



BRB No. 17-0560

KENNETH CARRELL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
B & S WELDING, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>Apr. 11, 2018</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Kathleen K. Charvet (Galloway, Johnson, Tompkins, Burr & Smith, PLC), Houston, Texas, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 07-307840) of District Director David A. Duhon 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(b) (the Act). The fee award of the district director must be affirmed unless it is shown by the challenge party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This case arises out of a claim for benefits for binaural hearing loss. Claimant worked for employer as a crane operator and supervisor on offshore oil rigs from January 6, 2010 until November 13, 2015. *See* DX 10 ¶ 1. Claimant underwent an audiogram on January 13, 2016 that showed a 29.1 percent binaural hearing loss. DX 10 ¶ 4. Claimant filed a claim for benefits on February 29, 2016, based on an average weekly wage of \$1,499.25. DX 1; DX 7. The district director notified employer of the claim on March 8, 2016.

On April 1, 2016, employer paid claimant compensation of \$845.73 per week (based on an average weekly wage of \$1,268.59) for two weeks for a one percent binaural hearing loss. DXs 3, 4. On April 7, 2016, employer controverted the claim, stating "Employer accepts loss as poten[t]ially noise induced, has volunteered 1% [permanent partial disability], and awaits confirmation of rating, wages, and relationship to employment." DX 5.

An informal conference was held on April 26, 2016. The district director recommended in writing that employer pay claimant permanent partial disability benefits for a 29.1 percent binaural hearing loss, but stated that if employer presented a contrary audiogram of equal probative value, the impairment ratings would be averaged, if the variance was 20 percent or less, to determine the extent of claimant's hearing loss. DX 7. The district director also encouraged the parties to stipulate to claimant's average weekly wage; if not, the district director stated that he would issue another recommendation after reviewing wage evidence. *See id.* Employer did not file another Notice of Controversion and did not pay claimant any additional compensation. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 28, 2016. Employer raised issues concerning claimant's average weekly wage, the need for medical treatment, causation, and the extent of claimant's disability.

In April 2017, the parties entered into a settlement agreement under Section 8(i), 33 U.S.C. §908(i), in which employer agreed to pay claimant a total of \$47,983.69 for a 24.85 percent binaural hearing loss which included a credit for the amount employer already paid. DX 10 ¶ 9. The settlement was approved by an administrative law judge on May 9, 2017. DX 11.

Thereafter, claimant's counsel filed a petition for an attorney's fee with the district director. On June 21, 2017, the district director issued a Compensation Order, awarding claimant's counsel an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b). The district director found that employer did not accept his written recommendations following the informal conference and, ultimately, claimant was successful in obtaining additional benefits. Compensation Order at 3. The district director awarded claimant's counsel an attorney's fee of \$2,420.79 for 10.7 hours of work at \$225 per hour plus \$13.29 in expenses, payable by employer. *Id.*

Employer appeals the district director's Compensation Order, contending it is not liable for an attorney's fee under Section 28(b) and that the attorney's fee award should be a lien on claimant's compensation under Section 28(c). The Director, Office of Workers' Compensation Programs, and claimant each filed a response brief, urging affirmance.

Section 28(b) applies where the employer has paid compensation without an award and a controversy then develops over the amount of additional compensation due. 33 U.S.C. §928(b)¹; *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

¹ Section 28(b) states:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, 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 . . . 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 the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the following requirements must be met before an employer may be liable for an attorney's fee under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) claimant's obtaining a greater award than what the employer was willing to pay after the written recommendation. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *see also Staftex Staffing v. Director, OWCP*, 237 F.3d 404, *modified on reh'g on other grounds*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

Employer contends that it should not be held liable for an attorney's fee under Section 28(b) because it did not reject the district director's recommendation following the informal conference but, in fact, accepted liability. Employer bases its argument on the statement in its LS-207, Notice of Controversion, that it "accepts loss as poten[t]ially noise induced," but "awaits confirmation of rating, wages, and relationship to employment." DX 5.

We reject employer's contention. Employer's LS-207 did not purport to accept liability for benefits for claimant's hearing loss, as the form specifically states that employer was awaiting confirmation of the relationship of the hearing loss to employment, without which employer would not be liable for benefits. Moreover, employer's LS-207 does not constitute an acceptance of the district director's recommendation because it was filed prior to the informal conference and the district director's recommendation.

Employer's actions after the informal conference also do not indicate that employer accepted the district director's recommendations. Employer relies primarily on the fact that it did not file another notice of controversion or otherwise take action after the informal conference. This is not sufficient to relieve employer of liability for an attorney's fee under Section 28(b). Section 28(b) states that within fourteen days of the recommendation, employer "shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled." 33 U.S.C. §928(b). The Board has stated that employer may avoid liability if it makes an offer that "demonstrates 'a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make a payment to the claimant.'" *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004) (quoting *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (en banc)).

amount tendered or paid shall be awarded in addition to the amount of compensation. . . .

Here, employer did not offer to pay any further compensation to claimant after the district director issued his written recommendation. This is supported by employer's pre-hearing statement filed on July 22, 2016, in which employer stated that it "dispute[d] causal relationship." DX 9. In disputing any liability to claimant, employer thereby rejected the district director's recommendation that claimant was entitled to permanent partial disability benefits for his hearing loss. *See, e.g., Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010). Thereafter, claimant used the services of counsel in reaching a settlement in which claimant obtained greater compensation than employer voluntarily paid after the informal conference. The district director correctly concluded that this case falls within the parameters of Section 28(b) and we affirm his finding that employer is liable for claimant's attorney's fee.² *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

Accordingly, the district director's Compensation Order Award of Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

² Thus, we reject employer's contention that the attorney's fee should be a lien on claimant's compensation under Section 28(c). Section 28(c) can apply only if an employer is not liable under either Section 28(a) or 28(b). *See Simmons v. Huntington Ingalls Inc.*, 48 BRBS 45 (2014), *aff'd sub nom. Simmons v. Director, OWCP*, 509 F. App'x 337 (5th Cir. 2013); *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010).