

THOMAS J. RING	)	
	)	
Claimant Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION	)	DATE ISSUED:
OF VIRGINIA	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Payment of Attorney Fees of B.E. Voultides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

BEFORE: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Order Denying Payment of Attorney Fees (Case No. 5-75713) of District Director B. E. Voultides 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 amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On May 26, 1990, claimant injured his right leg and foot during the course of his employment as a longshoreman with employer; subsequently, claimant underwent amputation of his right leg due to complications from his pre-existing diabetic condition. Employer voluntarily commenced payments of temporary total disability compensation to claimant as of May 27, 1990, and thereafter converted those payments to permanent total disability compensation as of June 5, 1990. On July 18, 1990, employer filed a Notice of

\*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).

Controversion, Form LS-207, stating only that claimant's container royalty, holiday and vacation pay were not included in its computation of claimant's average weekly wage. On April 27, 1991, claimant obtained counsel and filed a claim for benefits under the Act. Both before and during the informal conference held on May 22, 1991, employer acknowledged claimant's entitlement to permanent total disability compensation. In August 1991, employer increased its compensation payments to claimant to reflect an adjustment in its average weekly wage computation. In his Compensation Order, filed January 21, 1992, the district director found that claimant was entitled to permanent total disability compensation, that he had reached maximum medical improvement on December 17, 1990, that claimant's average weekly wage at the time of injury was \$676.07, and that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

Thereafter, claimant's counsel submitted a fee petition to the district director requesting an attorney's fee of \$2,676.75, representing 17 hours of services at \$155 per hour and costs of \$68. Employer filed objections to this fee petition arguing, *inter alia*, that it was not liable for claimant's counsel's fee. In a letter dated March 18, 1992, the district director requested that claimant's attorney advise him under which subsection of Section 28 of the Act, 33 U.S.C. §928, he was a due a fee. On May 22, 1992, claimant's counsel responded, requesting that the district director make a disposition of his fee request and noting that he expected to appeal the matter. In his Order Denying Payment of Attorney's Fee, the district director found that neither Section 28(a) nor Section 28(b) applies in this case and, therefore, employer was not responsible for claimant's attorney's fee. Accordingly, the district director denied claimant's counsel request for an attorney's fee payable by employer.

On appeal, claimant's counsel challenges the district director's denial of his request for an attorney's fee payable by employer. Specifically, claimant's counsel contends that employer is liable for his fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), since employer filed a Notice of Controversion, and, as a result of counsel's assistance, claimant obtained a higher average weekly wage and therefore greater compensation. In response, employer urges affirmance, averring that it unilaterally adjusted claimant's average weekly wage following the informal conference and that, therefore, claimant's counsel did not "assist" claimant in obtaining greater compensation.

Employer may be held liable for a claimant's counsel's fee only under the provisions of Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §928(a), (b).<sup>1</sup> Section 28(b) states, in pertinent part:

If the employer or carrier pays or tenders payment of compensation without an award

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<sup>1</sup>Pursuant to Section 28(a) of the Act, if employer declines to pay compensation within 30 days after receipt of written notice of the claim from the district director, it is liable for a reasonable attorney's fee incurred thereafter by claimant in pursuit of his claim. *See Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990). In the instant case, it is uncontested that employer voluntarily paid claimant compensation from May 27, 1990, through the date of the informal hearing; thus, Section 28(a) is inapplicable in this case.

pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the district director or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid by the employer or carrier, shall be awarded in addition to the amount of compensation... .

33 U.S.C. §928(b). Thus, Section 28(b) authorizes the assessment of attorney's fee against employer if a dispute arises over additional compensation and, following an informal conference, employer declines to pay the disputed amount. Under such circumstances, employer must pay claimant's attorney's fee if claimant is successful in obtaining a greater award than that paid or tendered by employer.<sup>2</sup> See *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991); see generally *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

In the instant case, the district director, in addressing counsel's fee request, initially noted that employer agreed that claimant was entitled to compensation for permanent total disability, and that employer had paid and was continuing to pay claimant compensation for total disability. Next, the district director stated that although employer had controverted the issue of claimant's average weekly wage, its position was "in accordance with the Department of Labor and had not been an issue in this case."<sup>3</sup> See *Order Denying Payment of Attorney's Fee* at 2. Thereafter, the district director summarily concluded that neither Section 28(a) nor Section 28(b) was applicable in the

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<sup>2</sup>The legislative history regarding Section 28(b) of the Act states, in part, that:

A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, despite the written recommendation of the deputy commissioner. The provision directs an award of a reasonable attorney's fee . . . where the employer or carrier has refused to accept the recommendation . . . .

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4717.

<sup>3</sup>Employer concedes on appeal that this statement is inaccurate and that, in fact, the Department had advised it that it did not agree with employer's method of calculating claimant's average weekly wage. See *Employer's brief* at 2.

instant case and that, thus, employer could not be held liable for claimant's counsel's attorney's fee. Based upon the summary nature of the district director's fee order, we are unable to ascertain whether counsel's contention that through his assistance claimant received greater compensation based upon a higher average weekly wage has merit.

In this regard, we note that the record in this case contains conflicting correspondence. Specifically, on April 24, 1991, claimant's counsel requested an informal conference on the issue of permanent total disability, and sought to obtain from employer medical records, reports, bills, employer's first report of accident, and the information upon which employer had calculated claimant's average weekly wage, as well as amounts of compensation and medical benefits paid by employer to date. *See* Letter dated April 24, 1991. In a letter dated May 13, 1991, employer informed claimant that it had no intention of contesting his entitlement to permanent total disability benefits; rather, employer stated that it would seek relief pursuant to Section 8(f) of the Act. Following the informal conference, the claims examiner, in a Memorandum of Informal Conference dated May 30, 1991, stated that the parties had agreed on the issue of permanent total disability, that relief pursuant to Section 8(f) was the only issue remaining, and that as claimant appeared unprepared to discuss the issue of average weekly wage, although it was recommended that claimant's temporary total disability benefits be converted to permanent total disability benefits, "the issue of average weekly wage will be addressed at such time as the claimant provides evidence to substantiate their claim." Memorandum at 2. Thereafter, claimant, without mentioning any disputed matter and based upon the average weekly wage that employer had originally proposed, made a proposal for a lump-sum settlement; employer elected not to settle. *See* Letter dated June 3, 1991. Subsequently, employer accepted the claims examiner's recommendation regarding payment for permanent total disability and, although the claims examiner's memorandum did not offer a recommendation regarding claimant's average weekly wage, employer amended its calculation and began to pay claimant at a higher weekly rate.

Based upon the district director's failure to make specific findings regarding these correspondences, we are unable to exercise our standard of review in order to determine whether a controversy in fact existed at the informal conference regarding claimant's average weekly wage, whether claimant thereafter received greater compensation through the assistance of his counsel or, as employer asserts, whether employer voluntarily and unilaterally adjusted claimant's average weekly wage following the informal conference. Resolution of these issues requires further findings, which the Board is not empowered to make. *See generally Roach*, 16 BRBS at 114. We therefore vacate the district director's order denying claimant's counsel a fee payable by employer, and we remand the case for the district director to consider the applicability of Section 28(b) to this case; specifically, the district director must address claimant's counsel's assertions regarding the existence of a controversy and his assistance in gaining greater compensation for claimant, and employer's response to those assertions.

Accordingly, the district director's Order Denying Payment of Attorney Fees is vacated and the case is remanded for reconsideration of the fee petition in accordance with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge