U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0143

BYRON ADAMS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TRAPAC, LLC	)	
	)	
and	)	DATE ISSUED: Oct. 30, 2015
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

William N. Brooks II, Long Beach, California, for employer/carrier.

Isaac S. Nicholson (Leonard Carder, LLP), Oakland, California, for intervenor.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2010-LHC-01481) of Administrative Law Judge Christopher Larsen 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

or not in accordance with law. *See, e.g., Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a work-related injury to his left leg on March 20, 2009. Claimant filed a claim under the Act; employer controverted the claim, and the ILWU-PMA Welfare Plan (the Plan) provided medical and disability benefits to claimant. The Plan intervened in the subsequent administrative proceedings, seeking reimbursement of medical benefits and a lien on any award of disability benefits payable to claimant pursuant to Section 17 of the Act, 33 U.S.C. §917. In a Decision and Order issued on August 22, 2012, Administrative Law Judge Russell D. Pulver awarded claimant benefits under the Act. Pursuant to claimant's appeal, the Board vacated the calculation of claimant's average weekly wage and remanded the case for further consideration. The Board affirmed Judge Pulver's award in all other respects. *Adams v. Trapac, Inc.*, BRB No. 12-0671 (June 24, 2013) (unpub.). On remand, the case was reassigned to Administrative Law Judge Christopher Larsen, who issued an Order on Remand in which he recalculated claimant's average weekly wage in accordance with the Board's instructions. Subsequently, claimant's counsel and the Plan's counsel submitted petitions for attorneys' fees and costs. Claimant's counsel sought an attorney's fee and costs of $120,255.29. Employer filed objections, and, upon considering them, the administrative law judge awarded a total fee and costs of $93,503.47 to claimant's counsel, payable by employer.

Counsel for the Plan sought a fee of $12,294.60, representing 43 hours of attorney services rendered by Isaac Nicholson and Shawn C. Groff at an hourly rate of $250 ($10,750), 2 hours of paralegal time at an hourly rate of $150 ($300), and $1,244.60 in costs. Employer objected to the Plan's fee petition on the grounds that: 1) the Plan does not have standing to recover an attorney's fee for time spent pursuing reimbursement of medical expenses; 2) the Plan is not entitled to an attorney's fee for time spent pursuing reimbursement of disability benefits pursuant to its Section 17 lien; 3) any compensable attorney fees should be reduced to account for the amount of benefits awarded; 4) the 14 hours spent preparing the Plan's post-trial brief and 9.25 hours spent preparing the fee petition are excessive; and, 5) the Plan's use of quarter-hour incremental billing inflated the amount of time spent on all tasks. The administrative law judge rejected these arguments, but deducted $174.13 in charges for Westlaw research, which he found constituted overhead costs. Thus, the administrative law judge awarded the Plan a total fee of $12,120.47, representing $11,050 in services rendered and $1,070.47 in costs, to be paid by employer. Employer appeals the administrative law judge's fee award to the Plan, and the Plan responds, urging affirmance. Employer filed a reply brief. Additionally, employer has filed a motion to permit additional briefing in this case, in light of the Supreme Court's recent decision in *Baker Botts LLP v. ASARCO LLC*, 576

U.S. __, 135 S.Ct. 2158, No. 14-103 (June 15, 2015). The Plan responded, urging denial of the motion. We deny employer's motion for additional briefing.[1] 20 C.F.R. §802.215.

On appeal, employer argues that the administrative law judge erred in awarding attorney's fees to the Plan, contending that: 1) the Plan does not have standing to recover from employer any attorney's fee for pursuing reimbursement of medical expenses; 2) the Plan is not entitled to an attorney's fee payable by employer for pursuing reimbursement of disability benefits under its Section 17 lien; and 3) the Plan's use of quarter-hour incremental billing inflated the amount of time spent on all tasks.

Section 28(a), which applies in this case, states that: "the person seeking benefits" shall be entitled to "a reasonable attorney's fee against the employer or carrier" upon the successful prosecution of his claim. 33 U.S.C. §928(a).[2] Pursuant to this section, in conjunction with Section 7(d)(3) of the Act, 33 U.S.C. §907(d)(3), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held an employer liable for the attorney's fees of health care providers seeking reimbursement of medical benefits provided to a claimant. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993);[3] *see also Ozene v. Crescent Wharf & Warehouse Co.*, 19

[1] In *Baker Botts*, the Supreme Court held that a bankruptcy court may not award attorney's fees for work performed in defending a fee application, because the Bankruptcy Code does not specifically "shift the costs of adversarial litigation from one side to the other." 135 S.Ct. at 2165. In contrast, Section 28 of the Longshore Act specifically authorizes courts to shift litigation costs to an employer under certain criteria, 33 U.S.C. §928(a), (b), and courts have explicitly held that, under Section 28, an employer may be held liable for a reasonable fee for defending a fee application. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *see also Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001); *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (*en banc*); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982).

[2] Section 2(1) of the Act, 33 U.S.C. §902(1) states that, as used in the Act, "The term 'person' means individual, partnership, corporation, or association."

[3] In *Hunt*, a doctor and a physical therapist retained their own counsel and intervened in a claim for disability benefits, seeking payment for medical services provided to the claimant after the employer ceased paying benefits. The Ninth Circuit held that the medical providers were "part[ies] in interest," *see* 33 U.S.C. §907(d)(3), seeking the reasonable value of medical treatment, and, therefore, were "persons seeking benefits" under the Act for purposes of Section 28(a). *Hunt*, 999 F.2d at 423-424, 27 BRBS at 91(CRT).

BRBS 9 (1986). Contrary to employer's assertion, *Hunt* remains good law.[4]

The Board recently addressed the issues presented herein in *Grierson v. Marine Terminals, Corp.*, 49 BRBS 27 (2015). In that case, the Board addressed whether the ILWU-PMA is entitled to an attorney's fee under Section 28(a). Citing *Hunt*, the Board held that the Plan's right to intervene in a claimant's claim, in conjunction with its derivative right to reimbursement for a claimant's covered medical benefits, entitles it, as a "party in interest," to seek medical benefits on behalf of claimant under Section 7(d)(3). Therefore, the Plan may be a "person seeking benefits" under Section 28(a), and the employer may be held liable for the reasonable and necessary attorney's fee for time spent pursuing reimbursement of the covered medical expenses. *Grierson*, 49 BRBS at 29. The Board further held that because a Section 17 lienholder does not pursue disability benefits on behalf of a claimant under the Act, the lienholder is not a "person seeking benefits" under Section 28(a), and the employer cannot be held liable for the Plan's attorney's fees incurred in validating its lien against the claimant's disability benefits.[5] *Id*. (citing *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, 7, *clarified on other grounds on recon*., 43 BRBS 115 (2009)).

Therefore, for the reasons stated in *Grierson*, we reject employer's assertion that it cannot be held liable under Section 28(a) for any of the Plan's attorney's fee for services in pursuit of reimbursement of covered medical expenses, pursuant to Section 7(d)(3). However, we agree with employer that the administrative law judge erred in awarding the Plan an employer-paid fee for work pursuing its Section 17 lien on disability benefits. Therefore, we vacate the award of an attorney's fee to the Plan payable by employer and

[4] In *Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012), the Ninth Circuit held that the litigating position of the Director, Office of Worker's Compensation Programs, is not entitled to *Chevron* deference but only to *Skidmore* deference. The Ninth Circuit's decision in *Hunt* concerning Section 7(d)(3) and 28(a) are not based on *Chevron* deference to the Director's litigating position, but on the court's determination that the Director's interpretation was "entirely compatible with the statutory scheme" and "best advance[d] the purposes of the Act." *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT). Moreover, there is no case precedent contrary to *Hunt*.

[5] The Board explained that, unlike Section 7(d)(3) which allows for a direct award to a party-in-interest for the reasonable value of medical treatment provided to a claimant for a work-related injury, Section 17 does not allow for a direct award to an intervenor-lienholder. Rather, Section 17 creates a legal relationship between the trust fund and the claimant and gives the trust fund a vested interest in the claimant's compensation; the claimant is responsible for paying the lien. *Grierson*, 49 BRBS at 29.

we remand the case for the administrative law judge to reconsider the amount of employer's liability for the Plan's attorney's fee consistent with *Grierson*.[6]

In the interest of judicial economy, we will address employer's remaining contention that the administrative law judge failed to adequately consider its objection to the Plan's use of quarter-hour billing increments. Attorney Fee Order at 13. Contrary to employer's assertion, the administrative law judge considered this objection. Although he expressed general concern with its usage, the administrative law judge did not err in finding that the practice of billing in quarter-hour increments is acceptable under the Act. *See Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); 20 C.F.R. §702.132. Accordingly, he declined to reduce the number of hours requested based on this objection. As employer has failed to show the administrative law judge abused his discretion, we affirm his allowance of quarter-hour billing.

[6] In *Grierson*, the Board stated that the administrative law judge rationally found that the legal services of the Plan's attorneys on the issues concerning the claimant's claim for medical benefits and the Plan's lien were too intertwined to permit him to sever them, as both issues turned on whether the claimant's disabling symptoms were work-related. The Board further held, however, that the employer could be held liable only for those services provided by the Plan's attorneys to the extent the services protected an entitlement interest belonging to the claimant that was not otherwise protected by the claimant's attorney. *Grierson*, 49 BRBS at 30.

Accordingly, we deny employer's motion for additional briefing. We vacate the administrative law judge's award of an attorney's fee to the Plan payable by employer and remand the case for further consideration consistent with this decision.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge