



BRB No. 17-0012

JASON T. NELSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICTSI OREGON, INCORPORATED	)	
	)	DATE ISSUED: <u>Aug. 23, 2017</u>
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Order on Reconsideration-Attorney’s Fees of R. Todd Bruininks, District Director, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLP), Portland, Oregon, for claimant.

James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order on Reconsideration-Attorney’s Fees of District Director R. Todd Bruininks 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 district director’s attorney’s fee award unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See, e.g., Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000).

This case arises out of claimant’s claim of work-related stomach/abdominal pain that was first reported to employer in December 2012. As of January 9, 2013, employer

began making payments to claimant at the minimum compensation rate because claimant's wage information was not available. On January 18, 2013, the district director's office received an LS-203 claim form from claimant's counsel dated January 15, 2013, asserting a discrepancy between claimant's average earnings over the last two years and the compensation rate employer was paying him. *See* Order on Reconsideration at 1. The district director served the claim on employer on January 23, 2013. *Id.* On January 25, 2013, the district director received a notice from employer stating it was now paying claimant temporary total disability benefits at the maximum compensation rate. *Id.* at 1-2. On February 6, 2013, the district director received a letter from claimant's counsel stating he had received claimant's PMA wage records which supported his contention that claimant should be receiving temporary total disability benefits at the maximum compensation rate. *Id.* at 2.

In a letter dated March 7, 2013, claimant's counsel requested an informal conference. The district director issued a notice of informal conference on March 14, 2013, but claimant's counsel, by letter dated March 19, 2013, informed the district director that the conference would not be necessary because he had confirmed with claimant that employer was paying benefits at the appropriate compensation rate. Counsel also stated he would eventually be filing a petition for an attorney's fee for obtaining that result. Order on Reconsideration at 2. The district director received a letter from employer, dated March 27, 2013, disputing claimant's counsel's entitlement to an attorney's fee because the adjustment to claimant's compensation rate was due to employer's receipt of the PMA wage records, and not to the efforts of claimant's counsel. *See id.* No informal conference was held in this case.

On September 12, 2014, the district director received claimant's counsel's Petition for Approval of Claimant's Attorneys' Fees and Costs for services rendered before the Office of Workers' Compensation Programs for the period from January 15 through September 26, 2013. The petition requested a fee for 4.25 hours of attorney time at a rate of \$392 per hour and .25 hour of paralegal time at a rate of \$150 per hour, for a total of \$1,703.50 in attorney's fees, plus \$18 in costs. Claimant's counsel asserted there was a controversy between the parties because employer originally paid claimant less than he was entitled to and it was only after claimant's claim of January 15, 2013 that claimant's compensation rate was adjusted.

On September 16, 2014, the district director sent a letter to employer's attorney, notifying him of the fee petition and informing him that he should confer with claimant's counsel and attempt to resolve the issue of attorney's fees prior to filing objections with the district director. On January 2, 2015, the district director received a letter from claimant's counsel dated December 29, 2014, stating he had not received any objections from employer and accordingly requesting that his fee be awarded. On January 5, 2015,

employer's counsel responded by letter reiterating that it had objected to counsel's request for an attorney's fee award.

On August 4, 2015, the district director issued a Compensation Order approving claimant's counsel's attorney's fee application for a total of \$1,703.50 plus costs of \$18, citing a lack of timely objection by employer. *See* Compensation Order (Aug. 4, 2015). On August 11, 2016, the district director received a letter from employer objecting to the fee award, including a copy of its January 5, 2015 and March 27, 2013 letters, to support its assertion that it timely objected to the fee application. *See* Order Granting Employer/Carrier's Motion for Reconsideration. The district director stated that he had not considered either the January 5, 2015 letter or the March 27, 2013 letter in his initial Compensation Order. Accordingly, he granted employer's motion for reconsideration and stated he would issue a separate decision on the merits of counsel's fee petition.

On October 13, 2015, the district director received another letter from claimant's counsel regarding his attorney's fee petition, attaching further documentation to support his request for an hourly rate of \$392. On October 16, 2015, employer again objected to claimant's counsel's fee request.

The district director issued an Order on September 15, 2016, concluding that claimant's counsel's requested hourly rate, the hours expended, and the costs incurred were undisputed as employer did not object to the fee petition on this basis. With respect to employer's liability for an attorney's fee, the district director stated that it was reasonable to conclude that there was a controversy between the parties concerning claimant's compensation rate and that claimant's counsel's actions prompted the increase in claimant's benefit payments. Accordingly, the district director found claimant's counsel entitled to an attorney's fee payable by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See* Order on Reconsideration at 5. Thus, the district director awarded claimant's counsel a fee of \$1,703.50. *Id.* at 6.

Employer appeals the district director's Order. Claimant responds, urging affirmance of the district director's decision. Employer filed a reply brief.

Employer contends the district director erred in holding it liable for claimant's attorney's fee pursuant to Section 28(b) as that section does not permit an award of an employer-paid fee in cases where there has been no informal or formal action. Employer emphasizes that it voluntarily increased payments to the maximum compensation rate without any proceedings.<sup>1</sup> Employer also contends the district director failed to make the

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<sup>1</sup> Section 28(a) is not applicable because employer did not decline to pay any compensation within thirty days of receipt of the claim. *See* 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

required finding that employer was aware that claimant had retained counsel prior to its adjusting claimant's compensation rate.<sup>2</sup>

Section 28(b) reads, in pertinent part,

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy . . . [I]f the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). The Ninth Circuit, within whose jurisdiction this case arises, has stated that “[t]he purpose of [Section 28(b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel.” *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 882, 11 BRBS 68 (9th Cir. 1979). The Ninth Circuit has also stated that “Section [28(b)] does not authorize the payment of attorney's fees if the only unresolved issue is whether attorneys' fees awarded should be for services performed prior to the successful termination of the

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<sup>2</sup> We reject claimant's contention that the Board should not consider employer's arguments because employer's objections to counsel's fee petition were untimely filed with the district director. Employer first objected, in general, before claimant's counsel filed his fee petition. Moreover, the district director accepted employer's objections and addressed them in his Order on Reconsideration. Thus, employer's contentions are properly before the Board. *Cf. R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guaranty Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53 (2010) (objections to a fee petition raised for the first time on appeal will not be addressed).

informal conference.” *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 611, 25 BRBS 65, 70(CRT) (9th Cir. 1991).

The district director found that there was a controversy over the amount of temporary total disability benefits to which claimant was entitled based on claimant’s January 15, 2013 claim identifying the discrepancy. The district director then cited the January 24, 2013 form from employer showing that employer had begun paying claimant at the maximum compensation rate on January 16, 2013. The district director reasoned that “[t]he issue . . . comes down to which came first, claimant’s counsel’s actions or the increase in claimant’s compensation rate. If claimant’s compensation rate was increased prior to retaining counsel, then claimant’s counsel would not be . . . eligible for an attorney fee award as he was not involved in the increase in claimant’s benefits.” Order on Reconsideration at 5. The district director stated that it is “reasonable to find that the act of being aware of claimant’s decision to obtain counsel could, itself, prompt greater activity/attention to a claim than that typically taken on a claim.” *Id.* Because claimant’s counsel’s initial letter was dated January 15, 2013 and the increase in claimant’s compensation took place on January 16, 2013, the district director awarded claimant’s counsel’s an attorney’s fee payable by employer. *Id.*

We agree with employer that the district director erred in awarding claimant’s counsel an attorney’s fee under Section 28(b), irrespective of the reason for employer’s increasing its compensation payments. In *Watts*, there was an informal conference, during which the employer stipulated that the claimant was entitled to the permanent total disability benefits claimed. The Ninth Circuit reversed the Board’s affirmance of the district director’s award of an attorney’s fee under Section 28(b). The court stated that there was no dispute after the informal conference as to the amount of compensation due claimant, and that the only unresolved issue was whether an attorney’s fee should be awarded. The court stated that as the employer did not decline to pay the claimant permanent total disability benefits following the informal conference, Section 28(b) does not authorize employer’s liability for an attorney’s fee where the only remaining dispute concerned claimant’s entitlement to an attorney’s fee. *Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT).<sup>3</sup>

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<sup>3</sup> The Ninth Circuit later reiterated this rule in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), holding that a claimant is entitled to an employer-paid attorney’s fee under Section 28(b) “where the extent of liability is controverted and the claimant successfully obtained increased compensation, whether or not the employer had actually rejected an administrative recommendation.” 154 F.3d at 1061, 32 BRBS at 155(CRT). In that case, the Ninth Circuit determined that the claimant was entitled to attorney’s fees payable by employer because even after the issuance of the district director’s recommendation as to the extent of the claimant’s disability, which the

Similarly, the Board has held that where an employer “paid benefits voluntarily without resort to informal or formal proceedings,” “[the] employer cannot be held liable for an attorney’s fee under Section 28(b).” *Boe v. Dept. of the Navy/MWR*, 34 BRBS 108 (2000). In *Boe*, the Board reversed the district director’s assessment of an attorney’s fee against the employer because the employer voluntarily paid temporary total and permanent partial disability benefits prior to the informal conference and the claimant did not seek or obtain additional benefits thereafter. *See id.*, 34 BRBS at 111 (citing *Watts* and *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997) (no fee liability under Section 28(b) when the case was resolved prior to an informal conference)).

In this case, any “controversy” as to the amount of compensation to be paid was resolved before any informal proceedings were convened, as employer voluntarily increased benefits to the maximum rate upon receipt of claimant’s wage records. The only remaining dispute between the parties thereafter concerned claimant’s counsel’s entitlement to an attorney’s fee. Under these circumstances, an award of an attorney’s fee under Section 28(b) is not in accordance with the law. *Watts*, 950 F.2d 607, 25 BRBS 65(CRT); *Boe*, 34 BRBS 108; *see also Perez*, 128 F.3d 908, 31 BRBS 162(CRT). Thus, we reverse the district director’s award of an employer-paid attorney’s fee under Section 28(b).

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court determined was the functional equivalent of an informal conference, the parties disagreed as to the method of calculating disability benefits and the amount of compensation to which the claimant was entitled, and he succeeded in obtaining a greater disability award. 154 F.3d at 1060, 32 BRBS at 153-54(CRT). In *Matulic*, formal proceedings were necessary to resolve the parties’ disagreement as to the amount of compensation to which the claimant was entitled. *See id.*

Accordingly, the district director's Order on Reconsideration-Attorney's Fees is reversed.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge