

MITCHELL L. DANIELS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CSX TRANSPORTATION)	DATE ISSUED: 05/07/2010
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Compensation Order Approval of Attorney Fee of Emma Riley, District Director, United States Department of Labor.

Bernard J. Sevel (Arnold, Sevel & Gay, P.A.), Baltimore, Maryland, for claimant.

Kenneth G. Engerrand and Julie C. Lomax (Brown Sims, P.C.), Houston, Texas, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Supplemental Compensation Order Approval of Attorney Fee (Case No. 04-034362) of District Director Emma Riley 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

The procedural history of this case has been gleaned from the parties' respective briefs and the attachments to those briefs. Claimant sustained a back injury while working for employer as a laborer on December 16, 1998. Employer accepted liability and voluntarily paid claimant temporary total disability benefits. A dispute subsequently arose between the parties regarding the payment of certain medical expenses. Following an April 24, 2008, informal conference, the district director recommended on April 28, 2008, that employer pay for continued treatment by claimant's treating psychologist, Dr. Richards. DX A. After a second informal conference held on November 13, 2008, the district director issued a written recommendation dated November 17, 2008, that "the employer/insurer reimburse claimant for all out-of-pocket expenses and mileage for all causally related medical treatment." EX B. By order dated January 30, 2009, the district director ordered employer to show cause within ten days why she should not issue an order "requiring payment of all benefits due."¹ EX C. In a February 6, 2009 response, employer indicated that payment either had already been made or was forthcoming for certain of the claimed medical and mileage expenses, but that payment for the remaining claimed expenses would not be made without additional documentation that the expenses were causally related to claimant's work injury.² EX E. By letter dated February 23, 2009, claimant responded that he had already provided employer with the necessary documentation relating the claimed expenses to his work injury. DX B. In a letter dated March 3, 2009, employer disputed claimant's assertion that he had already provided employer with adequate documentation and indicated its continued unwillingness to reimburse claimant for inadequately documented expenses. EX I. On May 4, 2009, the district director entered an order authorizing medical treatment and expenses. EX F. Specifically, the district director ordered employer to recognize claimant's current treating physicians, Drs. Richards and Benedict, as authorized treating physicians for

¹ This order indicated that \$474.16 was owed to Dr. Richards and \$5,895.64 was owed to claimant for reimbursement of out-of-pocket medical expenses and mileage. EX C.

² The exhibits attached to employer's Petition for Review and brief reflect that on February 6, 2009, employer paid \$474.16 to Dr. Richards and \$5,895.64 to claimant, the amounts stated to be owing in the district director's January 30, 2009 order to show cause. EXs C, D.

claimant's work injury³ and to reimburse claimant for his "out-of-pocket expenses and medical mileage reimbursement as claimed." *Id.*

Thereafter, claimant's counsel filed a fee petition for work performed before the district director. EX G. Claimant's counsel requested a fee in the amount of \$10,375, representing 36.75 hours of legal services performed between March 2, 2001, and May 6, 2009, at an hourly rate of \$280, and \$85 in costs. *Id.* Employer submitted objections to the fee petition, contending that it was not liable for an attorney's fee under either Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §928(a), (b); in the alternative, employer averred that it was not liable for a fee for services incurred prior to the issuance of the district director's written recommendation on November 18, 2008. The district director awarded claimant's counsel his requested attorney's fee, finding employer liable pursuant to Section 28(b). Employer was therefore ordered to pay claimant's counsel an attorney's fee in the amount of \$10,375.

On appeal, employer challenges the district director's award of a fee pursuant to Section 28(b); alternatively, employer contends that the district director erred in finding employer liable for fees incurred prior to the district director's November 18, 2008 written recommendation and in awarding the \$85 claimed for the cost of copying Dr. Richards' records. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also has responded, urging the Board to vacate the fee award and remand the case for further consideration by the district director.⁴

³ The district director additionally ordered employer to recognize various other health care providers for their past treatment of claimant's work-related injury. EX F.

⁴ Claimant's contention that the Director lacks standing to participate in this matter is rejected. Pursuant to the Board's regulations, the Director has standing to appeal or respond to an appeal before the Board as a party-in-interest. *See* 20 C.F.R. §§801.2(a)(10), 802.201(a), 802.212; *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995)(order).

In order for an employer to be held liable for claimant's attorney's fee pursuant to Section 28(b),⁵ the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that Section 28(b) requires all of the following: (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to adopt the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer paid or tendered after the written recommendation. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), cert. denied, 546 U.S. 960 (2005); see also *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

In this case, the district director considered and rejected employer's assertion that it did not refuse to accept the district director's written recommendation and therefore is not liable for a fee under Section 28(b). See Supplemental Compensation Order Approval of Attorney Fee (Fee Award) at 1. Specifically, the district director stated that:

Based upon review of the information in the case file, I find the employer did in fact "refuse to adopt the written recommendation." The employer's March 03, 2009 letter states in pertinent part "Employer denied and continues to deny reimbursing claimant for travel and out-of-pocket expenses...." In this case, the written recommendation was issued November 17, 2008 and as of March 03, 2009 employer had not paid as recommended. As such and consistent with the employer's response to the fee petition, claimant's counsel has fulfilled all four requirements for gaining entitlement to attorney's fees in accordance with §928(b).

⁵ In his response brief, claimant appears to argue that Section 28(a) provides another basis for finding employer liable for claimant's attorney's fee; claimant's reliance on *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), in support of this assertion, however, is misplaced. 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, it declines to pay *any* compensation. 33 U.S.C. §928(a); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), cert. denied, 546 U.S. 960 (2005). Thus, an employer's liability for a fee pursuant to Section 28(a) is predicated on the employer's payment or non-payment of benefits in the 30 days after its receipt of the claim. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). In the instant case, no party has averred that Section 28(a) applies based on employer's failure to pay *any* compensation within 30 days of its receipt of a claim from the district director.

Id. at 2. In challenging the district director's determination that it refused to adopt the written recommendation that it "reimburse claimant for all out-of-pocket expenses and mileage for all causally related medical treatment," employer avers that it endeavored to comply with this recommendation by seeking the documentation necessary to ascertain which claimed expenses were causally related to claimant's work injury.⁶ Employer additionally asserts that, contrary to the district director's statement that "as of March 03, 2009 employer had not paid as recommended," *see* Fee Award at 2, employer had, in fact, made payments on February 6, 2009 of \$5,895.64 to claimant and \$474.16 to Dr. Richards. *See* EX D.

We agree with the Director that the district director did not provide a sufficient explanation of her finding that employer refused to adopt the district director's written recommendation, thus preventing the Board from properly reviewing her fee award. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 287-88 (1990). Although the district director set forth employer's contention that it took proper action to fulfill the recommendation to reimburse claimant for expenses for all causally related medical treatment, *see* Fee Award at 1, she did not specifically address employer's contention that it paid all expenses causally related to claimant's work injury in accordance with the recommendation. In this regard, the district director did not acknowledge the payments made by employer on February 6, 2009. *See* EX D. We therefore vacate the fee award and remand the case to the district director for further consideration of the issue of whether employer refused to adopt the district director's recommendation.

Employer contends, in the alternative, that if a fee is awardable under Section 28(b), the district director erroneously found employer liable for the entire amount of the fee sought by claimant's counsel, which represented all of his work dating back to March 2, 2001, the date on which he commenced representing claimant. The Board has long held with respect to Section 28(b) that an "employer is not liable for the services of claimant's attorney which were performed prior to the date a controversy developed over the amount of additional compensation to which the claimant sought entitlement." *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469, 471 (1983). In this case, the district director found employer liable under Section 28(b) for a fee for services dating back to the commencement of counsel's representation of claimant without having addressed the point at which a controversy developed in this claim. Such a finding is necessary as it constitutes the date from which any employer-paid fee may commence.

⁶ Employer concedes that all of the other requirements for its liability for a fee under Section 28(b) have been satisfied. *See* Emp. Petition for Review at 6; *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).

Id. Therefore, if, on remand, the district director finds that employer is liable for a fee under Section 28(b), she must determine the date when a controversy arose in this claim.⁷

Accordingly, we vacate the district director's award of an attorney's fee, and remand for the district director to reconsider the award in a manner consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁷ The district director should also address employer's additional objection that it is not liable for the cost associated with copying Dr. Richards' records.