

U.S. Department of Labor

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



BRB No. 23-0370

DANIEL MUNIZ MARTINEZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 09/30/2024
HUNTINGTON INGALLS)	
INCORPORATED, INGALLS)	
SHIPBUILDING DIVISION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Denial of Attorney Fee Application and Order Denial of Motion to Reconsider Attorney Fee Order of David Duhon, District Director, United States Department of Labor.

John D. Gibbons (John D. Gibbons & Associates, P.C.), Mobile, Alabama, for Claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for Self-Insured Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Director David Duhon’s Order Denial of Attorney Fee Application and Order Denial of Motion to Reconsider Attorney Fee Order (OWCP No. 07-477289) on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §§901-950 (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, based on an abuse of discretion or not in accordance with law. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684 (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim seeking benefits for a work-related hearing loss on April 28, 2022.¹ The district director notified Employer of this claim by letters dated April 29, 2022, and May 3, 2022.² On May 25, 2022, Employer controverted this claim. On June 1, 2022, it filed an initial LS-208 with the Office of Workers' Compensation Programs (OWCP), indicating it issued Claimant a check for \$431.75. On that same date, Employer also sent Claimant's counsel a letter stating it had accepted the hearing loss claim, including responsibility for Claimant's "reasonable, necessary, pre-authorized, and causally related audiological benefits" under 33 U.S.C. §907, and that "payments are being commenced within thirty days of formal notice."³ Thereafter, Claimant sought authorization from Employer to visit USA Speech and Hearing Center to obtain hearing aids and Employer ultimately provided its authorization to the medical provider on October 26, 2022.

On March 6, 2023, the district director issued an order finding Claimant entitled to 119.4 weeks of compensation pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), based on the parties' stipulation that Claimant sustained a 59.7% binaural hearing loss. At that time, he also granted Employer's pending request for Section 8(f) relief, 33 U.S.C. §908(f). Accordingly, the district director awarded Claimant \$93,296.78 in total compensation plus interest, finding Employer liable for \$10,314.22 of that amount, plus

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because Claimant sustained his injury in Mississippi. 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 parties stipulated Employer "was made aware of Claimant's alleged injury on May 9, 2022, when it received Claimant's LS-203 dated April 28, 2022." Joint Stipulation #1.

³ In this letter, Employer explained that its initial payment represented "one week of compensation."

\$93.58 in interest,⁴ as well as for any necessary medical and audiological expenses for Claimant's work-related hearing loss.⁵

On April 5, 2023, Claimant's counsel, John D. Gibbons (Counsel), filed an itemized fee petition with the district director seeking an attorney's fee under 33 U.S.C. §928, totaling \$7,312.50 for 16.25 hours of attorney time at an hourly rate of \$450. Employer filed objections to the fee petition, contending Counsel is not entitled to an employer-paid fee under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). In an order dated May 22, 2023, the district director found "[t]he requirements of Section 28(a) and (b) have not been met in this case" and therefore denied the requested employer-paid attorney's fee. Order Denial of Attorney Fee Application at 1. Accordingly, he instructed Counsel "to discuss with his client and attempt to agree on a fee due from him." *Id.* at 2.⁶ Claimant filed a motion for reconsideration, maintaining Section 28(a) applies because Employer "declined to pay compensation (both indemnity and medical) on or before the 30th day after receiving written Notice when they filed their Controversion on May 25, 2022." Cl's M/R dated May 31, 2023, at 6. The district director denied Claimant's motion for reconsideration.

On appeal, Counsel challenges the district director's denial of an employer-paid attorney's fee. Employer responds, urging affirmance of the district director's orders. Counsel has filed a reply brief.

Counsel asserts Employer's filing of its notice of controversion, declining to pay any compensation, automatically subjected it to potential fee liability under Section 28(a). Specifically, he maintains that because Employer unequivocally declined to pay any compensation on May 25, 2022, within the 30-day period indicated by Section 28(a), Claimant was free to obtain counsel who, if successful, would be entitled to an employer-paid attorney's fee under that provision. Counsel concedes Employer made a "token" payment of benefits in this case but asserts this payment "cannot be used as a qualifier to

⁴ The district director ordered the Special Fund to pay Claimant the remaining \$82,982.56 in owed benefits, plus \$418.58 in interest.

⁵ On March 7, 2022, the district director issued an errata order adding that Claimant's counsel's attorney fee petition "is to be submitted for consideration subsequent to the issuance of this order."

⁶ On June 27, 2023, the district director approved an agreement for Claimant to pay Counsel \$2,500 as an attorney's fee for Counsel's services in this case to be paid out of the compensation due. 33 U.S.C. §928(c); Order Approving Attorney Fee.

disengage” Section 28(a) even if it was done within the 30-day period.⁷ For these reasons, Counsel asserts Section 28(a) “was clearly triggered and engaged for purposes of allowing” Claimant to have an attorney pursue his claim.

Section 28(a) of the Act provides:

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, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney’s fee. . . .

33 U.S.C. §928(a) (emphasis added). A prerequisite for an employer’s liability under Section 28(a) is that it refused to pay “any compensation” within 30 days of its receipt of the notice of the claim from the district director. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Obadiaru v. IIT Corp.*, 45 BRBS 17 (2011). Therefore, if employer admits to liability for the injury and pays any compensation within the 30-day period after the filing of the written claim, it cannot be held liable for an attorney’s fee pursuant to Section 28(a). *Andrepoint*, 566 F.3d at 419; *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889; *see also Lincoln v. Director, OWCP*, 744 F.3d 911, 915-916 (4th Cir. 2014), *cert. denied*, 574 U.S. 932 (2014).⁸

⁷ Counsel states he “take[s] issue” with the interpretation expressed by the United States Court of Appeals for the Fourth Circuit in *Lincoln v. Director, OWCP*, 744 F.3d 911 (4th Cir. 2014), *cert. denied*, 574 U.S. 932 (2014) (when an employer pays “some” of the disability payments sought or “tenders any compensation” tied to the alleged injury, Section 28(a) fee liability will not shift to the employer), because it is contrary to the plain language of Section 28(a) which mandates an employer’s fee liability “[i]f the employer/carrier declines to pay any compensation.”

⁸ The Fourth Circuit held the “unequivocal” language of Section 28(a) demonstrates an employer’s refusal to pay compensation in the 30-day period must be absolute for it to face possible fee liability under Section 28(a). *Lincoln*, 744 F.3d at 915. Therefore, if the employer pays “any” compensation to the claimant and contests only the total amount of benefits, it is sheltered from fee liability under Section 28(a). *Id.* Moreover, the court held that an employer’s filing of a notice of controversion prior to its payment is not relevant to its fee liability as Section 28(a) does not incorporate Section 14(d). *Id.* at 917. Although

In this case, the district director found Employer reported it received its first notice of Claimant's claim on May 9, 2022, and issued its payment of compensation on June 1, 2022. Order Denial of Motion to Reconsider Attorney Fee Order at 1. Because Employer's payment was made within 30 days of receiving notice of the claim, the district director concluded the requirements of Section 28(a) have not been met. *Id.* As noted above and based on Employer's First Report of Injury (LS-202), Employer received notice of Claimant's injury and claim "on May 9, 2022, when it received Claimant's LS-203 dated April 28, 2022." Joint Stipulation #1. Although Employer initially controverted the claim on May 25, 2022, it ultimately accepted liability for both disability and medical benefits, and it paid some compensation on June 1, 2022, as the district director found. *See* Emp's Letter to Claimant's Counsel and LS-208 dated June 1, 2022. Under these circumstances where Employer did not deny either medical or disability benefits, it cannot be held liable for Claimant's attorney's fee pursuant to Section 28(a). *Andrepoint*, 566 F.3d at 418-419; *compare with Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11, 14 (2017) (if there is a denial of any part of a claim and then a successful prosecution, the employer is liable for a fee under

this case arises within the Fifth Circuit's jurisdiction, *Lincoln* is persuasive because the Fifth Circuit has construed the statute in a manner similar to the Fourth Circuit. *Compare Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005), *with Pool Co. v. Cooper*, 274 F.3d 173 (5th Cir. 2001). Nevertheless, because this case arises within the Fifth Circuit, we decline Counsel's invitation to revisit the Fourth Circuit's *Lincoln* decision.

Section 28(a)). Consequently, we affirm the district director's denial of a fee award under Section 28(a) as it accords with law.⁹ *Id.*

Accordingly, we affirm the district director's Order Denial of Attorney Fee Application and Order Denial of Motion to Reconsider Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁹ We also affirm the district director's finding that Employer is not liable for an attorney's fee under Section 28(b) in this case as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).