

DAVID P. RICHEY )  
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 Claimant-Respondent )  
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 v. )  
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 PREMIERE, INCORPORATED ) DATE ISSUED: Jan. 17, 2014  
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 and )  
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 LOUISIANA WORKERS' )  
 COMPENSATION CORPORATION )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Aaron J. Allen (Law Offices of Matt & Allen, LLC), Lafayette, Louisiana, for claimant.

Matthew R. Richards (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2011-LHC-00366) of Administrative Law Judge Patrick M. Rosenow 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim for work-related injuries to his left thumb and left hand after employer terminated its voluntary payments of disability benefits. The district director did not recommend that employer pay any additional benefits because he found the record incomplete. The claim was forwarded to the Office of Administrative Law Judges. Claimant alleged that his work injuries combined with pre-existing injuries to aggravate his pre-existing psychological condition, making him permanently, or at least temporarily, totally disabled. Employer argued that claimant's psychological problems were exclusively related to his pre-existing conditions, that it had compensated claimant for the permanent partial disability to his left thumb, and that it owed him no further benefits. Alternatively, claimant sought compensation for the period between March 27, 2010, when he stopped receiving disability benefits, and December 7, 2011, the date on which employer established the availability of suitable alternate employment.

The administrative law judge found that claimant's thumb condition reached maximum medical improvement on March 10, 2010, and that any psychological exacerbation had resolved to its pre-injury level. He awarded claimant total disability benefits until December 7, 2011, when employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant additional compensation beyond that which employer had paid.

Claimant's counsel subsequently filed with the administrative law judge a petition for \$17,193.35 in attorney's fees and expenses. Employer filed objections arguing only that it is not liable for an attorney's fee because the requirements of neither Section 28(a) nor Section 28(b) of the Act, 33 U.S.C. §928(a), (b), were satisfied. Claimant's counsel replied, asserting that Section 28(a) applies because employer failed to pay any compensation on or before the thirtieth day following its receipt of written notice of the claim. 33 U.S.C. §928(a). Specifically, counsel argued that after employer stopped paying benefits in March 2010, claimant filed a claim for compensation on May 28, 2010, the district director notified employer of that claim in writing on June 28, 2010, and employer did not pay any additional benefits in response to the claim until September 17, 2010, when it tendered claimant \$10,603.95 for a four percent permanent impairment to his left hand.

In his Supplemental Decision and Order, the administrative law judge found that Section 28(a), and not Section 28(b), applies to this case. He concluded that employer's failure to pay any additional compensation within the 30-day period following notice of the claim, and claimant's subsequent successful prosecution of the claim, warranted application of Section 28(a). Supp. Decision and Order at 3-4 (citing *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)). As employer did not challenge the amount of the fee or expenses requested, the administrative law judge awarded counsel

an employer-paid fee in the amount of \$17,193.35, representing 63.7 hours of work at an hourly rate of \$250, plus \$1,268.35 in expenses. Employer appeals the fee award, contending the administrative law judge erred in applying Section 28(a) to hold it liable for claimant's attorney's fee.<sup>1</sup> Claimant responds, urging affirmance.<sup>2</sup>

Employer specifically contends it did not cease paying benefits, and the administrative law judge did not find that it ceased paying benefits, "on the ground that there is no liability for compensation within the provisions of this chapter." Rather, employer ceased paying because it believed it had paid everything to which claimant was entitled for his compensable injury and, following receipt of the claim, it paid claimant additional compensation. Accordingly, employer asserts that the provisions of Section 28(a) have not been met, and counsel is not entitled to an employer-paid fee. We reject employer's assertion.

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 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. . . .

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<sup>1</sup> We affirm as unchallenged the administrative law judge's finding that Section 28(b) is not applicable in this case. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see also Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

<sup>2</sup> Claimant also moves to dismiss employer's appeal due to its failure to file a "Petition for Review" with its "Brief in Support of Petition for Review," pursuant to Section 802.211(d) of the Board's regulations, 20 C.F.R. §802.211(d). We deny the motion to dismiss, as it was not filed in a separate document, 20 C.F.R. §802.219(b), and as Section 802.211(b) states that deeming an appeal abandoned for lack of a petition for review is at the Board's discretion. Although employer did not file a specific document entitled "Petition for Review," its brief adequately identifies the administrative law judge's alleged errors, and sets forth employer's contentions in terms of relevant case precedent.

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.*, 274 F.3d 173, 35 BRBS 109(CRT); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Precedent establishes that the phrase “declines to pay” means either an employer’s inaction or silence within the 30-day period, *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), or its overt controversion of the claim within the 30-day period, *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002). An employer’s voluntary payment of benefits before the claim was filed or after the 30-day period expired does not prevent application of Section 28(a) if, during the 30-day period, the employer took no action. *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT); *see also Virginia Int’l 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 “on the ground that there is no liability for compensation within the provisions of this chapter,” its inaction during the 30-day period after it received notice of the claim for compensation means, pursuant to case precedent, that 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. Therefore, as claimant successfully prosecuted his claim, we affirm the administrative law judge’s award of an employer-paid attorney’s fee pursuant to Section 28(a) as it is in accordance with law.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge