

EUGENE CRAIG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees of Chris John Gleasman, District Director, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming, Gibbons & Kittrell, P.C.), Mobile, Alabama, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees (Case No. 07-153732) of District Director Chris John Gleasman 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts in this case are gleaned from attachments to the parties' briefs. Claimant filed a claim under the Act for a work-related binaural hearing loss on July 12, 1999. Attached to the claim were the results of a hearing examination which does not appear to indicate that claimant suffered a compensable hearing impairment. Claimant did not attach a medical report to the claim, but did attach a cover letter requesting that employer compensate

claimant for medical care by a physician of his choice. Employer filed a Notice of Controversion on July 30, 1999, asserting that since no medical report was attached to the claim, and since the June 22, 1999, audiogram was not performed by a certified audiologist, there was not a valid claim to which to respond. Formal notice of claimant's claim was sent by the district director to employer on August 3, 1999. Claimant underwent a second audiometric evaluation on September 16, 1999, which showed a 42.8 percent binaural hearing loss. After a copy of this report was sent to employer on October 6, 1999, employer, on October 19, 1999, voluntarily began paying permanent partial disability compensation to claimant. 33 U.S.C. §908(c)(13)(B). Claimant underwent an audiometric evaluation by employer's physician on November 8, 1999, which revealed a 7.8 percent binaural impairment. Based on these results, on November 23, 1999, employer filed an LS-208 form, Notice of Final Payment, stating that it had made full and final payment of benefits to claimant for a work-related 7.8 percent binaural impairment.<sup>1</sup>

Claimant's counsel thereafter filed a fee petition for work performed before the district director, requesting a fee totaling \$825, representing 5.5 hours at an hourly rate of \$150, and \$250.50 in expenses. Employer filed objections to the fee petition. In his Compensation Order, the district director stated that since entitlement to compensation was not established until submission of the November 12, 1999, audiogram, at which time employer made prompt payment, all time charged cannot be the liability of employer; rather, the district director found claimant's counsel's services to be the liability of claimant as a lien on his compensation. 33 U.S.C. §928(c). He stated further that time claimed before August 26, 1999, cannot be assessed against employer, citing *Jones v. Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980). The district director awarded claimant's counsel a fee of \$250 for his work, stating he was taking into consideration the amount of benefits obtained.

On appeal, claimant contends that the district director erred in concluding that all time and expenses incurred by claimant's counsel were the responsibility of claimant. Claimant asserts that employer should be liable for claimant's attorney's fee for services rendered and costs incurred from August 3, 1999, the date upon which employer formally received notice from the district director that a claim had been filed, to October 19, 1999, the date it made its

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<sup>1</sup>Computation for claimant's benefits was made in the following manner: 7.8 percent x 200 weeks = 15.6 weeks of compensation x compensation rate of \$410.02 = \$6,396.31. Employer paid the balance of this amount, \$3,936.19, on November 23, 1999.

first payment of compensation. Claimant further contends that the district director did not specify his reasons for reducing counsel's fee request, and requests that the case be remanded to the district director for clarification. Employer responds, urging affirmance of the district director's fee award. For the reasons set forth below, we affirm the district director's award of an attorney's fee.

Employer may be held liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), only if employer "declines to pay" any compensation on or before the thirtieth day after receiving written notice of a claim for compensation, and claimant is thereafter successful in obtaining benefits. *See Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). If employer pays some benefits voluntarily, and a controversy develops over additional benefits, employer may be held liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the present case arises, has held that employer's liability under Section 28(b) is predicated on employer's refusal to follow the recommendation of the district director following informal proceedings and on claimant's thereafter obtaining greater compensation than employer voluntarily paid. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); *see also Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). If employer pays all benefits due without resort to formal proceedings, it may not be held liable for claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164(CRT); *Boe*, 34 BRBS at 110-111. If employer cannot be held liable for claimant's attorney's fee under either Section 28(a) or (b), claimant may be held liable for an attorney's fee as a lien on his compensation award. 33 U.S.C. §928(c); *see* 20 C.F.R. §702.132(a).

In the instant case, claimant's initial claim of July 12, 1999, stated that claimant had suffered a work-related hearing loss, but did not identify a specific degree of impairment. The audiogram attached to the claim does not appear to indicate that claimant suffered a compensable hearing impairment. Thus, claimant's filing was akin to an anticipatory filing inasmuch as it did not identify a specific degree of hearing impairment. *See, e.g., I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5, *aff'd mem.*, No. 00-1442 (4th Cir. Nov. 17, 2000). Accordingly, at this point there was no claim to which employer could respond by paying benefits; without an impairment rating, employer could neither commence payment nor decline to pay.<sup>2</sup>

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<sup>2</sup>While the claim did request authorization for medical treatment, employer was not

On October 6, 1999, employer received a copy of claimant's September 16, 1999, audiogram, which showed a specific binaural loss of 42.8 percent; it was at this point that employer was first put on notice of a compensable claim for disability benefits. Thereafter, employer made its first payment of compensation on October 19, 1999. Based on its response to the October claim, employer cannot be held liable under Section 28(a) of the Act for the attorney's fee awarded in this case, as employer did not decline to pay compensation within 30 days of receipt of claimant's claim for compensation. *See Perez*, 128 F.3d at 910, 31 BRBS at 163-164(CRT); *Boe*, 34 BRBS at 110-111. Moreover, we hold that employer cannot be held liable for an attorney's fee under Section 28(b) of the Act, as employer paid all benefits due by November 23, 1999, without resort to further proceedings. *Id.* Accordingly, we affirm the district director's determination that employer is not liable for claimant's counsel's attorney's fee.

Lastly, claimant challenges the reductions made in the amount of the fee requested; specifically, claimant contends that the district director erred by not specifying the items he disapproved in reducing the fee requested by claimant's counsel. In view of the limited award of permanent partial disability compensation, the district director awarded counsel a fee of \$250 as a lien upon compensation. As the district director's reduction is reasonable, and the Board has previously affirmed across the board reductions where the fact-finder determined that claimant achieved limited success, the district director's above-mentioned reduction is affirmed. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000).

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presented with a specific request for payment to which it could respond. Thus, employer's failure to pay benefits at that time cannot be construed as a refusal to pay.

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge