

U.S. Department of Labor

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



BRB No. 22-0184

LENORA BRYANT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
KINDER MORGAN)	
)	DATE ISSUED: 4/17/2023
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Attorney Fee Order of Marco A. Adame II, District Director, United States Department of Labor.

Alana G. I. Simmons (The Dalton Law Firm), Portland, Oregon, for Claimant.

Mark K. Conley (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

William M. Bush (Seema Nanda, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Director Marco A. Adame II's ("district director") Attorney Fee Order rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act (LS-14314059), 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained a head injury on October 7, 2019, while working as a hold man in Employer's Vancouver, Washington, terminal.¹ Claimant went to the emergency room and followed up the next day with Dr. William McCreight at Urgent Medical Center. Employer initially approved this requested medical treatment and began paying temporary total disability payments on October 16, 2019. *See* Emp. Brief at 1.

Dr. McCreight referred Claimant to a neurologist, Dr. Anne Hamburg, on October 29, 2019, after complaining of concussion symptoms. On November 5, 2019, Claimant attended an appointment with her primary care physician, Dr. Charles Webb, who also claimed to have experience in treating concussions. Claimant subsequently sought treatment with Dr. Webb over Dr. Hamburg. Employer initially would not authorize an evaluation with Dr. Webb because Dr. McCreight specifically referred her to a neurologist. Emp. Brief at 1. Subsequently, Claimant retained counsel on November 7, 2019, filed a claim, and requested an informal conference, which was scheduled for February 12, 2020. *See* CX 10.

On November 29, 2019, Employer approved the requested medical treatment from Dr. Webb and continued paying temporary total disability payments until Claimant returned to work on January 6, 2020. On February 12, 2020, the parties attended an

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Vancouver, Washington. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

informal conference, where the only issue remaining in dispute was a disagreement on Claimant's average weekly wage calculation,² as Employer had made all other outstanding medical payments. Emp. Brief at 2. Following that conference, the Office of Workers' Compensation Programs (OWCP) set a second follow-up informal conference for March 6, 2020, to further address the average weekly wage contentions. *Id.* The claims examiner did not issue any recommendations.

Following the first informal conference and before the second, Employer's counsel sent a letter to Claimant's counsel on February 15, 2020, stating Claimant is entitled to a compensation rate of \$1,511.13 based on its calculation. CX 11. In a letter dated March 5, 2020, Claimant asserted entitlement to over \$2,000 in unpaid benefits, an additional assessment of \$223.39 under 33 U.S.C. §914(e), and \$279.39 in mileage reimbursement. CX 12. Also, in a letter dated March 5, 2020, Employer reported its discovery that Claimant's attorney had miscalculated Claimant's earnings by over \$5,000 for September 7, 2019, which led to the difference between their average weekly wage calculations. CX 13 at 1. Employer agreed to pay \$1,515 in additional temporary total disability compensation based on its calculated average weekly wage, and it did not dispute the medical mileage.³ *Id.* At the March 6 conference, both Claimant and Employer agreed Claimant would be entitled to \$1,515 in additional compensation along with a 10% assessment (or \$151.50) for underpayment and \$279.39 in mileage for Claimant's travel to medical appointments.⁴ CX 4 at 1. Employer issued payment to Claimant on March 18, 2020. *Id.* Because the parties had resolved their issues, the claims examiner did not issue recommendations. Emp. Brief at 3; Director Brief at 2.

On April 23, 2020, Claimant's counsel filed a fee petition with the OWCP seeking \$9,392.05 for 25.4 hours of attorney work at \$300 per hour, 13.95 hours of paralegal work at \$125 per hour, and costs of \$28.30. Initial Fee Petition Affidavit at 4. Employer filed objections on July 17, 2020, noting Claimant's petition did not explain how Employer

² Claimant sought additional benefits based on an average weekly wage of \$2,364.69, CX 10, and Employer asserted Claimant's average weekly wage was \$2,266.70, CX 11.

³ Employer's counsel stated he would check with Employer as to its agreement on the Section 14(e) assessment, 33 U.S.C. §914(e), of \$151.50. CX 13.

⁴ In an email dated March 10, 2020, Claimant's counsel stated Claimant's agreement and sought confirmation from Employer. If there was no agreement, she added "please advise so we can request an IC Recommendation from Ms. Dietz." CX 4 at 2.

should be held liable for attorney's fees under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b).⁵

On July 31, 2020, the claims examiner sent Claimant's counsel a letter asking her to note the applicable authority under which the alleged fees were due.⁶ Claimant's counsel responded, arguing she is entitled to a fee under either Section 28(a) or 28(b). On March 12, 2021, the OWCP sent a letter to both parties stating Claimant was entitled to fees under Section 28(a) and permitted Employer to file objections.⁷ Misinterpreting this letter as a final determination of Claimant's entitlement to fees, Employer filed an appeal with the Board. However, the Board dismissed the appeal as premature and remanded the matter back to the OWCP. *Bryant v. Kinder Morgan*, BRB No. 21-0364 (June 25, 2021).

Before the district director, Employer submitted specific itemized objections to counsel's fee request on August 23, 2021, including objecting to the fee for over 39 hours of work as unreasonable and excessive and maintaining its stance that counsel is not entitled to an employer-paid fee. *See* Objections to Reasonableness of Claimant's Petition for Attorney Fees ("Specific Fee Pet. Obj.").

Claimant's counsel filed a reply to Employer's objections along with a supplemental petition for additional attorney's fees. In the supplemental fee petition, counsel increased her requested hourly rates, responded to Employer's objections by conceding a small number of billed hours were clerical in nature, and requested an additional \$12,625 in fees for time spent responding to Employer's initial objections and appeal to the Board. The \$12,625 reflected 29.75 additional hours of attorney work at \$350 per hour, 8.2 hours of paralegal work at \$150 per hour, 3.8 hours and 2.5 hours for law clerks at \$150 and \$165

⁵ Employer also requested leave to file further briefing if the district director determined it is liable for the fees and costs.

⁶ In the letter, the claims examiner stated "In order to prevail on the issue of attorneys (sic) fees under Section 28(b), the record must show that the employer refused to accept the recommendation of the Claims Examiner following the informal conference. In this case, my records show that the parties were able to agree on the new, higher AWW without a conference and the [Employer] voluntarily agreed to pay the new rate." *See* July 31, 2020 Letter to Alana Simmons from OWCP at 1.

⁷ This marks a change from the OWCP's position in its July 31, 2020 letter, where the OWCP seemed to suggest Claimant's counsel was not entitled to an Employer-paid fee under Section 28(b). *Compare* July 31, 2020 Letter to Alana Simmons from OWCP at 1 *with* March 12, 2021 Letter from OWCP at 1.

per hour, respectively. Employer submitted a response, objecting to counsel's entitlement and the excessiveness and unreasonableness of the requested fee.

On January 28, 2022, the district director issued a fee order awarding Claimant's counsel \$22,710.80 for 53.15 total hours of attorney work at \$350 per hour, 20.65 hours of paralegal work at \$150 per hour, 3.8 hours of work by a law clerk at \$150 per hour, 2.5 hours of work by another law clerk at \$165 per hour, and \$28.30 in costs.⁸ Fee Order at 8. In his decision, the district director noted Employer's objections to the fees as duplicative and excessive given the amount in dispute but found Claimant's counsel "has well documented the time entries with sufficient supporting information to understand why each task was billed." *Id.* at 4-5. And, without full explanation, the district director found Section 28(b) applied to this case and warranted an Employer-paid fee. *Id.* at 7.⁹

Employer appeals the district director's Fee Order on the grounds that Claimant's counsel is not entitled to an employer-paid fee under either Section 28(a) or 28(b).¹⁰ Employer contends it is not liable for an attorney's fee under Section 28(b) because the issues in dispute with regard to Claimant's entitlement were resolved at or before the March 6, 2020 informal conference. Emp. Brief at 16-17. Alternatively, Employer contends, if the Board determines Claimant's counsel is entitled to an employer-paid fee, the fee should be greatly reduced as the time billed is unreasonable, not supported by substantial evidence, largely clerical in nature, and overly excessive given the amount of work done and the award granted to Claimant. Claimant's counsel responds, urging affirmance. The Director,

⁸ The bulk of this time, 47 hours, was spent on researching and arguing in support of the fee request.

⁹ The district director also did not include any recitation of the facts and procedure while this case was before the OWCP.

