

BRB No. 02-0607

JAMES BOYD)
)
 Claimant-Respondent)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: May 22, 2003
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Order – Award of Attorney’s Fee of B. E. Voultsides, District Director, United States Department of Labor.

John H. Klein (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order – Award of Attorney’s Fee (Case No. 5-104078) of District Director B. E. Voultsides 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, and abuse of discretion, or not in accordance with law. See, *e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a cleaner in employer’s X33 department, injured his left knee at work on April 28, 1998. Claimant filed his claim on June 3, 1998, and employer voluntarily paid claimant temporary total disability benefits from September 7, 1998, to April 5, 1999, inclusive, when claimant missed work following knee surgery. On June 29, 1999, Dr. Stiles stated that claimant has a 10 percent permanent left lower extremity impairment. The district director entered an order on November 24, 1999,

awarding claimant permanent partial disability benefits in accordance with the parties' stipulation and Dr. Stiles's rating.

Subsequently, claimant's counsel submitted a fee petition to the district director, requesting an attorney's fee of \$884.55, representing 5.31 hours of attorney services at \$166.58 per hour. Employer objected to the fee petition only with regard to its liability for any fee. The district director considered employer's objection but awarded the fee of \$884.55 to claimant's counsel payable by employer. The district director held employer liable for the fee award because employer had controverted the claim twice. The district director did not specify whether employer is liable for claimant's counsel's fee under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Employer appeals the district director's fee award, contending it cannot be held liable for claimant's attorney's fee. Claimant responds, urging affirmance.

In the instant case, claimant worked post-injury for several months in a light duty capacity at the same rate of pay. He filed a claim for benefits on June 3, 1998, which stated that he had not yet lost time from work due to the injury. Cl. Ex. 1; Emp. Exs. 13, 14 at 1. Subsequently, claimant had left knee surgery. Emp. Ex. 15 at 1. Employer voluntarily paid claimant temporary total disability benefits from September 7, 1998, until April 5, 1999, when he returned to work. On June 28, 1999, Dr. Stiles rated claimant with a 10 percent permanent left lower extremity impairment. Cl. Ex. 2; Emp. Exs. 1, 8 at 2, 14 at 2. On July 12, 1999, employer sought clarification from Dr. Stiles regarding this disability rating, understanding why the doctor could arrive at a seven percent impairment rating, but expressing uncertainty as to whether the remaining three percentage points were due to muscle atrophy and whether the atrophy was permanent or could be resolved with physical therapy. Emp. Ex. 2. On July 13, 1999, employer filed its first notice of controversion pending clarification of Dr. Stiles's rating. Cl. Ex. 3b; Emp. Ex. 3. Employer controverted claimant's right to compensation by checking the boxes "extent of temporary disability" and "extent of permanent disability," and specifically stating, "Controvert extent of permanent disability pending clarification from Dr. Stiles." *Id.*

On July 19, 1999, the district director informed claimant that employer objected to his right to compensation. Cl. Ex. 3a. On August 17, 1999, claimant's counsel wrote to employer and requested payment of compensation based on Dr. Stiles's rating. Emp. Ex. 4. On August 18, 1999, employer responded to claimant's counsel that it was seeking clarification of Dr. Stiles's rating. Emp. Ex. 5. That same day, Dr. Stiles clarified his rating for employer, stating that the extra three percentage points were indeed given because of claimant's muscular atrophy which is a permanent condition. Emp. Ex. 10. On August 25, 1999, employer forwarded draft stipulations to claimant's counsel, incorporating the 10 percent disability rating. Emp. Ex. 6. Employer also filed a second notice of controversion informing the Office of Workers' Compensation Programs (OWCP), that it was "currently in contact with claimant regarding agreement of impairment as outlined in 6-28-99

medical report.” Cl. Ex. 5b (mostly illegible); Order – Awarding Attorney’s Fee at 2. Employer also controverted claimant’s right to compensation by checking the box “extent of permanent disability.” *Id.*

On August 26, 1999, employer completed a LS-206 form (payment of compensation without award) indicating employer would pay scheduled permanent partial disability benefits for a 10 percent impairment to claimant’s left knee for 28.8 weeks. Emp. Ex. 7. On August 30, 1999, claimant’s counsel requested the district director to award claimant permanent partial disability benefits in accordance with Dr. Stiles’s 10 percent rating. Cl. Ex. 4; Emp. Ex. 8. On August 31, 1999, the district director again informed claimant that employer objected to his right to compensation. Cl. Ex. 5a. The district director’s characterization of employer’s second notice of controversion, however did not reference employer’s August 26, 1999, filing in which employer agreed to pay claimant benefits for a 10 percent impairment. On September 10, 1999, the stipulation of facts was signed by both parties. Cl. Ex. 6a-b; Emp. Ex. 12 at 2, 3.

The parties agreed that claimant injured his left knee at work on April 28, 1998, and that as a result of the injury, claimant was entitled to temporary total disability benefits from September 17, 1998, to April 5, 1999, inclusive, amounting to \$12,296.86, which employer had paid. *Id.* They also stipulated to claimant’s entitlement to scheduled permanent partial disability benefits equivalent to 10 percent loss of use of the left leg for which claimant was entitled to compensation for 28.8 weeks (10 percent of 288 weeks), amounting to \$12,333.60. *Id.* The parties waived their right to a formal hearing and consented to the issuance of a formal order based upon the above stipulations and agreements. *Id.*; see 20 C.F.R. §702.315.

On September 14, 1999, claimant’s counsel sent the stipulations of fact to the district director, and requested a consent order. On September 17, 1999, employer forwarded the parties’ stipulations to the district director for issuance of an order and notified the district director that employer had started making payments in anticipation of the order. Emp. Ex. 12. On November 24, 1999, the district director awarded claimant permanent partial disability benefits in accordance with the parties’ stipulations and Dr. Stiles’s rating. Cl. Ex. 7a-d. On December 10, 1999, claimant’s counsel requested a fee of \$2,308.95, payable by employer. The fee request was subsequently reduced on December 13, 1999, to \$884.55. Emp. Ex. 9 at 3. Employer objected only to its liability for claimant’s counsel’s fee. Emp. Ex. 11. On April 25, 2002, the district director issued his fee award as requested by

claimant's counsel, finding employer liable for the fee.

Employer's liability for an attorney's fee is governed by Section 28(a) and (b) which states:

(a) 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 [district director], on the ground that there is no liability for compensation within the provisions of this [Act], 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

(b) 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 refuse [sic] 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 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 In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(a), (b). On appeal, employer contends that it is not liable for claimant's counsel's fee under Section 28(a). Employer asserts that the fact that it filed two notices of controversion on July 13, 1999, and August 25, 1999, does not necessarily entitle claimant's counsel to a fee payable by employer because it never

¹ The district director had previously referred the case to the administrative law judge in an attempt to have the liability issue determined at that level. The administrative law judge declined, stating he is without jurisdiction to determine the liability issue for work performed before the district director.

denied liability for compensation. Employer also asserts that it tendered on August 25, 1999, five days prior to claimant's claim on August 30, 1999, all compensation to which claimant claimed for permanent partial disability. Employer further asserts that it cannot be held liable for claimant's attorney's fee under Section 28(b) as the claim was resolved without resort to informal or formal proceedings. We agree with employer that the district director erred in holding employer liable for claimant's attorney's fee.

Initially, we hold that employer cannot be held liable for claimant's fee under Section 28(a) because it did not decline to pay compensation within 30 days of receipt of claimant's claim for compensation. See *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108, 110 (2000). Claimant's claim is dated June 3, 1998, but claimant did not seek disability benefits until September 7, 1998, which employer voluntarily paid in a timely manner. Claimant's claim for permanent partial disability benefits was made on August 30, 1999, when claimant's counsel requested from the district director an award of permanent partial disability benefits pursuant to Dr. Stiles's opinion. Employer tendered the permanent partial disability benefits on August 25, 1999, five days prior to claimant's claim, and it started payments on September 17, 1999, within 30 days of its receipt of the claim from the district director. See *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997). That employer filed prior notices of controversion does not confer liability on employer to pay claimant attorney's fee because the notices of controversion stated that employer was seeking clarification from Dr. Stiles; the later notice also stated employer was in contact with claimant regarding the parties' agreement regarding the impairment rating given by claimant's doctor.

Moreover, employer cannot be held liable for an attorney's fee under Section 28(b) on the facts of this case as it paid benefits voluntarily without resort to informal or formal proceedings. Employer voluntarily paid claimant temporary total and permanent partial disability benefits prior to the convening of an informal conference, and no dispute remained between the parties after employer tendered and paid permanent partial disability benefits. See *Perez*, 128 F.3d 908, 31 BRBS 162(CRT); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs, [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991); *Boe*, 34 BRBS at 110-111. There was a delay in employer's payment of permanent partial disability benefits, but that delay was not due to inaction on employer's part. The delay was caused by Dr. Stiles, who waited over a month to respond to employer's inquiry regarding his

² Claimant's counsel's request to employer for permanent partial disability benefits by letter dated August 17, 1999, cannot constitute a claim for compensation as it was not filed with the district director or sent to employer by the district director. See *Craig v. Avondale Indus., Inc.*, 36 BRBS 65 (2002)(order on motion for reconsideration *en banc*), *aff'g* 35 BRBS 164 (2001)(decision and order on motions for reconsideration *en banc*); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

impairment rating of claimant. *Boe*, 34 BRBS at 111.

As employer voluntarily paid compensation within 30 days of its receipt of claimant's claim for permanent partial disability, without resort to informal or formal proceedings, it cannot be held liable for claimant's attorney's fee pursuant to Section 28(a) or (b). The district director's award of an attorney's fee assessed against employer therefore is reversed. However, since claimant did obtain compensation, counsel may be entitled to the fee, assessed against claimant as a lien on his compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). The regulations provide that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. 20 C.F.R. §702.132. We therefore remand the case to the district director to consider an attorney's fee award payable by claimant under Section 28(c).

Accordingly, the district director's assessment of claimant's attorney's fee against employer is reversed. The case is remanded for consideration of an attorney's fee payable by claimant.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge