

ROBERT COLANTTI)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SEALAND SERVICES,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order-Award of Compensation of Richard V. Robilotti, District Director, United States Department of Labor.

Milton Garber (Baker, Garber, Duffy & Pederson), Hoboken, New Jersey, for the claimant.

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

PER CURIAM:

Claimant appeals the Compensation Order-Award of Compensation (2-95771) 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, who was exposed to loud noise while working as an electrician in employer's shipyard, sought compensation under the Act for occupational hearing loss. The parties ultimately stipulated that claimant was entitled to \$34,549.76 in disability compensation for a 28 percent binaural hearing loss based upon a compensation rate of \$616.96. The parties also agreed that "claimant's attorney will request a fee of \$7,500 to

*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).

which the claimant consents." Pursuant to a cover letter dated December 12, 1988, claimant's counsel forwarded a signed copy of the parties' stipulations to the district director¹ along with a fee petition in which he requested \$7500, representing 32 hours of services at \$250 per hour.² On December 21, 1988, the district director issued a Compensation Order in which he incorporated the parties' agreement as to the disability compensation owed and awarded claimant's counsel a fee of \$4000, payable by claimant as a lien on his compensation. *See* 33 U.S.C. §928(c).

Claimant appeals, contending that the district director erred in determining that he was liable for his own attorney's fee. Claimant asserts that inasmuch as this was a contested claim and claimant ultimately prevailed in establishing that he was entitled to disability compensation, employer is liable for his attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a).³ Employer has not filed a response brief in this case.

Inasmuch as claimant did not explicitly stipulate to liability for his attorney's fee, we agree with claimant that the district director erred in holding him liable for his attorney's fee without explanation.⁴ While a claimant may be held liable for attorney's fees under Section 28(c) if the employer is found not to be liable for an attorney's fee under Section 28(a) or (b), the district director failed to make any initial findings as to whether liability should be imposed upon employer. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days of receiving formal 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.⁵ Pursuant to Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by

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.

²Claimant's counsel miscalculated the sum listed on his fee petition. The total number of hours requested, based on the itemized services listed in the petition, amounts to 31 and one half. At an hourly rate of \$250, this amounts to a requested fee of \$7875.

³Counsel does not contest the amount of the attorney's fee awarded by the district director.

⁴In any event, a stipulation cannot be accepted where it evinces an incorrect application of the law. *McDevitt v. George Hyman Construction Co.*, 14 BRBS 677 (1982).

⁵Claimant, however, may be held liable for those fees incurred prior to the time that employer's liability commences under Section 28(a) of the Act, 33 U.S.C. §928(a), as a lien upon his compensation liability. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993). Where a claimant is deemed to be liable for an attorney's fee, the fee awarded must take into account the financial circumstances of the claimant. *See* 20 C.F.R. §702.132(a).

employer. *See* 33 U.S.C. §928(b); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).⁶ Because the district director imposed fee liability upon claimant without first considering whether employer should be liable pursuant to Section 28(a) or Section 28(b), we vacate his finding that claimant is liable for \$4,000 in attorney's fees as a lien upon his compensation award and remand the case for the district director to reconsider the question of fee liability consistent with this opinion.

Accordingly, the district director's award of attorney's fees against claimant contained in his Compensation Order-Award of Compensation is vacated and the case remanded for further findings consistent with this opinion. The Compensation Order-Award of Compensation is, in all other respects, affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

⁶In the instant case, although claimant has attached correspondence to his petition for review which suggests that employer may have initially refused to accept liability for the claim and that a valid tender of compensation may not have been made, we can not consider this evidence as it was not a part of the administrative file before the district director. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985).