¹⁰ While both Employer and Claimant discuss fee entitlement under Section 28(a), the district director did not award an Employer-paid fee under Section 28(a). In any event, Employer voluntarily paid benefits within nine days of receiving Claimant's claim for compensation and continued to do so until he returned to work on January 12, 2020. Emp. Brief at 1; *see also* CX 10 at 2. It also authorized the disputed medical treatment with Dr. Webb within fifteen days of receiving Claimant's claim. CX 9 at 1; Cl. Response Brief, Ex. 7 at 1. As such, Claimant's counsel is not entitled to a fee under Section 28(a). 33 U.S.C. §928(a); *see Dyer v. Cenex Harvest States Co-op*, 563 F.2d 1044, 1047 (9th Cir. 2009) (entitlement to an employer-paid fee under Section 28(a) requires evidence that an employer did not voluntarily pay benefits within 30 days after receiving the claim for compensation).

Office of Workers' Compensation Programs (the Director) also responds, urging the Board to vacate the fee award and, in agreement with Employer, to hold Claimant's counsel is not entitled to an employer-paid fee under Section 28(b) because none of the events that would trigger an employer-paid fee have occurred. Employer also filed a reply brief.

Employer contends Claimant's counsel is not entitled to a fee under Section 28(b) because the Claimant's average weekly wage dispute was resolved at the March 6, 2020 informal conference, the claims examiner issued no recommendation, there were no formal proceedings, and only entitlement to a fee was in question thereafter. Section 28(b) provides, in pertinent part:

If the employer or carrier pays or tenders payment of compensation without an award ... and thereafter a controversy develops over the amount of additional compensation ..., the deputy commissioner or Board shall set the matter for an informal conference and ... shall recommend in writing a disposition of the controversy. If the employer or carrier refuse 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.... In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). The United States Court of Appeals for the Ninth Circuit has held an employer liable for an attorney's fee under Section 28(b) only if the employer refuses to pay the amount of compensation recommended following an informal conference or if an unresolved controversy remains after the informal conference. *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 610-611, 25 BRBS 65, 70(CRT) (9th Cir. 1991). The Ninth Circuit stated:

The purpose of [Section 928(b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in *formal* proceedings in which he or she is represented by counsel.

Watts, 950 F.2d at 610, 25 BRBS at 70(CRT). In *Watts*, at the informal conference, the employer conceded the claimant was entitled to permanent total disability benefits after

initially controverting his claim. *Id.*, 950 F.2d at 609, 25 BRBS at 67(CRT). As such, the court determined Section 28(b) did not authorize an employer-paid attorney fee because there was no controversy concerning liability on the amount of compensation after the informal conference. *Id.*, 950 F.2d at 611, 25 BRBS at 70(CRT).

Based on the Act and the Ninth Circuit's ruling in *Watts*, we agree with the position of Employer and the Director that the district director's attorney fee order cannot be affirmed. Contrary to the district director's finding, Claimant is not entitled to an employer-paid attorney's fee under Section 28(b). The administrative record establishes after a dispute arose on a medical issue and Claimant's average weekly wage, Claimant and Employer reached agreement at the informal stage without a documented recommendation from the OWCP or any further proceedings. CXs 4, 11, 13. Consequently, none of the Section 28(b) prerequisites has occurred, and the only issue left after the informal conference was attorney fee liability.¹¹ Section 28(b) does not apply. *Watts*, 950 F.2d 607, 25 BRBS 65(CRT).

¹¹ We reject counsel's assertion that holding two informal conferences indicates there was a remaining dispute. Rather, the second conference was described as a follow-up, and only after the second conference did counsel state Claimant would seek a written recommendation if Employer disagreed with what the parties had agreed upon at the second informal conference. Further, counsel's reliance on the fees awarded in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (counsel entitled to a fee because issues remained in dispute following the informal conference, and the claimant obtained a greater award on appeal, despite there being no rejection of an OWCP recommendation), and *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011) (counsel entitled to a fee where the claimant secured greater benefits for other work-related conditions in formal proceedings after the employer had voluntarily paid benefits for only one of the conditions), is misplaced. In both cases, contrary to the situation here, disputes remained after the informal conferences, and the claimants obtained greater benefits in formal proceedings.

Accordingly, we reverse the district director's Attorney Fee Order.¹²

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

¹² In light of our decision, we express no opinion on the amount of the fee awarded. Additionally, as neither Section 28(a) nor (b) applies, should counsel wish to obtain an attorney's fee, she must seek approval from the district director pursuant to Section 28(c), 33 U.S.C. §928(c).