BRB No. 00-0716

RAY ALARIO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: March 12, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees For Employee's Petition for Reconsideration of Charles Lee, District Director, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming, Gibbons & Kittrell, P.C.), Mobile, Alabama, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metarie, Louisiana, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees For Employee's Petition for Reconsideration (Case No. 07-153726) of District Director Charles Lee 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts in this case are gleaned from attachments to the parties' briefs. Claimant filed a claim under the Act for a work-related binaural hearing loss on July 12, 1999. Attached to the claim were the results of a June 21, 1999, hearing examination which does not appear to indicate that claimant suffered a compensable hearing impairment. Claimant

did not attach a medical report to the claim, but did attach a cover letter requesting that employer compensate claimant for medical care by a physician of his choice. Employer filed a Notice of Controversion on July 30, 1999, asserting that since no medical report was attached to the claim, and since the June 21, 1999, audiogram was not performed by a certified audiologist, there was not a valid claim to which to respond. Formal notice of claimant's claim was sent by the district director on August 4, 1999. Claimant underwent a second audiometric evaluation on August 16, 1999, which showed a 62.8 percent binaural hearing loss. Employer and the district director received a copy of this report on September 13, 1999; thereafter, on September 14, 1999, employer voluntarily began paying permanent partial disability compensation to claimant. 33 U.S.C. §908(c)(13)(B). Claimant underwent an audiometric evaluation by employer's physician on September 27, 1999, which revealed a 54.1 percent binaural impairment. Based on the average of the latter two audiograms, employer, on October 12, 1999, filed an LS-208 form, Notice of Final Payment, stating that it had made full and final payment of benefits to claimant for a work-related 58.45 percent binaural impairment.[1]

Claimant's counsel thereafter filed a fee petition for work performed before the district director, requesting a fee totaling $1,237.50, representing 8.25 hours at an hourly rate of $150, and $233.75 in expenses. Employer filed objections to the fee petition. In an initial Compensation Order, District Director Chris John Gleasman found that since entitlement to compensation was not established until September 13, 1999, at which time employer made prompt payment, all time charged by claimant's counsel cannot be the liability of employer; rather, he found claimant's counsel's services to be the liability of claimant as a lien on his compensation. 33 U.S.C. §928(c). District Director Gleasman stated further that pursuant to *Jones v. Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980), the time claimed before August 26, 1999, cannot be assessed against employer, as no claim had been filed. District Director Gleasman awarded claimant's counsel a fee of $300 as a lien upon claimant's compensation, stating he was taking into consideration the amount of benefits obtained.

Thereafter, claimant filed a Petition for Reconsideration with the district director's office. On March 10, 2000, District Director Charles Lee (the district director) issued a second Compensation Order in this matter, finding that employer was liable for the time claimed by counsel between August 4, 1999 through September 14, 1999, totaling one hour, as the time spent was reasonable. The district director further found that employer was liable for 1.5 hours in time claimed subsequent to September 14, 1999, as this time constituted

[1]Employer's voluntary payments to claimant totaled $26,979.35.

reasonable "wind-up" services, and that employer was additionally liable for counsel's expenses, totaling $233.75, as they were also reasonable. Thus, the district director found that employer was liable for $608.75 in fees and expenses. Lastly, the district director awarded claimant's counsel the sum of $862.50, representing 5.75 hours at $150 per hour, as a lien against compensation, payable by claimant.

On appeal, employer contends that the district director erred in finding that it was liable to claimant's counsel for an attorney's fee and expenses, as employer voluntarily paid compensation in a timely fashion after receiving notice on September 13, 1999, of the first valid audiogram. Claimant responds, urging affirmance. Employer has filed a reply brief, reiterating the arguments contained in its initial appellate brief. For the reasons set forth below, we reverse the district director's Compensation Order.

Employer may be held liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), only if employer "declines to pay" any compensation on or before the thirtieth day after receiving written notice of a claim for compensation, and claimant is thereafter successful in obtaining benefits. *See Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). If employer pays some benefits voluntarily, and a controversy develops over additional benefits, employer may be held liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the present case arises, has held that employer's liability under Section 28(b) is predicated on employer's refusal to follow the recommendation of the district director following informal proceedings and on claimant's thereafter obtaining greater compensation than employer voluntarily paid. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); *see also Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Boe v. Dep't of the Navy/MWR,* 34 BRBS 108 (2000). If employer pays all benefits due without resort to formal proceedings, it may not be held liable for claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164 (CRT); *Boe*, 34 BRBS at 110-111. If employer cannot be held liable for claimant's attorney's fee under either Section 28(a) or (b), claimant may be held liable for an attorney's fee as a lien on his compensation award. 33 U.S.C. §928(c); *see* 20 C.F.R. §702.132(a).

In the instant case, claimant's initial claim of July 12, 1999, stated that claimant had suffered a work-related hearing loss, but did not identify a specific degree of impairment. The audiogram attached to the claim does not appear to indicate that claimant suffered a compensable hearing impairment. Thus, claimant's filing was akin to an anticipatory filing inasmuch as it does not identify a specific degree of hearing impairment. *See, e.g., I.T.O.*

Corp. of Virginia v. Pettus, 73 F.3d 523, 30 BRBS 6(CRT)(4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5, *aff'd mem.*, No. 00-1442 (4th Cir. Nov. 17, 2000). Accordingly, at this point there was no claim to which employer could respond by paying benefits; without an impairment rating, employer could neither commence payment nor decline to pay.

On September 13, 1999, employer received a copy of claimant's August 16, 1999, audiogram, which showed a specific binaural loss of 62.8 percent; it was at this point that employer was first put on notice of a compensable claim for disability benefits. Thereafter, employer made its first payment of compensation on September 14, 1999. Based on its response to the September claim, employer cannot be held liable under Section 28(a) of the Act 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. *See Perez*, 128 F.3d at 910, 31 BRBS at 163-164(CRT); *Boe*, 34 BRBS at 110-111. Moreover, we hold that employer cannot be held liable for an attorney's fee under Section 28(b) of the Act, as employer paid all benefits due by October 12, 1999, without resort to further proceedings. *Id*. Accordingly, we vacate the district director's determination that employer is liable for $608.75 in attorney's fees and expenses, and reverse the district director's Compensation Order.

Accordingly, the Compensation Order-Award of Attorney's Fees For Employee's Petition for Reconsideration of the district director is reversed. The Compensation Order-Award of Attorney's Fees of District Director Gleasman is reinstated.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge