

JANISE GARLAND)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NAVY PERSONNEL COMMAND/MWR)	DATE ISSUED: <u>Sept. 14, 2004</u>
)	
and)	
)	
CONTRACT CLAIMS SERVICES,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Eric L. Richardson, District Director, United States Department of Labor.

Rita R. Carroll, Dallas, Texas, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 18-73216) of District Director Eric L. Richardson 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, an educational technician at a child development center on the Point Loma submarine base in San Diego, California, injured her neck and upper back on November 17, 1999. Prior to the informal conference, employer voluntarily paid claimant temporary total disability benefits at an average weekly wage of \$332.46, for periods between November 28, 1999, to March 11, 2002. Claimant returned to work on March 11, 2002. An informal conference was held on April 3, 2003, before the district director on the issue of claimant's average weekly wage. The district director

recommended that compensation be paid at the average weekly wage of \$378.58. On April 16, 2003, employer paid claimant at the average weekly wage of \$434.39.

Subsequently, claimant's counsel submitted a fee petition to the district director, requesting an attorney's fee of \$6,125, representing 24.5 hours of attorney services at \$250 per hour. Employer objected to the fee petition with regard to its liability for any fee, as well as to the hourly rate, certain times charges as excessive or unnecessary, and the overall fee as excessive in light of the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Claimant replied, asserting that employer is liable for an attorney's fee under Section 28(b), 33 U.S.C. §928(b), that billing in minimum one-quarter hour increments is appropriate in this case, that the Benefits Review Board and the Office of Administrative Law Judges (OALJ) have previously awarded him hourly rates ranging from \$200 to \$250, and that the fee request is commensurate with the amount of benefits obtained. The district director held employer liable for claimant's attorney's fee, finding that, due to counsel's involvement, claimant obtained benefits at a higher average weekly wage. The district director awarded claimant a fee of \$4,600, representing 23 hours of attorney services at \$200 per hour.

On appeal, employer argues that it is not liable for claimant's counsel's fee under either Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Assuming, *arguendo*, that it is liable for the fee, employer also argues that the district director erred by failing to apply *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and by mechanically applying the rule allowing for minimum billing in one-quarter hour increments. Claimant has not filed a response brief in this case.

We first address the facts relevant to employer's liability for an attorney's fee. Employer filed a notice of final payment of compensation payments on April 9, 2002, reflecting a total payment of \$8,272.48 based on an average weekly wage of \$332.46. Emp. Ex. D to Emp. Br.; Emp. Ex. 2 to Emp. Objections. On January 9, 2003, claimant requested a telephonic informal conference to address the issues of average weekly wage and attorney's fees. Emp. Ex. D to Emp. Br.; Emp. Ex. 3 to Emp. Objections. The informal conference was held on April 3, 2003, and on that same date, claimant forwarded W-2 tax forms for 1998 and 1999 to the claims examiner. Emp. Ex. F to Emp. Br.; Emp. Ex. 4 to Emp. Objections. On April 11, 2003, the claims examiner issued her written recommendation that employer pay claimant disability benefits at an average weekly wage of \$378.58 based on the 1998 and 1999 W-2s claimant had provided. Emp. Ex. E to Emp. Br.; Emp. Ex. 5 to Emp. Objections. Thereafter, on April 15, 2003, claimant requested a formal hearing by filing a pre-hearing statement. Emp. Ex. H to Emp. Br.; Emp. Ex. 7 to Emp. Objections.

On April 16, 2003, employer filed another notice of final payment of compensation, reflecting a total payment of \$15,555.12 based on an average weekly wage

of \$434.39.¹ Emp. Ex. G to Emp. Br.; Emp. Ex. 6 to Emp. Objections. The case was referred to the OALJ on April 21, 2003. Subsequently, claimant requested that the OALJ remand the case to the district director's office as employer had paid claimant the additional compensation sought. By Order dated May 15, 2003, Judge Karst remanded the case to the district director.

Employer's liability for an attorney's fee is governed by Section 28(a), (b) of the Act which 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
- (b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(a), (b). The district director did not state under which subsection he was finding employer liable for claimant's fee. Initially, we hold that employer is not liable

¹ Employer's voluntary payment at a higher average weekly wage than that recommended by the claims examiner was due to its recalculation of claimant's average weekly wage based on information provided by claimant after the informal conference.

for the fee under Section 28(a) because there is no evidence that it declined to pay compensation within 30 days of receipt of claimant's claim for compensation.² See *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT)(9th Cir. 2003); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT)(5th Cir. 1997); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

We also hold that employer is not liable for an attorney's fee under Section 28(b), pursuant to the plain language of the statute and the holding in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT)(9th Cir. 1991). In the instant case, employer paid claimant disability benefits without an award and thereafter a controversy developed over the amount to which claimant was entitled. The matter was set for an informal conference which took place on April 3, 2003, and subsequently the claims examiner issued a written recommendation on April 11, 2003. Employer did not refuse to accept the claims examiner's recommendation, but instead paid claimant benefits on April 16, 2003, in an amount exceeding the recommended average weekly wage. Claimant did not refuse employer's payment and obtain additional compensation after employer's payment. Therefore, claimant's counsel is not entitled to an attorney's fee payable by employer pursuant to Section 28(b).

In *Watts*, employer and claimant each requested an informal conference on the nature and extent of the claimant's disability. At the informal conference, employer agreed that the claimant was entitled to permanent total disability benefits. The only issue remaining in dispute thereafter was claimant's entitlement to an attorney's fee. The district director awarded an attorney's fee payable by employer. On appeal, the Ninth Circuit held that employer could not be held liable for the fee under Section 28(b). *Watts*, 950 F.2d at 610-611, 25 BRBS at 69-70(CRT). The court held that there was no dispute after the informal conference concerning the amount of compensation to which the claimant was entitled. The only remaining dispute was claimant's entitlement to an attorney's fee, and the court held that Section 28(b) does not authorize the payment of an attorney's fee by employer when the only issue remaining after the informal conference is entitlement to an attorney's fee.³ *Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT). Similarly, in the present case, as claimant's entitlement to additional benefits was resolved by employer's payment of additional benefits within two weeks of the informal

² Claimant's initial claim for compensation is not contained in the record before the Board; however, employer asserts that it never declined to pay compensation in this case. See Emp. Br. at 1. Moreover, claimant's counsel asserted in his reply to employer's objection to the fee petition that he is entitled to a fee payable by employer under Section 28(b). Emp. Ex. L to Emp. Br.

³ The court expressed no opinion regarding employer's liability for a fee pursuant to Section 28(a) and remanded the case for consideration of that issue. *Watts*, 950 F.2d at 611, 25 BRBS at 70(CRT); see n.2, *supra*.

conference, employer is not liable for claimant's attorney's fee under Section 28(b). Therefore, the district director's award of an attorney's fee assessed against employer is reversed.⁴

As claimant did obtain additional compensation and the district director found counsel's services were necessary, counsel may be entitled to a fee assessed against claimant as a lien on the compensation award, pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *Boe*, 34 BRBS 108. The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. 20 C.F.R. §702.132. Thus, the case is remanded to the district director for consideration of an attorney's fee payable as a lien on claimant's compensation.

Accordingly, the district director's assessment of the attorney's fee against employer is reversed. The case is remanded for consideration of an attorney's fee payable as a lien on claimant's compensation award.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴ In light of our reversal of the district director's award of an attorney's fee assessed against employer, we need not address employer's remaining contentions.