

BRB No. 12-0418

STEVEN LINCOLN)
)
 Claimant-Petitioner)
)
 v.)
)
 CERES MARINE TERMINALS,) DATE ISSUED: 04/16/2013
 INCORPORATED)
)
 Self-Insured Employer-)
 Respondent) DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fee of Charles D. Lee, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fee (Case No. 06-211285) of District Director Charles D. Lee 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). We must affirm the fee award of the district director unless it is shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for a work-related binaural hearing loss on May 24, 2011. On May 26, 2011, employer filed its First Notice of Injury and Notice of Controversion forms. By cover letter dated June 14, 2011, the district director served employer with formal notice of claimant's claim. On July 8, 2011, employer filed Form LS-208 indicating it had voluntarily paid claimant permanent partial disability benefits for a 0.5 percent binaural hearing loss in the amount of \$1,256.84, based on the maximum

compensation rate. Employer made no other payments and did not authorize medical treatment until an Order was entered on October 4, 2011, approving the parties' Section 8(i) settlement for \$23,879.96 in compensation for a 10 percent binaural hearing loss and \$4,000 for medical benefits. 33 U.S.C. §908(i). On August 18, 2011, claimant's counsel filed a fee petition with the district director requesting \$3,460, representing 11.26 hours of attorney services at an hourly rate of \$350. Employer objected to the fee petition contending it was not liable for any attorney's fees because it paid compensation within 30 days, and that, if it were found liable, counsel's hourly rate and hours requested were excessive.

The district director found that employer's payment to claimant of \$1,256.94 for a 0.5 percent impairment constituted "actual compensation," as opposed to a nominal payment.¹ The district director relied on the fact that the amount paid was based on the maximum compensation rate under the Act. Therefore, as employer paid claimant compensation within the 30-day period after it received notice of the claim from the district director, employer is not liable for claimant's attorney's fee pursuant to Section 28(a). Claimant appeals the denial of an attorney's fee, and employer responds urging affirmance. Claimant filed a reply brief.

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 [district director], on the ground that there is no liability for compensation within the provisions of this Act, 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)(emphasis added). Thus, Section 28(a) applies to shift fee liability to employer when it declines to pay any benefits within 30 days of receiving notice of the claim from the district director. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

In this case, despite having filed a notice of controversion before receiving formal notice of the claim, employer voluntarily paid claimant benefits for a 0.5 percent binaural hearing loss based on the maximum compensation rate within 30 days after receiving notice of the claim from the district director. The district director acted within his

¹See *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011) (the employer paid \$1 within the 30-day period but that did not represent payment of compensation).

discretion in finding this amount constituted a payment of actual compensation as compared to the nominal \$1.00 paid in *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011). We cannot say that he reached an unreasonable result.² Pursuant to the plain language of Section 28(a), it is employer's payment or non-payment of "any compensation" in the 30 days after its receipt of the claim on which employer's liability for a fee pursuant to Section 28(a) is predicated. See *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). As the district director's finding that employer paid claimant compensation within the 30-day period after its receipt of the claim is based on a rational application of law, and is not arbitrary or capricious, we affirm his denial of an employer-paid attorney's fee under Section 28(a).³

Accordingly, the district director's Compensation Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

²The district director did not err in considering the Board's unpublished decision in *Meszaros v. Federal Marine Terminals, Inc.*, BRB No. 10-0589 (June 9, 2011), which is factually similar to this case. In *Meszaros*, the Board affirmed the administrative law judge's finding that one payment to claimant based on claimant's actual compensation rate constituted the payment of "any compensation" under Section 28(a).

³Employer cannot be held liable for claimant's attorney's fee under Section 28(b) as no informal conference was held. 33 U.S.C. §928(b).