

BRB No. 11-0873

ROBERT ALDRIDGE)
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 Claimant-Respondent)
)
 v.)
)
 ELECTRIC BOAT CORPORATION) DATE ISSUED: 07/19/2012
)
 Self-Insured)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Compensation Order Awarding of Attorney Fees and Order Denying Employer/Self-Insured Motion for Reconsideration of Findings of Fact and Award of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Peter D. Quay, Taftville, Connecticut, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Order Awarding of Attorney Fees and the Order Denying Employer/Self-Insured Motion for Reconsideration of Findings of Fact and Award of Attorney Fees (No. 01-172143) of District Director David Groeneveld

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. *See, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a notice of injury and a claim for compensation on December 21, 2010. He asserted that he had suffered injury to his hands and arms from repetitive stress due to his work duties; nevertheless, claimant continued to work for employer. Employer did not controvert the claim. On April 1, 2011, employer received a medical report from Dr. Willetts wherein he diagnosed claimant with a five percent work-related permanent impairment to his right hand and a two percent impairment to the left. On April 4, 2011, employer filed a notice of Payment of Compensation Without Award, and it commenced paying benefits on April 11, 2011, based on Dr. Willetts' report.

Subsequently, claimant's counsel filed a fee petition for work performed before the district director in the amount of \$2,967.50. Employer filed objections, arguing that it is not liable for counsel's fee and that the fee request should be reduced. Ultimately, the district director awarded claimant's counsel an attorney's fee of \$2,892.50 pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). The district director denied employer's motion for reconsideration.

On appeal, employer challenges the district director's award of an employer-paid attorney's fee. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds urging affirmance of the district director's finding that employer is liable for the attorney's fee pursuant to Section 28(a).

Employer contends that the district director erred in awarding a fee pursuant to Section 28(a), as it did not "decline to pay" benefits "on the ground that there is no liability." 33 U.S.C. §928(a). Rather, employer asserts that the delay in payment of benefits was due entirely to claimant's having submitted a claim for an undetermined amount of benefits and having scheduled his doctor's appointment well after the 30 days for employer's response had expired. As it did not file a notice of controversion or decline to pay any benefits, and as it merely awaited the amount of benefits sought by claimant, paying promptly upon receiving the medical report, employer asserts that it is not liable for a fee under the Act.

Section 28(a) of the Act states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim from the district director. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). An employer's inaction during the 30-day period has been held to constitute a "decline to pay" and its voluntary payment of benefits before the claim has been filed or after the 30-day period expires does not prevent application of Section 28(a). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

In *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), the Board rejected the employer's argument that it could not have paid benefits within the 30-day time frame because it did not know what amount to pay. The Board agreed with the Director that nothing in the Act requires a claimant to submit evidence of disability or impairment with the claim for compensation, *see* 33 U.S.C. §913, and that receipt of the notice of the claim itself is what triggers the commencement of the 30-day period under Section 28(a). The Board stated that the 30-day period allows an employer sufficient time to have a claimant examined and to determine whether to pay or controvert the claim. *Craig*, 36 BRBS at 66-67; *Craig*, 35 BRBS at 169-170. The United States Court of Appeals for the Fifth Circuit affirmed the Board's decisions in *Craig*, holding that a claimant need not supply evidence of the extent of his claimed disability with his claim for compensation. *Alario*, 355 F.3d at 852-853, 37 BRBS at 118-119(CRT).

In this case, the fact that employer promptly and voluntarily paid benefits upon receiving Dr. Willetts' report in April 2011 does not negate its admitted failure to pay benefits before the expiration of the 30-day period following its receipt of the notice of the claim, irrespective of whether claimant provided evidence of impairment with his

claim. *Id.* Therefore, we reject employer’s assertion that it did not “decline to pay” benefits, as its inaction during the 30-day period after it received notice of the claim equates to having “declined to pay.” *Alario*, 355 F.3d 848, 37 BRBS 116(CRT). The district director properly held employer liable for claimant’s attorney’s fee, and we affirm that finding. *Id.*; *Mangiantine*, 42 BRBS 30. Moreover, as employer does not challenge the amount of the fee award, we affirm the district director’s award of an attorney’s fee, payable by employer, in the amount of \$2,892.50.

Accordingly, the district director’s the Compensation Order Awarding of Attorney Fees and Order Denying Employer/Self-Insured Motion for Reconsideration of Findings of Fact and Award of Attorney Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge