BRB No. 89-335

WILLIAM McATEE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	DATE ISSUED:
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees of Michael J. Swart, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Winn S. L. Faulk, Mobile, Alabama, for the self-insured employer.

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

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Compensation Order-Award of Attorney's Fees (6-98904) of District Director Michael J. Swart 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On October 16, 1986, claimant filed a claim under the Act for a 7.5 percent left ear monaural[1] hearing loss and provided employer with notice of his injury that same day. Employer thereafter filed a Form LS-207 Notice of Controversion on October 27, 1986, stating that it had not received adequate information to make a determination of liability, and that if such information was provided and it was determined to be the last exposing maritime employer, it would accept the claim and pay compensation and medical benefits subject to the limitations of the Act. Emp. Ex. 2 . In addition, Vernon E. Duke, the Director of Insurance, Medical and Safety for employer, wrote

[1]Although the claim refers to a 7.5 percent binaural hearing loss, the letter of notice to employer indicated that compensation was being sought based on a 7.5 percent monaural hearing loss.

claimant's counsel a letter on the same date in which he requested copies of any medical reports and test results to substantiate the claim, and indicated that employer was ready to pay compensation and medical expenses "subject to the limitations of the Act." On May 14, 1987, employer received formal notice of the claim from the district director. On July 26, 1988, when employer received copies of 1985 and 1986 federal tax returns indicating that Alabama Shipbuilding was claimant's last covered employer, it voluntarily made a lump sum compensation payment of $866.11 for a 7.5 percent monaural hearing loss based on an average weekly wage of $333.12.

Claimant's attorney, thereafter, filed a fee petition for work performed before the district director, requesting $1102.50, for 12.25 hours of time billed at $90 per hour, plus expenses of $61.75. In a letter dated August 23, 1988, employer contested its liability for the fee based on its purported acceptance of the claim in its LS-207 and the fact that it voluntarily commenced payment of compensation immediately upon receiving the documentation it had requested in support of the claim. *See* Emp. Ex. 10. On October 6, 1988, claims examiner Sandra Kitchin wrote a letter to employer in which she rejected employer's liability argument and indicated that employer was liable for a fee of $956.25 for 11.25 hours of services at $85 per hour. *See* Emp. Ex. 11. On October 13, 1988, employer wrote a letter to the claims examiner in which it requested reconsideration of the liability determination and contended that certain itemized entries regarding time allegedly spent in connection with an Alabama state claim should be disallowed. *See* Emp. Ex. 12. In a Compensation Order dated January 6, 1989, the district director awarded claimant's counsel a total fee of $956.25 for 11.25 hours of services at the hourly rate of $85. Order at 1. Employer appeals this award.

In its appeal, employer initially contends that the district director erred in determining that it was liable for claimant's attorney's fees under Section 28(a), 33 U.S.C. §928(a), because it accepted liability for the claim in its LS-207 pending receipt of reasonable evidence that it was claimant's last maritime employer. In the alternative, employer contends that it is only liable for 15 minutes of the 1.25 hours of services performed after thirty days from the date it received formal notice of the claim from the district director. Finally, employer contends that any fee awarded must be made consistent with the principles enunciated by the United States Court of Appeals for the Eleventh Circuit in *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), arguing that the $956.52 fee awarded is excessive in light of the routine and uncomplicated nature of the case and the minimal benefits claimant ultimately obtained.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. *See* 33 U.S.C. §928(a). We reject employer's contention that it is not liable for claimant's attorney's fees because it accepted the compensability of the claim in its LS-207 Form. In *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990), the Board found that a response similar to that contained on employer's LS-207 in this case did not affect employer's liability under Section 28(a). In *Tait*, employer did not make any payments until more than a year following its purported acceptance of the claim. Thus, the Board held it had declined to pay compensation until that time. In the instant case, as in *Tait*, employer's response to the claim in its notice of controversion was not explicit regarding such matters as when employer would make payment and the amount it would pay; the language of the document accordingly cannot be construed as any form of payment or tender of compensation. *See Tait*, 24 BRBS at 61. In the present case, inasmuch as employer did

not pay any compensation until July 26, 1988, *i.e.*, beyond 30 days from May 14, 1987, when employer received formal notice of the claim, the district director's determination that employer is liable for a portion of claimant's attorney's fee pursuant to Section 28(a) is affirmed.

We agree with employer, however, that consistent with the plain language of Section 28(a), it may only be held liable for those services rendered after 30 days from the date that employer received notice of the claim or, within the 30-day period after such notice, from the date it declined to pay benefits, whichever is sooner. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993). In the present case, only 5.25 of the 11.25 hours awarded by the district director involved work performed following 30 days from May 14, 1987, the date employer received formal notice of the claim.[2] Accordingly, the fee award is modified to reflect that employer's liability for the fee is limited to $446.24, representing 5.25 hours of services at an hourly rate of $85. Although employer contends that the 2.75 hours claimed on February 11, March 24, and April 8, 1988, should be disallowed because they involved services rendered in an unnecessary action brought under the Alabama State Workmen's Compensation Law for the same disability, services performed in collateral actions may be compensable where the same services are used in connection with the Longshore Act claim. *See Roach v. New York Protective Covering*, 16 BRBS 114 (1984). In any event, the services in question appear to be generic, and employer's unsupported assertions to the contrary are insufficient to establish that the district director abused his discretion in awarding a fee for these services, having considered employer's objection below. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1980).

[2]Employer's argument that only 1.25 hours of the 11.25 hours of services found compensable by the district director involved work performed after 30 days following employer's formal notice of the claim is inconsistent with the record. Although employer also asserts that of this 1.25 hours, the one hour claimed on July 29, and 30, and August 1, 1988 is not compensable, we need address this assertion which is being raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

With regard to the fee for services performed prior to the time that employer received formal notice of the claim, claimant may be liable pursuant to Section 28(c), 33 U.S.C. §928(c). Such a fee will be a lien on claimant's compensation and, in such circumstances, the regulations require consideration of claimant's financial circumstances. 20 C.F.R. §702.132(a). Inasmuch as the district director did not consider assessment of a fee against claimant, the case is remanded for him to consider a reasonable fee under Section 28(c), based upon consideration of applicable factors for time billed prior to May 14, 1987. *See Watkins*, 26 BRBS at 181; *see generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. February 26, 1980), *amended*, (D.C. Cir. March 31, 1980).

Employer's remaining argument is that the fee awarded is excessive in light of the complexity of the case, the benefits obtained, and various other factors discussed in *Norman, supra*, and the Codes of Professional Responsibility of the American and Alabama Bar Associations. While the case was before the district director, however, the only objections made by employer concerned liability for the fee and the compensability of four specific itemized entries regarding time spent in connection with a simultaneous Alabama state workmen's action previously discussed. As employer did not otherwise object to the reasonableness of the services while the case was before the district director, we decline to address this argument, as it is being raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB Nos. 90-194/A (July 16, 1993)(Brown and McGranery, JJ., concurring and dissenting); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note that the district director's fee award was made in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. Employer has not met its burden of showing that the $446.24 fee for which it is being held responsible is unreasonable in light of the benefits obtained and the other factors. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is modified to provide that employer is liable for a fee of $446.25, representing 5.25 hours of services at a rate of $85 per hour. The case is remanded for the district director to consider the assessment of a fee for the remaining hours of work against claimant under Section 28(c) and 20 C.F.R. §702.132.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the result only.

REGINA C. McGRANERY
Administrative Appeals Judge