

ROBERT THEURER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Edward B. Bounds, District Director, United States Department of Labor.

Yvette A. Boehnke (Samuelson, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (No. 18-21129) of District Director Edward B. Bounds 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 21, 1985, claimant filed his claim. Emp. Ex. 1.¹ At that time, Mr. Easley entered an

¹All exhibits are found in employer's brief.

appearance as claimant's counsel. Emp. Ex. 2. Almost a year later, Mr. Nizich entered an appearance as claimant's counsel. Emp. Ex. 7. Mr. Easley filed his attorney's fee petition for \$1562.50 soon thereafter on April 28, 1986. Emp. Ex. 6. In January 1989, the parties stipulated to a payment of \$2875 in an attorney's fee for Mr. Nizich and to claimant's entitlement to disability and medical benefits. Emp. Ex. 3. The district director approved the parties' stipulations. Emp. Ex. 4. Over a year after the parties' stipulations were approved by the district director, Mr. Easley requested an informal conference to discuss his entitlement to an attorney's fee. Emp. Ex. 6. After exchanging letters with the parties and arranging an informal conference at which no one appeared, the district director awarded an attorney's fee to Mr. Easley in the amount of \$1050.² Emp. Exs. 7-9. The award provided that claimant, employer, and Mr. Nizich would each pay Mr. Easley \$350. Emp. Ex. 9.

Employer challenges the district director's award of an attorney's fee for Mr. Easley assessed against employer. Employer's challenge has merit. An attorney's fee can only be levied against an employer if the conditions of Section 28(a), 33 U.S.C. §928(a), or Section 28(b), 33 U.S.C. §928(b), are met. *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *see also* 20 C.F.R. §702.134. If employer is not liable for an attorney's fee under Section 28(a) or (b), the attorney's fee may be made a lien on claimant's compensation pursuant to Section 28(c), 33 U.S.C. §928(c). *Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), *rev'g Loiselle v. Portland Stevedoring Co.*, 2 BRBS 214 (1975). Claimant may also be liable for fees incurred prior to employer's receipt of formal notice of the claim and refusal to pay. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

In his Compensation Order, the district director found that the case was settled improperly without considering the attorney's fee of Mr. Easley. After reasoning that all parties were responsible for settling all of the issues in this case, the district director found that the attorney's fee of Mr. Easley was to be paid equally among the three parties. After reducing Mr. Easley's fee request of \$1562.50 to \$1050, the district director ordered employer, claimant, and Mr. Nizich to each pay Mr. Easley \$350. The district director did not provide a rationale pursuant to Section 28, 33 U.S.C. §928, as to why each was responsible for Mr. Easley's attorney's fee, stating only that they settled claimant's claim and Mr. Nizich's entitlement to an attorney's fee without providing for Mr. Easley's fee. We, therefore, vacate the district director's award of an attorney's fee for Mr. Easley, and remand this case to the district director for further consideration. On remand, the district director must initially determine whether employer is liable for any attorney's fee pursuant to Section 28(a) or (b), and if so, to determine when employer's liability accrued. If employer is not liable for the fee pursuant to Section 28(a) or (b), the district director may assess the attorney's fees against claimant as a lien on claimant's compensation pursuant to Section 28(c), taking into consideration his ability to pay. 20 C.F.R. §702.132(a).

Accordingly, the district director's Compensation Order Award of Attorney Fees is vacated, and this case is remanded to the district director for further consideration consistent with this

²The district director reduced Mr. Easley's fee request from \$1562.50 to \$1050 after reducing it by the same percentage as Mr. Nizich's fee request had been reduced in the parties' stipulations. Emp. Ex. 9.

opinion.

SO ORDERED.

BETTY JEAN HALL,

Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge