

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0295

DARYL RICHARD)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 01/23/2019
McDERMOTT, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Douglas P. Matthews (King & Jurgens, L.L.C.), New Orleans, Louisiana, for self-insured employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 07-308294) of District Director David A. Duhon 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 fee award of the district director must be affirmed unless it is shown to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for hearing loss benefits on May 6, 2016. Employer did not receive formal notice of the claim from the district director at the correct address until January 12, 2017. It is undisputed that, within 30 days of its receipt of formal notice of the claim, employer paid claimant \$554.97, which represented one-half week of compensation based on claimant's average weekly wage¹; employer also controverted the claim in this period. Thereafter, employer filed a claim for Section 8(f) relief. 33 U.S.C. §908(f). Ultimately, claimant and employer stipulated that claimant has a 37.2 percent binaural impairment and the OWCP approved Section 8(f) relief. The parties also stipulated that "since employer is in compliance with Section 928(a) and since there has been no Informal Conference scheduled in this matter, the employer is not responsible for claimant's attorney's fees under the circumstances." Stip. 10.

The district director issued a Compensation Order on March 12, 2018, awarding claimant benefits pursuant to the parties' stipulations: employer was held liable for a 17.5 percent impairment and the Special Fund was held liable for a 19.7 percent impairment, pursuant to Section 8(f). The compensation order further recited the parties' stipulation that employer had complied with Section 28(a) of the Act, 33 U.S.C. §928(a). Therefore, the district director stated that claimant is responsible, under Section 28(c) of the Act, 33 U.S.C. §928(c), for his counsel's attorney's fee and costs.

Claimant's counsel had filed a petition for an attorney's fee of \$4,812.50, representing 27.5 hours of attorney time at \$175 per hour, while the case was pending before the district director. Employer objected on the ground that it is not liable for claimant's counsel's fee. Alternatively, employer objected to the fee petition on substantive grounds.

The day after he issued the compensation order awarding benefits, the district director issued a fee award to claimant's counsel of \$2,275, payable by employer. The

¹ The parties later stipulated to the average weekly wage on which this payment was based.

district director found that employer's payment of a half-week's compensation within 30 days after its receipt of the claim was a "sham" payment to avoid liability under Section 28(a).

Employer appeals the fee award, contending it cannot be held liable for claimant's counsel's fee pursuant to Section 28(a), as it paid some compensation within 30 days of receiving notice of the claim. The Director, Office of Workers' Compensation Programs (the Director), responds that the case should be remanded for the district director to provide a more detailed explanation for his determination that employer is liable for claimant's counsel's fee under Section 28(a). Employer filed a reply brief.²

Section 28(a) of the Act provides:

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. . . .

33 U.S.C. §928(a) (emphasis added). A prerequisite for an employer's liability under Section 28(a) is that it refused to pay "any compensation" within 30 days of its receipt of the notice of the claim from the district director. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *see also Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In *Green v. Ceres Marine Terminals*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011), the Board affirmed the administrative law judge's finding that the employer's payment of one dollar within the 30-day period does not preclude the applicability of Section 28(a), as the administrative law judge permissibly found that the payment was merely an attempt to avoid fee liability, rather than the payment of compensation for the claimant's injury. Consequently, as the employer did not pay the claimant "any compensation" within the meaning of Section 28(a) of the Act, and, in fact, controverted the claim prior to receiving notice of the claim, the Board

² Claimant did not respond to employer's appeal.

concluded that the administrative law judge properly held the employer liable for claimant's attorney's fee. *Green*, 43 BRBS at 177.³

Subsequently, in a case in which an employer paid benefits for a .5 percent binaural impairment within the 30-day period, equating to one week of compensation at the maximum compensation rate, the United States Court of Appeals for the Fourth Circuit affirmed the finding that the employer was not liable for the claimant's attorney's fee under Section 28(a). *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir.), *cert. denied*, 135 S.Ct. 356 (2014). The court distinguished *Green* because the employer's payment therein "was clearly untethered to the underlying claim and therefore was not 'compensation' at all." *Id.*, 744 F.3d at 916, 48 BRBS at 20(CRT). In contrast, the payment of one week's benefits at the maximum compensation rate was "directly tied" to the claim and thus was "compensation" within the meaning of Section 28(a). *Id.* The court also rejected the contention that the employer's controversion of the claim prior to making its payment was not significant, as Section 28(a) does not reference notices of controversion or Section 14(d), 33 U.S.C. §914(d). *Id.*, 744 F.3d at 917, 48 BRBS at 20(CRT).

In his fee award in this case, the district director supported his conclusion that employer's payment was a "sham" intended to avoid fee liability with employer's LS-207 form, Notice of Controversion, and LS-208 form, Notice of Final Payment or Suspension of Compensation Payments, filed on January 31, 2017, and January 25, 2017, respectively, after employer paid claimant on January 23, 2017. Order at 2; Emp. Pet. for Rev. at exs 2, 3. The district director also stated that employer made no further payments to claimant even though it sought and obtained Section 8(f) relief. *Id.*

We agree with the Director that the district director's Order does not provide a sufficient basis for the Board's review, and therefore we remand the case. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990) (Lawrence, J., concurring in part and dissenting in part). The district director must address his rejection of the parties' stipulation that employer is not liable for claimant's attorney's fee one day after he accepted it and the other stipulations in the compensation order awarding benefits. If he again intends to reject the stipulation, the district director must provide the parties an

³ The Board's decision on the merits was overturned on appeal to the United States Court of Appeals for the Fourth Circuit, and thus no fee was payable. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

opportunity to address the issue of fee liability.⁴ *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

Moreover, the district director must provide a more detailed explanation for his conclusion. He must discuss the standard and explain the relevance of employer's filing LS-207 and LS-208 forms and seeking and obtaining Section 8(f) relief to his finding that employer's payment of a half-week's compensation based on claimant's average weekly wage was a sham payment to avoid fee liability under Section 28(a). If the district director determines that employer is not liable for claimant's attorney's fee, he must take into account claimant's financial circumstances if claimant is to be held liable for the fee. 20 C.F.R. §702.132(a).

Accordingly, the district director's Compensation Order Award of Attorney's Fees is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ A stipulation that evinces an incorrect application of law may be rejected, with notice to the parties. *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982).