

BRB No. 10-0168

STUART E. THOMPSON)
)
 Claimant-Respondent)
)
 v.)
)
 NORTHROP GRUMMAN SHIPBUILDING,) DATE ISSUED: 09/08/2010
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Order-Award of Attorney's Fee of T.A. Magyar, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Order-Award of Attorney's Fee (Case No. 05-123721) of District Director T.A. Magyar 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 district director's attorney's fee award 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., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right knee on August 5, 2006, during the course of his employment for employer. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from August 25 to November 16, 2006, and from April 2 to November 11, 2007. Claimant started working for a different employer on November 13, 2007. He sought compensation for temporary total disability on November 12, 2007, and

for temporary partial disability, 33 U.S.C. §908(e), commencing November 13, 2007. Claimant further averred that his left knee became symptomatic as a result of the work-related right knee injury. In a Memorandum of Informal Conference dated February 1, 2008, the district director declined to issue a recommendation on these issues as claimant did not raise his entitlement to additional compensation until January 23, 2008, and claimant's counsel requested that the left knee issue be held in abeyance pending the deposition of Dr. Zaslav, which was scheduled for February 6, 2008.

After the district director received Dr. Zaslav's deposition, she sent a letter, dated May 20, 2008, to the parties stating that claimant's left knee condition is a compensable consequence of the right knee injury and recommending that claimant is entitled to compensation for temporary partial disability commencing November 12, 2007, for his right knee injury. The letter also stated that claimant's weekly compensation rate could not be determined because insufficient wage information had been submitted to the district director's office. The district director stated that in order to determine a compensation rate additional wage information needed to be submitted. On May 30, 2008, claimant requested that the case be transferred to the Office of Administrative Law Judges for a formal hearing. By letter dated June 4, 2008, employer acknowledged claimant's May 30 letter, which referenced the district director's May 20 letter. Employer stated it had not received the May 20 letter and inquired as to whether it constituted the district director's final recommendation; employer requested that the district director supply a copy of the letter. Claimant subsequently sent some pay stubs to employer, and, on June 26, 2008, employer stated it was instituting temporary partial disability benefits as of November 12, 2007.¹ Noting the parties' apparent agreement, the district director subsequently stated it was unnecessary to refer the case to the administrative law judge.

Claimant's counsel subsequently sought an attorney's fee of \$7,966.80 for work before the district director, representing 21.82 hours by Attorney Camden and two hours by Attorney Klein at \$300 per hour, 8.64 hours of paralegal work at \$95 per hour, plus \$248.81 in costs. Employer objected to the fee petition, to which claimant responded. The district director stated that employer is liable for an attorney's fee under Section 28(b), 33 U.S.C. §928(b), because it did not timely accept the May 20, 2008

¹ Employer agreed to pay claimant temporary partial disability compensation of \$459.15 per week from November 12, 2007 to May 11, 2008, while claimant was employed by Bay Aging, and \$259.07 per week commencing May 12, 2007, when claimant started working for Lacy Auto Parts.

recommendation. The district director also rejected employer's contention that services rendered and costs expended to obtain information related to claimant's claim under the workers' compensation laws of Virginia are not compensable as the information also pertains to the claim filed under the Act. The district director reduced the hourly rate requested for attorney work from \$300 to \$250. The district director awarded claimant's counsel a fee of \$7,024.61, representing \$5,955 in attorney's fees, \$820.80 for paralegal work, and costs of \$248.81.

On appeal, employer asserts that it is not liable for a fee under Section 28(b). Employer alternatively asserts that the district director did not sufficiently address its contention that services rendered and costs expended in pursuit of the state claim are not compensable. Claimant responds, urging affirmance of the fee award.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132.² Section 28(b) of the Act states, in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award...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 employer or carrier, a reasonable attorney's fee . . . 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(b). In this case, employer paid compensation without an award and then a controversy arose over claimant's entitlement to additional compensation. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, in order for employer to be liable under Section 28(b), the district director

² Neither party contended below or on appeal that Section 28(a) is applicable in this case. 33 U.S.C. §928(a).

must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer voluntarily paid or tendered. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

Employer contends the district director erred in holding it liable for claimant's attorney's fee pursuant to Section 28(b). Employer asserts that the district director's May 20, 2008 correspondence stating that claimant has a work-related left knee condition and that he is entitled to compensation for temporary partial disability for his right knee injury does not constitute a written recommendation under Section 28(b) because the district director specifically stated that she could not provide the applicable compensation rate due to the absence of sufficient wage information. As the letter did not state claimant's compensation rate, employer argues that it did not reject a recommendation that it pay claimant compensation for temporary partial disability.

In her fee award, the district director stated that a recommendation was issued on May 30 (*sic*), 2008, and that employer failed to accept the recommendation until June 26, 2008, which is in excess of fourteen days after the date of the recommendation was issued. Moreover, the district director stated that employer failed to actually pay compensation to claimant for an additional twelve days. The district director concluded, therefore, that the conditions were met for conferring fee liability under Section 28(b).

In this case, an informal conference was conducted on January 30, 2008. 20 C.F.R. §702.311. No written recommendation was issued at that time because claimant had not timely raised his entitlement to additional disability compensation, and claimant's counsel requested that the issue of the work-relatedness of claimant's left knee condition be held in abeyance pending the deposition of Dr. Zaslav. The May 20, 2008 letter resolved these issues in claimant's favor. However, the letter states that

the weekly amount [of compensation] can not currently be determined as insufficient evidence has been submitted to establish such. During the two week period from January 1, 2008 to January 15, 2008 the claimant worked 53 hours but during the period from January 16, 2008 to January 31, 2008 the claimant only worked 33.50 hours and there is no explanation for this disparity. In order for this office to determine an appropriate weekly rate for temporary partial disability additional wage information needs to be submitted.

May 20, 2008 letter at 2. We agree with employer that, because the May 20, 2008, letter specifically stated that a compensation rate could not be calculated, the letter does not constitute a written recommendation for purposes of conferring on employer liability for claimant's attorney's fee pursuant to Section 28(b). Claimant was no longer working for employer and did not provide the district director with sufficient wage information from which she could calculate a compensation rate.³ Under these circumstances, employer was unable to either accept or reject liability for the payment of temporary partial disability benefits. Moreover, the district director did not address when employer received the May 20 letter. As of June 4, 2008, employer had not received it and the Act states that employer's liability is triggered by its refusal of the written recommendation within 14 days "after its receipt by them."⁴ 33 U.S.C. §928(b). Based on the circumstances presented here, we hold that the district director did not issue a written recommendation to pay compensation as she specifically stated that a compensation rate could not be calculated. Thus, employer is not liable for claimant's attorney's fee pursuant to Section 28(b). *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). Therefore, the district director's finding that employer is liable for an attorney's fee under Section 28(b) is reversed. See *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

If an employer is not liable for an attorney's fee under Section 28(a) or (b), the attorney's fee may be assessed against claimant as a lien on his compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the amount of benefits awarded is a factor relevant to the amount of a fee award, and 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(a). Therefore, as the district director did not address the applicability of Section 28(c), the case is remanded for the district director to address claimant's liability for an attorney's fee as a lien on his compensation. See *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

³ Rather than provide this information to the district director, claimant's counsel instead requested a formal hearing before employer had an opportunity to respond to the district director's action.

⁴ In addition, in its June 26, 2008, letter, employer tendered compensation to claimant. Contrary to the district director's finding, the fact that employer did not make an actual payment until 12 days later is not dispositive in that the Act says employer should "pay *or* tender" to claimant compensation that it believes is due. 33 U.S.C. §928(b) (emphasis added); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) ("pay" and "tender" have separate meanings).

In this regard, the district director should address more specifically the compensability of the services allegedly expended on claimant's state compensation claim. Generally, an attorney is not entitled to a fee under the Act for time spent in relation to a state workers' compensation claim; however, an attorney's fee may be awarded for services performed in a state claim where the services also are necessary to establish entitlement under the Act. *Eaddy v. R.C. Head & Co.*, 13 BRBS 455 (1981). Where services were performed in conjunction with a state claim, the claimant has the burden of showing both that these services were necessary to establish entitlement under the Act and that his attorney has not previously been compensated for these services under the state act. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Employer objected to claimant's counsel's fee petition in a letter dated August 6, 2008. Employer asserted that the requested costs of \$248.81 were incurred for work related to claimant's state claim. Employer also objected to numerous entries on the fee petition from June 13, 2007 to June 6, 2008, on the basis that the time expended related solely to the state claim. In her order, the district director summarily rejected employer's objections, stating only that the "information" was used in both the state and longshore claims. Order at 3. She did not make a finding that claimant's counsel was not paid for these services and costs under the state law. *Id.* Given that these objections are relevant to the amount of claimant's fee liability under Section 28(c), on remand, the district director should fully discuss them and provide an adequate rationale for her findings on this issue. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Accordingly, the district director's Order-Award of Attorney's Fee is reversed insofar as the district director held employer liable for the payment of claimant's attorney's fee pursuant to Section 28(b). The case is remanded for the district director to address claimant's liability for the attorney's fee pursuant to Section 28(c) in a manner consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge