

BRB No. 01-0804

ALFRED BOATWRIGHT)
)
 Claimant-Respondent)
)
 v.)
)
 LOGISTEC OF CONNECTICUT,) DATE ISSUED: July 12, 2002
 INCORPORATED)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Compensation Order-Awarding of Attorney Fees of Marcia D. Finn, District Director, United States Department of Labor.

David A. Kelly (Monstream and May, L.L.P.), Glastonbury, Connecticut, for claimant.

Christopher J. Field (Field Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order-Awarding of Attorney Fees (OWCP No. 01-148527) of District Director Marcia D. Finn 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).

Claimant was injured on November 12, 1999, when a beam rolled over onto his right

leg and foot. On November 24, 1999, Employer voluntarily initiated payment of temporary total disability compensation, which it paid for the period from November 13, 1999 to September 4, 2000, at the compensation rate of \$371.64 per week. Claimant returned to work in September 2000. He filed a claim for benefits on October 24, 2000. By letter to employer dated January 2, 2001, claimant's counsel sought to increase claimant's average weekly wage on the previously paid benefits. By letter to employer dated February 13, 2001, counsel also sought permanent partial disability benefits pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4), for a five percent impairment to claimant's right foot. On March 2, 2001, employer paid the requested permanent partial disability benefits and increased the compensation rate for the period of temporary total disability to \$413.82 per week.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed before the district director, requesting \$640.50, representing 3.7 hours of legal services at the hourly rate of \$165, and .60 hours of legal assistant services at the hourly rate of \$50. Employer responded, objecting to its liability for a fee, on the basis that it paid all benefits voluntarily. The district director summarily awarded the amount requested after reviewing "the fee application taking into consideration the complexity of the case, the issues involved and the results obtained, the actual necessary work performed and other factors including the expertise of the attorney." Order at 1.

On appeal, employer contends that it is not liable for claimant's counsel's fee inasmuch as it voluntarily accepted the claim as compensable and tendered benefits accordingly, and that there were no disputed issues between the parties. Claimant responds, urging affirmance of the district director's fee award.

Under Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer voluntarily pays or tenders 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 or tendered by employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, although employer voluntarily commenced paying claimant temporary total disability benefits based on the average weekly wage of \$557.47, claimant contended that a higher average weekly wage applied. In addition, claimant sought permanent partial disability benefits pursuant to Section 8(c)(4) for a five percent impairment to his foot. 33 U.S.C. §908(c)(4). Thus, a controversy arose after employer voluntarily paid benefits and claimant successfully obtained an increase in his average weekly wage and permanent partial disability compensation for a five percent impairment to his right foot. Under such circumstances, employer is properly held liable for claimant's attorney's fee under Section 28(b), and we affirm the district director's finding that claimant's attorney is entitled to a fee

award to be assessed against employer.¹ 33 U.S.C. §928(b); *see generally* *Caine v.*

¹We reject employer's contention that Section 28(b) is not applicable as no informal conference was held in this case. This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit, which has not addressed the issue of whether the absence of an informal conference is an absolute bar to the imposition of fee liability under Section 28(b). *Cf. Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that informal conference is prerequisite to fee liability under Section 28(b)). Following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. United States Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), that a written recommendation by the district director is not a prerequisite to fee liability under Section 28(b), the Board has held that the absence of an informal conference does not preclude fee liability under Section 28(b) if a controversy arises between the parties after employer voluntarily paid benefits, and claimant gains additional benefits. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986).

Washington Metropolitan Area Transit Authority, 19 BRBS 180 (1986). Inasmuch as employer is liable for claimant's attorney's fee pursuant to Section 28(b), we need not address employer's contentions concerning Section 28(a).²

²We note however, that in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), the Fifth Circuit imposed fee liability on employer under Section 28(a) where employer's voluntary payments preceded the claimant's written claim for compensation, the employer declined to pay further benefits within 30 days of receiving written notice of the claim from the district director, and the claimant gained additional benefits. In this case, claimant's claim dated October 24, 2000, was filed after employer's voluntary payments ceased, and employer did not tender additional benefits until March 2, 2001. It is not clear, however, when employer received written notice of the claim from the district director.

Accordingly, the Compensation Order-Awarding of Attorney Fees of the district director is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge