

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 23-0355

RYAN SIMMS)
)
 Claimant-Petitioner)
)
 v.)
)
 KINDER MORGAN)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 08/15/2024
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of Order - Denial of Attorney Fee Application of Marco A. Adame II, District Director, United States Department of Labor.

Alana G. I. Simmons (The Dalton Law Firm), Portland, Oregon, for Claimant.

Mark K. Conley (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy 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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Claimant appeals the Order - Denial of Attorney Fee Application of District Director Marco A. Adame II (OWCP No. LS-14312180) rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).¹ 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, based on an abuse of discretion or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007).

Claimant sustained a work-related injury to his right shoulder on January 8, 2019, (OWCP No. LS-14312180), and later injured his back undergoing work-hardening physical therapy on May 28, 2019 (OWCP No. LS-14313329).² Employer filed its First Report of Injury (Form LS-202) with the Office of Workers' Compensation Programs (OWCP) on January 14, 2019, and its first Notice of Payments (Form LS-208) on January 23, 2019. Employer's Objection to Claimant Petition for Attorney Fees and Costs Exhibit (EX) 1. According to the LS-208, Employer initially paid disability benefits based on an average weekly wage of \$2,266.14, resulting in the maximum compensation rate of \$1,510.76. *Id.* At the time, however, Employer was paying Claimant \$1,412.14 per week in compensation. EXs 2, 5.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

² The district director's order was issued under both claims' numbers; however, Claimant solely appeals OWCP No. LS-14312180 (shoulder injury).

On June 3, 2019, Claimant filed a claim for compensation (Form LS-203) with the OWCP for his right shoulder injury, along with his attorney's notice of representation, and a letter explaining he believed there was a discrepancy with his average weekly wage and his compensation rate.³ EX 3; Claimant's Reply to Employer/Carrier's Objection to Claimant's Petition for Attorneys' Fees Exhibit (CX) I. On June 13, 2019, Employer filed its Notice of Controversion (Form LS-207) with the OWCP, disputing, *inter alia*, "the calculation of Claimant's average weekly wage and corresponding compensation rate." CX A. Notwithstanding the controversion, Employer continued paying weekly disability benefits at the rate of \$1,412.14. EXs 2, 5. On June 26, 2019, Employer acknowledged Claimant's average weekly wage entitled him to the maximum compensation rate of \$1,510.76 per week and recognized there had been an underpayment of \$98.62 per week. EX 5; CX F. From that date, Employer commenced weekly payments at the maximum compensation rate until July 2, 2019, when Claimant returned to work.⁴ EXs 2, 5, 6; CX 5.

On July 2, 2019, Employer filed an amended Form LS-208, reflecting the correction of Claimant's compensation rate and issued Claimant a \$2,366.88 check for the underpayment. EXs 2, 5-6; CX G. On July 8, 2019, Claimant received a check for temporary total disability benefits at the maximum compensation rate (\$1,510.76) for the period of June 26, 2019, through July 2, 2019; he received the check for the underpayment of benefits on July 11, 2019. CX G. Employer filed a final Form LS-208 on July 9, 2019, indicating its total payment for temporary total disability benefits (\$37,966.24) from January 9, 2019, through July 1, 2019. EX 6.⁵

Claimant's counsel, Alana G. I. Simmons, filed an application for an attorney's fee with the OWCP on March 27, 2020, seeking \$7,688.75 in fees and \$28 in costs for both claims under Section 28 of the Act, 33 U.S.C. §928.⁶ Employer responded, objecting to Claimant's entitlement to an employer-paid fee where Employer did not contest liability for the claims and paid compensation within thirty days of receiving notice of the claims.

³ Claimant filed his claim for compensation for his May 28, 2019 back injury on June 26, 2019. EX 4.

⁴ Claimant was released to return to work for both injuries on or about June 26, 2019, and returned to work on July 1, 2019. EX 6; CX D.

⁵ Employer's payment ledger, EX 2, and Claimant's wife's declaration, CX G, indicate Employer paid temporary total disability compensation through July 2, 2019.

⁶ Counsel requested an hourly rate of \$300 for herself and \$125 for paralegal Ruby Vandel.

After the OWCP postponed the matter,⁷ Claimant's counsel resubmitted her fee application on September 12, 2022, Employer renewed its objections on October 20, 2022, and Claimant's counsel submitted her reply on November 7, 2022.

On June 22, 2023, the district director issued an order denying counsel's application for an employer-paid attorney fee in both claims. Order at 12. Because Employer paid compensation within thirty days of receiving notice of the claims and continued paying compensation benefits despite filing a notice of controversion (Form LS-207) for the shoulder claim on June 13, 2019, the district director determined Employer was not liable for counsel's fee under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a)-(b), and denied the fee application in its entirety.

On appeal, Claimant contends the district director erred in denying an employer-paid attorney's fee and costs under Section 28 of the Act, 33 U.S.C. §928. Employer and the Director, Office of Workers' Compensation Programs (Director) each filed a response, urging affirmance of the district director's denial.

Claimant first contends the conditions for fee shifting under Section 28(a) of the Act, 33 U.S.C. §928(a), are met because Employer filed its notice of controversion (Form LS-207) in response to his claim for an increased compensation rate for his shoulder injury and, by doing so, Employer declined to pay benefits within thirty days after it received written notice of the claim from the OWCP. Cl. Brief at 8-12. In the alternative, Claimant asserts Employer did not pay benefits within thirty days because he did not receive payment for either the correct amount of weekly compensation or for the underpayment of benefits until after the thirty-day window expired. Referencing Section 14(f) of the Act, 33 U.S.C. §914(f), Claimant maintains the date he received the benefits is the date payment was made under Section 28(a), 33 U.S.C. §928(a). Cl. Brief at 12-14. Finally, Claimant argues he is entitled to an employer-paid attorney fee because the humanitarian nature of the Act requires all doubts as to questions of law be resolved in his favor. *Id.* at 14.

Section 28 of the Act allows for the assessment of a reasonable attorney's fee against an employer in particular circumstances. 33 U.S.C. §928; *see also* 20 C.F.R. §702.134. At issue here is Section 28(a),⁸ which allows for the assessment of an attorney's fee against

⁷ The OWCP scheduled and rescheduled informal conferences in May and June 2020 to address Claimant's entitlement to an attorney's fee assessed against Employer; however, Claimant's counsel requested the informal conference be postponed to allow her additional time to reply to Employer's objections.

⁸ Section 28(a) provides, in relevant part:

an employer if four conditions are met: (1) the claimant files a claim for compensation under the Act; (2) the employer receives written notice of the claim from the OWCP; (3) the employer “declines to pay compensation” or does not respond within thirty days of receiving notice of the claim; and (4) the claimant thereafter utilizes the services of an attorney to prosecute his claim. 33 U.S.C. §928(a); *Dyer v. Cenex Harvest States Co-op*, 563 F.3d 1044, 1048 (9th Cir. 2009).

In this case, the parties dispute whether Employer “decline[d] to pay any compensation” within thirty days after it received notice of the claim. When determining whether an employer declined to pay any compensation, “[t]he relevant time period . . . begins with receiving notice of the claim, and ends thirty days after.” *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003) (citing *Pool Co. v. Cooper*, 274 F.3d 173, 186-187 (5th Cir. 2001)); *see also Lincoln v. Director, OWCP*, 744 F.3d 911, 916 (4th Cir. 2014); *Andrepoint v. Murphy Exploration and Production Co.*, 566 F.3d 415, 418-419 (5th Cir. 2009); *Day v. James Marine, Inc.*, 518 F.3d 411, 419 (6th Cir. 2008); *Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.2d 313, 316-317 (4th Cir. 2005); *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 852 (5th Cir. 2003). Prior to Claimant’s filing of his claim for a recalculation of his average weekly wage and an increased compensation rate, Employer accepted liability under the Act, authorized medical treatment, and paid weekly disability benefits. EXs 1-3; CX I. After Employer received written notice of Claimant’s claim for a higher compensation rate, dated June 4, 2019, *see* Notice to Employer and Insurance Carrier that Claim Has Been Filed (Form-215a), it responded by filing its notice of controversion (Form LS-207) with the OWCP on June 13, 2019. CXs A-B. Despite filing its notice of controversion, however, Employer continued paying Claimant weekly benefits (albeit at a lower compensation rate than Claimant sought). Employer eventually rescinded its controversion on June 26, 2019, when it conceded Claimant was entitled to the maximum compensation rate, and it advised Claimant’s counsel there was an underpayment of his disability benefits. EXs 2, 5-6; CXs F-G. By July 2, 2019, Employer had made one payment of benefits at the higher compensation rate and issued payment to rectify the underpayment. EX 6; CX G. Thus, within thirty days of

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....

33 U.S.C. §928(a) (emphasis added).

receiving written notice of Claimant's claim, Employer had paid disability benefits as well as the additional compensation claimed.

Claimant's argument that Employer declined to pay benefits within thirty days after it received written notice of the claim because it filed a notice of controversion (Form LS-207) misconstrues Section 28(a). Pursuant to the Ninth Circuit's decision in *Richardson*, what is relevant under Section 28(a) is whether the employer paid any compensation within thirty days of receiving written notice of the claim from the OWCP and not what the employer filed with the OWCP in response to the claim. *Cf. Richardson*, 336 F.3d at 1105; *see also Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59, 61 (1990) (employer's payment or non-payment of compensation, rather than its filed "response," dictates attorney fee liability under Section 28(a)). In *Richardson*, where the employer paid compensation before receiving notice of the claim but did not pay anything after receiving that notice, the question before the court was whether an attorney fee under Section 28(a) is available if the employer does not "formally refuse" (i.e., file a notice of controversion) to pay compensation during the "relevant time period." *Id.* The court clarified that the relevant, operative phrase in Section 28(a) is "declines to pay any compensation," and held an employer may be liable for an attorney fee under Section 28(a) where it did not pay compensation, offer to pay the additional compensation claimed, or "formally refuse" to pay benefits during the relevant period. *Id.* Thus, an employer's filing of a notice of controversion (Form LS-207) is not dispositive as to whether it declines to pay compensation. Here, Employer actually paid the compensation due, including remittance of all benefits owed, within the relevant timeframe. Consequently, we reject Claimant's argument that Employer's mere perfunctory filing of a notice of controversion (Form LS-207) establishes that it declined to pay compensation, triggering its liability for an attorney's fee under Section 28(a) of the Act. *See Lincoln*, 744 F.3d at 916-917 (Section 28(a) "contains only one explicit trigger: the payment of 'any compensation' within 30 days of the employer's receipt of official notice of the claim.")⁹

⁹ Claimant cites *Avondale Industries, Inc. v. Alario*, 355 F.3d 848 (5th Cir. 2003), in support of his argument that filing a notice of controversion satisfies the "declines to pay any compensation" condition under Section 28(a). However, *Alario* is factually distinguishable from the instant case because the employer in *Alario* filed a notice of controversion before receiving formal notice of the claim from the OWCP and did not pay any benefits within thirty days after receiving formal notice, whereas here, Employer continued paying disability benefits, offered to pay the additional compensation claimed, and paid all compensation due within thirty days of receiving formal notice of the claim from the OWCP. Other cases Claimant cites are, likewise, distinguishable, as the employers did not pay compensation within the requisite thirty-day period, or they address other issues. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357 (5th Cir. 2002) (addressing

Given Employer did not “decline[] to pay any compensation” within thirty days of receiving notice of Claimant’s claim from the OWCP, and, indeed, paid some compensation, the conditions for an assessment of an attorney’s fee against Employer pursuant to Section 28(a) have not been met. 33 U.S.C. §928(a); *Lincoln*, 744 F.3d at 915-916; *Andrepoint*, 566 F.3d at 418-419; *Edwards*, 398 F.3d at 316-317.¹⁰

the meaning of the term “thereafter” in Section 28(a) as to whether a claimant “thereafter ... utilized the services of an attorney ... in the successful prosecution of his claim”); *but see Dryer v. Cenex Harvest States Co-op*, 563 F.3d 1044 (9th Cir. 2009); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980) (liability for a claim for compensation begins at receipt of notice of the claim; if the employer does not pay compensation and does not actively dispute the claim, then attorney fee liability begins).

¹⁰ We reject Claimant’s remaining arguments. We acknowledge Claimant’s assertion that he did not receive a check for either disability compensation at the maximum compensation rate (\$1,510.76) until July 8, 2019, or the underpayment of benefits (\$2,366.88) until July 11, 2019, CX G, and the fact that both dates are beyond the thirty-day window. Nevertheless, as explained herein, the dispositive issue is whether Employer “decline[d] to pay *any* compensation” within thirty days of receiving formal notice of the claim, 33 U.S.C. §928(a) (emphasis added), and the record clearly establishes Employer paid at least some compensation during the relevant period. It also acknowledged it was underpaying disability benefits, began paying at the higher compensation rate, and issued payment for the additional compensation claimed during the relevant time. Therefore, Employer clearly did not “decline to pay any” benefits in the relevant time.

Moreover, contrary to Claimant’s assertion, we need not apply the Section 14(f) requirements, 33 U.S.C. §914(f), to Section 28(a). Section 28(a) makes no reference to Section 14(f), and Section 14(f) serves an entirely different purpose, providing for additional compensation to make a claimant whole after delayed payment following an award of benefits, and is inapplicable by its very language. *Id.* (“If any compensation, payable *under the terms of an award...*”) (emphasis added). In this case, Employer voluntarily paid compensation, and there has been no award for compensation. Therefore, we reject Claimant’s assertion that the time he received payment controls the time for assessing whether the Section 28(a) requirements have been met. In any event, those payments, while made outside of the thirty-day window, do not negate the payments Employer made within the thirty-day window.

We also reject the argument that all doubts be ruled in favor of Claimant. The “true doubt” rule has long been put to rest, and Claimant may not invoke it here to address the statutory interpretation of Section 28(a) or to cast doubt on undisputed facts. *Director*,

Accordingly, we affirm the district director's Order - Denial of Attorney Fee Application.¹¹

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority opinion on the basis that it is undisputed Employer accepted liability within 30 days of receiving notice of the claim and continued paying Claimant weekly compensation during that period. EXs 2, 5. These facts preclude fee liability under Section 28(a) even though the payments Employer made (\$1,412.14) were less than the full amount Claimant requested (\$1,510.76) and Employer initially controverted Claimant's entitlement to the higher amount. *See Lincoln v. Director, OWCP*, 744 F.3d 911, 916 (4th Cir. 2014) (payment of "some compensation" within 30 days precludes fee liability under plain language of Section 928(a) despite the employer's previous controversion of the claim); *Andrepoint v. Murphy Exploration and Production Co.*, 566 F.3d 415, 418-419 (5th Cir. 2009) ("[I]f the employer admits to liability for the injury and tenders any compensation, it is not liable for attorneys' fees under section 928(a)."); *see also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003) (noting "fees might be available" under Section 928(a) because the employer "did not offer to pay within thirty days after receiving notice of the claim for additional benefits") (emphasis added); *Day v. James Marine, Inc.*, 518 F.3d 411, 419 (6th Cir. 2008) (although the employer paid benefits before the claim was filed, it was liable for fees under Section

OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). Claimant's counsel, as petitioner for an attorney's fee, bears the burden of establishing entitlement for a fee. *Richardson*, 336 F.3d at 1107.

¹¹ We affirm the district director's denial of an employer-paid attorney's fee under Section 28(b), 33 U.S.C. §928(b), as unchallenged on appeal. *See generally Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

928(a) because it “did not pay the claim” during the 30-day window after it received notice of the claim).

The Board therefore need not consider Claimant’s argument that the statute should be interpreted to impose fee liability when payments are “issued” by the employer but not “received” by the claimant during the 30-day window. Whether Claimant received Employer’s final weekly payment of \$1,510.76, or its \$2,366.88 reimbursement for past underpayments, within 30 days of Employer receiving notice of the claim, does not negate Employer’s acceptance of liability and continued weekly payments of \$1,412.14 during that period.

GREG J. BUZZARD
Administrative Appeals Judge