U.S. Department of Labor

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

BRB No. 20-0084

RYAN VOLTZKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANADIAN NATIONAL RAILWAY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 05/22/2020
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order [Denial] of Attorney's Fees and the Letter Denying Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Steven T. Moe (Petersen, Sage, Graves, Layman & Moe, P.A.), Duluth, Minnesota, for claimant.

Beth A. Butler and Larry J. Peterson (Peterson, Logren & Kilbury, P.A.), Roseville, Minnesota, for employer/carrier.

William M. Bush (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order [Denial] of Attorney's Fees and the Letter Denying Reconsideration (Case No. 08-312664) of District Director David A. Duhon 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).[1] 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. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On September 28, 2017, claimant injured his left ankle while working for employer at the ore docks in Duluth, Minnesota. Employer voluntarily paid disability and medical benefits from September 29, 2017, through October 14, 2018, when claimant was released to full-duty work. 33 U.S.C. §§907, 908(c)(2).

On June 27, 2018, claimant filed two LS-203 Claim for Compensation forms – one for the September 2017 ankle injury and the other for a "consequential low back injury" occurring on or around May 19, 2018, while performing physical therapy exercises for his ankle injury. Employer filed a Notice of Controversion dated July 24, 2018, denying liability for any disability and medical benefits related to claimant's back problems.[2] By letter dated September 6, 2018, claimant requested an informal conference regarding his entitlement to medical benefits for his back injury. Claimant asserted his low back injury is consequential to his left ankle injury and medical benefits are compensable because "[t]he law states: 'If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into

[1] On November 12, 2019, the district director issued a letter to claimant's counsel denying his motion for reconsideration because no evidence justified such action.

[2] It is unclear from the record before the Board when employer received formal notice of claimant's June 2018 claims; however, its Notice of Controversion indicates it first gained knowledge of claimant's back injury on July 18, 2018. DX G.

one compensable injury.'" DX H at 1-2; *see Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454, 457 (9th Cir. 1954).[3]

The district director held an informal conference on November 27, 2018. He recommended employer reimburse claimant for his back-related medical expenses and assume liability for future medical benefits related to claimant's consequential low back injury. Employer accepted the recommendation.

Subsequently, claimant's counsel filed a petition for an attorney's fee, which employer opposed. The district director found employer is not liable for an attorney's fee pursuant to Section 28(a), 33 U.S.C. §928(a), because employer "voluntarily began paying compensation for temporary total disability (TTD) [benefits for claimant's ankle injury] on September 29, 2017, which was prior to [counsel]'s involvement in this claim." Order at 3. The district director further found:

> A dispute arose regarding payment of medical benefits for the claimant's back condition (a claimed consequential injury which was originally filed as a new claim but combined with the present claim as consequential). An Informal Conference was held on November 27, 2018 at which the District Director's office recommended the carrier pay for medical treatment related to the low back condition and reimburse the claimant for any out-of-pocket expenses for the back. Employer/Carrier agreed with this recommendation and notified Claimant's Counsel by correspondence dated December 7, 2018.

Id. Thus, the district director concluded employer also is not liable for a fee pursuant to Section 28(b), 33 U.S.C. §928(b). *Id.* Claimant requested reconsideration, which the district director summarily denied by letter dated November 12, 2019. DX L.

On appeal, claimant challenges the district director's denial of an employer-paid attorney's fee pursuant to Section 28(a).[4] Employer and the Director, Office of Workers' Compensation Programs (the Director), respond in separate briefs, urging affirmance. Claimant filed a reply to the Director's brief. Claimant contends the district director should have held employer liable for his attorney's fee under Section 28(a) because employer declined to pay any compensation within 30 days of receiving his back injury claim, and he thereafter successfully prosecuted it. Employer asserts Section 28(a) is inapplicable

[3] Claimant incorrectly attributed this quote to other cases.

[4] We affirm, as unchallenged on appeal, the district director's finding that counsel is not entitled to an employer-paid fee pursuant to Section 28(b). *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

because claimant's low-back claim was combined with his initial ankle injury claim in which compensation was voluntarily paid. Similarly, the Director asserts Section 28(a) is inapplicable because employer voluntarily paid disability and medical benefits with respect to claimant's ankle injury through October 14, 2018, and claimant's back injury claim "merely request[s] 'additional compensation' in connection with his [primary ankle] injury," for which claimant was paid compensation. Dir. Br. at 3. For the reasons set forth below, we reverse the district director's denial of an employer-paid fee pursuant to Section 28(a).

Section 28(a) provides an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation and the claimant thereafter successfully prosecutes his claim. 33 U.S.C. §928(a);[5] *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). An employer's voluntary payment of compensation prior to the time the claimant files his formal claim is not determinative of the employer's liability for a fee pursuant to Section 28(a). *See Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co. v. Cooper*, 294 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Rather, fee liability is determined by the employer's payment or non-payment of benefits in the 30 days after its receipt of notice of the claim. *Id.*

We reject the Director's assertion that Section 28(a) is inapplicable because claimant's June 2018 back claim merely requests additional compensation in connection with his prior primary ankle injury claim. Although a claimant may amend a previously filed claim to include a claim for benefits due to a secondary injury, there was no prior

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[5] 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).

claim for claimant to amend in this case as employer voluntarily paid benefits for his ankle injury without a claim having been filed. *C.f. Edwards*, 398 F.3d at 316-317, 39 BRBS 3-4(CRT) (a claim is "filed" when, by "formal action," it is received, endorsed, and entered in the official record). Therefore, as the June 27, 2018 LS-203 forms are the first documents of record asserting compensable ankle and back injuries, claimant's claims were filed on this date, and employer's liability for a fee pursuant to Section 28(a) is determined by its payment or non-payment of benefits in the 30 days after it received notice these claims. *Id.*

It is undisputed employer continued to pay benefits for claimant's ankle injury following notice of his ankle injury claim filed on June 27, 2018. However, it did not pay any benefits related to claimant's back injury within 30 days of receiving notice of that claim filed the same day. Applicability of Section 28(a) is controlled by the Board's decision in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017). In *Taylor*, an administrative law judge denied the claimant's counsel an employer-paid attorney's fee under Section 28(a) because the employer, although declining to pay disability benefits, voluntarily paid medical benefits within 30 days of receiving notice of the claim. The Board, in reversing this finding, agreed with the Director that the term "compensation" in Section 28(a) should be read as "disability and/or medical benefits[,]" and its "precise meaning in the phrase 'declines to pay any compensation' depends on what benefits are claimed and what benefits the employer paid or declined to pay in each case." *Taylor*, 51 BRBS at 14. The Board adopted the Director's interpretation that: 1) a claim under the Act may be made up of parts, *i.e.*, disability benefits, death benefits, medical benefits, and 2) if the employer declines to pay any type of benefits on that "claim," a claimant employing the services of an attorney to obtain the denied benefit is entitled to an employer-paid fee because the employer's refusal to pay any compensation caused the need for attorney involvement. *Id.*

In this case, although employer paid claimant disability and medical benefits for his ankle injury within 30 days of receiving notice of the claims filed on June 27, 2018, it specifically declined to accept his back injury claim as compensable.[6] *See* DX G. Because primary and secondary injuries are distinct injuries under the Act, *Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 689, 50 BRBS 81, 86(CRT) (4th Cir. 2017), employer's payment of medical benefits for claimant's ankle injury does not amount to its having paid for his back injury. *See Taylor*, 51 BRBS at 14. Employer did not accept liability for claimant's back injury until December 12, 2018. *See* DX J. On the uncontested facts of this case, claimant's counsel successfully prosecuted the claim for a work-related

[6] Employer concedes on appeal "a dispute arose regarding payment of medical benefits for [claimant]'s consequential back condition, which had been filed as a new claim [on June 27, 2018,] but then later combined with the present [ankle injury] claim as a consequential injury." Emp. Br. at 1.

back injury for which employer declined to pay any compensation within 30 days of its having received notice of the claim. Thus, employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act. *Taylor*, 51 BRBS 11.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge