

BRB No. 07-0885

W.G. )  
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 Claimant-Respondent )  
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 v. )  
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 MARINE TERMINALS CORPORATION ) DATE ISSUED: 06/26/2008  
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 and )  
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 LAMORTE BURNS & COMPANY, )  
 INCORPORATED )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Approval of Attorney Fee (Case No. 14-140920) of District Director Karen P. Staats 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 law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). This case is before the Board for the second time.

Claimant injured his right foot and ankle on November 12, 2003. He filed a claim on February 9, 2004, which employer initially controverted but subsequently agreed to pay on October 20, 2004. Employer paid claimant temporary total disability benefits, medical benefits and an attorney's fee in December 2004. Subsequent to his reaching maximum medical improvement on August 18, 2005, claimant sought additional compensation. The district director recommended that employer pay claimant permanent partial disability benefits; nine days later, employer complied with this recommendation. Claimant's counsel filed a fee petition with the district director which was denied on the ground that employer cannot be held liable for the fee pursuant to Section 28(b), 33 U.S.C. §928(b), because employer timely paid benefits following the district director's recommendation.

Claimant appealed the denial of an employer-paid attorney's fee. On appeal, the Board reversed the district director's denial of such a fee. The Board held that because claimant's request for permanent disability benefits was not a new claim but part of claimant's initial claim for benefits which employer had not timely paid pursuant to Section 28(a), 33 U.S.C. §928(a), employer's liability for an attorney's fee fell under Section 28(a). *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Accordingly, the case was remanded to the district director for consideration of counsel's fee petition under Section 28(a).

On remand, the district director noted that employer's sole objection to counsel's fee petition was that it could not be held liable for a fee pursuant to Section 28(b) of the Act. The district director awarded counsel a fee of \$2,100.63, plus costs of \$941.52, payable by employer pursuant to Section 28(a).

Employer appeals, contending that the district director erred in awarding an attorney's fee under Section 28(a) because the Board erroneously held that Section 28(b) is not applicable in this case. Claimant responds urging affirmance of the fee award. In addition claimant's counsel filed a petition for an attorney's fee for work performed before the Board in his prior appeal.

Employer contends that the Board erred in holding it liable for an attorney's fee under Section 28(a). The Board's prior decision constitutes the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). In its prior decision, the Board held that claimant's pursuit of permanent partial disability benefits after he filed his 2004 claim for temporary disability benefits was not a new "claim." As employer did not pay any compensation within 30 days of its receipt of the claim in 2004, claimant is entitled to an attorney's fee paid by employer pursuant under Section 28(a) of the Act, for his subsequent successful prosecution of that claim. Once an employer met the conditions that permit fee shifting under Section 28(a) in the first instance, employer

remains liable for an attorney fee's incurred in any successful prosecution of his claim. This holding, that the pursuit of permanent disability benefits following a claim seeking temporary disability compensation does not involve a new claim but rather the permanent aspect of the previous claim, is consistent with that of more recent appellate authority, *see Day v. James Marine, Inc.*, 518 F.3d 411 (6<sup>th</sup> Cir. 2008), as well as that cited in the Board's opinion, *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 3313, 39 BRBS 1 (CRT)(4<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT)(9<sup>th</sup> Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5<sup>th</sup> Cir. 2001).

Recently, in *A.M. v. Electric Boat Corp.* \_\_\_ BRBS \_\_\_, BRB No. 07-0791 (June 18, 2008), the Board, following this circuit court precedent and the prior decision in the present case, held that Section 28(a) governs under the following fact pattern: (1) claimant filed a claim on January 22, 2002, for permanent partial disability benefits to each arm, which employer controverted within the thirty-day period; (2) employer paid permanent partial disability benefits in October 2003; (3) claimant sought temporary total disability and medical benefits in 2007 for surgery to his hands; and (4) employer promptly authorized surgery and paid temporary total disability benefits. As employer did not pay any benefits within 30 days of its receipt of the claim in 2002, the Board held that fee liability is governed by Section 28(a), as claimant subsequently successfully prosecuted his claims for additional temporary total disability and medical benefits.

As the Board has recently reaffirmed the principles stated in the Board's prior decision in this case, and the holding therein is consistent with the decision of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), we affirm our holding in this case that claimant is entitled to an employer-paid attorney's fee pursuant to Section 28(a). Employer raises no other contentions of error. Therefore, we affirm the district director's award of a fee payable by employer pursuant to Section 28(a).

Claimant has submitted a fee petition for work performed before the Board in his prior appeal. Claimant seeks a fee of \$2,749.37, representing 10.375 hours of attorney services at \$265 per hour. Employer objects to this fee on the basis that it is premature as claimant has not yet prevailed. As we now affirm the district director's fee award, claimant's attorney is entitled to fee for his successful appeal in BRB No. 06-0501. We reduce counsel's hourly rate to \$250, as that amount is reasonable for the area in which the services were performed. In all other respects, the fee request is approved as it is reasonably commensurate with the necessary work performed, taking into account the quality of the representation, the complexity of the legal issues, and the amount of benefits obtained. Accordingly, we award claimant's attorney a fee of \$2,593.75, payable by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the district director's Compensation Order Approval of Attorney Fee is affirmed. Claimant's attorney is entitled to a fee payable by employer of \$2,593.75 for work performed before the Board in BRB No. 06-0501.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge