BRB No. 99-1134

CASEY BOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/MWR	)	DATE ISSUED: JUL 3, 2000
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

Gerald S. Besses (Law Office of Steven M. Birnbaum), San Francisco, California, for claimant.

Rita R. Carroll, Dallas, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 13-094516) of District Director Joyce L. Terry 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, working part-time as a bus boy for employer at the Mare Island Naval Shipyard on April 30, 1995, slipped while carrying a glass and cut the pinky finger on his right hand. Employer voluntarily paid temporary total disability benefits and medical costs, including those associated with two surgeries. Claimant subsequently sought a determination regarding the permanency of his condition from several physicians. Claimant died as a result of an automobile accident in June or July 1998. On September 12, 1998, employer issued a check to claimant's estate for a 40 percent impairment of the right hand, even though no physician had stated a permanent impairment rating.[1]

Claimant's counsel thereafter requested an attorney's fee totaling $3,217.30, representing 7.6 hours at an hourly rate of $205, 4.55 hours at an hourly rate of $140, and costs of $512.30. Employer objected to its liability for an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. The district director found that claimant's counsel prevailed in obtaining benefits for claimant in this case, and that his hourly rate is consistent with the usual and customary rate in the community. Accordingly, she awarded the requested attorney's fee in its entirety to be assessed against employer.

On appeal, employer challenges the district director's award of an attorney's fee, contending it cannot be held liable for the fee under either Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Claimant responds, urging affirmance.

[1]In its letter acknowledging payment of permanent partial disability compensation, employer stated that it paid compensation for a 40 percent permanent impairment of the right hand, quadrupling the worst case scenario which would be a 100 percent loss of the fourth finger, converted to a 10 percent impairment of the hand. Emp. brief at exhibit U.

In the instant case, employer voluntarily paid benefits commencing on the day after the injury, May 1, 1995, until April 3, 1996. Employer filed a notice of controversion on April 19, 1996, based on Dr. Cabayan's report, dated April 13, 1996, wherein he opined that claimant could return to work. Claimant's second surgery, however, prompted employer to pay an additional period of temporary total disability benefits between June 14, 1996, and September 26, 1996. On January 9, 1997, claimant informed employer that he would seek to get Dr. Jackson, the treating physician, to provide a permanent impairment rating, and that if she would not, he would find another doctor who would. In response, employer filed a notice of controversion, dated February 4, 1997, wherein it controverted medical treatment by anyone other than Dr. Jackson. On April 17, 1997, Dr. Jackson opined that claimant's condition was permanent and stationary; however, she provided no permanent impairment rating. On May 1, 1997, employer controverted all future physical therapy since Dr. Jackson stated that it was no longer necessary. In letters to Dr. Jackson dated May 2, 1997, and July 11, 1997, employer requested a permanent impairment rating of the fourth finger of claimant's right hand pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*, but none was forthcoming. Employer, on July 10, 1997, controverted claimant's request to change physicians to Dr. Gordon.[2] In addition, on November 19, 1997, employer requested a second opinion from Dr. Stark, including an assignment of a permanent impairment rating. Dr. Stark did not provide the requested impairment rating, although he did note that claimant lost about 40 percent of the gripping capacity of his right hand. Following this, employer again requested that Dr. Stark provide a permanent impairment rating, and Dr. Stark responded without providing this information.

In September 1998, claimant's counsel notified employer of claimant's death, and requested temporary total disability benefits for an additional five days, as well as an increased average weekly wage for the benefits already paid. On September 12, 1998, employer notified the Department of Labor that it paid permanent partial disability benefits to claimant's estate for a 40 percent loss of use of the right hand despite the lack of a permanent impairment rating. Claimant's counsel thereafter filed his attorney's fee petition.

In holding employer liable for claimant's attorney's fee, the district director found that employer filed four notices of controversion She also stated that while employer voluntarily paid permanent partial disability benefits to claimant's estate, it previously had controverted claimant's right to obtain a permanent impairment rating even after his treating physician failed to supply a rating. The district director did not specify whether employer is liable for the fee under Section 28(a) or Section 28(b) of the Act.

[2]The record contains a medical report from Dr. Gordon dated August 22, 1997, but no permanent impairment rating is indicated.

Employer's liability for an attorney's fee is governed by Section 28(a) and (b) of the Act, which states:

> (a)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 [district director], 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 against the employer or carrier . . .
>
> (b)If the employer or carrier pays or tenders payment of compensation without an award 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] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] 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 shall be awarded in addition to the amount of compensation . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(a), (b). Initially, we hold that employer cannot be held liable under Section 28(a) for the attorney's fee awarded in this case, as employer did not decline to pay compensation within 30 days of receipt of claimant's claim for compensation.[3] *See FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

[3]Claimant's claim for compensation is dated July 19, 1995. At this time, employer was voluntarily paying claimant temporary total disability benefits, and continued to do so until April 3, 1996, when claimant was released to return to work.

We hold, moreover, that employer cannot be held liable for an attorney's fee under Section 28(b) on the facts of this case as it paid benefits voluntarily without resort to informal or formal proceedings. In *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, explained that the purpose of Section 28(b) is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in proceedings in which he or she is represented by counsel. In that case, the parties were unable to agree on the claimant's average weekly wage or the extent of his disability following an informal hearing and the district director, without making any written recommendation, referred the case to the Office of Administrative Law Judges for a formal hearing. The administrative law judge ultimately awarded additional benefits in that case and ordered employer to pay an attorney's fee pursuant to Section 28(b). The Ninth Circuit affirmed the administrative law judge's award of an attorney's fee since claimant, via formal proceedings, succeeded in obtaining additional compensation. *Id.*, 606 F.2d at 882-883, 11 BRBS at 73. *See also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT)(9th Cir. 1998) (employer is liable for an attorney's fee under Section 28(b) as claimant prevailed on issues that remained in dispute following the informal conference); *Barker v. United States Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT)(1st Cir. 1998)(First Circuit stated that an attorney's fee may be awarded under Section 28(b) only if the compensation awarded after the claimant obtains the services of counsel is greater than the amount paid or tendered by the employer). The Ninth Circuit, however, rejected the contention that a written recommendation by a district director is a precondition to an award under Section 28(b). *National Steel*, 606 F.2d at 882, 11 BRBS at 73; *see also Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986).

In contrast, in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991), the Ninth Circuit held that the employer was not liable for claimant's attorney's fee under Section 28(b) as there was no dispute after the informal conference concerning the amount of compensation to be awarded. Specifically, in *Watts*, at the informal conference, the employer agreed to pay claimant permanent total disability benefits. The only issue in controversy thereafter was the claimant's entitlement to an attorney's fee, and the court held that Section 28(b) does not authorize employer's liability for an attorney's fee under such circumstances. *Id.*, 950 F.2d at 611, 25 BRBS at 70(CRT). Similarly, in *Perez*, 128 F.3d at 910, 31 BRBS at 164(CRT), the Fifth Circuit held that an attorney's fee award under Section 28(b) was inappropriate, as the parties settled their dispute as to the amount of compensation owed prior to imposition of the Department of Labor's informal conference mechanism.

In the instant case, employer voluntarily paid temporary total and permanent partial

disability benefits prior to the convening of an informal conference. *Id.* Moreover, although employer filed notices of controversion, claimant did not pursue or obtain additional benefits thereafter. In addition, contrary to the district director's finding, employer did not controvert claimant's entitlement to permanent partial disability benefits, and in fact sought to obtain a permanent impairment rating itself from claimant's treating physician, Dr. Jackson, as well as from Dr. Stark. After unsuccessful attempts by both parties to obtain an impairment rating, employer voluntarily paid permanent partial disability benefits.[4] The delay in the payment of permanent partial disability benefits was not due to any action on employer's part.

As employer voluntarily paid compensation in this case without resort to informal or formal proceedings, it cannot be held liable for claimant's attorney's fee in this case. *Perez*, 128 F.3d at 910, 31 BRBS at 164(CRT); *Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT). The district director's award of an attorney's fee assessed against employer therefore is reversed. However, since claimant did obtain compensation, counsel may be entitled to a fee assessed against claimant as a lien on the compensation, pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). We note that the regulations provide that the amount of benefits awarded should be taken into account in awarding the fee, and that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. 20 C.F.R. 702.132. The case is remanded for the district director to consider an attorney's fee payable as a lien on claimant's compensation.

Accordingly, the district director's assessment of the attorney's fee against employer is reversed. The case is remanded for consideration of an attorney's fee payable as a lien on claimant's award.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]That it did so only after claimant's death is of no import to the disposition of this case.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge