

DOUGLAS PRESTLY)
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 Claimant-Respondent)
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 v.)
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 ELECTRIC BOAT CORPORATION) DATE ISSUED: 01/26/2012
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Compensation Order Awarding of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Awarding of Attorney Fees (OWCP No. 1-171935) of District Director David Groeneveld 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 fee award unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for compensation on November 4, 2010. He asserted that repetitive kneeling, squatting, crawling, walking, and working on hard surfaces caused him injury to both lower extremities; however, he stated he did not lose time from work. By form letter, which appears to be dated November 10, 2010, the district director notified employer of this claim.¹ On December 21, 2010, Dr. Willetts concluded that claimant has a five percent permanent impairment of each knee, with a portion of that

¹Employer's first report of injury, Form LS-202, is dated November 9, 2010, and indicates that employer authorized medical treatment with claimant's choice of physician.

being due to his work activities. Counsel forwarded this report to the district director's office on January 6, 2011. On January 19, 2011, employer filed a notice of payment of compensation without an award, indicating it was paying claimant benefits under the schedule, 33 U.S.C. §908(c)(2), for a five percent impairment to each leg in accordance with Dr. Willetts's report.

On January 28, 2011, claimant's counsel filed a petition for an attorney's fee for work performed before the district director. He requested a fee for services in the amount of \$2,222.50, representing 8.75 hours of attorney time at an hourly rate of \$250 and .5 hours of paralegal time at an hourly rate of \$70, plus \$750 in legal costs. Employer filed objections, challenging only its liability for a fee, arguing it did not decline to pay benefits and, in fact, immediately paid claimant benefits upon receiving Dr. Willetts's medical report, as it did not know how much to pay until it had the doctor's report. In reply, counsel asserted that payment did not occur within 30 days after notice of the claim as required by Section 28(a), 33 U.S.C. §928(a).

The district director considered the fee petition and the objections. He noted that claimant filed his claim on November 9, 2010, and employer filed its notice of payment without award on January 19, 2011. The district director applied Section 28(a) of the Act and found that counsel is entitled to an employer-paid fee. Because he considered several entries to be excessive, the district director reduced the fee request by 1.25 hours and awarded a total fee of \$2,660, representing the remaining hours as well as the costs requested. Employer appeals the fee award. Claimant has not responded.

Employer contends the district director erred in awarding a fee pursuant to Section 28(a), as it did not "decline to pay" "on the ground that there is no liability." Rather, employer asserts that the delay in payment was due entirely to claimant's having presented a claim for an undetermined amount of benefits and having scheduled his doctor's appointment well after the 30 days for employer's response had expired. As it did not file a notice of controversion or decline to pay any benefits, and as it merely waited to determine the amount of benefits sought by claimant, and it paid those promptly upon so learning, employer asserts that it is not liable for a fee under the Act.

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 deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter 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). Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim from the district director. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). An employer's inaction during the 30-day period has been held to constitute a "decline to pay" and its voluntary payment of benefits before the claim has been filed or after the 30-day period expires does not prevent application of Section 28(a). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *see also Virginia International Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005). Therefore, contrary to employer's assertion that it did not "decline to pay" benefits, its inaction during the 30-day period after it received notice of the claim for compensation means it "declined to pay" any benefits under Section 28(a). *Id.*; *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Mangiantine*, 42 BRBS 30.

Moreover, we reject employer's contention that it could not have paid benefits within the 30-day period because claimant had not claimed benefits for any specific impairment. In *Craig, et al.*, the various claimants executed claims for compensation for hearing loss but did not attach interpreted audiograms or state the amount of disability claimed or benefits sought. The employer argued that it could not have paid benefits within the 30-day time-frame as it did not know what amount to pay and, when it so learned, it paid promptly. The Board held that the claimants' attorneys were entitled to attorney's fees paid by the employer, as the employer had not paid benefits within the allotted 30 days after receiving the notices of the claims. The Board agreed with the Director, Office of Workers' Compensation Programs, that nothing in the Act requires a claimant to submit evidence of disability or impairment with the claim for compensation, *see* 33 U.S.C. §913, and that the notice of the claim itself is what triggers the 30-day period under Section 28(a). *Craig*, 36 BRBS at 66-67; *Craig*, 35 BRBS at 169-170. The Board stated that the 30-day period allows an employer sufficient time to have a claimant examined and to determine whether to pay or controvert the claim. *Craig*, 35 BRBS at 170.

The United States Court of Appeals for the Fifth Circuit affirmed the Board's decision in *Craig*. The court agreed that a valid "claim" does not require that evidence be provided when the claim is filed. Thus, it mattered not whether the claimants had attached uninterpreted audiograms or had attached nothing to their claims. Rather, a claim only need be a writing disclosing the intent to assert a right to compensation. The court stated that the employer is free to schedule an evaluation of a claimant and should

have done so immediately upon receiving notice of the claims, thereby giving it time to ascertain the amount of benefits due so as to avoid fee liability. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 852-853, 37 BRBS 116, 118-119(CRT) (5th Cir. 2003). As employer did not pay any compensation within 30 days of notice of the claims, the court affirmed the liability of the employer pursuant to Section 28(a). Similarly, in this case, the fact that employer voluntarily paid benefits upon receiving Dr. Willetts's report in January 2011 does not negate its failure to pay benefits before the expiration of the 30-day period following its receipt of the notice of the claim in November 2010, irrespective of whether claimant provided evidence of impairment with his claim. *Id.* Thus, the district director properly held employer liable for claimant's attorney's fee. *Id.*; *Mangiantine*, 42 BRBS 30. As employer does not challenge the amount of the fee award, we affirm the district director's award of an attorney's fee payable by employer.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge