

BRB No. 06-0501

W. G.)
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 Claimant-Petitioner)
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 v.)
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 MARINE TERMINALS CORPORATION) DATE ISSUED: 03/22/2007
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 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney Fee (Case No. 14-140920) of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the 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, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained injuries to his right foot and ankle while working for employer on November 12, 2003, prompting him to file a claim under the Act on February 9, 2004. Employer initially controverted the claim, but subsequently agreed, by letter dated October 20, 2004, to pay compensation and medical benefits. Employer paid claimant temporary total disability benefits, medical benefits, and an attorney's fee on or about December 16, 2004.¹ After claimant's condition reached maximum medical improvement, the parties sought to resolve the issue of claimant's entitlement to permanent partial disability benefits.² On August 18, 2005, the district director recommended that employer pay claimant permanent partial disability benefits in the amount of \$593.74, based on the 36 percent permanent impairment rating less a credit for claimant's prior award, from 1989, of permanent partial disability benefits. Employer paid this amount on August 27, 2005, nine days after the recommendation.

Claimant's counsel thereafter filed a fee petition with the district director requesting an attorney's fee of \$2,985.90, representing 8.125 hours of attorney time at an hourly rate of \$265, plus \$941.52 in costs. Employer filed objections to the fee petition. The district director denied the fee petition in its entirety on the ground that employer cannot be held liable for the fee pursuant to Section 28(b), 33 U.S.C. §928(b), because employer timely paid the permanent partial disability benefits following the district director's recommendation. The district director, in effect, treated the request for permanent partial disability benefits as a new claim.

On appeal, claimant challenges the district director's denial of an attorney's fee. Employer responds, urging affirmance.

Claimant asserts that the district director erred by not considering claimant's entitlement to an attorney's fee under Section 28(a), 33 U.S.C. §928(a). Claimant maintains that the district director's rationale for finding Section 28(a) inapplicable was

¹ It is undisputed that employer paid temporary total disability benefits to claimant totaling \$14,136.41 for the period between June 17, 2004, and September 20, 2004, as well as medical benefits in the amount of \$5,657.75. Employer also acknowledged the payment of \$5,828.95 in attorney's fees.

² Employer obtained a statement from claimant's treating physician, Dr. Woll, who initially opined that claimant had no permanent partial disability as a result of his November 12, 2003, injury. Claimant submitted to the district director on August 4, 2005, a report from Dr. Coletti rating claimant's disability, as a result of the November 12, 2003, ankle injury, at 36 percent impairment of the right lower extremity. Dr. Woll then stated that he was "in complete agreement with Dr. Coletti[s]" assessment of claimant's permanent impairment at 36 percent.

expressly rejected in *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In particular, claimant argues that in light of *Richardson*, employer's payment of temporary total disability benefits does not change the fact that it "declined to pay" the claim for benefits within 30 days. Thus, claimant maintains that employer is liable for an attorney's fee pursuant to Section 28(a) for work relating to obtaining the permanent partial disability benefits.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that 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 benefits. 33 U.S.C. §928(a); *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). Section 28(b), in general, allows an employer-paid attorney's fee if an employer timely pays or tenders compensation and thereafter a controversy develops over additional compensation owed, and a claimant successfully obtains additional compensation after following the procedures set forth in the Act. 33 U.S.C. §928(b); *National Steel & Shipbuilding, Co. v. U.S. Dep't of Labor, OWCP*, 606 F.2d 875, 880, 11 BRBS 68 (9th Cir. 1979).

In *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), employer voluntarily paid benefits for claimant's two injuries, terminating benefits for the knee injury upon completion of payments due under the schedule and ceasing payments for the back injury upon concluding that claimant was fabricating it. The claimant then filed a claim for benefits and, nearly two years later, the employer offered to settle the claim for \$5,000. The claimant refused and sought a consolidated hearing on the claims for both injuries. Ultimately, the claimant was entitled to \$932 more for his knee injury, but, although the contention that he fabricated the back injury was rejected, the administrative law judge found it had resolved and claimant was entitled to nothing more. *Richardson*, 336 F.3d at 1104-1105, 37 BRBS at 81-82(CRT). Counsel sought a fee payable by employer, which was denied.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that Section 28(a) of the Act applies to the back injury portion of the case because, although the employer voluntarily paid compensation, it did not timely pay any benefits after receiving the claim for benefits. The court stated that the "relevant time period ... begins with receiving notice of the claim, and ends thirty days after." *Id.*, 336 F.3d at 1105, 37 BRBS at 81(CRT) (citing *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)). Although the employer declined to pay benefits within this time frame and Section 28(a) was thus applicable, the court ultimately denied an employer-paid fee as the claimant did not successfully prosecute his claim for his back injury.

In this case, claimant filed a claim in February 2004, which employer controverted. Employer did not timely pay benefits, thus triggering liability under Section 28(a). Claimant subsequently successfully prosecuted the claim, obtaining payment of the benefits sought pursuant to the recommendations of the district director, albeit at two separate intervals. The district director held employer liable for the fee for work involving the initial temporary total disability payments but found that the work involving the payment of permanent partial disability benefits was governed by Section 28(b). Since employer timely paid the permanent partial disability benefits following the district director's recommendation, the district director held employer was not liable for a fee for the work regarding this payment under the terms of Section 28(b). We cannot affirm the conclusion that Section 28(b) applies. Pursuant to the plain language of Section 28(a), we hold that as employer did not pay benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for work involving all benefits due on the claim must be determined pursuant to Section 28(a). *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Clark*, 38 BRBS 67.

After initially controverting the claim, employer paid claimant temporary total disability benefits for the period between June 17, 2004, and September 20, 2004, totaling \$14,136.41, and employer paid the fee for work regarding these benefits. Claimant subsequently reached maximum medical improvement, and he ultimately was successful in obtaining permanent partial disability benefits. Claimant's pursuit of these benefits, however, did not involve a new claim but rather the permanent disability aspect of the previously filed claim. Under these circumstances Section 28(a) must be applied to the entire claim. The conclusion that the pursuit of additional benefits after an initial payment is not a new "claim" is supported by the decision of the United States Court of Appeals for the Fourth Circuit in *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 126 S.Ct. 478 (2005). In *Edwards*, the court rejected the argument that a fee was due under Section 28(a) where employer voluntarily paid benefits within 30 days of claimant's filing of his formal claim but claimant later sought additional benefits which employer declined to pay. Construing the term "filing a claim," the court held this phrase refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks additional benefits on a prior claim. In this case, claimant's pursuit of permanent partial disability benefits similarly is a part of claimant's initial claim for benefits. Contrary to the district director's analysis, it is not a new claim separate from the initial disability claim. As employer did not timely pay benefits after receipt of the claim, fee liability on the entire claim is governed by Section 28(a) rather than Section 28(b).³

³ This conclusion is also supported by the language of Section 28(b), which requires timely voluntary payment. Specifically, Section 28(b) is inapplicable to the instant case since employer did not pay or tender payment of compensation without an

Consequently, the district director's determination that employer's liability for claimant's attorney's fee with regard to work performed in pursuit of his permanent partial disability benefits falls under Section 28(b) is reversed. As claimant, with the continued assistance of counsel, obtained the payment of permanent partial disability benefits, he successfully prosecuted his claim in this regard. As employer declined to pay any benefits within 30 days of its receipt of the claim and claimant thereafter successfully prosecuted it, we hold that employer is liable for counsel's fee pursuant to Section 28(a). *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Clark*, 38 BRBS 67; *see also Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on reconsideration en banc), *aff'd on reconsideration en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). The case is remanded to the district director for consideration of the amount of the fee to which claimant's counsel is entitled. 20 C.F.R. §702.132.

award pursuant to the time constraints of Section 14(a) and (b). *See* 33 U.S.C. §§928(b), 914(a), (b).

Accordingly, the district director's finding that claimant's counsel is not entitled to an attorney's fee payable by employer is reversed. The case is remanded to the district director for consideration of counsel's fee petition.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge