

BRB No. 07-0791

A.M.)
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 Claimant-Petitioner)
)
 v.)
)
 ELECTRIC BOAT CORPORATION) DATE ISSUED: 06/18/2008
)
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

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

Conrad M. Cutcliffe (Cutcliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

Kathleen H. Kim and Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant appeals the Compensation Order Denial of Attorney Fees (Case No. 01-154981) 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). The Board held oral argument in this case on April 16, 2008, in Providence, Rhode Island.

Claimant sustained injuries to both of his hands and arms as a result of his repetitive use of air-fed vibratory equipment over the course of his 19-plus years of work for employer. As a result, claimant filed a claim for benefits under the Act on January 22, 2002, which employer controverted by letter dated February 7, 2002. Employer ultimately paid compensation for separate losses to claimant's right and left hands pursuant to the schedule on October 17, 2003,¹ 33 U.S.C. §908(c)(3), followed by its payment of an attorney's fee in 2004 for services related to the procurement of the scheduled awards.²

On December 17, 2006, claimant, who continued to work regularly for employer, contacted his attorney to convey his belief that the condition in his hands had worsened. Claimant's counsel recommended an evaluation by employer's expert, Dr. Weiss, which culminated in the performance of carpal tunnel release surgeries on claimant's right and left hands on or around April 1, 2007. Employer authorized the surgical procedures and paid temporary total disability benefits from April 2, 2007, through May 20, 2007.

Claimant's counsel subsequently filed a fee petition with the district director requesting an attorney's fee of \$1,117.55, representing 5.15 hours of attorney time at an hourly rate of \$217. Employer filed objections to the fee petition. The district director denied the fee petition in its entirety because he found that employer timely paid all benefits owed and did not file any notices of controversion with regard to the claim for temporary total disability benefits.

¹ The record establishes that claimant had an 8.5 percent impairment of his left hand and a 12.5 percent impairment of his right hand for which employer paid a total of \$28,373.13 in compensation.

² The record establishes that the parties agreed that claimant's counsel was entitled to an attorney's fee totaling \$3,878.95, for work associated with claimant's entitlement to the scheduled awards of permanent partial disability benefits.

On appeal, claimant challenges the district director's denial of an attorney's fee, asserting he is entitled to an attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Employer responds, urging affirmance of the district director's denial of an attorney's fee.³ The Director, Office of Workers' Compensation Programs (the Director), also responds, agreeing with claimant that employer is liable for an attorney's fee in this case pursuant to Section 28(a). The Director requests remand to the district director for a determination as to the amount of the attorney's fee payable by employer under Section 28(a).

Claimant argues that, contrary to the district director's finding, he is entitled to an attorney's fee pursuant to Section 28(a) because employer did not pay benefits to claimant within 30 days of its receipt of the claim from the district director. In support of his position, claimant cites the Board's decision in *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007), and asserts that employer's notice of controversion dated February 7, 2002, demonstrates its failure to pay benefits within the 30 day period rendering it liable for an attorney's fee for all work performed by claimant's counsel on the claim, including that regarding the additional temporary total disability benefits. The Director similarly argues that the text of Section 28(a) and the cases interpreting it, *e.g.*, *W.G.*, 41 BRBS 13, establish that an employer's attorney's fee liability under that subsection is premised solely on whether the employer "declines to pay any compensation" within thirty days after receiving notice of a claim. As such, the Director contends that the fact that employer voluntarily paid the additional disability and medical benefits in this case in a timely fashion is irrelevant to its liability for an attorney's fee under Section 28(a). Employer maintains that since it acceded to claimant's requests for additional medical and disability benefits in a timely fashion, it is not liable for claimant's attorney's fee in this case.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation.⁴ 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103,

³ We hereby accept employer's response brief, dated April 8, 2008. 20 C.F.R. §§802.212, 802.217.

⁴ Section 28(a) states, in relevant part:

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 chapter and the person seeking benefits shall thereafter have utilized the services of an

37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Section 28(b), in general, allows an employer-paid attorney's fee if an employer timely pays or tenders compensation and thereafter a controversy develops over additional compensation owed, and a claimant successfully obtains additional compensation after following the procedures set forth in the Act. 33 U.S.C. §928(b); *see Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

In *W.G.*, 41 BRBS 13, the claimant filed a claim in February 2004, which employer controverted, thus potentially triggering its liability for claimant's attorney's fee under Section 28(a). In October 2004, employer agreed to pay compensation and medical benefits, and it paid temporary total disability benefits, medical benefits and an attorney's fee in December 2004. After claimant's condition reached maximum medical improvement, the parties addressed claimant's permanent partial disability, and employer paid benefits for a 36 percent scheduled impairment pursuant to the district director's recommendation. The district director held employer liable under Section 28(a) for the fee for work involving the initial temporary total disability payments obtained but found that Section 28(b) governed fee liability for the work involving the subsequent payment of permanent partial disability benefits. The district director held that employer was not liable for a fee under Section 28(b) for work relating to claimant's permanent partial disability, since employer timely paid the permanent partial disability benefits sought following the district director's recommendation.

On appeal, the Board held that employer's liability for all of the attorney's fee claimed was governed by Section 28(a), and not Section 28(b), since employer did not pay benefits to claimant within 30 days of its receipt of the claim from the district director. The Board relied on case precedent stating that a claimant's pursuit of additional benefits after an initial claim is filed did not involve a "new claim" and that fee liability is governed by employer's actions in relation to the actual claim filed. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005) (a claim is a formal action that initiates a legal proceeding, rather than an informal action that seeks additional benefits on a prior claim); *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT) (Section 28(a) applies to the back injury portion of the case because, although the employer voluntarily paid compensation, it did not timely pay any benefits during the pertinent time period, *i.e.*, the period which begins with receiving notice of the claim, and ends thirty days after); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (employer liable for a fee under Section 28(a) since it

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).

ceased its voluntary payment of benefits prior to the filing of claimant's claim and thereafter did not pay benefits within 30 days of its receipt of that claim). *See also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). Consequently, in *W.G.*, the Board held that Section 28(a) applied because employer "decline[d] to pay any compensation on or before the thirtieth day after receiving written notice" of the claim, and claimant thereafter successfully prosecuted it in that he obtained temporary total and permanent partial disability benefits, albeit at two separate intervals. *W.G.*, 41 BRBS at 15. The Board thus reversed the district director's denial of an attorney's fee, and remanded the case for consideration of the amount of the fee for which employer is liable under Section 28(a). *Id.*

The United States Court of Appeals for the Sixth Circuit recently addressed the Board's decision in *W.G.* in a case with similar facts. *Day v. James Marine, Inc.*, 518 F.3d 411 (6th Cir. 2008). In *Day*, employer voluntarily paid claimant temporary total disability benefits at the time of the initial injury in October 2000, but then declined to timely pay benefits within 30 days after it received written notice of claimant's claim in October 2001.⁵ *Id.* Employer, however, subsequently paid additional disability benefits over various other periods of time, and ultimately an administrative law judge awarded claimant ongoing permanent total disability benefits, as well as an attorney's fee under Section 28(b). The district director also awarded an attorney's fee pursuant to Section 28(b). Employer appealed only the district director's finding that it was liable for an attorney's fee for work performed at that level.

In its decision, the Board vacated the district director's award of an attorney's fee and remanded the case to the district director for further consideration. *Day v. James Marine, Inc.*, BRB No. 05-0346 (Dec. 20, 2005) (unpub.). The Board held that employer is liable for an attorney's fee pursuant to Section 28(a) from the date it received written notice of claimant's claim from the district director to the date it paid benefits pursuant to the district director's December 2001 recommendations, and that employer's liability for an attorney's fee would thereafter fall under Section 28(b). As the relevant dates were

⁵ Specifically, employer voluntarily paid benefits from October 6, 2000, to May 15, 2001. Claimant filed his claim on July 31, 2001. Employer was not paying benefits at that time. Claimant was receiving his full wages from employer by using his vacation days throughout July, August, and September 2001. Claimant ceased employment on September 24, 2001, and employer filed its first notice of controversion on September 25, 2001. The district director gave employer notice of the filing of the claim on October 24, 2001. In 2002, employer made payments pursuant to a December 2001 recommendation of the district director, but it refused a district director's July 2003 recommendation to pay further benefits.

not contained in the record before the Board, the case was remanded for the district director to ascertain these dates and to enter a fee award accordingly.⁶

The Sixth Circuit reversed the Board's holding that employer's liability for a fee was governed by Section 28(b).⁷ *Day*, 518 F.3d 411. The court cited with approval the Board's holding in *W.G.*, issued after the Board's *Day* decision, that, pursuant to the plain language of Section 28(a), an employer's liability for an attorney's fee for work involving all benefits due on the claim must be determined pursuant to that provision if the employer does not pay benefits to claimant within 30 days of its receipt of the claim from the district director. *Day*, 518 F.3d at 420. Stating that, as in *W.G.*, the employee's subsequent pursuit of permanent disability benefits did not involve a new claim but rather the permanent disability aspect of the previously filed claim, the court "reach[ed] the same conclusion" as the Board in holding that Section 28(a) must be applied to the entire claim.⁸ *Id.* The Sixth Circuit concluded that the key question for determining an employer's attorney's fee liability under Section 28(a) is whether the employer paid the

⁶ In addition, the Board held that employer is liable for the attorney's fee under Section 28(b) for work after it declined the district director's recommendation in July 2003. It also directed that, as claimant received an ongoing award of permanent total disability benefits, the district director was to address claimant's liability for a fee for the periods when employer was not liable pursuant to Section 28(c). On remand, the district director ascertained the relevant dates and assessed an attorney's fee of \$4,690 against employer and of \$9,415.40 against claimant. Claimant appealed the district director's award of an attorney's fee, contending only that the Board's prior decision was in error. Claimant thus requested an expedited, summary decision in order to preserve his appellate rights regarding the Board's prior decision. The Board granted claimant's request in its Order dated May 25, 2006. *Day v. James Marine, Inc.*, BRB No. 06-0518 (May 25, 2006) (unpub. Order).

⁷ In the first portion of its decision, the court held that employer is not liable for pre-controversion fees under Sections 28(a), (b).

⁸ The Sixth Circuit found that this conclusion was "consistent with the tide of appellate authority." *Day*, 518 F.3d at 420 citing *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253 (6th Cir. 2007) (holding that the pursuit of additional benefits after an initial payment is not a new "claim"); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).

claim during the “30-day window” after it received notice from the district director.⁹ *Id.* at 421.

This case mirrors *W.G.*, 41 BRBS 13, and *Day*, 518 F.3d 411, in that in each instance the claimant filed a claim and employer did not pay benefits within 30 days of its receipt of the claim from the district director. Additionally, in both cases, claimants subsequently sought further benefits for the same work-related injury.¹⁰ Specifically, in this case, claimant filed his claim for benefits on January 22, 2002, employer received written notification of the claim from the district director on February 6, 2002, and filed its notice of controversion on February 7, 2002. Employer ultimately paid scheduled awards of permanent partial disability benefits on October 17, 2003, and a related fee as well as temporary total disability and medical benefits in 2007. Under these circumstances, Section 28(a) must be applied to the entire claim. *Day*, 518 F.3d 411; *W.G.*, 41 BRBS 13; *see also Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).¹¹

⁹ The Sixth Circuit thus determined that the facts that employer paid claimant some benefits prior to the time it received written notice of claimant’s claim and then paid some benefits after it controverted claimant’s claim are irrelevant for purposes of determining its liability for an attorney’s fee under Section 28(a), since neither payment occurred within the “30-day window” contemplated by that provision. *Day*, 518 F.3d at 421; *see also Cooper*, 274 F.3d 173, 35 BRBS 109(CRT).

¹⁰ As it is well established that a claim remains pending until it is adjudicated and a formal order is entered, *see Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff’d on recon.*, 32 BRBS 224 (1998), and it is undisputed that claimant’s initial claim had not been withdrawn, formally settled, or closed by a formal order, the claim filed in 2002 remained open and viable, thereby obviating any need for claimant to file an additional claim for benefits in 2007, when he required surgery.

¹¹ In *Edwards*, the court rejected the argument that a fee was due under Section 28(a) where employer voluntarily paid benefits within 30 days of claimant’s filing of his formal claim but claimant later sought additional benefits which employer declined to pay. Construing the term “filing a claim,” the court held this phrase refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks additional benefits on a prior claim. In this case, claimant’s pursuit of additional medical and temporary total disability benefits similarly is a part of claimant’s initial claim for benefits.

We reject employer's assertions that it cannot be liable for an attorney's fee in this case as it did not deny claimant the medical treatment he sought in 2007.¹² Employer argues that since it did not deny claimant any medical treatment at any time in this case, employer's 2002 controversion of claimant's entitlement to disability compensation is, pursuant to the decision of the United States Court of Appeals for the First Circuit in *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998), irrelevant to a determination of its liability for an attorney's fee in this case. In *Barker*, employer timely paid the claimant temporary total disability benefits under the Maine statute for his neck injury. Three years after returning to a higher paying job, but still in pain, claimant sought a scheduled award under the Act. The administrative law judge found the schedule inapplicable to the neck injury, and the Board and court affirmed this finding. *See Barker*, 138 F.3d 431, 32 BRBS 171(CRT). An attorney's fee also was denied. *Id.*

In addressing the denial of an attorney's fee, the court first stated that only Section 28(b) was potentially applicable as employer had timely paid benefits, albeit under the state Act. The court held that claimant had not received "additional compensation" as required by Section 28(b) because the claim for a scheduled award was denied. Claimant contended that employer was liable for a fee due to his obtaining additional medical benefits. The First Circuit stated, in *dicta*, "[i]t is an open question whether the payment of medical bills constitutes 'compensation' under the LHWCA." *Barker*, 138 F.3d at 439, 32 BRBS at 177(CRT) (citing court cases discussing whether medical payments are "compensation" in varying contexts). The court added, however, that it need not decide the question because "the record is bereft of any credible evidence indicating that employer unreasonably withheld the payment of medical bills at any time, or, put another way, that the petition brought about a payment that would not otherwise have occurred." *Id.* As employer had paid medical benefits all along, the court stated that claimant did not obtain "additional compensation" assuming, *arguendo*, that medical benefits are "compensation." *Id.*

¹² We reject, as unfounded, employer's contention at the oral argument that the "actual claim" in this case did not arise until the point at which claimant presented medical bills and thus, as employer timely paid those bills, it cannot be liable for an attorney's fee under Section 28(a). *See Oral Argument Transcript at 39-41.* Contrary to employer's contention, the record establishes that claimant filed a "Claim for Compensation" with the district director for work-related injuries to his hands on January 22, 2002, and that employer controverted this claim. This claim remained open at the time when claimant required additional treatment which resulted in additional disability as a result of the same work-related injury. *See n.10, supra.*

In this case, employer contends, based on *Barker*, that medical benefits are not “compensation” and that as it paid medical benefits when it was requested to do so, claimant did not successfully prosecute his claim. We reject this contention, as the basis for assessing an attorney’s fee against employer here does not rest on claimant’s obtaining medical benefits. Unlike *Barker*, employer here did not timely pay benefits after it received notice of the claim, and thus fee liability is determined under Section 28(a), rather than Section 28(b).¹³ Moreover, claimant in this case did not obtain only additional medical benefits, but he also obtained additional temporary total disability benefits following his surgical procedures in 2007. Claimant thus successfully obtained both additional disability and medical benefits. As we have explained, the fact that employer promptly paid these benefits when the need for surgery arose cannot alter the outcome under Section 28(a). *Day*, 518 F.3d 411. Consequently, we reject employer’s contention that *Barker* precludes its liability for any attorney’s fee in this case.¹⁴

As employer declined to pay any benefits within 30 days of its receipt of the claim, and claimant thereafter successfully obtained additional benefits, albeit at different periods, we hold, based on the plain language of the statute, that employer is liable for counsel’s fee pursuant to Section 28(a). *Day*, 518 F.3d 411; *W.G.*, 41 BRBS 13; *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). This case therefore is remanded to the

¹³ We note that Section 28(a) and Section 28(b) differ with regard to the “success” required by claimant in order to obtain an attorney’s fee payable by employer. In this regard, Section 28(a) requires that claimant utilize the services of an attorney in the “successful prosecution of his claim,” 33 U.S.C. §928(a), whereas Section 28(b) states that claimant must utilize the services of an attorney to obtain “additional compensation” beyond that tendered or paid by employer. 33 U.S.C. §928(b). In *Barker*, only Section 28(b) was at issue.

¹⁴ As employee’s liability for a fee does not turn on its payment of medical benefits alone, we need not address the issue reserved by the First Circuit regarding whether medical benefits are “compensation.” However, the Board has long held that a claimant who obtains a contested award of medical benefits is entitled to an employer-paid fee under both Section 28(a) and (b). *See, e.g., Morgan v. General Dynamics Corp.*, 16 BRBS 336 (1984); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975); *see also Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993) (medical provider who obtains payment of medical benefits is “person seeking benefits” under Section 28(a)); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993) (attorney’s fees payable under Section 28(a) where there is evidence of actual past medical expenses or treatment necessary in the future).

district director for consideration of the amount of the fee to which claimant's counsel is entitled. 20 C.F.R. §702.132.

Accordingly, the district director's denial of an attorney's fee is reversed. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge