U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0314

PATRICK GRIERSON	)	
	)	
Claimant	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	DATE ISSUED: May 19, 2015
and	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
	)	
Employer/Carriers-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Respondent	)	DECISION and ORDER

Appeal of the Attorney's Fees Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for Marine Terminals Corporation, Majestic Insurance Corporation and Technology Insurance Company.

Shawn C. Groff (Leonard Carder, LLP), Oakland, California, for intervenor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney's Fees Order (2009-LHC-1976, 2010-LHC-1361) of Administrative Law Judge William Dorsey 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 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 suffered a work-related head injury on June 25, 2001, while working for Marine Terminals Corporation (employer). Claimant filed a claim under the Act; employer controverted the compensability of the claim and alternatively argued that it was not the responsible employer as claimant last worked for another employer. In the interim, the ILWU-PMA Welfare Plan (the Plan) provided medical and disability benefits to claimant. The Plan intervened in the administrative proceedings, seeking reimbursement of medical benefits and a lien on any award of disability benefits payable to claimant pursuant to Section 17 of the Act, 33 U.S.C. §917. The administrative law judge awarded claimant benefits under the Act, holding employer liable therefor and finding that the Plan is entitled to reimbursement of medical benefits and that its lien against claimant's disability benefits is valid. The Board affirmed the award. *Grierson v. Marine Terminals Corp., et al.*, BRB No. 12-0562 (June 18, 2013).

Subsequently, the Plan submitted an application to the administrative law judge, for an employer-paid fee for its attorneys' services.[1] Employer objected to the application on the grounds that: 1) the Plan does not have standing to recover attorney's fees for time spent pursuing reimbursement of medical expenses; 2) the Plan is not entitled to an attorney's fee for time spent pursuing reimbursement of disability benefits pursuant to its Section 17 lien; and, 3) any fees accrued after December 5, 2011, when the parties stipulated to the Plan's entitlement to a lien on compensation and reimbursement for medical benefits should be disallowed as unnecessary.[2] The administrative law judge rejected these arguments and awarded the Plan the entirety of the fees and costs sought, $17,425.03, to be paid by employer. Employer appeals, and the Plan responds, urging affirmance.

[1] The Plan sought a fee of $17,425.03, representing 49 hours of attorney services rendered by Shawn C. Groff at an hourly rate of $250 ($12,250), 15.25 hours of attorney services rendered by Estelle Pae Huerta at an hourly rate of $200 ($3,050), 3.25 hours of paralegal time at an hourly rate of $150 ($487.50), and $1,637.53 in costs.

[2] Employer did not object to the requested hourly rates for services rendered or object to any services rendered before December 5, 2011.

On appeal, employer raises the same arguments as it did before the administrative law judge. We address each argument in turn. Section 28(a) 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 [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, 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) (emphasis added).[3] Pursuant to this section in conjunction with Section 7(d)(3) of the Act, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held an employer liable for the attorney's fees of health care providers seeking reimbursement of medical benefits provided to a claimant.[4] *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). In *Hunt*, a doctor and a physical therapist retained their own counsel and intervened in a claim for disability benefits, seeking payment for medical services provided to the claimant after the employer ceased paying benefits. In addressing whether the providers had standing under the Act to recover their attorney's fees, the Ninth Circuit, deferring to the interpretation of the Director, Office of Workers' Compensation Programs (the Director), held that the medical providers were "part[ies] in interest" petitioning the Secretary for an award of "the reasonable value of [] medical or surgical treatment" provided to an injured longshore worker pursuant to Section 7(d)(3), and, therefore, they were "persons seeking benefits" under the Act for purposes of Section 28(a). *Hunt*, 999 F.2d 423-424, 27 BRBS

[3] Section 2(1) of the Act, 33 U.S.C. §902(1) states that, as used in the Act, "The term 'person' means individual, partnership, corporation, or association."

[4] Section 7(d)(3) states:

> The Secretary may, upon application by a *party in interest*, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

33 U.S.C. §907(d)(3) (emphasis added).

at 91(CRT).[5] Therefore, as the providers had successfully prosecuted their claim for the value of medical treatment provided, the court held they were entitled to a reasonable attorney's fee payable by the employer pursuant to Section 28(a).[6]

In this case, unlike *Hunt*, the intervener is an insurance provider rather than a medical provider. Thus, the question before the Board is whether, under Section 7(d)(3), the Plan is a "party in interest" seeking the "value" of medical treatment provided to claimant such that employer is liable for the Plan's attorney's fee under Section 28(a).[7] The term "party in interest" used in Section 7(d)(3) is not defined in the statute or the 20 C.F.R. Part 700 regulations.[8] It is well-established that an insurer seeking reimbursement for medical benefits covered by the Act has a right to intervene in the administrative proceedings, as its claim is derived from the same nucleus of operative facts as the claimant's claim for compensation. *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *clarified on other*

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[5] The Ninth Circuit agreed with the Director that Section 7(d)(3) "does not confer any 'benefits' on medical providers as such" but it allows providers to seek recovery of an injured claimant's medical benefits to the extent that benefits are owed in satisfaction of unpaid bills. *Hunt*, 999 F.2d 423-424, 27 BRBS at 91(CRT); *see also Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986) (if claimant does not comply with Section 7, the intervening insurance carrier cannot recover).

[6] The court held that holding the employer liable for the providers' attorney's fees under Section 28(a) served two purposes of the Act: 1) it provided an incentive for employers to pay valid claims rather than to contest them; and 2) it ensured that the value of the claimant's benefits are not diminished by the cost of legal services. With respect to this second consideration, the court observed that "unless employers are compelled to bear such collection costs, the costs will manifest themselves in increased fees or decreased access to medical services for injured workers." *Hunt*, 999 F.2d at 423-424, 27 BRBS at 89-91(CRT).

[7] We reject employer's assertion that the Ninth Circuit's holding in *Hunt* is inapplicable to this case because the Director did not intervene here as he did in *Hunt*. Although the Ninth Circuit deferred to the Director's interpretation of Sections 7(d)(3) and 28(a), the applicability of the court's holding is not dependent upon the participation of the Director. *See Buchanan v. Int'l Transp. Serv.*, 31 BRBS 81 (1997).

[8] However, the Board's regulation at 20 C.F.R. §801.2(a)(10) states:

> *Party* or *Party in Interest* means the Secretary of Labor or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken.

grounds on recon., 43 BRBS 115 (2009); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52, *modifying on recon.* 18 BRBS 254 (1986); *Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986). Thus, the combination of the Plan's right to intervene and its derivative right to reimbursement for claimant's covered medical benefits entitles it, as a "party in interest" under Section 7(d)(3), to seek benefits on behalf of the employee. Consequently, we hold that, in this respect, the Plan may be a "person seeking benefits" under Section 28(a), and employer may be held liable for its reasonable and necessary attorney fees for time spent to recover the injured employee's medical benefits to the extent that the benefits are owed to the insurer as reimbursement of covered medical expenses. *See Hunt*, 999 F.2d 423-424, 27 BRBS at 91(CRT); *see* discussion, *infra.*

We agree, however, with employer that, generally, it cannot be held liable for fees incurred in the Plan's pursuit of its Section 17 lien. Unlike Section 7(d)(3), which allows for a direct award to a party in interest for the reasonable value of medical treatment provided to a claimant for a work-related injury, Section 17 does not allow for a direct award to an intervenor-lienholder. Rather, Section 17 creates a legal relationship between the trust fund and the claimant and gives the trust fund a vested interest in the claimant's compensation; the claimant is responsible for paying the lien.[9] *Kellstrom*, 43 BRBS at 7. Therefore, as a Section 17 lienholder does not pursue disability benefits on behalf of a claimant under the Act, it is not a "person seeking benefits" under Section 28(a), and the employer cannot be held liable for the attorney's fees incurred in validating its lien against the claimant's disability benefits.

Nonetheless, in this case the administrative law judge rationally found that the Plan's efforts to establish that employer is liable for claimant's medical benefits were inextricably intertwined with its efforts to show the compensability of the claim. Specifically, the administrative law judge recounted that employer disputed liability and the extent of claimant's disability on the merits, and that the Plan reviewed the evidence

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[9] Section 17 states:

> Where a trust fund which complies with section 186(c) of Title 29 established pursuant to a collective-bargaining agreement in effect between an employer and an employee covered under this chapter has paid disability benefits to an employee *which the employee is legally obligated to repay by reason* of his entitlement to compensation under this chapter or under a settlement, the Secretary shall authorize a lien on such compensation in favor of the trust fund for the amount of such payments.

33 U.S.C. §917 (emphasis added).

claimant submitted and offered its own proof to support claimant's entitlement.[10] The administrative law judge concluded that "[d]oing so maximized [the Plan's] potential to be reimbursed for [claimant's] medical care, and to recover on its lien." Fee Order at 2 (emphasis added). The administrative law judge further found that "[s]eparating the efforts to show [employer] was liable for the medical care from the efforts to create the fund on which [the Plan] had its lien would not only be difficult, the effort required would be disproportionate to the result."[11] Fee Order at 3. As the Plan's entitlement to recover Section 7 medical benefits and its Section 17 lien on claimant's disability benefits both turned on whether claimant's disabling symptoms were work-related, the administrative law judge rationally determined on the facts of this case that the time the Plan spent pursuing its reimbursement for medical expenses under Section 7(d)(3) cannot be severed from the time spent pursuing its lien for disability benefits under Section 17.

We find merit, however, in employer's contention regarding the fee for services rendered after December 5, 2011. Employer argued before the administrative law judge that it cannot be held liable for the Plan's attorneys' fees for services provided after the date the parties stipulated that the Plan is entitled to a lien under Section 17 and to reimbursement for medical benefits, if claimant's disability and medical benefits claim were found to be compensable.[12] In addressing employer's argument, the administrative law judge found that it was "prudent" for the Plan's attorney to remain at the hearing until the last potentially liable employer assented to the stipulation, and, without further explanation, he rejected "the idea that [the Plan] should not be reimbursed for the time to write a post-hearing brief, to review what other parties filed, or for the cost of the hearing transcript." Fee Order at 4. As employer contended that claimant does not have any neuropsychological condition related to the work accident, the issue of causation remained viable after the parties' stipulations, and thus the Plan had an interest in proving a causal relationship between claimant's injury and the work accident. The administrative law judge did not address, however, whether the Plan's attorney's services after December 5, 2011, were necessary to establishing the Plan's entitlement to

[10] With respect to employer's liability, employer argued that claimant's neuropsychological condition was not work-related and that employer was not the responsible employer as claimant experienced increased symptoms while working for later employers.

[11] Although the administrative law judge recognized that the Plan devoted some time to introducing the papers acknowledging its lien and tallying what the Plan had paid claimant, the administrative law judge found this time was trivial and that a reduction in fees to account for it would be arbitrary.

[12] The parties stipulated to the amount that the Plan paid in indemnity and medical benefits.

reimbursement of medical benefits given that these attorney services may have been duplicative of those provided by claimant's counsel, who had the primary interest in establishing a causal relationship between claimant's disabling condition and the work accident.[13] Employer may be held liable only for a "reasonable attorney's fee" for "necessary work done." 33 U.S.C. §928(a); 20 C.F.R. §§702.132(a). Employer can be held liable for the Plan's post-stipulation attorney services in this case only to the extent that the services protected an entitlement interest belonging to the claimant that was not otherwise protected. *See, e.g., Hunt*, 999 F.2d at 424, 27 BRBS at 92(CRT). Therefore, we vacate the administrative law judge's award of attorney's fees for services after December 5, 2011. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007) (duplicative fees may be deducted as unnecessary). We remand the case for the administrative law judge to address the necessity of the services provided by the Plan's attorneys after December 5, 2011.[14]

[13] In *Hunt*, the Ninth Circuit held the Board erred in concluding that claimant's counsel could have adequately represented the medical providers before the administrative law judge and that therefore the attorney they retained did not serve a "necessary" function. In so doing, the court observed that the claimant had no particular incentive to prove that the provider's charges were "prevailing community charges" as required by Section 7(g) of the Act, 33 U.S.C. §907(g), and 20 C.F.R. §702.413. *Hunt*, 999 F.2d at 424, 27 BRBS at 92(CRT).

[14] The Plan remains entitled to representation by an attorney, but not necessarily at employer's expense.

Accordingly, the administrative law judge's Attorney's Fees Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge