U.S. Department of Labor

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

BRB No. 19-0364

KEITH H. STAMPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON UNITED TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	DATE ISSUED: 3/30/2022
Employer/Carrier-Petitioners	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Carrier-Respondent	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	ORDER

Claimant's counsel (Lara D. Merrigan) has filed an itemized petition for an attorney's fee for work performed before the Benefits Review Board in this case, *Stamper v. Washington United Terminals, Inc.*, BRB No. 19-0364 (Sept. 9, 2020). 33 U.S.C. §928; 20 C.F.R. §802.203(a). Counsel requests Employer pay a fee of $14,512.50, comprising $9,675 for services rendered between May 2019 and November 2020 responding to the appeal, representing 21.5 hours of legal services at $450 per hour, and $4,837.50 responding to Employer's objections to her fee petition, representing 10.75 hours of legal

services at $450 per hour.[1] Employer has filed a response objecting to counsel's fee petition, asserting it cannot be held liable for counsel's fee because Claimant obtained no success before the Board; it also challenges certain itemized time entries as duplicative and unnecessary. Counsel filed a reply brief.

To briefly summarize the pertinent merits of the underlying claim, Claimant filed a claim for injuries sustained during his employment. Employer's carrier, American Longshore Mutual Association (ALMA), provided coverage at the time of Claimant's April 17, 2016, neck injury. Claimant returned to work for eight shifts from January 3 to January 16, 2017, when he stopped due to renewed neck pain. Signal Mutual Indemnity Association (Signal) was on the risk at this time. ALMA contended Claimant's return to work aggravated his neck condition, relieving it of liability and making Signal the responsible carrier. The Administrative Law Judge (ALJ) awarded benefits but found Claimant did not sustain a permanent aggravation in January 2017, making Signal liable only for the temporary exacerbation, with ultimate liability reverting to ALMA thereafter.[2]

ALMA appealed only the ALJ's responsible carrier finding. Claimant and Signal filed response briefs, urging affirmance. The Board held the ALJ rationally determined ALMA is the responsible carrier and affirmed the ALJ's decision. *Stamper*, slip op. at 7. Counsel subsequently filed this petition for an Employer-paid attorney's fee for her work before the Board.

Counsel is not entitled to an Employer-paid fee for this work before the Board. Her services in this appeal were not necessary and did not result in any additional success or "relief" for Claimant. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held a claimant "successfully prosecutes" his claim if he obtains "some actual relief that 'materially alters the legal relationship between the

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[1] On December 22, 2020, counsel filed a motion requesting the Board allow her to file a reply brief, addressing Employer's objections to her fee petition. She had already filed such brief on December 21, 2020. On June 29, 2021, she filed a letter citing Rule 28(j) of the Federal Rules of Appellate Procedure as supplemental authority permitting her to file a reply brief. The Board grants the motion and accepts counsel's previously-filed reply to Employer's objections. 20 C.F.R. §802.219.

[2] The ALJ also addressed causation, timeliness, maximum medical improvement, usual employment, suitable alternate employment, average weekly wage, post-injury wage-earning capacity, and Employer's entitlement to Section 8(f) relief. *Stamper v. Washington Untied Terminals, Inc.*, 2017-LHC- 01556, 01557 (Apr. 15, 2019), *aff'd*, BRB No. 19-0364 (Sept. 9, 2020).

parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106, 37 BRBS 80, 82(CRT) (9th Cir. 2003). This standard requires only that the claimant gain something of "substance," i.e., something "that causes the defendant's behavior to change for the benefit of the plaintiff." *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT).

In *Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), the Ninth Circuit summarily rejected a fee request because the only issue was the form of compensation, bi-weekly versus a lump sum, and not the existence or extent of the employer's liability. *Portland Stevedoring Co.*, 552 F.2d at 294, 6 BRBS at 61. In *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986), a District of Columbia Workmen's Compensation Act case, the Board held counsel was not entitled to a fee for work on remand because the claimant's entitlement to benefits was not at issue; the only issue was the employer's entitlement to a credit for payments made under the workers' compensation laws of Virginia. *Murphy*, 20 BRBS at 70. The Board stated: "[A]ttorney's fees may not be awarded for services rendered before a given tribunal unless the claim has been 'successfully prosecuted,' *i.e.*, unless additional benefits have been awarded by that tribunal or on appeal from that tribunal." *Id*. Employer-paid fees may also be awarded where counsel assists a claimant in successfully defending an award on appeal. *LaPlante v. Gen. Dynamics Corp.*, 15 BRBS 83 (1982).

The appeal in this case addressed which carrier is liable for Claimant's benefits – neither Claimant's entitlement to compensation nor Employer's liability was in dispute. The amount due to Claimant also was not in dispute. *Stamper*, slip op. at 3. While Claimant's counsel asserts her efforts were necessary to ensure Claimant continued to be paid benefits in the event the Board vacated the ALJ's responsible carrier finding, she is mistaken. Section 4(a) of the Act, 33 U.S.C. §904(a) (emphasis added), provides: "Every *employer* shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title." Though this generally means an employer will "secure" insurance to cover its workers' compensation claims, the employer nevertheless bears the ultimate responsibility for paying a claimant's benefits. Therefore, if an employer has no insurer or its carrier is unable to pay, for instance if the insurer is bankrupt, the employer remains liable. *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989), *aff'g* 20 BRBS 151 (1987); *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g in pert. part on recon.* 35 BRBS 75 (2001). In the event there is a delay in payments, the claimant may be entitled to interest on the past-due compensation or additional compensation under Section 14(f) of the Act. 33 U.S.C. §914(f); *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT) (9th Cir. 1996); *Found. Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Similarly, even if the Board had instead vacated the ALJ's responsible carrier finding and remanded the case for further consideration of that issue, Employer is bound by the ALJ's final decision holding it liable for Claimant's benefits for his work-related injury.[3] There would be no situation where Claimant would be eligible for benefits but unable to receive them due to the absence of an order by the Board instructing either of the potentially-liable insurers, ALMA or Signal, to pay him. No gap or disruption would occur because, if a carrier could not or did not pay, Employer would be required to do so. Consequently, under these circumstances, Claimant's benefits were assured and a special order mandating continuing payments was not necessary or warranted given that the dispute on appeal between the carriers did not affect Employer's liability for Claimant's benefits.[4]

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[3] The ALJ's Order specifically stated: "Washington United Terminals/American Longshore Mutual Ass'n, Ltd. is the responsible employer/carrier for Claimant's ongoing benefits." Decision and Order at 49. Where he held Signal liable for medical benefits for Claimant's temporary exacerbation, he stated: "Washington United Terminals/Signal Mutual Indemnity Ass'n shall provide…." *Id.* In all, 7 of 13 paragraphs of the ALJ's Order identified Employer as liable. *Id.* at 49-50. The Board affirmed as unchallenged on appeal Employer's liability for Claimant's benefits; the ALJ's decision on that matter was final. *Stamper*, slip op. at 3 n.4.

[4] Contrary to counsel's assertions, the circumstances at issue in *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *aff'd and modified on recon.*, 40 BRBS 1 (2005), are distinguishable from this case. In that case, the Board vacated the ALJ's responsible *employer* finding and remanded the case for further consideration of the issue. In an order on reconsideration, the Board modified its decision to reflect that the original responsible employer's liability for the claimant's benefits continued while the responsible employer issue was being resolved. The attorney's request for reconsideration and clarification ensured the claimant's compensation payments continued absent knowing which employer was ultimately responsible. Because the identity of the responsible employer in this case has been established, and Employer is the primary party liable for the payment of Claimant's benefits, that issue was not up for debate and was not challenged on appeal, so no such similar action was necessary. Moreover, the Board has previously held that attorney fees sought for work relating to the source of a claimant's compensation payments, either the employer or the Special Fund, did not affect the claimant's entitlement to benefits and, therefore, are not compensable. *Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96 (1989); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984).

ALMA's appeal did not challenge any aspect of Claimant's entitlement to benefits, and the Board's affirmance of the ALJ's finding ALMA to be the responsible carrier did not result in a successful prosecution or defense of the claim for Claimant.[5] The result of the appeal did not "materially alter[] the legal relationship" between Claimant and Employer and, given Employer's continued liability for benefits if either insurer failed to pay, did not modify Employer's or its insurers' "behavior in a way that directly benefits" Claimant. *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Consequently, Claimant's counsel's services did not gain Claimant any actual relief. *Id.*;[6] *Portland Stevedoring Co.*, 552 F.2d at 294, 6 BRBS at 61; *Shaw*, 23 BRBS 96. Thus, neither Section 28(a) nor (b) is satisfied as a result of the Board's decision. 33 U.S.C. §928(a), (b).

[5] After briefing was completed, but prior to issuing its decision in this case, the Board issued an order dismissing the appeal and remanding the case for the district director to reconstruct the record or, in the alternative, for the Office of Administrative Law Judges to conduct a new hearing. *Stamper*, BRB No. 19-0364, Order (July 9, 2020). Claimant's counsel asserts that the possibility of a new hearing, which she alleges could have ended with different results for Claimant, also necessitated her involvement to protect Claimant's interests. But, this argument does not support her assertion she is entitled to an Employer-paid fee for work before the Board. The bulk of counsel's itemized services occurred between 10 and 14 months prior to the Board's dismissal order: her first entry was dated May 9, 2019, and she filed her response brief on September 4, 2019. The "threat" of a new hearing, which did not materialize, could not have been a reason for her filing a response brief. Moreover, counsel does not request any fees for reconstructing the record, which presumably occurred after the Board remanded the claim. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996) (Board may award an attorney's fee only for services rendered before it).

[6] In *Richardson*, the court held it was not enough for the claimant to obtain the "possibility of future relief." *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Because he did not obtain any actual relief, "nominal, injunctive, or otherwise[,]" his counsel was not entitled to a fee for work on a back injury claim. *Id.*

Accordingly, we deny counsel Merrigan's application for an Employer-paid attorney's fee for work performed before the Board in this case.[7]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[7] This decision does not address or affect any liability that Employer and its carriers may have for fees requested for work performed before the district director or ALJ.