

JOHN SHINE)
)
 Claimant-Petitioner)
)
 v.)
)
 M.K. MERGENTINE)
)
 and)
)
 AETNA LIFE & CASUALTY) DATE ISSUED:
)
 Employer/Carrier-)
 Respondents)
)
 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 and Order Denying Reconsideration of Richard V. Robilotti, District Director, United States Department of Labor.

Rosetta Dwyer, White Plains, New York, for the claimant.

Joseph F. Manes, Tarrytown, New York, for the employer/carrier.

Samuel J. Oshinsky (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Compensation Order and Order Denying Reconsideration (2-92633) of District Director Richard V. Robilotti in which claimant's counsel was awarded an attorney's fee payable by claimant. 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 law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back and hips while working for employer on September 17, 1986. Claimant subsequently filed a claim under the Act in which he sought permanent total disability compensation for occupationally induced osteoarthritis of both hips. Employer controverted the claim, asserting that claimant's condition was not an occupational disease and that it was not work-related. At an informal conference held on March 15, 1988, the parties agreed that claimant would undergo an impartial examination with regard to the issue of causal relationship. Based on the opinion of the impartial examiner, Dr. Henry Magliato, that while claimant's work injury may have aggravated the osteoarthritis in his hips and spine, no direct causal relationship existed between the development of that condition and the subject work injury, employer renewed its refusal to pay claimant compensation.

The case was ultimately referred to the Office of Administrative Law Judges for a formal hearing. Prior to the hearing, however, employer agreed to accept liability for the claim. The parties thus stipulated that as claimant suffered a traumatic injury on September 16, 1986, which aggravated an underlying osteoarthritic condition, resulting in permanent total disability, he was entitled \$64,502.54 in back compensation and a continuing award of \$614 per week subject to future cost-of-living adjustments under Section 10(f), 33 U.S.C. §910(f), as well as payment of medical expenses. Based on the parties' agreement, the administrative law judge determined that there was no need for further action before the Office of Administrative Law Judges and accordingly remanded the case to the district director¹ for implementation of the proposed agreement, or such other appropriate disposition as may be warranted.

Via cover letter dated September 14, 1988, claimant's counsel forwarded two signed copies of the parties' stipulations to the district director. At the same time, claimant's counsel filed a fee petition, in which he requested \$11,162.50, representing 61.50 hours of services at \$175 per hour plus \$400 in expenses. On October 5, 1988, the district director issued a Compensation Order in which he incorporated the parties' stipulations and awarded benefits. He also awarded claimant counsel a fee of \$4500, payable by claimant as a lien upon his compensation award. *See* 33 U.S.C. §928(c). Claimant's motion for reconsideration regarding the fee award was denied by Order dated October 28, 1988.

Claimant appeals, arguing that the district director erred in failing to hold employer liable for his attorney's fee. Claimant asserts that the total fee requested should have been approved as part of

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105 the term "district director" has replaced the term "deputy commissioner" used in the statute.

the parties' negotiated agreement because the fee petition was appended to the stipulations and employer did not object to the fee request. Claimant further asserts that the fee approved by the district director was based on an hourly rate of \$66.67, and suggests that the prevailing hourly rate in the area where the services were rendered is \$175. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), because his counsel was ultimately successful in prosecuting this contested claim. Employer also responds, urging that the district director's fee liability determination be affirmed.

We agree with the claimant and the Director that the district director erred in holding claimant liable for his attorney's fee; employer is liable pursuant to Section 28(a) of the Act. Employer maintains that it is not liable for the fee because it reasonably controverted claimant's unusual claim for occupationally-induced osteoarthritis, the parties had agreed to submit the causal relationship question to an impartial examiner who concluded that no such relationship existed, and claimant ultimately prevailed under a completely different traumatic injury/aggravation theory which it did not oppose. Employer's argument must be rejected as it is contrary to the Act.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days of receiving formal written notice of the claim from the district director and claimant's counsel's services result in the successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. In the present case, employer challenged the occupational nature of the injury and causation in general up until some time after the case was referred to the Office of Administrative Law Judges, when it ultimately agreed that claimant was entitled to permanent total disability compensation and medical benefits for his work-related osteoarthritic condition. As employer thus paid no benefits voluntarily and claimant is entitled to permanent total disability benefits, claimant's counsel successfully prosecuted the claim. Based upon these undisputed facts, claimant is entitled to an attorney's fee in this case payable by employer pursuant to Section 28(a). *See generally Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd* 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989).

Although we agree with claimant and the Director that employer is liable for claimant's attorney's fee pursuant to Section 28(a), we find no merit in claimant's assertion that the district director was required to award the full fee requested pursuant to Section 702.241(e) of the regulations, 20 C.F.R. §702.241(e), on the basis that the fee petition was appended to the parties' stipulations and employer did not object to the amount of the fee. Initially, Section 702.241(e) provides that a fee for representation which is presented as part of a Section 8(i), 33 U.S.C. §908(i), settlement shall be automatically approved as part of the settlement unless specifically disapproved within 30 days. This section is not applicable in the present case as the parties did not enter into a Section 8(i) settlement.

In addition, an attorney's fee must be awarded in accordance with Section 28 of the Act and the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee must be reasonably commensurate with the necessary work done, the complexity of the legal issues involved,

and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Contrary to claimant's assertions, the fact that employer did not object to the fee request did not preclude the district director from reducing the requested fee. Nonetheless, although the district director may award a lesser fee than that requested if an adequate explanation for the reduction is provided in this case, the district director did not explain the reduction. His failure to indicate whether the hourly rate or number of hours sought were reduced and why in the present case renders his fee award arbitrary. *See Devine v. Atlantic Container, Inc.*, 23 BRBS 280, 288 (1990)(Lawrence, J., concurring and dissenting on other grounds). We accordingly vacate the fee award and remand the case for the district director to specify and fully explain any reduction in the hourly rate or hours consistent with Section 702.132. *See Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983).

In reconsidering the fee award on remand, the district director should note that pursuant to Section 28(a), employer may only be held liable for those fees incurred after 30 days from the time that employer received formal notice of the claim, or within the 30 day period if employer declines to pay, whichever occurs first. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 177 (1993). Moreover, as claimant may be held liable for those fees incurred prior to this date as a lien upon his compensation,² and the fee petition submitted by claimant fails, in large part, to delineate when the services claimed were performed, the fee petition should be amended on remand to correct this deficiency and to otherwise comply with the regulatory criteria. 20 C.F.R. §702.132.

²Under such circumstances where the fee awarded is a lien on claimant's compensation, the regulations require consideration of claimant's financial circumstances. 20 C.F.R. §702.132(a)

Accordingly, the Compensation Order and Order Denying Reconsideration of the district director are modified to reflect that employer is liable for claimant's attorney's fee. The fee award itself is vacated, and the case is remanded for further consideration of the amount of the fee consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge