

DONNIE ODOM)
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 Claimant-Respondent)
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 v.)
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 DAVIS & SONS, INCORPORATED) DATE ISSUED:
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 and)
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 LIBERTY MUTUAL INSURANCE)
 COMPANY)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

D.A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Jerome M. Volk, Jr. and Shannon V. Lobell (DeMartini, LeBlanc, D'Aquila & Volk), Kenner, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (No. 7-074511) of District Director Jeana F. Jackson 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 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).

On January 1, 1981, claimant injured his back while working as a roustabout for employer. Employer voluntarily paid claimant temporary total disability benefits from January 2, 1981. Following the agreement of the parties, the district director issued a compensation order directing employer to pay claimant temporary total disability benefits

from November 20, 1987, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Employer was awarded a credit for payments already made. The district director further stated that employer is only liable to claimant for permanent total disability benefits for 104 weeks after finding that employer is relieved from continuing compensation liability after November 16, 1989 pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The district director further awarded claimant cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f).

Prior to the district director's award of compensation, claimant's counsel submitted a fee petition to the district director, seeking an attorney's fee of \$12,405.09, representing 89.5 hours of attorney services at \$135 per hour and \$322.59 in expenses. Employer filed an objection to the fee petition, asserting that it is not liable for claimant's counsel's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), as claimant did not obtain additional compensation. After finding that employer's objection lacked merit because claimant obtained permanent total disability and contested medical benefits, the district director awarded claimant's counsel a fee of \$11,325.45, representing 89.5 hours of attorney services at an hourly rate of \$125 and \$137.95 in expenses to be paid by employer. In awarding the fee, the district director reduced the hourly rate from \$135 to \$125 and the requested expenses from \$322.59 to \$137.95. The district director noted that employer did not make specific objections to the hourly rate, the number of hours, or the total fee claimed.

Employer filed a motion for reconsideration of the district director's fee award, to which claimant's counsel responded, asserting that it was not liable for the fee under Section 28(b), and that, even if it were, the fee awarded is excessive in light of the amount of additional compensation received by claimant.¹ The district director summarily denied employer's motion for reconsideration by letter dated August 16, 1996, stating that employer's recourse was through an appeal to the Board.

On appeal, employer contends that it is not liable for an attorney's fee before the district director pursuant to Section 28(b), or if it is, that the fee is excessive in light of the additional compensation gained by claimant. Claimant responds, urging affirmance of the fee award.

Under Section 28(b), when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by

¹Employer had not raised its alternative argument, that the fee award should be limited by the amount of additional compensation received by claimant, in its initial objections to claimant's counsel's fee petition before the district director.

the employer. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1994); 33 U.S.C. §928(b). Claimant's entitlement to cost-of-living adjustments pursuant to Section 10(f) constitutes additional compensation within the meaning of Section 28(b). *See generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (employer is liable for an attorney's fee where claimant obtains a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), as it results in the accrual of a benefit to claimant greater than that voluntarily paid by employer).

Employer initially contends that it is not liable for an attorney's fee under Section 28(b) as it voluntarily paid claimant benefits and claimant did not receive additional compensation except cost-of-living adjustments pursuant to Section 10(f) which arose by operation of law. In this case, an informal conference was held on January 14, 1986, where employer controverted its liability for permanent total disability benefits. Cl. Br. at Ex. 2. As a result of the informal conference, Dr. Rutledge examined claimant and opined in his report of November 20, 1987, that claimant had reached maximum medical improvement and would benefit from a work hardening program. Based on Dr. Rutledge's opinion that claimant would benefit from a work hardening program, employer was not willing to accept claimant as permanently and totally disabled on June 1, 1992. Cl. Br. at Ex. 3. Subsequently, claimant requested a hearing on January 26, 1994, in order to obtain permanent total disability benefits with its accompanying cost-of-living adjustments pursuant to Section 10(f). Cl. Br. at Ex. 4. A claims examiner recommended that the parties consent to a compensation order awarding claimant permanent total disability benefits and employer Section 8(f) relief. The parties agreed to this, waiving a formal hearing, and the district director thus issued her compensation order awarding claimant permanent total disability benefits. *See* 20 C.F.R. §702.315.

We affirm the district director's finding that employer is liable for claimant's attorney's fee. Although employer voluntarily paid temporary total disability benefits to claimant, a controversy arose in this case following the 1986 informal conference when employer notified claimant that it was unwilling to accept him as permanently and totally disabled. *See generally Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). Thereafter, in 1994, claimant requested a formal hearing in order to obtain permanent total disability benefits. As a result of the parties' agreement that claimant is entitled to permanent total disability benefits with its attendant Section 10(f) adjustments, claimant obtained additional compensation over that which employer voluntarily paid. *See generally Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Fairley*, 25 BRBS at 61. The district director therefore properly assessed the attorney's fee against employer.² *Rihner*,

²In addition, the district director stated in the fee order that there was an issue regarding outstanding medical expenses. Compensation Order Award of Attorney's Fees

41 F.3d at 997, 29 BRBS at 43 (CRT).

at 1. This is contrary to the finding in the compensation order in which the district director stated "The employer has furnished the claimant with medical treatment, *etc.*, in accordance with Section 7 of the Act." Amended Compensation Order at 2. It is thus unclear whether this finding is a proper basis for fee liability.

Employer also contends that, if it is liable for the fee in this case, the attorney's fee awarded by the district director is excessive in light of the additional compensation obtained by claimant, which employer claims is \$302.82.³ The district director did not address this argument which was first raised by employer in its motion for reconsideration. As the district director did not consider this argument and stated that employer's recourse was to appeal to the Board, we vacate the district director's award of an attorney's fee and remand this case to the district director for a discussion of this objection consistent with the law governing the award of a reasonable fee in view of the amount of claimant's recovery.⁴ See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); 20 C.F.R. §702.132.

Accordingly, the district director's Compensation Order Award of Attorney's Fees is affirmed insofar as it holds employer liable for claimant's attorney's fee. With respect to the amount of the fee, the district director's award of attorney's fees is vacated, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³Employer claims this is the amount of the Section 10(f) adjustments for which it is liable prior to the Special Fund's assumption of liability. Employer fails to note that its fee liability is not lessened due to the operation of Section 8(f) in this case. See generally *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 202 (1989).

⁴In addition, if there was a controversy over employer's liability for medical expenses, see n. 2, *supra*, the district director should take claimant's success on this issue into account in awarding a reasonable fee.