

U.S. Department of Labor

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



BRB No. 21-0119

VICTOR D. FERREIRA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	DATE ISSUED: 06/28/2021
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Approving Attorney Fee of David Groeneveld, District Director, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for Claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for Self-Insured Employer.

Olgamaris Fernandez (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Approving Attorney Fee (OWCP No. 01-308415) of District Director David Groeneveld 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This appeal arises from a work-related injury to Claimant's right ring finger, for which he was assigned a two percent impairment. Employer voluntarily paid Claimant compensation and medical benefits.

On January 29, 2020, Claimant's counsel filed a fee petition for his work before the district director, requesting a fee of \$3,842.25, representing 10.75 hours of attorney work at an hourly rate of \$355 and .25 hours of paralegal work at an hourly rate of \$104. Employer objected, arguing counsel is not entitled to an Employer-paid attorney's fee and, in the alternative, that the hours billed are excessive.

The district director found counsel is not entitled to an Employer-paid attorney's fee because "the self-insurer never contested the injured worker's claim and pai[d] appropriate compensation in a voluntary fashion." He awarded Claimant's counsel a reduced fee of \$2,881.69 to be paid as a lien on Claimant's compensation. Order Approving Attorney Fee at 1; 33 U.S.C. §928(c).

Claimant appeals the district director's order, asserting he is entitled to an Employer-paid attorney's fee under Section 28 of the Act, 33 U.S.C. §928. Claimant also asserts he is entitled to additional compensation in the amount of \$43.90 under Section 14(e), 33 U.S.C. §914(e). Employer filed a response, urging affirmance of the district director's fee order and also urging the case be remanded for the district director to address the issue of an assessment under Section 14(e). The Director, Office of Workers' Compensation Programs, also filed a response, asserting the case should be remanded because the district director did not make sufficient findings regarding fee liability and for consideration of Claimant's Section 14(e) claim.¹ Employer filed a reply to the Director's response.

¹ The Director also noted the issue raised on appeal may be moot because there is some indication Employer may have already paid a fee to counsel. Employer's reply to

Section 28 of the Act provides for the award of an attorney's fee to Claimant's attorney, with subsections (a) and (b) authorizing the assessment of an attorney's fee payable by Employer under specific circumstances. Employer cannot be held liable for attorney's fees for Claimant's counsel unless the requirements of Section 28(a) or (b) are met.² See *R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008). If neither subsection applies, Claimant may be held liable for his attorney's fee as a lien on his compensation. 33 U.S.C. §928(c).

the Director's brief clarified that it has not paid an attorney's fee and the issue of counsel's entitlement to a fee is not moot.

² 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). 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).

We agree with the position of the Claimant and the Director that the district director's Order cannot be affirmed and the case must be remanded. The district director summarily awarded a fee as a lien on Claimant's compensation without making any specific findings regarding Employer's liability under the criteria of Section 28(a) or (b). Therefore, the Board cannot review the propriety of the imposition of the attorney's fee on Claimant. The district director must provide an explanation for a fee award to enable the Board to determine if it accords with law, or is arbitrary, capricious, or based on an abuse of discretion. *See Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990); *Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97 (1981). The district director did not do so and, therefore, we must remand the case for him to make the necessary findings as to whether the requirements for an Employer-paid attorney's fee have been met. On remand, the district director should also address Claimant's entitlement to additional compensation under Section 14(e).³ *See generally Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989); *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981) (an assessment under Section 14(e) is mandatory and the issue may be raised at any time).

³ Section 14(e) provides that an employer is liable for additional compensation of ten percent if employer does not pay benefits within 28 days of receiving notice/knowledge of an injury or does not controvert the claim within 14 days of receiving notice/knowledge of an injury.

Accordingly, we vacate the district director's Order Approving Attorney Fee and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge