

E.W.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 09/19/2008
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Award of Attorney's Fee of T.A. Magyar, District Director, United States Department of Labor.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Award of Attorney's Fee (Case No. 05-116459) of District Director T.A. Magyar 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).

Claimant sustained worked-related injuries to his right knee, hand and wrist, on June 2, 2003, for which an administrative law judge found him entitled, under the Act, to temporary total disability benefits from June 4, 2003, to January 7, 2004, a scheduled award for a 13 percent permanent impairment of his right leg, 33 U.S.C. §908(c)(2), and medical benefits for ongoing treatment to his right arm. Employer subsequently agreed, on May 7, 2007, to voluntarily pay additional compensation pursuant to the schedule, 33 U.S.C. §908(c)(2), based on a 40 percent permanent impairment to claimant's right arm beginning on February 5, 2007.

The parties also agreed that the Virginia Workers' Compensation Act (VWCA) applied to claimant's June 2, 2003, work-related injuries. As a result, the Virginia Workers' Compensation Commission (VWCC) issued Award Orders on May 2, 2006, and May 22, 2007, finding claimant entitled to temporary partial disability compensation, as well as benefits for a 13 percent loss of the use of his right leg and a 40 percent loss of the use of his right arm. Employer's Exhibits (EX) 3, 4. The second Award Order also provided that "[t]he sum of \$6,000 shall be deducted from the compensation awarded [to the claimant] and paid directly to Attorney Richard B. Donaldson, Jr. for professional services rendered." EX 4. Moreover, the Award Orders gave employer credit for payments made under the Act. EX 3, 4.

Acting on claimant's counsel's fee petition, the administrative law judge denied an attorney's fee, payable by employer, under either Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §28(a), (b). Claimant's counsel also filed a petition seeking an attorney's fee for work performed before the district director. Accompanying that petition was a signed statement by claimant indicating that he had reviewed the accounting of his attorney's services, understood the charges, and requested the entry of an award of fees in the amount of \$2,000 to be paid by him pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). On September 5, 2007, the district director informed the parties that, absent objection, she would issue a fee award within 30 days and that the fee would be "paid as a lien on compensation at the rate not to exceed \$50.00 per week." *See* District Director's Letter dated September 5, 2007. With neither party filing a response, the district director issued an Award of Attorney's Fees on November 2, 2007, wherein she found that claimant agreed, and was financially capable, to pay an attorney's fee of

\$2,000. The district director ordered that the fee be a lien on claimant's compensation, payable at a rate not to exceed \$50 per week.¹

On appeal, employer challenges the district director's award of an attorney's fee as a lien upon compensation. In response, the Director has filed a motion to dismiss the appeal, asserting that employer's appeal should be dismissed for lack of standing and ripeness. Alternatively, the Director responds, urging affirmance of the district director's award of an attorney's fee as a lien upon compensation. Claimant has not responded to this appeal.

Employer contends that the district director erred in making the fee award a lien upon the compensation it pays to claimant because the district director acted without its input on this issue and the lien interferes with the VWCC's Orders requiring employer to pay claimant compensation. Specifically, employer maintains that its compliance with the district director's order awarding an attorney's fee of \$50 per week up to \$2,000, will result in an underpayment of compensation pursuant to the VWCC's Orders, and thus, subject employer to a penalty under the VWCA. In response, the Director asserts that employer has not established that it was adversely affected or aggrieved by the district director's order and that its appeal, therefore, should be dismissed for lack of standing and ripeness. The Director also contends the fee award is in accordance with the Section 28(c) of the Act.

As an initial matter, we reject employer's assertion that the district director issued the fee award without its input. Employer, by virtue of the letter dated September 5, 2007, received notice of the district director's intent to issue an award of an attorney's fee as a lien upon compensation and was given 30 days to raise any objections to the district director's proposed disposition. Employer, however, did not raise any objections at that time, and the district director therefore issued the Award of Attorney's Fee on November 5, 2007. Thus, as the Director argues, since employer did not object when it was given 30 days by the district director in which to do so, it cannot now raise them for the first

¹ At the time of the district director's November 2, 2007, order, employer was paying claimant \$521.85 per week pursuant to the VWCC's Order of May 22, 2007, as well as the same amount voluntarily under the Act. Employer was also paying an ongoing award of \$391.20 per week under the VWCC's Order dated May 2, 2006, but it was no longer paying the permanent partial disability compensation ordered by the administrative law judge for claimant's right leg disability.

time on appeal.² *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Moreover, employer has not shown that it is adversely affected or aggrieved by the district director's order. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.201(a); *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 127, 29 BRBS 87, 89(CRT) (1995), quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 Fed. Appx. 415 (5th Cir. 2004). In this regard, employer provides nothing in support of its conclusory statement that the district director's award of an attorney's fee as a lien upon compensation violates the VWCA, nor has it explained how it will be subjected to a penalty under the VWCA.³ Consequently, as employer has not demonstrated any error in the district director's attorney's fee award, and as that award is in accordance with 33 U.S.C. §928(c) which specifically permits the district director to make an attorney's fee a lien on compensation due under the Act,⁴ it is affirmed.

² We note that employer did not file a reply brief with the Board to suggest that the Director is in error on this point.

³ Employer's argument appears to be without merit. As the Director suggests, in cases where claimant is responsible for the attorney's fees as in this case, the VWCC routinely orders that the attorney's fees are to be deducted from compensation. Moreover, those funds do not lose their character as "payments" of "compensation" for purposes of the Virginia penalty provision simply because the VWCC, pursuant to its authority to approve and award attorney fees, orders that the employer pay a particular portion of those funds directly to the claimant's attorney as a reasonable fee. *See Roman v. Ondeo Degremont, Inc.*, 47 Va.App. 773, 627 S.E.2d 539 (Va.App. 2006).

⁴ Section 28(c) provides, in pertinent part:

In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

Accordingly, the district director's Award of Attorney's Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge