

BRB No. 01-0625

GINA MELGOZA)
(Widow of MICHAEL MELGOZA))
)
 Claimant-Petitioner)
)
 v.)
)
 STEVEDORING SERVICES) DATE ISSUED: April 29, 2002
 OF AMERICA)
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 and)
)
 HOMEPORIT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Denying Attorney's Fees and Order Denying Reconsideration of William R. Dorsey, Administrative Law Judge, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for claimant.

James P. Aleccia and Lisa M. Conner (Aleccia & Brooks), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits and Denying Attorney's Fees, and Order Denying Reconsideration (00-LHC-2311) of Administrative Law Judge William R. Dorsey 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 the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's husband (decedent) died on September 5, 1999, during the course of his employment for employer. He was survived by claimant, his widow, a daughter, Alexis Melgoza, and Christopher DiBiase, an unadopted stepson. Employer promptly began paying death benefits to claimant and to Alexis. 33 U.S.C. §909(b). On September 20, 1999, the attorney for the survivors requested an informal conference to discuss the entry of a formal compensation order. Claimant demanded that employer enter into a joint stipulation establishing the work-related nature of the death, the dependency of all the survivors, and employer's ongoing obligation to pay benefits, which employer rejected on the basis that it was voluntarily paying death benefits. On November 17, 1999, the survivors' attorney sent employer's attorney copies of receipts for funeral expenses which had been paid by claimant. During the informal conference on December 29, 1999, employer continued to oppose the entry of a binding compensation order because it did not want to go through modification proceedings under Section 22 of the Act, 33 U.S.C. §922, if any basis arose to terminate compensation payments to claimant or Alexis. The claims examiner noted the parties' disagreement, and stated the case would be referred for a formal hearing to the Office of Administrative Law Judges (OALJ). In addition, the claims examiner stated she could not recommend that employer pay benefits to Christopher, as necessary documentation concerning his status as an eligible survivor was not presented. She also recommended that claimant's counsel forward to the carrier any unpaid or unreimbursed funeral expense receipts.

In May 2000, the case was referred to the OALJ. In August 2000, employer received from claimant the documentation necessary to establish Christopher as a "child" under Section 2(14) of the Act, 33 U.S.C. §902(14), and employer admitted its liability to Christopher in answers to claimant's request for admissions dated September 27, 2000. EX 17. Employer also stated in this document that it had paid prior to August 30, 2000, some funeral expenses to the providers of funeral services. Claimant was fully reimbursed for funeral expenses she paid as of October 17, 2000. At the calendar call before the administrative law judge on December 11, 2000, the parties agreed that employer was paying benefits, that employer agreed that Christopher was a survivor eligible for death benefits prior to his 18th birthday in July 2000, and that employer had reimbursed claimant her outstanding funeral expenses. Claimant sought a formal order embodying the survivors' right to death benefits under the Act, and an attorney's fee payable by employer. In a brief submitted to the administrative law judge in lieu of a formal hearing, claimant contended that employer is liable for an attorney's fee because employer resisted the entering of a formal order and failed to promptly reimburse claimant for all funeral expenses she paid.

Employer countered that it was claimant's failure to properly document the funeral expenses that led to the "late" reimbursement, and that it is not liable for claimant's attorney's fee because it voluntarily paid death benefits at the proper rate at all times.

The administrative law judge entered a formal Decision and Order awarding death benefits to claimant for her lifetime or until she remarries, *see* 33 U.S.C. §909(b) and to Alexis until she turns 18 or she qualifies as a student under Section 2(18), 33 U.S.C. §902(18). The administrative law judge also found that Christopher was entitled to death benefits until he reached age 18 in July 2000, but that no actual compensation is due Christopher as employer paid Alexis the full amount owing the children during Christopher's period of eligibility. *See* 33 U.S.C. §909(b). The administrative law judge also rejected claimant's contention that Christopher is entitled to interest or a penalty, 33 U.S.C. §914(e), on the benefits otherwise due him. Finally, the administrative law judge found that the survivors have not met the statutory requirements for holding employer liable for their attorney's fee. 33 U.S.C. §928(a), (b). The administrative law judge rejected claimant's contention that securing the entry of a contested order is sufficient to impose fee liability on employer in the absence of an award of additional compensation. The administrative law judge concluded that the attorney's fee is to be a lien on claimant's compensation under Section 28(c) of the Act, 33 U.S.C. §928(c). On reconsideration, the administrative law judge rejected claimant's contention that employer's late payment of funeral expenses after the case was transferred to the OALJ merits an attorney's fee payable by employer, stating that claimant did not preserve this issue.

On appeal, claimant challenges the administrative law judge's finding that employer is not liable for claimant's attorney's fee. Specifically, claimant contends that her success in obtaining a compensation order is sufficient to impose fee liability on employer. Claimant also contends that the administrative law judge erred in stating she did not preserve the issue of employer's late reimbursement of funeral expenses as a basis for employer's fee liability. Employer responds, urging affirmance.

We reject claimant's contention that securing the entry of a compensation order resisted by employer is sufficient, standing alone, to impose fee liability on employer. In *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986), the Board rejected the claimant's contention that the employer was liable for an attorney's fee because the claimant obtained an enforceable award for permanent partial disability, as opposed to the voluntary temporary total disability benefits paid by the employer. As the claimant did not obtain greater compensation than the employer paid or agreed to pay, employer could not be held liable for claimant's attorney's fee.

More recently, the United States Court of Appeals for the First Circuit addressed a similar issue in *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). In *Barker*, the employer paid the claimant temporary total disability benefits for his work injury pursuant to the Maine workers' compensation scheme. The claimant sought benefits under the Act pursuant to the schedule at Section 8(c)(1), 33 U.S.C. §908(c)(1), which were denied as the claimant's injury was to his neck. The claimant also sought an attorney's fee on the ground that his claim, overall, was "compensable" because the employer stipulated to such under the Act or because he obtained an order entitling him to future medical benefits. The court affirmed the denial of an attorney's fee payable by the employer as the claimant did not obtain additional compensation beyond that which the employer paid.¹ The court stated that the "overall success" of the claimant's claim was "beside any relevant point." *Id.*, 138 F.3d at 439, 32 BRBS at 177(CRT). Moreover, the "award" of future medical benefits was of no moment, because there was no evidence that the employer withheld any medical treatment or controverted claimant's entitlement to such. *Id.*

¹Although the court analyzed the case in terms of Section 28(b) due to employer's voluntary payment of temporary total disability benefits (albeit under state law), *see Barker*, 138 F.2d at 438 n.6, 32 BRBS at 176 n.6(CRT), it noted that the result would be the same if Section 28(a) applied.

Thus, the embodiment in a formal order of those benefits that are being fully paid voluntarily cannot support the award of an attorney's fee against employer under Section 28(a) or (b). *Barker*, 138 F.3d at 439, 32 BRBS at 177(CRT); *Flowers*, 19 BRBS 162; see also *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978) (claimant not entitled to an attorney's fee for succeeding on appeal in having average weekly wage calculated under Section 10(c) rather than Section 10(b) where no change in amount of average weekly wage resulted). In the instant case, employer's resistance to a formal award was not accompanied by a failure to pay death benefits. Rather, at all times, employer paid the full death benefit.² See generally *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986) (Section 9 provides for one death benefit with varying distributions depending on who are the decedent's statutory survivors). That the survivors' entitlement to benefits may be easier to enforce if that entitlement is embodied in a formal compensation order is not a sufficient basis on which to hold employer liable for an attorney's fee under Section 28 of the Act. The Ninth Circuit has stated that "the purpose of section 928 is to authorize attorney's fees against employers when the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation." *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1979). In this case, therefore, as employer voluntarily paid death benefits, the administrative law judge properly concluded that claimant did not meet this standard by virtue of obtaining a formal award of death benefits and claimant's contention to the contrary is rejected.

We turn then to claimant's contention that the administrative law judge erred in finding that she did not preserve, as a basis for attorney's fee liability, her success in having

²Employer did not institute payment of death benefits to Christopher at the time it began paying claimant and Alexis, and the claims examiner found inadequate documentation to warrant payment to Christopher at the time of the December 1999 informal conference. Upon obtaining the necessary documentation, employer promptly conceded its liability to Christopher, although by that time Christopher's entitlement to benefits ceased. In any event, the amount payable to the children as a death benefit is capped at 16 and two-thirds percent of decedent's average weekly wage, if there is a widow. 33 U.S.C. §909(b). Thus, as stated by the claims examiner in a letter dated October 27, 2000, and reiterated by the administrative law judge in his decision, employer properly paid the full 16 and two-thirds percent award, but all of it was designated for Alexis rather than half to each child. See EX 14; Decision and Order at 10. Claimant does not allege on appeal that obtaining recognition of Christopher's entitlement to benefits upon the presentation of sufficient documentation entitles her to an attorney's fee payable by employer for work performed before the administrative law judge.

employer belatedly pay outstanding funeral expenses. The administrative law judge's finding in this regard appears to be based on the fact that claimant did not raise any issues regarding her entitlement to interest or a Section 14(e) penalty on the amounts belatedly paid. See Decision and Order at 2-3, 12. We agree with claimant that the case must be remanded for further consideration of whether employer's reimbursement of funeral expenses after the case was referred to the OALJ can support an award of an attorney's fee payable by employer pursuant to Section 28 of the Act. Although claimant did not raise her entitlement to interest and/or a penalty on the funeral expenses, she was not required to do so in order to preserve her right to seek an attorney's fee on this basis. Claimant clearly raised before the administrative law judge employer's delayed payment of these expenses after the case was referred to that office as a basis for attorney's fee liability. See Calendar Call Tr. at 11. The administrative law judge asked the parties for briefs on the attorney's fee issue, and claimant again raised the funeral expenses as a basis for fee liability. See Cl.'s Brief to ALJ at 4, 6, 9. As the administrative law judge erred in stating that this issue was not raised as a basis for attorney's fee liability, we vacate the denial of an attorney's fee payable by employer, and we remand the case for further consideration of this issue. 33 U.S.C. §928; *see generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991).

Accordingly, the administrative law judge's denial of an attorney's fee payable by employer is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge