

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0414

ALEXIS MACK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LOGISTEC CORPORATION)	
)	DATE ISSUED: 05/18/2021
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order - Denial of Attorney Fee Application of David Duhon, District Director, United States Department of Labor.

Nicholas E. Karatinos (Law Office of Nicholas E. Karatinos), Lutz, Florida, for Claimant.

James W. McCready, III and William R. Wick, III (Bowman and Brooke LLP), Miami, Florida, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Director David Duhon’s Order – Denial of Attorney Fee Application (OWCP No. 06-328872) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (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, based on an abuse of discretion or not in accordance with law. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

This case arises out of a work-related injury to Claimant's left ankle suffered on July 28, 2019. On July 29, 2019, Employer began paying temporary total disability benefits at a compensation rate of \$200. Claimant thereafter engaged the services of counsel and filed a claim on August 12, 2019.¹ The district director gave Employer notice of the claim on August 20, 2019.

Claimant challenged the compensation rate Employer used to calculate her benefits. On August 27, 2019, Employer filed a notice of controversion on the issue of Claimant's average weekly wage, but continued to pay benefits. Claimant also requested authorization to change her treating physician. An informal conference was held on November 6, 2019, and a memorandum issued on November 13, 2019 which recommended Claimant be paid at the minimum compensation rate of \$377.69 retroactive to the date of disability, with interest on the underpaid amount. The claims examiner denied Claimant's request for a change in physicians because she had not been compliant with her doctor's treatment, but recommended Claimant obtain a treatment plan from her treating doctor so that it could be ascertained if a referral elsewhere was warranted.

On November 19, 2019, Employer partially accepted the recommendation and paid the difference in the compensation rate while also controverting the payment of interest on the underpaid amount. Thereafter, Claimant requested another informal conference, alleging at various times that Employer had not timely paid benefits, Employer did not pay the awarded interest, Employer owed benefits for a longer period of disability, and her entitlement to a change in physician. On December 5, 2019 and January 31, 2020, the claims examiner reiterated Employer's liability for interest but denied Claimant's other claims. On February 11, 2020, Claimant filed a letter acknowledging receipt of Employer's payment of \$11.79 in interest.

Between December 27, 2019 and April 20, 2020, Claimant's counsel filed fee petitions for his work before the district director's office, totaling \$7,665 for 21.9 hours at an hourly rate of \$350.

Employer objected to the fee petitions, arguing counsel is not entitled to a fee under Section 28, 33 U.S.C. §928, or, in the alternative, that the fee requested is excessive since Claimant was successful in receiving only an additional \$11.79 in interest. On April 20,

¹ Claimant's LS-203 form mistakenly states the claim was filed August 12, 2018.

2020, Claimant filed a reply to Employer's objection to the fee petition. Counsel agreed to reduce his total requested fee by 50 percent to reflect his success only on obtaining a higher compensation rate and interest for a total fee of \$3,832.50. He also requested an additional fee of \$735 for 2.1 hours of work at an hourly rate of \$350. Finally, he withdrew Claimant's request for additional compensation and penalties and again requested an informal conference on the request for an independent medical examination.

The district director found counsel is not entitled to an attorney's fee under Section 28(a) because Employer paid compensation within 30 days of receiving notice of the claim. *See* Order Denial of Attorney Fee Application at 4. He also found counsel is not entitled to a fee under Section 28(b) because following the informal conference, employer accepted the recommendation for an increase in the compensation rate and controverted only the payment of the interest, but later paid the interest following an additional letter from the claims examiner. *See* Order at 5-6. He therefore denied the fee petition in its entirety. Order at 6.

Claimant appeals the district director's denial of her counsel's fee petition. Employer responds in support of the denial. Claimant filed a reply, disputing Employer's characterization of counsel's actions and reiterating her counsel's entitlement to an attorney's fee under Section 28(b).²

Section 28(b) provides, in pertinent part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they

² Claimant's reply brief suggests counsel could be entitled to a fee under Section 28(a) as well. Section 28(a) is not applicable here, however, as a prerequisite for fee liability under Section 28(a) is that employer refused to pay "any compensation" within 30 days of its receipt of the notice of the claim. *See* 33 U.S.C. §928(a); *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). In this case, it is undisputed that Employer voluntarily paid some compensation to Claimant following receipt of the notice of the claim.

believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . .

33 U.S.C. §928(b). Accordingly, an employer is liable for an attorney's fee under Section 28(b), if there was (1) an informal conference, (2) a written recommendation following the informal conference, (3) the employer's refusal to accept the recommendation, and (4) the employee's using the services of a lawyer to obtain a greater award. *See Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 421, 43 BRBS 27, 31(CRT) (5th Cir. 2009); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). The United States Court of Appeals for the Fifth Circuit has affirmed that an award of prejudgment interest may be the basis for an award of an attorney's fee. *See Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *modifying on reh'g*, 912 F.2d 798, 24 BRBS 43(CRT), *cert. denied*, 500 U.S. 916 (1991).

We agree with Claimant's argument that the district director's denial of an attorney's fee cannot be affirmed. Contrary to the district director's finding, the requirements for Employer's liability under Section 28(b) have been met. There was an informal conference in this matter concerning Claimant's compensation rate, following which a recommendation was made that Claimant was entitled to benefits at the minimum compensation rate and interest on the underpaid amount of benefits. While Employer timely accepted the increase in the compensation rate it filed a notice controverting the payment of interest on the underpaid compensation. *See* Nov. 19, 2019 Notice of Controversion. Thereafter, Claimant used the services of her counsel to obtain the unpaid interest in the amount of \$11.79. The district director's finding that Employer is not liable for an attorney's fee because "DOL resolved this controversion [on the unpaid interest] directly, issuing updated guidance on the Carrier's duty to furnish the interest payment" is not in accordance with the law. The plain language of Section 28(b) states an employer is liable for an attorney's fee if it refuses the informal conference recommendation within 14 days and Claimant obtains greater compensation. In this case, the dispute over the unpaid interest was not resolved until well over two months after the initial informal conference recommendation. *See* Cl. Dec. 27, 2019 letter (stating Employer had not yet paid the interest ordered by the district director). If Employer was unclear as to the amount of interest it owed, it should have sought clarification earlier. Its delay in doing so makes it liable for Claimant's attorney's fee.

We also reject Employer's argument that it is not liable for an attorney's fee under Section 28(b) as Claimant's letter dated April 20, 2020 withdrew her claim for additional compensation and interest. Claimant's April 20, 2020 letter stated Claimant withdrew her claim for any *additional* "penalties" or interest. It is undisputed that Employer did not timely pay the required initial award of interest following the informal conference recommendation. Thus, the prerequisites for an attorney's fee under Section 28(b) have been met. Accordingly, we reverse the district director's finding that Section 28(b) is not applicable and hold Claimant's counsel is entitled to an attorney's fee payable by Employer for his work obtaining interest on the underpaid amount of benefits. Because the district director did not address counsel's fee petition, we remand the case for the district director to address the amount of a fee for which Employer is liable.³ 20 C.F.R. §702.132; *see Ferguson v. Newport News Shipbuilding Co.*, 36 BRBS 17 (2002).

³ Because Employer did not dispute the informal conference recommendation as to the increased compensation rate and timely paid benefits after the recommendation was issued, Employer is not liable for a fee for counsel's work on this issue. *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT). Claimant was unsuccessful on the merits of her requests for a change in physician and an independent medical examination, and withdrew the claim for additional disability benefits and "penalties." Claimant's recovery of interest, though small, does not negate his success on this issue. *See Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (stating an attorney's fee need not be limited by the dollar amount of compensation gained but rather should reflect a claimant's degree of success on the contested issues).

Accordingly, we reverse the district director's Order Denial of an Attorney's Fee Petition and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge