

PAUL SOUTHER)
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 Claimant-Petitioner)
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 v.)
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 KALAMA EXPORT COMPANY) DATE ISSUED: Oct. 3, 2000
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 and)
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 SELF INSURED/SEDGWICK JAMES)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

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

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

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order - Approval of Attorney Fee Application (OWCP No. 14-129228) 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 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 filed a claim for a work-related hearing loss and employer, having received

the claim on November 23, 1998, voluntarily paid claimant \$4,254.18 on December 18, 1998, for a 9.4 percent monaural (left ear) hearing impairment. Claimant's counsel thereafter requested a fee for 6.5 hours of services rendered on claimant's behalf between June 29, 1998, and August 11, 1999, at an hourly rate of \$225, for a total fee of \$1,462.50. Employer objected, arguing that it is not liable for a fee because it never controverted the claim, and voluntarily paid benefits within 30 days of having received the claim.

In her Compensation Order, the district director agreed with employer's position and thus concluded that employer cannot be liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a). She then reduced the requested hourly rate from \$225 to \$175, approved the hours as requested, and therefore awarded an attorney's fee totaling \$1,137.50 to be assessed against claimant as a lien on his compensation. 33 U.S.C. §928(c).

On appeal, claimant challenges the district director's finding that employer is not liable for an attorney's fee under Section 28(a). Employer responds, urging affirmance.

Claimant argues that pursuant to the Board's decision in *Liggett v. Crescent City Marine Ways & Drydock Co., Inc.*, 31 BRBS 135 (1997) (*en banc*) (Smith and Dolder, JJ., dissenting in pertinent part), employer is liable under Section 28(a) for the attorney's fee awarded in this case. Claimant's contention is without merit.

Section 28(a), in pertinent part, 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 Act, 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....

33 U.S.C. §928(a). The conditional language of Section 28(a) limits employer's liability to those situations where employer controverts the claim or otherwise declines to pay benefits. In addressing the issue of liability for the attorney's fee in this case, the district director considered the Board's decision in *Liggett*, in conjunction with the explicit language of Section 28(a). In *Liggett*, the Board held that once conditions for shifting the fee to employer are met, Section 28(a), when read consistently with other fee-shifting provisions generally and Section 28 as a whole, provides for employer's liability for pre-controversion legal services, subject to the determination that such fees are incurred for legal work that is both reasonable and necessary to the successful prosecution of the claim. *Liggett*, 31 BRBS at

137-138. As such, the conditions for shifting the fee to employer, *i.e.*, that employer controverted the claim which is then successfully prosecuted, are prerequisites for a determination that employer may be liable for an attorney's fee. *Liggett*, 31 BRBS at 137. Thus, as the requirements for shifting liability for an attorney's fee have not been met, *Liggett* is inapplicable to the instant case. See 33 U.S.C. §928(a), (b).

The district director properly determined that as it is uncontested that employer did not controvert the claim, and that all benefits due were paid within 30 days of employer's receipt of the claim, there is no basis for assessing a fee against employer under Section 28(a) of the Act. *Boe v. Department of the Navy/MWR*, BRBS , BRB No. 99-1134 (July 26, 2000). Consequently, the district director's determination that employer is not liable for an attorney's fee in this case is in accordance with law and therefore is affirmed.

Accordingly, the district director's award of an attorney's fee is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge