BRB No. 00-795

DALE ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRANSOCEAN TERMINAL OPERATORS	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Charles Lee, District Director, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Douglas P. Matthews (Frilot, Partridge, Kohnke & Clements), New Orleans, Louisiana, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Compensation Order Award of Attorney's Fees (OWCP No. 07-145716) of District Director Charles Lee 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant was injured during the course of his employment on May 24, 1997. Employer voluntarily paid temporary total disability benefits from the date of injury through June 12, 1998. From June 13 through July 16, 1998, employer paid temporary partial disability benefits. Temporary total disability benefits were reinstated on July 17, 1998, and continued through March 19, 1999.[1] Because it supplied evidence of suitable alternate employment, employer paid temporary partial disability benefits from March 20, 1999 forward. On September 21, 1999, claimant hired an attorney to represent him in his claim to reinstate temporary total disability benefits. In a memorandum issued on December 7, 1999, following an informal conference, the claims examiner recommended claimant be paid temporary total disability benefits from June 3, 1999, and continuing, pursuant to Dr. Steiner's opinion regarding claimant's medical condition. By letter dated December 16, 1999, employer voiced its disagreement with the claims examiner's opinion. It stated it would not reinstate temporary total disability benefits until after claimant underwent surgery and his condition changed. Claimant underwent surgery on January 3, 2000, and, on January 11, 2000, employer reinstated temporary total disability benefits, including back payments to June 3, 1999. Claimant completed an LS-18 Pre-Hearing Statement on January 18, 2000. By letter dated January 28, 2000, employer informed claimant's counsel of the amended payments.

On March 6, 2000, claimant's counsel filed a fee petition for an attorney's fee in the amount of $2,253.12, representing 12.875 hours at an hourly rate of $175 for work performed between September 21, 1999, and February 15, 2000. Employer disputed the fee request, arguing that it paid the amount recommended by the claims examiner and filed the appropriate documentation; therefore, citing *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997), it asserted it was not liable for a fee. The district director rejected employer's argument, distinguished *Perez*, and awarded the fee as requested. Employer appeals the fee award, and claimant responds urging affirmance.

Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the

[1]Claimant and employer jointly filed a document of fact-related stipulations for the sole purpose of this appeal of the fee award. Although they stipulated that employer paid *permanent* partial disability benefits, it is clear from the administrative file that only *temporary* benefits were at issue.

employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater

compensation than that paid or tendered by the employer.[2] *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999); *Ahmed v. Washington Metropolitan Area Transit*

[2]Section 28(b) provides, in relevant part:

> 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 deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board 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 amount tendered or paid shall be awarded in addition to the amount of compensation.

Authority, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). An employer may avoid paying an attorney's fee under Section 28(b) if, within 14 days after the claims examiner's recommendation, it accepts that recommendation or if it refuses the recommendation but tenders a payment which is accepted as full payment by the claimant. 33 U.S.C. §928(b); *Perez*, 128 F.3d at 910, 31 BRBS at 163(CRT); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981).

In this case, employer contends it is not liable for an attorney's fee because it voluntarily reinstated total disability benefits prior to any formal proceedings. Specifically, it cites *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991), and *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), in support of this proposition, alleging that the United States Court of Appeals for the Ninth Circuit requires an award of additional benefits after *formal* proceedings before employers can be held liable for attorney's fees. We reject employer's contention and its reliance on those Ninth Circuit decisions, as neither *Watts* nor *National Steel* requires formal proceedings as a prerequisite to employer's liability. In *Watts*, the court affirmed the denial of a fee payable by the employer under Section 28(b) because there was no controversy remaining after the informal conference, other than a dispute over counsel's entitlement to a fee. *Watts*, 950 F.2d 607, 25 BRBS 65(CRT). In *National Steel*, disputed issues remained and the case was transferred to an administrative law judge who awarded the claimant additional benefits; thus, the employer was held liable for a fee. *National Steel*, 606 F.2d 875, 11 BRBS 68. The facts in the case at bar differ in that a controversy existed after the informal conference, as demonstrated by employer's December 16, 1999, letter specifically refusing to pay the recommended benefits.

Contrary to employer's assertions, neither the Ninth Circuit cases nor, more importantly, the language of the Act itself mandate that the claim proceed to a formal hearing before an administrative law judge in order for the employer to be held liable for a fee. The decisions in *Watts* and *National Steel* emphasize that Section 28(b) authorizes a fee in situations involving additional compensation where a dispute remains following informal attempts to resolve a claim. Similarly, employer's reliance on *Perez*, 128 F.3d 908, 31 BRBS 162(CRT), is misplaced. As the district director stated, the facts of *Perez* are distinguishable: the dispute therein was resolved prior to commencement of informal proceedings because the employer voluntarily and continuously paid the equivalent of the amount due for permanent total disability from the date of injury through the date of settlement. Thus, the employer was not held liable for an attorney's fee because the requirements of Section 28(b) were not satisfied. *Id.*; *see also Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

Section 28(b) sets out steps involving informal proceedings which determine whether employer is liable for claimant's attorney's fee. Section 28(b), however, makes no mention of referral to an administrative law judge for a formal hearing. The section states that where

employer pays benefits and a controversy arises over additional compensation, the district director must schedule a conference and issue a written recommendation. If employer refuses to accept the recommendation within 14 days, it can tender the compensation it believes is due; if claimant refuses to accept this amount, utilizes the services of an attorney, and then obtains additional benefits, employer is liable for a fee. Liability thus turns on whether employer accepts the district director's recommendation within the specified time and claimant thereafter obtains additional benefits over those employer was willing to pay.

The requirements set forth in Section 28(b) were met here, notwithstanding that referral to the Office of the Administrative Law Judges became unnecessary. Employer changed claimant's temporary total disability to temporary partial disability in March 1999. Claimant then obtained counsel and following an informal conference, it was recommended in December 1999 that employer pay temporary total disability back to June 3, 1999. Employer, however, specifically refused this recommendation and continued paying partial disability benefits, refusing to reinstate total disability benefits until claimant had surgery. Following claimant's January 3, 2000, surgery, on January 11, 2000, 35 days after the informal conference took place, employer paid the benefits claimant sought. Although formal adjudication was avoided, it is clear that employer did not accept the claims examiner's recommendation in a timely manner and that reinstatement of total disability benefits occurred only after employer's own conditions had been met. *See Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Hadel v. I.T.O. Corp. of Baltimore*, 6 BRBS 519 (1977) ("pay or tender" must be unrestricted admission of liability). Thus, the district director did not err in holding employer liable for a fee for counsel's services performed before his office. *See generally Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). Consequently, we reject employer's arguments, and we affirm the district director's fee award.[3]

Accordingly, the district director's fee award is affirmed.

SO ORDERED.

[3]We need not address employer's alternate arguments regarding the amount of the fee award, as employer did not object to the amount of the fee requested before the district director. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Further, as Section 28(a), 33 U.S.C. §928(a), is inapplicable, employer's reference to the Board's decision in *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980), which involved Section 28(a), is misplaced.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in my colleagues' decision, holding employer liable for claimant's attorney's fee under 33 U.S.C. §928(b). I write separately to point out the sophistry of employer's argument, that claimant is not entitled to an attorney's fee because the increased compensation claimant received following employer's failure to accept the district director's recommendation was not "awarded." 33 U.S.C. §928(b). That section provides in relevant part:

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

33 U.S.C. §928(b)(emphasis added).

Employer asserts that although it did not accept the claims examiner's recommendation within fourteen days, employer resumed making temporary total disability payments in January 2000, without formal proceedings or an award by an administrative law judge. Employer's argument is that additional compensation was not "awarded" in accordance with the terms of Section 28(b). Of course, employer overlooks its letter to claimant's counsel, dated January 28, 2000, in which employer wrote: "we suggest you request [DOL] withhold transmitting the case to the Office of the Administrative Law Judges for a Formal Hearing . . . ." Exhibit D attached to Claimant's Brief. Thus, the record is clear that employer sought to delay a hearing and thereby delay an award of increased compensation. Essentially, employer proposes that its rejection of the district director's recommendation and belated discharge of its obligation be rewarded by denying its liability for claimant's attorney's fee. Employer's contention, that it should escape liability for the fee because claimant's increase in compensation was not made pursuant to an administrative law judge's order awarding benefits, contravenes Congress's intent in enacting Section 28, to encourage settlement without resort to formal proceedings and to compensate successful claimants' attorneys after intransigent employers reject the district director's recommendation.

Courts have recognized that Section 28(b) must be interpreted in such a way as to vindicate its purposes. Recently, the Fifth Circuit rejected employer's argument, that it was not liable for an attorney's fee because it had not rejected the district director's recommendation to reinstate temporary total disability benefits. *James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). The court held that although the recommendation was not in evidence and employer had reinstated benefits, the record was nevertheless, clear, that after the conference claimant employed the

services of an attorney to recover an award of additional compensation. The court concluded that notwithstanding the statute's apparent requirement for imposition of attorney's fee liability on employer, that employer refuse the district director's written recommendation, "under these particular circumstances, we find that employer has failed to demonstrate that the ALJ erred in finding the conditions of §928(b) satisfied." *Id.*, 219 F.3d at 435, 34 BRBS at 42(CRT). Similarly , the Ninth Circuit rejected employer's contention that it was not liable for claimant's attorney's fee because it had agreed in advance to be bound by OWCP's recommendation as to extent of disability. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). The court found that because the amount of compensation remained in dispute after the conference and claimant was successful in obtaining increased compensation, employer was liable for the attorney's fee. *Id.*, 154 F.3d at 1061, 32 BRBS at 153-154(CRT).

In sum, employer in the case at bar is liable for claimant's attorney's fee under Section 28(b), where the record shows that after employer rejected the district director's recommendation and sought to delay a formal hearing, claimant required the services of an attorney to obtain the additional compensation owed. As the Fifth Circuit declared in *Flanagan Stevedores, Inc.*, "the conditions of §928(b) [were] satisfied." 219 F.3d at 435, 34 BRBS at 42(CRT). Accordingly, the district director's Order, imposing liability on employer for claimant's attorney's fee, should be upheld.

REGINA C. McGRANERY
Administrative Appeals Judge