

U.S. Department of Labor

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



BRB No. 21-0067

THOMAS KLETT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SSA TERMINALS)	
)	
and)	
)	
HOMEPORT INSURANCE COMPANY)	DATE ISSUED: 04/28/2021
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Approving Attorney Fee of Todd Bruininks, District Director, United States Department of Labor.

Amanda E. Peters (Blue Water Legal PLLC), Edmonds, Washington, for Claimant.

Matthew S. Malouf (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

David Miracchi (Elena S. Goldstein, Deputy 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Director Todd Bruininks's Order Approving Attorney Fee (OWCP No. 14-311963) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (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, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007).

The facts of this case are undisputed and arise out of a claim for compensation for hearing loss. Claimant filed a claim on December 6, 2018. EX 2. The district director sent notice of the claim to Employer on December 10, 2018. Employer paid Claimant some compensation on January 3, 2019, based on an average weekly wage of \$1,410.66. EX 5.

Thereafter, on March 27, 2019, Claimant sent a letter to the Office of Workers' Compensation Programs (OWCP) indicating his disagreement with the average weekly wage used to calculate his compensation rate. EX 6. On January 22, 2020, Claimant requested an informal conference on the issue. EX 7. An informal conference was scheduled for March 5, 2020. On February 13, 2020, before the informal conference took place, Employer agreed to pay additional permanent partial disability benefits based on an increased average weekly wage. EX 9. On March 13, 2020, the district director issued a compensation order based on the parties' agreement, confirming a permanent partial disability award for a 1.94 percent hearing loss at the maximum compensation rate of \$1,510.76 in effect on the date of Claimant's last exposure. EX 11;¹ 20 C.F.R. §702.315.

On July 1, 2020, Claimant's counsel filed a fee petition for her work before OWCP, requesting \$2,317.50, representing 4.4 hours of attorney work at an hourly rate of \$300, 3.4 hours of paralegal work at an hourly rate of \$150, and 3.9 hours of associate paralegal work at an hourly rate of \$125. Employer objected to the fee, arguing counsel is not entitled to an Employer-paid attorney's fee under either Sections 28(a) or (b).

The district director found "Counsel is owed fees under either or both sections 928(a) and 928(b)." Order at 2. He further found counsel is entitled to a fee under Section 28(b), noting it is "technically true" that there had been no formal proceedings, but only

¹ The informal conference was canceled.

because Employer “relied on the work of [C]laimant’s attorney to research and determine the correct rate, and paid only after being presented with the correct rate on a silver platter as it were.” *Id.* He found an attorney’s fee appropriate for work performed after March 27, 2019, which related to the issue of Claimant’s average weekly wage and awarded a total fee of \$1,307.50 payable by Employer. Order at 2-3.

Employer appeals the district director’s fee award, asserting it cannot be held liable for Claimant’s attorney’s fee under either Section 28(a) or (b). Claimant filed a response brief in support of the fee award. Employer filed a reply brief. The Director, OWCP, also filed a response brief, agreeing with Employer that the district director erred in awarding a fee payable by Employer.

Section 28(a) of the Act provides, in pertinent part:

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 . . . 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. . . .

33 U.S.C. §928(a). Therefore, a prerequisite for an employer’s liability for an attorney’s fee under Section 28(a) is that it refused to pay “any compensation” within 30 days of its receipt of notice of the claim. *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

We agree with Employer that it cannot be held liable under Section 28(a). There is no dispute that Employer voluntarily began paying some compensation on January 3, 2019, within 30 days of receiving notice of the claim, which was sent on December 10, 2018. Therefore, to the extent the district director found Employer could be liable for attorney’s fees under Section 28(a), we reverse the conclusion as it is not in accordance with law. *Boe v. Dep’t of the Navy/MWR*, 34 BRBS 108 (2000).

We further hold Employer cannot be liable for Claimant’s attorney’s fee under Section 28(b). Section 28(b) provides, in pertinent part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district

director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . .

33 U.S.C. §928(b).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, does not adhere to a strict interpretation of the language of Section 28(b). It has held that a claimant is entitled to an employer-paid attorney's fee under Section 28(b) when liability is controverted and he successfully obtains increased compensation, "whether or not the employer had actually rejected an administrative recommendation." *Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061, 32 BRBS 148, 154(CRT) (9th Cir. 1998) (quoting *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1978)). The Ninth Circuit has generally held Section 28(b) does not require formal proceedings as a prerequisite for Section 28(b) to apply, provided a controversy remains between the parties *after* informal proceedings. *See Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991). The Board has also clarified that Section 28(b) applies where the case "required action by the district director to address the dispute" and the claimant obtained greater compensation thereafter. *Wilson v. Serv. Employees Int'l, Inc.*, 45 BRBS 1(2011), *aff'g on recon.* 44 BRBS 81 (2010).

In this case, in finding Section 28(b) applicable, the district director acknowledged there was no informal conference but stated this was immaterial as Employer "relied on the work of claimant's attorney to research and determine the correct rate." Order at 2. The district director's finding is not in accordance with the law. The fact that Employer may have relied on the work of Claimant's counsel does not affect its liability for a fee in this case. Under the terms of the statute and the case law, Section 28(b) is applicable only where some action, whether formal or informal, by the Department of Labor was necessary before the claimant succeeded in his claim.

Because the parties resolved their dispute concerning Claimant's average weekly wage without any action taken by the district director or any other Department of Labor

component, Section 28(b) is inapplicable. *See Boe*, 34 BRBS at 111 (reversing the district director’s fee award where employer voluntarily paid compensation “without resort to informal or formal proceedings”); *see also Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT) (Section 28(b) inapplicable where the parties resolved all issues except for attorney’s fees at the informal conference); *Wilson*, 45 BRBS at 2 (Section 28(b) applied where the parties settled dispute following the district director issuance of a recommendation). We therefore reverse the district director’s finding that Section 28(b) applies in this case and hold Employer may not be held liable for Claimant’s counsel’s fee under either Section 28(a) or (b).²

Accordingly, we reverse the district director’s Order Approving Attorney Fee in which Employer was held liable for Claimant’s attorney’s fee.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

² Because Claimant succeeded in obtaining an increase in his compensation rate, counsel may be entitled to a fee under Section 28(c), 33 U.S.C. §928(c), which provides for an attorney’s fee payable by Claimant as a lien on his compensation. *See Boe*, 34 BRBS at 111. Claimant’s counsel may request the district director to determine her entitlement to a fee under Section 28(c). *See* 20 C.F.R. §702.132(a) (a claimant’s financial circumstances must be taken into account in assessing his ability to pay the fee).