

D.T.)
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 Claimant-Petitioner)
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 v.)
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 ROGERS TERMINAL AND SHIPPING) DATE ISSUED: 09/25/2008
 CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson and Kennedy K. Luvai (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order-Approval of Attorney's Fee (Case No. 14-137169) of District Director Karen 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 law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered an injury to his left shoulder while working in a gang on a bulk wheat ship for employer on January 11, 2002. After surgery and recuperation, claimant returned to work on October 19, 2002, and his condition reached maximum medical improvement on February 13, 2003. Employer paid medical benefits and temporary total disability benefits for this injury. Claimant filed a claim for benefits, and the parties

disputed claimant's average weekly wage and the extent of his continuing disability, if any.

The administrative law judge found that claimant's left shoulder injury is compensable and that claimant's average weekly wage, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), is \$1,365.75. The administrative law judge also found that claimant's post-injury wage-earning capacity is \$1,357.41, and he awarded claimant temporary and permanent partial disability benefits of \$8.34 per week. On appeal, the Board affirmed the administrative law judge's determination of claimant's average weekly wage and his finding that claimant sustained a real, but small, loss of wage-earning capacity due to his inability to perform certain jobs due to pain and discomfort. *D.T. v. Rogers Terminal & Shipping Corp.*, BRB Nos. 07-1003/A (Aug. 29, 2008)(unpub.).

On September 19, 2007, claimant's counsel submitted a fee petition in the amount of \$4,204.50, representing 12 hours of legal services performed before the district director at an hourly rate of \$350, and \$4.50 in costs. The district director found that an hourly rate of \$240 is appropriate "taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits awarded." Order at 3. Moreover, the district director found that employer is not liable for an attorney's fee for services provided before March 30, 2005. Therefore, the district director awarded claimant's counsel a fee in the amount of \$2,880, representing 12 hours at \$240 per hour plus costs of \$4.50. The district director held claimant liable for a fee for the services provided from January 8, 2003 through March 21, 2005, for a total of \$1,080, and held employer liable for the remaining fee of \$1,800, plus the \$4.50 in costs.

On appeal, claimant contends that the district director erred in awarding a fee based on the hourly rate of \$240, as she failed to consider the prevailing hourly rates for legal services in the relevant market. In addition, claimant contends that employer's notice of termination of benefits dated October 21, 2002, should be considered a notice of controversy, and thus the date from which employer's liability for claimant's attorney's fee accrues. Claimant argues in the alternative that employer's liability accrues from the date the claim was filed, January 21, 2003. Employer responds, urging affirmance of the district director's fee award. Claimant has filed a reply brief.

Claimant challenges the awarded hourly rate, contending that the district director erred by basing her determination on the hourly rate awarded to comparable longshore attorneys in the Portland, Oregon area, rather than on the market rate for all attorneys in similar types of cases. Claimant's counsel requested \$350 per hour for his services. The district director found the requested hourly rate excessive in view of the regulatory criteria of Section 702.132(a), 20 C.F.R. §702.132(a), and she rejected some of counsel's

submissions intended to support a rate of \$350 per hour. The district director found that most of the services rendered in this case were routine, and given the complexity of the case, the rates awarded to attorneys with similar experience, and the amount benefits awarded, claimant's counsel is entitled to a fee based on an hourly rate of \$240.

The regulation governing fee awards, 20 C.F.R. §702.132, states, *inter alia*, that “[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded” Pursuant to this regulation, the attorney must state his “normal billing rate.” 20 C.F.R. §702.132(a). Claimant contends that Section 702.132 may not supersede the holding in *Blum v. Stenson*, 465 U.S. 886 (1984), requiring a fee awarded pursuant to a fee-shifting statute to be based on prevailing market rates. *Blum* arose under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, under which reasonable fees are to be calculated according to the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 896. However, the Court noted the difficulty in determining an appropriate market rate given the nature of services rendered by attorneys and placed the burden on the fee applicant to produce such satisfactory evidence, in addition to his own affidavit. *Blum*, 465 U.S. at 896 n. 11; *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007); *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007). Moreover, the courts and the Board have held that the hourly rate determinations in comparable cases may properly be considered as probative evidence of the prevailing market rates in the relevant community. *See B & G Mining Inc., v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2000); *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007); *D.V.*, 41 BRBS 84; *see also Robins v. Matson Terminals, Inc.*, 2008 WL 2490442, No. 07-72479 (9th Cir. June 19, 2008).

In support of his fee petition in the instant case, claimant's counsel submitted the Morones Survey of Commercial Litigation Fees for the Portland, Oregon area, and the affidavit of William B. Crow, a lawyer in the practice of civil litigation in Oregon. In reducing the hourly rate, the district director properly considered the complexity of the case, the quality of representation, and the amount of benefits obtained as provided by the applicable regulation, Section 702.132(a). *See Moyer v. Director, OWCP*, 124 F.3d 1378, 34 BRBS 134 (CRT) (10th Cir. 1997).¹ Moreover, the district director did not err in

¹ We further note that the district director did not rely on the holding in the unpublished decision in *Laird v. Sause Brothers, Inc.*, 2006 WL 1891786 (9th Cir. July 11, 2006), to establish that any particular hourly rate is appropriate for counsel's work, but for the proposition that a fee award is appropriately based on the regulatory criteria of 20 C.F.R. §702.132(a). This is a well-established principle, *see, e.g., Moyer*, 124 F.3d

declining to rely on the Morones survey. *See B.C.*, 41 BRBS at 108 n.15; *D.V.*, 41 BRBS 84. However, the district director did not address the adequacy of the Crow affidavit submitted to support the reasonableness of the requested hourly rate of \$350. As this affidavit is relevant to counsel's claim that his requested rate is in line with prevailing market rates for comparable Portland area attorneys performing comparable work, the district director's failure to address it constitutes an abuse of discretion. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Therefore, we vacate the district director's finding that \$240 is an appropriate hourly rate in this case and remand the case for further consideration.

Claimant also contends that the district director erred in finding that employer's liability for claimant's counsel's fee did not commence until March 30, 2005, when claimant raised the specific issue of average weekly wage. Claimant avers that employer's notice of termination of benefits dated October 21, 2002, served as a notice of controversion as of that date, and thus employer's liability for an attorney's fee began on that date. Alternatively, claimant contends that the claim for benefits filed on January 21, 2003, although not specific, was sufficient to require employer to respond or be held liable for an attorney's fee upon claimant's successful prosecution of the claim pursuant to Section 28(a).

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's office, it declines to pay any compensation, and claimant thereafter successfully prosecutes his claim. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). An employer's voluntary payment of compensation prior to the time claimant files his formal claim is not determinative of employer's liability for a fee pursuant to Section 28(a). *See Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co. v. Cooper*, 294 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M. v. Electric Boat Corp.*, ___ BRBS ___, BRB No. 07-0791 (June 18, 2008); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Rather, it is employer's payment or non-payment of benefits in the 30 days after its receipt of the claim on which employer's liability for a fee pursuant to Section 28(a) is predicated. *Id.* Moreover, if employer controverts the claim prior to its receipt of the claim, and does not thereafter pay benefits within 30 days of its receipt of the claim, employer is liable for claimant's fee pursuant to Section 28(a). *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

1378, 31 BRBS 134(CRT), and thus citation to this unpublished case cannot establish reversible error. *See Ct. App.* 9th Cir. Rule 36-3.

In the present case, employer terminated its voluntary temporary total disability benefits on October 18, 2002, and claimant alleges that employer filed a notice of controversion at this time.² Claimant also filed a claim for benefits under the Act for permanent partial disability to his left shoulder by letter dated January 21, 2003.³ The Board and the Fifth Circuit have held that a claim for compensation need not include any competent evidence of disability in order to be “valid;” a claim need only be a writing evincing an intent to seek compensation. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff’g Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001), *aff’d on recon. en banc*, 36 BRBS 65 (2002). Employer’s liability for an attorney’s fee pursuant to Section 28(a) thus commences with reference to employer’s receipt of this claim from the district director irrespective of whether any evidence is supplied with the claim for benefits. *Alario*, 355 F.3d at 473, 37 BRBS at 119(CRT).

In view of this law, therefore, the district director erred in failing to determine if employer is liable for claimant’s counsel’s fee for services rendered prior to March 30, 2005. We vacate the district director’s finding that employer’s liability did not commence until the date an “actual dispute” arose on March 30, 2005. On remand, the district director should specifically address whether employer’s fee liability commenced prior to March 30, 2005. *Id.*; *see Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *see also Day*, 518 F.3d 411, 42 BRBS 15(CRT).

² This form is not in the administrative file forwarded to the Board

³ This letter, from claimant’s counsel, is addressed to the Office of Workers’ Compensation Programs. It states, in pertinent part,

At this time [claimant] is claiming permanent partial disability to his left shoulder . . . I am making this claim on behalf of [claimant] to protect his rights to future benefits pursuant to Section 13 of the [Act]. When I receive [claimant’s] medical records and other compensation claim documents, I will make a more specific claim on his behalf.

A copy of this letter was sent to employer.

Accordingly, the Compensation Order-Approval of Attorney's Fee of the district director is vacated, and the case is remanded for further consideration 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