant's injury. Further, the district director weighed heavily the fact that employer paid the full amount of compensation as soon as it received claimant's audiogram.

Claimant's counsel appeals the district director's denial of an employer-paid fee. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds in support of counsel's entitlement to an employer-paid attorney's fee. Claimant's counsel filed a reply brief.

Claimant's counsel and the Director contend employer's failure to pay any part of the claim within the 30-day period following its receipt of the notice of the claim triggers

¹ There are two notices of payment in the record. On July 15, 2019, when employer received claimant's audiogram, it paid over \$1,500 for "PPD advance for hearing loss claim." On July 24, 2019, after it had the audiogram analyzed, it paid over \$7,000 for permanent partial disability benefits for a 9.375 percent hearing loss.

its liability for a fee.² Employer disputes its liability for counsel's fee, asserting case law and the plain language of the Act preclude an employer-paid fee.

Section 28(a) of the Act states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of a claim from the district director. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). An employer's inaction during the 30-day period has been held to be the equivalent of "declin[ing] to pay" any benefits, and voluntarily paying benefits before a claim has been filed or after the 30-day period expires does not prevent application of Section 28(a). *Richardson*, 336 F.3d at 1105-1106, 37 BRBS at 81(CRT); *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

In *Craig*, the Board rejected the employer's argument that it could not have paid hearing loss benefits within the 30-day time frame because it did not know what amount to pay. The Board held nothing in the Act requires a claimant to submit evidence of disability or impairment with a claim for compensation, and receipt of the notice of the claim triggers the commencement of the 30-day period under Section 28(a). The Board stated that the 30-day period allows an employer sufficient time to have a claimant examined and to

² The Director correctly states the district director's reliance on *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998), is misplaced, as that case addressed an employer's knowledge of the full extent of an injury with respect to paying additional compensation under Section 14(e), 33 U.S.C. §914(e), not with respect to paying an attorney's fee.

determine whether to pay benefits or to controvert the claim.³ *Craig*, 36 BRBS at 66-67; *Craig*, 35 BRBS at 169-170. The United States Court of Appeals for the Fifth Circuit affirmed *Craig*, holding a claimant need not supply evidence of the extent of his disability with his claim for compensation. An employer is free to schedule a hearing loss evaluation for the claimant so it may ascertain the amount it owes and begin paying benefits within the 30-day period Section 28(a) provides. Payments outside the 30-day period are irrelevant for purposes of avoiding fee liability under Section 28(a). *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has identified the requirements for applying Section 28(a) as: “(1) the claimant must file a claim with the [District Director]; (2) the employer must receive notice of the claim from the [District Director]; (3) the employer must decline to pay compensation *or not respond within 30 days*; and (4) the claimant must ‘thereafter’ utilize the services of an attorney to prosecute his claim.” *Dyer*, 563 F.3d at 1048, 43 BRBS at 34(CRT) (emphasis added) (citing *Day v. James Marine, Inc.*, 518 F.3d 411, 414, 42 BRBS 15, 16(CRT) (6th Cir. 2008)).

Employer contends it cannot be liable for a fee because its request that claimant provide evidence of his hearing loss constitutes a “response” to the claim within 30 days under *Dyer*. We reject employer’s contention. In *Dyer*, the employer specifically contested liability and “refused to pay” benefits within 30 days; the court did not address whether providing *any* response to a claim insulates an employer from fee liability, and we decline to interpret its four-factor test so broadly.⁴ The language of the statute explicitly relieves an employer of fee liability if it does not “decline to pay” compensation after receiving notice of the claim, but there is no statutory basis for relieving an employer of fee liability if it simply “responds” to the claim. 33 U.S.C. §928(a). As the Ninth Circuit held in *Richardson*, an employer is liable for fees even if it does not “formally refuse to pay” compensation within 30 days of receiving notice of the claim. *Richardson*, 336 F.3d at 1105, 37 BRBS at 81(CRT). Thus, *Dyer*’s statement that an employer is liable for fees

³ Thirty days is sufficient time to pay the claimant at least a portion of what he might be owed. See *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014), *cert. denied*, 574 U.S. 932 (2014); see also *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017) (a purpose of Section 28 is to provide employers an incentive to pay benefits and avoid fees).

⁴ Rather, *Dyer* interpreted the term “thereafter” to determine when the employer’s liability commenced, holding that “a successful claimant is entitled to both pre- and post-controversion attorney’s fees.” *Dyer*, 563 F.3d at 1048.

if it “does not respond within 30 days” – when read in context and in a manner consistent with the statute and Ninth Circuit precedent – describes instances when an employer does not formally “decline to pay” compensation, but does so by its inaction. *Id.*; *see also Day*, 518 F.3d at 414, 42 BRBS at 16(CRT) (describing the “decline to pay” element as “the employer must decline to pay compensation *or allow 30 days to lapse without paying compensation*”) (emphasis added).

We also reject employer’s assertion that it cannot be held liable for an attorney’s fee pursuant to *Alario* because it did not file a Notice of Controversion. While *Alario* held the employer’s filing of a Notice of Controversion satisfied the “decline to pay” element, *Alario*, 355 F.3d at 853, 37 BRBS at 119(CRT), it does not necessarily support employer’s reverse argument that the “decline to pay” element cannot exist in the absence of a Notice of Controversion.⁵ Regardless, controlling Ninth Circuit precedent holds that a formal Notice of Controversion is not required for an employer to have “decline[d] to pay.” Inaction and non-payment are sufficient.⁶ *Richardson*, 336 F.3d at 1105-1106, 37 BRBS at 81(CRT); *see also Mangiantine*, 42 BRBS 30.

The district director erred in applying the law. He denied claimant’s counsel an employer-paid fee on the ground that employer did not know the extent of claimant’s injury. An employer’s knowledge of the extent of injury is not a factor in assessing its liability for an attorney’s fee under Section 28(a). *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT). Moreover, although employer did not formally challenge the validity of claimant’s claim and voluntarily paid benefits upon receiving claimant’s audiogram in July 2019, these facts do not negate that, by inaction, it “declined to pay any compensation”

⁵ Although *Alario* identifies the “decline to pay” element as “employer’s controversion of the claim[.]” it adopted that language from *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 360, 36 BRBS 12, 14(CRT) (5th Cir. 2002), which similarly held an “employer’s act of declining to pay the claim may be triggered . . . by a controversion of the claim.” Neither decision indicates the formal filing of a Notice of Controversion is a prerequisite to an employer’s fee liability under Section 28(a).

⁶ We reject employer’s contention that Section 28(a) is not applicable because there is no evidence it declined to pay compensation “on the ground that there is no liability for compensation[.]” Emp. Br. at 6 (quoting 33 U.S.C. §928(a)). An employer’s mere “inaction” in the 30-day period is sufficient to shift fee liability. Case precedent does not require the “inaction” to be for any particular reason. *Richardson*, 336 F.3d at 1105-1106, 37 BRBS at 81(CRT).

before the expiration of the 30-day period following its receipt of the notice of the claim in March 2019. Therefore, we agree with claimant's counsel and the Director: employer's failure to pay any benefits during the 30-day period after it received notice of the claim equates to its having "declined to pay any compensation" under Section 28(a). *Richardson*, 336 F.3d at 1105-1106, 37 BRBS at 81(CRT); *Mangiantine*, 42 BRBS 30. As claimant used his counsel's services to successfully obtain permanent partial disability benefits, claimant's counsel is entitled to an employer-paid attorney's fee. *Id.*

Accordingly, we reverse the district director's denial of an employer-paid fee and remand the case for him to determine the amount of the fee for which employer is liable pursuant to Section 28(a). 20 C.F.R. §702.132.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge