

WILLIAM JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MATSON TERMINALS,)	DATE ISSUED: <u>Jan. 30, 2002</u>
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Amended Compensation Order - Approval of Attorney Fee Application of Philip G. Williams, District Director, United States Department of Labor.

Steven M Birnbaum, San Francisco, California, for claimant.

Barbara A. Bodager, San Francisco, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Amended Compensation Order - Approval of Attorney Fee Application (OWCP No. 13-96289) of District Director Philip G. Williams 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 sustained work-related injuries to his back and left hand on December 23, 1996, and employer voluntarily paid temporary total disability benefits until February 4, 1998, at which time claimant returned to his usual employment with employer. In July 1999, claimant's treating physician, Dr. Van Peteghem, recommended that he undergo back surgery

which was originally scheduled for November 17, 1999.¹ Claimant continued to work until November 17, 1999.² A dispute thereafter arose as to whether claimant's inability to work from November 17, 1999, to March 28, 2000, and his need for back surgery, were work-related. After its physician of choice opined that claimant's inability to perform his usual employment was work-related, employer paid claimant temporary total disability benefits for the period between November 17, 1999, and March 28, 2000.

Claimant's counsel then requested an attorney's fee totaling \$2,607 for services rendered on claimant's behalf between May 23, 1997, and April 4, 2000, representing 4.8 hours of work by Attorney Birnbaum at an hourly rate of \$245, .85 hours of work by Attorney Rahman an hourly rate of \$145, 6.55 hours of work by Attorney Besses at an hourly rate of \$175, and 1.9 hours of work performed by a law clerk at an hourly rate of \$85. Employer objected, arguing that it is not liable for a fee as claimant's counsel's efforts did not result in any additional benefits to claimant. In a Compensation Order dated August 28, 2000, the district director disallowed any time charged in furtherance of claimant's state workers' compensation claim and he made across the board reductions in the hourly rates, culminating in an attorney's fee award totaling \$1,987.25.³ Claimant's request for

¹As of March 6, 2000, the surgical procedure in question had not yet been performed. *See* Dr. Raisbeck's letter dated March 6, 2000.

²Claimant disputes employer's characterization of claimant's work status as he alleges that he was told by his foreman to use vacation time for the period between October 8, 1999, through November 16, 1999.

³Specifically, the district director disallowed .45 hours of work performed by Attorney Birnbaum, 1.45 hours of work performed by Attorney Besses, and .95 hours of time for work performed by the law clerk. Additionally, he reduced the hourly rates of these individuals to \$215, \$170, and \$65 respectively. The district director made no reductions in the attorney's fee sought for work performed by Attorney Rahman.

reconsideration was summarily denied by letter dated September 6, 2000. Employer also sought reconsideration on the ground that the instant case falls under the provisions of Section 28(b), 33 U.S.C. §928(b), rather than Section 28(a), 33 U.S.C. §928(a), and that the requirements for employer's liability under Section 28(b) have not been met.

In his Amended Compensation Order, the district director observed that he misapplied Section 28. Although he noted that the requirements for liability under Section 28(b) had not been met, he concluded that Section 28(a) is the applicable provision in this case because employer, while voluntarily paying temporary total disability benefits, declined to pay certain medical expenses, *i.e.*, the cost of claimant's surgery, within 30 days of claimant's request for disability and medical benefits. The district director further determined that an attorney's fee is payable only for the period of the controversy as to the payment of claimant's surgery, *i.e.*, from July 23, 1999, the date that Dr. Van Peteghem recommended surgery and indicated that it was scheduled for November 18, 1999, until March 28, 2000, the date that employer retroactively resumed the payment of compensation. The district director additionally awarded attorney's fees for "wrap-up" work through April 4, 2000. Accordingly, the district director awarded an attorney's fee of \$807.50, representing 4.75 hours at an hourly rate of \$170 per hour covering the period from July 23, 1999, through April 4, 2000, payable by employer. Claimant's request for reconsideration of the amended Compensation Order was denied.

On appeal, claimant argues that the district director erred in limiting the award of an attorney's fee to the period of controversy. Claimant maintains that under the applicable provision, Section 28(a), and pursuant to the Board's decision in *Liggett v. Crescent City Marine Ways & Drydock Co., Inc.*, 31 BRBS 135 (1997) (*en banc*) (Smith and Dolder, JJ., dissenting in pertinent part), the district director was obligated to award the attorney's fee in its entirety. Employer, in response, argues that while the district director incorrectly applied Section 28(a) in awarding the attorney's fees in this case, his ultimate determination limiting the award of fees incurred only during the period of controversy should be affirmed under the applicable provision, Section 28(b). Claimant replies, urging the Board not to consider employer's argument as to the applicability of Section 28(b) as it was improperly raised in its response brief.

Employer may be held liable for an attorney's fee under Section 28(a) only if it declines to pay *any* compensation, and claimant is thereafter successful in obtaining benefits.⁴ 33 U.S.C. §928(a); *see generally* *Hunt v. Director, OWCP*, 999 F.2d 419, 423, 27

⁴Section 28(a), in pertinent part, states:

(a) 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

BRBS 84, 89-90(CRT) (9th Cir. 1993). In the instant case, as employer voluntarily paid temporary total disability benefits subsequent to claimant's injury until a dispute arose over entitlement, its liability in this case is properly limited to services related to the period when benefits were in controversy. *See generally Boe v. Dept. of Navy/MWR*, 34 BRBS 108 (2000). Thus, we reject claimant's contention that *Liggett*, 31 BRBS 139, applies to the instant case to result in his counsel's entitlement to an attorney's fee for the entire amount requested, as *Liggett* involves liability under Section 28(a) for services performed prior to employer's receipt of the claim. Employer cannot be liable under Section 28(a) for services performed while benefits were being voluntarily paid. Moreover, in light of employer's concession as to its liability under Section 28(b) for the period when benefits were in controversy, the district director's award of an attorney's fee in the amount of \$807.50 payable by employer is affirmed.⁵

Accordingly, the district director's award of an attorney's fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

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...

⁵We reject claimant's counsel's request that the Board order the district director to award additional attorney's fees for work associated with his defense of the fee petition. Claimant may apply to the district director for an additional fee for work necessary to secure the fee awarded.

BETTY JEAN HALL
Administrative Appeals Judge