

BRB Nos. 00-0747
and 00-0747A

JOSEPH HOWARD)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
AVONDALE INDUSTRIES, INCORPORATED)	DATE ISSUED: <u>April 24, 2001</u>
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Compensation Order-Award of Attorney's Fees of Charles Lee, District Director, United States Department of Labor.

Frank A. Bruno (Bruno and Bruno), New Orleans, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Compensation Order-Award of Attorney's Fees (Case No. 07-136724) of District Director Charles Lee 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts in this case are gleaned from attachments to the parties' briefs and the district director's order. On November 19, 1996, claimant executed a claim for compensation for a work-related hearing loss. Employer filed a notice of controversion on December 12, 1996. The district director served a copy of the claim on employer on December 31, 1996. On January 8, 1998, employer received a copy of a June 1995 audiogram and report stating claimant sustained a 13.8 percent binaural impairment. Employer paid claimant benefits for this impairment on January 14, 1998. Subsequently, a dispute arose regarding hearing aids. Employer agreed to pay for hearing aids, but not for the full cost associated with the equipment recommended by claimant's audiologist.

Following the case's referral to the administrative law judge, in response to the parties' Joint Motion to Remand, the administrative law judge remanded this case on October 20, 1999, to the district director for consideration of an award of attorney's fees for work performed before the district director.¹ Claimant's counsel submitted a fee petition requesting a total of \$3,031.25, amounting to 19.75 hours at an hourly rate of \$150, plus \$68.75 in costs. Employer filed objections, and the district director awarded an attorney's fee totaling \$1,575, plus \$68.75 in costs. The district director found that employer did not pay claimant in a timely fashion, having failed to make payment within 30 days of having been served with the claim by the district director on December 31, 1996; therefore, the district director found employer liable for time charged after December 31, 1996 through January 15, 1998. Next, the district director found that a second disputed issue arose on March 11, 1998, when employer advised claimant that it would pay for claimant's hearing aids but at a lower amount than the cost of the equipment recommended by claimant's audiologist; therefore, the district director found employer liable for an attorney's fee for all time billed after March 9, 1998.

On appeal, claimant contends that the district director erred in failing to award an attorney's fee against employer from December 12, 1996, the date on which employer filed its notice of controversion, even though the district director did not serve the claim on employer until December 31, 1996. Claimant also contends that the district director erred in not finding that the hearing aid dispute arose on January 8, 1998, when claimant submitted to employer the report of his audiologist, Mr. Bode, recommending "in the ear power hearing aids." In its response, employer urges affirmance of the district director's finding that the

¹After the case was referred for a formal hearing, the parties reached an agreement as to the hearing aid issue. The exact agreement of the parties is not discernible from the administrative file.

dispute over hearing aids arose on March 11, 1998, when employer notified claimant that it disagreed with the type and price of hearing aids he requested, and therefore would not authorize their purchase. On cross-appeal, employer's sole contention is that the district director erred in finding that it failed to make timely payment to claimant according to 33 U.S.C. §908(c)(13).

Employer may be held liable for an attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), only if employer "declines to pay" any compensation on or before the thirtieth day after receiving written notice of a claim for compensation from the district director, and claimant is thereafter successful in obtaining benefits. *See Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 877, 13 BRBS 294 (5th Cir. 1981); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 98 (5th Cir. 1976). If employer pays some benefits voluntarily, and a controversy develops over additional benefits, employer may be held liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), if claimant obtains greater benefits than those paid or tendered by employer. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

We reject claimant's contention that employer's liability for an attorney's fee commences on December 12, 1996, the date employer controverted the claim. The 30-day time frame in which employer must pay or controvert does not begin to run until the date employer receives written notice of the claim from the district director. *Watkins v. Ingalls Shipbuilding Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); 33 U.S.C. §928(a).

Employer correctly contends, however, in its cross-appeal, that the district director erred in finding that its payment to claimant was untimely. Claimant's claim form simply alleged he had suffered a "hearing loss" due to "exposure to injurious noise," without stating any specific degree of impairment. Moreover, there is no allegation in claimant's response brief that an audiogram or report was attached to this claim form. Thus, claimant's filing was akin to an anticipatory filing inasmuch as it does not identify a specific degree of hearing impairment. *See, e.g., I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5, *aff'd mem.*, No. 00-1442 (4th Cir. Nov. 17, 2000). Accordingly, at this point there was no claim to which employer could respond by paying benefits; without claimant's alleging the degree of impairment sustained, employer could neither commence payment nor decline to pay benefits.²

²In a hearing loss claim, the degree of impairment is determined pursuant to the

On January 8, 1998, employer received a copy of claimant's June 1995 audiogram, which showed a specific binaural loss of 13.8 percent; it was at this point that employer was first put on notice of a compensable claim for hearing loss benefits. Inasmuch as employer paid the entire amount due claimant on January 15, 1998, employer paid the contested amount within 30 days of receiving a valid claim as required by Section 28(a) of the Act, and employer cannot be held liable for an attorney's fee for services rendered after December 31, 1996, until the time the dispute arose over the hearing aids.³ See generally *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). Thus, we reverse the administrative law judge's award of an attorney's fee payable by employer from December 31, 1996 through January 15, 1998.

Lastly, we reject claimant's contention that the district director erred in finding that a controversy arose on March 11, 1998, over employer's liability for hearing aids. In the 1995 audiogram report, claimant's audiologist recommended "in the ear power hearing aids." On February 17, 1998, employer authorized two hearing aids for claimant at a total cost of \$870.

On March 9, 1998, claimant's attorney advised employer that this was unsatisfactory, and that claimant wanted the hearing aids recommended by his audiologist. By letter dated March 11, 1998, employer refused to authorize payment above the \$870 previously tendered. Contrary to claimant's contention that a controversy regarding the hearing aids arose in January 1998 when employer received the 1995 audiogram report recommending hearing aids, the district director did not abuse his discretion in finding that a controversy did not arise until employer specifically refused to pay for the equipment sought by claimant. There is no indication that claimant sought specific equipment until after employer tendered \$870 for the payment of hearing aids. Thus, we affirm the district director's determination that employer is liable for an attorney's fee after March 9, 1998. 33 U.S.C. §928(b); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983); see also n. 1, *supra*.

³We reject claimant's contention that employer's assertion of a causation and jurisdiction defense in its notice of controversion negates the fact that employer timely paid benefits within 30 days of receiving documentation of a specific degree of hearing impairment. After employer paid, it did not renew its controversion on these grounds.

Accordingly, the district director's award of an attorney's fee payable by employer prior to March 11, 1998 is reversed. The fee award is modified to reflect employer's liability for an attorney's fee of \$600, representing four hours at an hourly rate of \$150, plus expenses of \$68.75.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge