

THOMAS CIMALORE)
)
 Claimant-Respondent)
)
 v.)
)
 ELECTRIC BOAT CORPORATION) DATE ISSUED: 09/27/2012
)
 Self-Insured)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

David N. Neusner (Embry and Neusner), Groton, Connecticut, for claimant.

Peter D. Quay (Law Offices of Peter D. Quay, LLC), Taftville, Connecticut, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Award of Attorney Fees (Case No. 01-172221) of District Director David Groeneveld 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).

On January 11, 2011, claimant filed a claim for benefits for a work-related hearing loss. The district director served this claim on employer on January 24, 2011. Employer accepted the claim for disability and medical benefits on January 24, and, on January 31, made its first payment of compensation pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13).

Claimant's counsel filed a petition for an attorney's fee for work performed before the district director in the amount of \$1,140.27. Employer objected to its liability for any fee because it accepted the claim and paid benefits. The district director, stating that this was a controverted claim, awarded claimant's counsel an attorney's fee of \$1,140.27 to be paid by employer.

Employer appeals, contending it is not liable for an attorney's fee pursuant to Section 28(a), 33 U.S.C. §928(a), because it commenced payment of benefits to claimant within 30 days of receiving notice of the claim from the district director. Employer also avers that Section 28(b) is inapplicable. Claimant's counsel responds, conceding that employer's recitation of the facts and arguments regarding the inapplicability of Sections 28(a) and 28(b) are correct and that employer is not liable for any attorney's fee in this matter. Counsel states he has no objections to the Board's vacating the district director's fee award and that he will refund to employer the attorney's fee paid pursuant to the district director's award.¹

An employer's liability for an attorney's fee under Section 28(a) commences only if the employer declines to pay compensation within 30 days of receiving from the district director the claim for compensation. *See Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008). In this case, employer paid benefits within the 30-day period following its receipt of the claim, and thus cannot be held liable for claimant's attorney's fee pursuant to Section 28(a). In addition, Section 28(b) is not applicable as no further controversy concerning claimant's entitlement to benefits arose. *See generally Davis v. Eller & Co.*, 41 BRBS 58 (2007).

¹The Director, Office of Workers' Compensation Programs, responds to employer's appeal, urging the Board to vacate the fee award and remand the case to the district director, as he did not specify under which section of the Act employer is liable for counsel's fee. In light of our disposition of this case, this contention is moot.

As employer cannot be held liable for counsel's attorney's fee and counsel so concedes, we vacate the district director's fee award.²

Accordingly, the district director's Compensation Order Award of Attorney Fees is vacated.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

²Claimant's counsel may seek an attorney's fee payable by claimant as a lien on his compensation by filing a fee petition with the district director. 33 U.S.C. §928(c); 20 C.F.R. §702.132.