

BRB No. 07-0679

R.K.)
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 Claimant-Petitioner)
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 v.)
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 FRASER SHIPYARDS, INCORPORATED) DATE ISSUED:
) 03/27/20082008
 and)
)
 AMERICAN HOME ASSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)

DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Steven T. Moe (Petersen, Sage, Graves, Layman & Moe), Duluth, Minnesota, for claimant.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fees (Case No. 10-038985) of District Director David A. Duhon 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).

Claimant, a welder, fractured his left wrist when it became entangled in welding cable while he was climbing scaffolding on February 16, 2001. Employer paid temporary total disability compensation for the periods between February 19, 2001, to October 31, 2002, and from January 7, 2003, to April 15, 2004. On April 13, 2005, claimant filed a claim for compensation for permanent partial disability arising out of this injury. Employer filed a notice of controversion on May 5, 2005. In his “Recommendation of Record,” dated August 2, 2006, the district director recommended, *inter alia*, that employer pay claimant permanent partial disability compensation for a 25 percent impairment of his hand. Employer accepted this recommendation on August 22, 2006 and made payment effective as of March 9, 2006.

Subsequently, claimant’s attorney filed a fee petition seeking an attorney’s fee of \$4,020.00 representing 20.1 hours of legal services at \$200 per hour. The district director found that employer could not be held liable for this fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), because employer voluntarily paid benefits. The district director found that employer is not liable for a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), because employer timely accepted the recommendation of the district director that it pay permanent partial disability benefits.

Claimant appeals, contending the district director erred in finding that employer is not liable for his attorney’s fee. Employer responds, urging affirmance of the district director’s order.

Claimant contends that the district director erred in finding that Section 28(a) is not applicable in this case. We agree that under the circumstances presented, employer is liable for a claimant’s attorney’s fee under Section 28(a). Therefore, for the reasons stated below, we reverse the district director’s finding and remand the case for the determination of the amount of the fee for which employer is liable.

Section 28(a) provides that an employer is liable for an attorney’s fee if, within 30 days of its receipt of a claim from the district director’s office, it declines to pay any compensation, and claimant thereafter successfully prosecutes his claim. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). An employer’s voluntary payments of compensation prior to the time claimant files his formal claim are not determinative of employer’s liability for a fee pursuant to Section 28(a). *See Day v. James Marine, Inc.*, ___ F.3d ___, No. 06-4001 (6th Cir. March 7, 2008); *Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co. v. Cooper*, 294 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Rather, it is employer’s payment or non-payment of benefits

in the 30 days after its receipt of the claim on which employer's liability for a fee pursuant to Section 28(a) is predicated. *Id.*; see generally *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring).

Employer is liable for claimant's attorney's fee pursuant to 28(a) in this case because it declined to pay any compensation on or before the thirtieth day after its receipt of claimant's claim for permanent partial disability compensation. Although employer voluntarily paid temporary total disability compensation for the injury to claimant's wrist, it stopped paying in April 2004 when claimant returned to work. Approximately one year later, on April 13, 2005, claimant filed a claim for additional compensation to which employer filed a notice of controversion on May 5, 2005. Thereafter, claimant successfully prosecuted his claim by virtue of employer's acceptance of the district director's recommendation that it pay scheduled permanent partial disability benefits. Under these facts, employer is properly held liable for claimant's attorney's fee pursuant to Section 28(a). *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Pool Co.*, 294 F.3d 173, 35 BRBS 109(CRT). Therefore, we reverse the district director's finding to the contrary, and we remand the case to the district director to determine the amount of the fee for which employer is liable. 20 C.F.R. §702.132.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge