SECTION 28 - ATTORNEY'S FEES

Introduction

Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney. Only fees approved under Section 28 may be received by claimant's attorney. 33 U.S.C. §928(e). Claimant's attorney is entitled to a fee only upon successful prosecution of a claim. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *Wilhelm v. Seattle Stevedore Co.*, 15 BRBS 432 (1983); *Director, OWCP v. Hemingway Transport Inc.*, 1 BRBS 73 (1974). Section 28 authorizes the assessment of an attorney's fee against employers under specific circumstances, *see* 33 U.S.C. §928(a),(b), and against the claimant as a lien on his compensation, *see* 33 U.S.C. §928(c); costs are recoverable pursuant to Section 28(d). The Act does not provide for an attorney's fee award to employer's counsel. *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990).

The Board has held that the term "compensation" as used in Section 28 is a generic term encompassing all forms of relief potentially available under the Act, including medical and surgical benefits, pecuniary compensation for injury, and death benefits. *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975).

Section 28(a) of the Act is an example of one instance where Congress has made an exception to the American Rule, pursuant to which litigants pay their own attorney's fees, but medical providers do not fall into that exception. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993). In reversing the Board's decision, the Ninth Circuit stated that permitting medical providers who prevail under the Act to recover their reasonable attorney's fees provides an incentive for employers to pay valid claims rather than to contest them, and it supports the goal of ensuring that the employee's benefits are not diminished through increased costs of medical care. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993); *see also Buchanan v. International Transportation Services,* 31 BRBS 81 (1997).

Applying its ruling in *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991), the Board reversed the administrative law judge's award of an attorney's fee to employer's counsel, payable by the Special Fund, pursuant to Section 26. Attorney's fees may not be considered costs within the meaning of Section 26. The Board also rejected employer's argument that it is entitled to an attorney's fee award payable by the Special Fund under Section 18.29(a)(8) and (9) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.29(a)(8), (9), and by reference, Rules 37 and 11 of the Federal Rules of Civil Procedure, and the Equal Access to Justice Act, since the Act contains no specific provision whereby the Special Fund can be liable for an attorney's fee. *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994). The Fifth Circuit, without addressing whether the Equal Access to Justice applies to cases arising under the Longshore Act, rejected employer's attempt to hold the Special Fund liable for an attorney's fee as claimant did not follow the required procedures under that Act. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

In addressing the issue of whether an award of attorney's fees to employer based on an alleged breached of an insurer' duty to defend under the terms of its insurance policy with employer is a question "in respect of a claim" as is required to fall within the administrative law judge's jurisdiction under Section 19(a), the Board overrules *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978), and affirms the administrative law judge's finding that he lacked jurisdiction to address employer's request for a fee payable by its carriers. Whereas in each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award, the Board determined that in retrospect *Gray* stands out as an anomaly in that it is the only case in which the Board found that the administrative law judge had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to any other issue necessary to resolution of the claim. Finally, neither Section 28 nor any other provision of the Act provides for an award of attorney's fee to an employer or addresses how the assessment of a reasonable fee is to be made. *Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP,* 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999); *see also Ricks v. Temporary Employment Services, Inc.,* 33 BRBS 81 (1999), *rev'd on other grounds sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Fifth Circuit affirmed in the Board's dismissal of employer's claim for attorney's fees against its carriers for lack of jurisdiction, holding that, based on the express language of Section 28(a), only a "person seeking benefits" may assert an attorney's fee claim. Consequently, the Fifth Circuit concluded that Section 28(a) does not confer a federal cause of action on an employer for the prosecution of, or vest jurisdiction in the administrative law judges to resolve, an attorney's fee claim against its carriers. *Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

Appeals of Fee Awards

Standard of Review

The Board dismissed employer's arguments that claimant's counsel's application was unreasonable in that 17 hours were charged for telephone conversations with the client in February and March where counsel's daily delineation of work included other activities besides telephone conversations, such as file review and trial preparation, during the time at issue. Employer therefore failed to meet its burden of proving that the administrative law judge abused his discretion. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

The Board holds that where employer provides no support for its allegations of excessiveness, it has not met its burden of showing a fee award is unreasonable. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

The administrative law judge did not abuse his discretion in awarding attorney's fees at the rate of $175 for the hours claimed, as he found counsel competent and experienced as evidenced by the few hours billed, and he reasonably rejected employer's contention that there was excess billing due to an error in counsel's part on the average weekly wage issue. *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(*en banc)*(Smith & Dolder, JJ., dissenting on other grounds).

Timely Appeal/Finality

The Board rejects claimant's counsel's request that the Board order employer to pay attorney's fees awarded by the administrative law judge and deputy commissioner. Employer is not required to pay the attorney's fee award embodied in the compensation order until the order becomes final, i.e., when all appeals are exhausted. Spinner v. Safeway Stores, Inc., 18 BRBS 155 (1986), aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP, 811 F.2d 676 (D.C. Cir. 1987).

An administrative law judge can award an attorney's fee during the pendency of an appeal, but the award is not enforceable until the compensation order becomes final. Lewis v. Bethlehem Steel Corp., 19 BRBS 90 (1986); *see also Story v. Navy Exchange Service Center,* 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

An administrative law judge may render an attorney's fee determination when he issues his decision, even though his Decision and Order may be overturned on appeal, since any such determination regarding attorney's fees is not enforceable until all appeals have been exhausted. Williams v. Halter Marine Service, Inc., 19 BRBS 248 (1987).

The Board rejected claimant's contention that employer should be held liable for his attorney's fees pursuant to FRCP 11(c). FRCP is not applicable to proceedings before the district director, administrative law judge, or Board. Fee liability may shift to employer only if the requirements of Section 28(a) or (b) are met; these criteria are not met in this case. *R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

The Ninth Circuit has jurisdiction to hear a petition for enforcement of an attorney's fee award which was dismissed as premature by the district court. The Ninth Circuit affirmed the district court's dismissal, however, holding that the attorney's fee award was not enforceable while the appeal of the compensation award was pending before the Board. Thompson v. Potashnick Construction Co., 812 F.2d 574 (9th Cir. 1987).

The Board rejects employer's contention that the administrative law judge's and deputy commissioner's attorney's fee awards were "premature" because the issues of attorney's fee liability and the proper calculation of claimant's hearing loss benefits were on appeal. It is well-established that a fact-finder may render an attorney's fees determination when he issues his decision, in order to further the goal of administrative efficiency. Any such award of an attorney's fee does not become effective and is thus not enforceable until all appeals are exhausted. Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989)(en banc) (Brown, J., concurring), aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).

The Board agrees with claimant that the administrative law judge's fee award is due and payable even though the proceedings in the case have not been concluded. Employer did not challenge claimant's entitlement to benefits on appeal, and the Board's remand for reconsideration of suitable alternate employment does not affect claimant's entitlement to at least permanent partial disability benefits exceeding employer's voluntary payment. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

The Ninth Circuit held that an administrative law judge's compensation award is not final under Section 28(a) during the pendency of the claimant's appeal of the award to the Board; thus, the district court properly determined that it lacked jurisdiction to hear claimant's petition for enforcement of the administrative law judge's attorney fee award under Section 21(d) while claimant's appeal of the underlying compensation award was pending. Citing *Vonthronsohnhaus,* 24 BRBS 154, claimant had argued that the attorney fee award should be enforceable when the underlying compensation order has not been appealed by the employer on the basis that, regardless of the outcome of claimant's appeal, employer is liable for at least the amount of compensation originally awarded by the administrative law judge. The Ninth Circuit rejected claimant's argument, noting *Vonthronsohnhaus* is procedurally distinguishable, and because the plain language of Sections 21(a) and 28(a) do not distinguish between appeals by one party or the other. *Christensen v. Stevedoring Services of America,* 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2005).

The Board may issue a fee award prior to the time that an award becomes final but the award is not enforceable until such time as all appeals are exhausted. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994)(*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993)(McGranery, J., dissenting)(decision on remand), *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP,* 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Board rejected employer's argument that the fee award is premature and held that the administrative law judge may enter a fee award during the pendency of an appeal; however, the fee is not enforceable until the compensation order becomes final. Nevertheless, the Board held that employer's related argument that the fee is excessive has merit in light of the Board's decision to vacate the award of benefits and remand the case for further consideration of the nature and extent of claimant's disability. Therefore, the Board also vacated the fee award and remanded for further consideration in light of the benefits awarded on remand. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251 (1998).

Because an administrative law judge has the authority to enter a fee award during the pendency of an appeal, the administrative law judge erred in denying counsel's supplemental fee petition, which was submitted while an appeal of the compensation award was pending before the Ninth Circuit. The Board held that it was neither unreasonable nor premature for claimant's attorney to have filed the supplemental fee petition and a legal memorandum addressing the attorney fee issues that previously had been remanded to the administrative law judge by the Board. The Board modifies to award a fee for these services. *B.C. v. Stevedoring Service of America,* 41 BRBS 107 (2007).

The Board held that an administrative law judge has the authority to consider a request for enhancement of a fee if the request is filed within a reasonable time after the fee becomes enforceable. In this regard, the Board clarified the distinction between when a fee becomes "final" for appeal purposes and when it becomes "final" for payment purposes. Therefore, counsel's enhancement request in this case, which was made shortly after employer paid the fee award but before the fee became enforceable due to the completion of the appellate process, was timely. Consequently, the Board remanded the case for the administrative law judge to consider counsel's fee enhancement request. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Ninth Circuit concurs with the Board's decision in *Bellmer*, 32 BRBS 245 (1998), holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney's fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT)(9th Cir. 1999).

The Board vacates the fee awarded on two grounds. First, the case is being remanded to determine if employer received statutory notice of the hearing as required by Section 19(c). If the award of benefits must be vacated due to a lack of such notice, the fee award also must be vacated. Regardless, the fee award cannot stand as the administrative law judge merely awarded the fee requested due to the lack of objections. The administrative law judge must review the fee petition in light of the regulatory criteria of 20 C.F.R. §702.132(a) and applicable case law whether or not employer has objected to the fee petition. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

Direct Appeal

The Board affirms holding in Glenn, 18 BRBS 205 (1986), that unless an issue of fact is presented, attorney's fee awards by the deputy commissioner, regarding both amount and liability, should be appealed directly to the Board. Jarrell v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 216 (1987).

The Ninth Circuit holds that a district director's attorney's fee award is directly appealable to the Board if there are no disputed facts. The court affirms the Board's decision that the fee award did not involve disputed facts, as the only conceivable dispute could concern when claimant's attorney's representation commenced. This was explained to the district director's satisfaction, and moreover, this has no bearing on the fee award here. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied,* 121 S.Ct. 378 (2000).

Requirements Regarding Objections Below

The Board will not consider objections to an attorney's fees petition which were not raised before the administrative law judge. Clophus v. Amoco Production Co., 21 BRBS 261 (1988).

Employer cannot raise an objection to the specificity of the fee petition for the first time on appeal. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

In rejecting employer's motion for reconsideration of the Board's affirmance of the administrative law judge's fee award, the Board rejects employer's contention that the fee should be limited by the amount of compensation gained, and that claimant had only limited success in the case on the merits. As claimant was fully successful and as employer did not object below to the number of hours or hourly rate, a prerequisite to raising the issues on appeal, the fee award is affirmed. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting) (decision on recon.).

The Board held that since employer did not raise the issue of claimant's "nominal" award in its objections to claimant's counsel's fee petition below, it will not remand the case for reconsideration of the amount of the attorney's fee award. Nonetheless, the Board held that given claimant's success in the case, the administrative law judge's fee award is consistent with the requirements set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995).

Where employer did not raise arguments before the administrative law judge regarding the amount of the fee in relation to the amount of benefits or premised on claimant's limited success, the Board will not address them for the first time on appeal, but will limit itself to the reviewing the specific objections to the fee which are properly before it. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995).

The Board rejected employer's arguments that counsel's fee should be limited to the difference between the amount voluntarily paid and the amount awarded by the administrative law judge, that counsel's efforts resulted in only a nominal award, and that claimant was only partially successful because employer did not raise these issues before the administrative law judge and cannot raise them for the first time on appeal. Moreover, the Board noted that it has consistently rejected the argument that fee awards must be limited to the difference between the amount of benefits awarded and the amount paid or tendered. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

In denying a motion for reconsideration, the Board states that it should not have addressed employer's arguments regarding the amount of the fee in relation to the benefits awarded, as this objection was not raised before the administrative law judge. The Board's discussion in the initial case thus is *dicta*. *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1993) (Brown, J., dissenting).

Proper Application

General

The Board held that the deputy commissioner abused his discretion in denying all attorney's fees for failure to submit a fee petition within 30 days of the date of the award of benefits. The Board noted that the time limit was included in the findings of fact and not in the Order, that counsel had rendered three years of services and had rectified his failure to file immediately upon learning of his error. Paynter v. Director, OWCP, 9 BLR 1-190 (1986).

The Board holds that an attorney's fee petition which states generally that all services were performed by an attorney with counsel's firm is sufficiently specific to satisfy 20 C.F.R. §702.132. The Board holds that in light of the generally well-detailed nature of the petition, it was not impossible for the administrative law judge to determine whether certain costs and services were necessary. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

Raising the issue of an attorney's fee at the hearing is insufficient for an award to issue. No fee award can be made until a fee petition is filed. Smith v. Ingalls Shipbuilding Div., Litton Systems Inc., 22 BRBS 46 (1989).

Counsel is entitled to an attorney's fee, since establishing coverage under the Act constitutes a "successful prosecution;" however, in order to be awarded a fee, counsel must file an application which conforms to the requirements of 20 C.F.R. §702.132 and 20 C.F.R. §802.203. Olson v. Healy Tibbits Construction Co., 22 BRBS 221 (1989)(Brown, J., dissenting on other grounds), remanded, No. 89-70306 (9th Cir. Mar. 20, 1991)(due to claimant's death, court held that underlying coverage issue was moot and remanded fee, finding petition had been filed).

The administrative law judge did not err in relying on *Pullin*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993), to deny requested attorney time generated pursuant to counsel's practice of "unit" or "increment" billing. The Board held that this practice is incompatible with 20 C.F.R. §702.132, as it is with 20 C.F.R. §802.203. *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Billing in quarter-hour increments is in compliance with 20 C.F.R. §702.132 and 20 C.F.R. §802.203. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.,* 12 F.3d 209 (5th Cir. 1993); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

In an unpublished opinion the Fifth Circuit holds that its unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is circuit precedent. The court stated that the quarter-hour minimum billing method cannot be utilized if less time was actually expended, and that generally, attorneys may not bill more than one-eighth of an hour for reviewing a one-page letter and one-quarter of an hour for writing a one-page letter. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995) (table), *aff'g and modifying Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting) and *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994).

On remand from a decision of the United States Court of Appeals for the Fifth Circuit, *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) unpublished), the Board remanded the case to the administrative law judge for reconsideration of counsel's quarter-hour minimum billing method, in light of the Fifth Circuit's decision that counsel's use of a quarter-hour minimum billing method was improper under the fee order in *Fairley*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished). *Bullock v. Ingalls Shipbuilding, Inc.*, 29 BRBS 131 (1995) (*decision on remand en banc*).

The Board rejected employer's objection to the use of the quarter-hour minimum billing method where the administrative law judge reduced certain entries of the petition in compliance with the Fifth Circuit's order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), which allows one-quarter hour for preparing one-page letters and one-eighth hour for reading one-page letters. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Fifth Circuit declines to definitively reiterate its (unpublished) prohibition on the quarter-hour minimum billing method, as the fee awarded in the instant case was not based on mechanical application of a minimum billing method. *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Where the administrative law judge accepted claimant's counsel's voluntary reduction of eight one-quarter hour billing charges, thereby giving tacit approval to the remaining one-quarter charges, the Board held that the administrative law judge's attorney's fee award conforms to the criteria set forth by the Fifth Circuit regarding minimum billing. *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

As claimant's counsel was not successful in obtaining additional benefits for claimant, and counsel's fee petition, which requested an attorney's fee of "$3,000 if claimant is to pay," did not conform with the requirements of Section 702.132 of the regulations, the Board affirmed the administrative law judge's denial of an attorney's fee. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Tenth Circuit held that an attorney representing a claimant before the district director does not have a property interest in the hourly fee or number of hours submitted for approval pursuant to the fee contract between him and claimant, as under 20 C.F.R. §702.132(a) contracts pertinent to amount of a fee are not recognized. An attorney who must seek regulatory approval of the reasonableness of his fee has a property interest only in a reasonable fee, not in an amount specified in a fee contract. *Moyer v. Director, OWCP,* 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

The Board holds that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to the regulations at 20 C.F.R. §702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.,*702.234-236. The case is remanded for reconsideration of claimant's liability for a fee under Section 28(c) and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

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<u>Due Process/Hearing Requirements</u>

Since the Board affirmed the administrative law judge's award of compensation, claimant's counsel was entitled to an attorney's fee. However, the Board vacated the administrative law judge's award of fees and costs as claimant had not served a copy of his fee petition on employer. The Board remanded the case to the administrative law judge for reconsideration of the fee issue so that employer could receive a reasonable time to respond to the fee petition before a new award is issued. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

The Board held that the deputy commissioner erred in failing to give employer a reasonable opportunity to respond to claimant's request for a fee where the fee award was issued five days after the fee petition was mailed. Due process requires that a fee request be served on employer and that it be given a reasonable time to respond. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

The Board held that the administrative law judge erred in failing to allow employers (SSA and South Stevedoring) the opportunity to file objections to claimant's supplemental fee petition. In an order below, the administrative law judge had directed claimant's counsel to submit a supplemental fee petition, identifying the specific injury to which each itemized service was related, in order to properly apportion fee liability between the two employers. After claimants counsel filed his supplemental fee petition, the administrative law judge issued his award of an attorney's fee four days later without allowing the employers the time or the opportunity to respond to the specific charges sought against them. Thus, the Board vacated the administrative law judge's fee award and remanded the case for the administrative law judge to reconsider the fee after allowing SSA a reasonable time to file a response to counsel's supplemental fee petition. *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998).

It is counsel's responsibility to file a fee petition conforming to the requirements if 20 C.F.R. §702.132. In the instant case, the administrative law judge provided counsel two opportunities to file a conforming application. Accordingly, the administrative law judge's decision to rule on the validity of the amended petition, instead of offering counsel an opportunity to further amend the petition, was not an abuse of discretion. *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

The Board held that the regulations at 29 C.F.R. Part 18, which apply to proceedings before the administrative law judge, support the administrative law judge's finding that employer

did not file a timely response to claimant's petition for an attorney's fee. Specifically, the regulations at 29 C.F.R. §§18.4, 18.6, together provide 15 days for the response to a motion, and employer's response was filed after the time frame. The Board affirmed the fee award, finding no abuse of discretion in the administrative law judge's decision to not consider employer's untimely objection. *Harmon v. Sea-Land Service, Inc*., 31 BRBS 45 (1997).

Attorney representing claimant was not deprived of due process where district director reduced number of hours billed and hourly rate without prior notification or opportunity to allow him to submit additional materials before reduction was made. *Moyer v. Director, OWCP,* 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Noting that the administrative law judge has presided over this case at the Office of Administrative Law Judge level from its inception, the Board affirmed his determination that a hearing on the issue of the fee petition would not be fruitful and consequent rejection of employer's request for such action. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

The Board rejected employer's contention that the administrative law judge violated Rule 201 of the Federal Rules of Evidence by taking judicial notice of the hourly rates of attorneys working in the South listed in the 1998 Survey of Law Firm Economics. Under Section 23(a) of the Act and Section 702.339 of the regulations, administrative law judges are not bound by statutory rules of evidence, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

Authority to Award Fee

Level of Proceedings

The court has the authority to grant fees for work done on appeal from the Board, but not for work done below. Director, OWCP v. Palmer Coking Coal Co., 867 F.2d 552 (9th Cir. 1989).

The Board can award an attorney's fee only for services rendered before it. The Board disallows time requested for services rendered before the administrative law judge's decision was filed and after the Board issued its decision. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

The fee petition/affidavit submitted to the Board involving work relating to counsel's attempt to secure enforcement of the administrative law judge's award of benefits should be submitted to the district director, as enforcement issues fall within the province of the district director, 33 U.S.C. §918, and the Board lacks jurisdiction to consider the petition. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 160 (1996).

The Board held that an administrative law judge has the authority to consider a request for enhancement of a fee if the request is filed within a reasonable time after the fee becomes enforceable; the request should be handled as a supplemental fee petition. In this regard, the Board clarified the distinction between when a fee becomes “final” for appeal purposes and when it becomes “final” for payment purposes. Therefore, counsel’s enhancement request in this case, which was made shortly after employer paid the fee award but before the fee became enforceable due to the completion of the appellate process, was timely. Consequently, the Board remanded the case for the administrative law judge to consider counsel’s fee enhancement request. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Ninth Circuit concurs with the Board’s decision in *Bellmer*, 32 BRBS 245 (1998), holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney’s fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT)(9th Cir. 1999).

Where the administrative law judge awarded claimant’s counsel a fee for work performed while the case was before the district director, the Board and the court of appeals, the Board excluded the fee for all services not rendered before the OALJ, as the administrative law judge does not have the authority to award a fee for services at other levels of the proceedings. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

After the Fifth Circuit reversed the Board's previous affirmance of an administrative law judge's award of compensation, the Board rejected employer's contention that the administrative law judge's second fee award violated Rule 41 of the Federal Rules of Appellate Procedure, or the Mandate Rule, holding that the absence of a remand order by the Fifth Circuit did not affect the administrative law judge's jurisdiction. Where a claimant's award is reduced due to the employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with claimant's ultimate degree of success once the award is final. The Board affirmed the administrative law judge's fee award, as counsel prevailed on the issues of causation and medical benefits, and the administrative law judge's 50 percent reduction in counsel's fee was reasonable in relation to the results obtained. *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

The Ninth Circuit denied claimant's application for attorney's fees and costs incurred for successfully opposing employer's petition for writ of certiorari before the Supreme court. The Supreme Court's order denying a fee, but permitting claimant to file with the Ninth Circuit, does not specifically delegate jurisdiction to the court. The court held that, pursuant to Section 28(c), the work performed was not "before" the court. The court also held that it was unclear under what rule the motion for fees should be viewed as timely. Ninth Circuit Rule 39-1.6 is not applicable and the Supreme Court's rules are not applicable to proceedings before the court. *Stevedoring Services of America v. Price*, 432 F.3d 1112, 39 BRBS 85(CRT) (9th Cir. 2006); *but see Stevedoring Services of America v. Price*, 126 S.Ct. 1456 (2006) (Supreme Court subsequently states, "Renewed motion of respondent Arel Price for attorney's fees and costs is referred to the United States Court of Appeals for the Ninth Circuit for adjudication.").

Citing Section 28(c), the Ninth Circuit rejected claimant's contention that he is entitled to a fee for the hours his attorney spent preparing his defense of a complaint brought by employer before the State of Hawaii Office of Disciplinary Counsel, as that work was not done "before" the district court which awarded a fee for work enforcing a default order. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007).

Amount of Award

Sufficient Explanation

Since the administrative law judge provided an adequate rationale for her reduction of hourly rate, her award of an attorney's fee is affirmed. Thompson v. Lockheed Shipbuilding & Construction Co., 21 BRBS 94 (1988).

The Board held that remand is required where the deputy commissioner recites the regulatory criteria of 20 C.F.R. §702.132, but fails to specifically state how these criteria apply to the fee reduction. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

The Board affirmed reductions in both the hourly rate and the number of hours requested which were fully explained and reasonable. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

In the instant case, the administrative law judge reduced the number of hours sought by counsel in preparing the original fee petition, but rejected all other objections to the fee petition "on the grounds recited in the responses to the objections." The Board declined to further reduce or disallow the hours addressed by the administrative law judge, as employer's assertions were insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Where district director applied the regulatory criteria, discussed how they applied in the fee reduction, and explained the reduction she made in the hourly rate and number of hours awarded, her rationale was adequate to support the decision. *Moyer v. Director, OWCP,* 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

The Board vacates the fee award, as the administrative law judge did not fully discuss and render adequate findings regarding employer's numerous objections to the fee petition. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Given the cursory nature of the administrative law judge's supplemental decision, and in particular his failure to adequately and independently set out and discuss the reasons for his reduction in both the hourly rate and number of hours of attorney work requested, the Board vacates the fee award and remands for further consideration. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Ninth Circuit held that the district court acted within its discretion in disallowing a fee for hours it found duplicative. The court gave a sufficient explanation of the disallowance, in view of its "superior understanding" of the underlying litigation. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007).

The Board holds that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to the regulations at 20 C.F.R. §702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.,*702.234-236. The case is remanded for reconsideration of claimant's liability for a fee under Section 28(c) and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

The Board vacates the fee awarded on two grounds. First, the case is being remanded to determine if employer received statutory notice of the hearing as required by Section 19(c). If the award of benefits must be vacated due to a lack of such notice, the fee award also must be vacated. Regardless, the fee award cannot stand as the administrative law judge merely awarded the fee requested due to the lack of objections. The administrative law judge must review the fee petition in light of the regulatory criteria of 20 C.F.R. §702.132(a) and applicable case law whether or not employer has objected to the fee petition. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

Factors Considered in Award

Updated Citation: *Memmer v. ITT/Sheraton Washington*, 18 BRBS 123 (1986), *aff'd in part and vacated in part mem.*, 816 F.2d 8 (D.C. Cir. 1987) (court affirms Board that award of bonus was not justified by claimant's inability to communicate, but remands for consideration of whether other factors such as amount of benefits, quality of representation or contingent nature of the case warranted the bonus).

The Board affirmed the administrative law judge's award of $4,400 in attorney's fees, despite the fact that only two weeks of temporary total disability benefits were awarded. The administrative law judge noted that there would be a substantial recovery in the future when extent of permanent disability was determined and therefore found that, considering all factors, the award was not unreasonable. In affirming, the Board noted that the status issue raised on appeal involved an issue of first impression and that the amount of the fee was not limited by the amount of the award of benefits. Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n, 22 BRBS 434 (1989).

There is no requirement that the amount of an attorney's fee award be commensurate with claimant's award of benefits. Clophus v. Amoco Production Co., 21 BRBS 261 (1988).

There is no requirement that the amount of the fee award be limited to the amount of the award of benefits. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

A different billing standard need not be applied to trial work and appellate work. Thus, billing in quarter hour increments may be suitable for both types of work and the administrative law judge did not abuse his discretion in approving this method. Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

The administrative law judge did not abuse his discretion in reducing the number of hours claimed for telephone calls, as he found the request unreasonably high. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

An attorney's fee is awarded for time spent and services rendered which are reasonably necessary to the award of benefits. Although the amount of benefits awarded is a valid consideration, the amount of the fee is not limited to the amount of compensation gained, since to do so would drive competent counsel from the field. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds).

The Board holds that intervention by an attorney for a medical provider is not necessary in this case, as there is no indication that the doctor's attorney performed a function that could not have been fulfilled by the claimant's attorney. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993).

The Ninth Circuit reverses the Board's holding that claimant's attorney could have adequately represented the doctors' interests, as claimant's counsel has no incentive to prove issues regarding prevailing community charges under Section 7(g). *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991).

The Board rejected employer's contention that the fee is excessive in light of the doctrine of *de minimis non curat lex.* and an unpublished Board opinion. The Board held that claimant's settlement for a lump sum payment of $1,371.62, $170 in interest, $19.79 in a penalty, and continuing bi-weekly payments of $12.10 is not a *de minimis* award. Nor is such an award evidence of an unsuccessful claim under *Hensley*. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

The Fifth Circuit rejected employer's argument that since claimants had no measurable hearing impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

The Board held that since employer did not raise the issue of claimant's "nominal" award in its objections to claimant's counsel's fee petition below, it will not remand the case for reconsideration of the amount of the attorney's fee award. Nonetheless, the Board held that given claimant's success in the case (he ultimately prevailed in obtaining disability compensation and medical benefits where none were voluntarily paid by employer, as well as Section 14(e) penalties), the administrative law judge's fee award is consistent with the requirements set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995).

As employer paid no compensation voluntarily, and claimant prevailed on every issue presented to the administrative law judge, the administrative law judge's fee award is consistent with the requirements set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), despite the small amount of benefits. *Hensley* does not define success in monetary terms but rather by how successful a claimant is in achieving the claims asserted. The Board also states that the administrative law judge accounted for the complexity of the issues in his hourly rate determination and that the fee is excessive in light of the doctrine of *de minimis non curat lex.* and an unpublished Board opinion. *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

In denying reconsideration, the Board states that it should not have addressed employer's arguments regarding the amount of the fee in relation to the benefits awarded, as this objection was not raised before the administrative law judge. The Board's discussion in the initial case is *dicta*. *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1993) (Brown, J., dissenting).

The Board affirmed the administrative law judge's attorney's fee award against employer's challenge that the fee was too large in light of the nominal amount of benefits. The Board held that the award comported with *Hensley* and its progeny as employer had not paid benefits voluntarily and claimant was completely successful in obtaining an award in a contested case. Moreover, the second step of *Hensley* is met as the administrative law judge specifically considered the amount of benefits as a factor in awarding the fee. *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting).

The Board rejected employer's argument that the lack of complexity warrants further reduction of counsel's fee when lack of complex issues is but one of the factors to consider in awarding a fee and the administrative law judge reduced the hourly rate because of the lack of complex issues in this case. The Board also rejected employer's argument that the fee award should be based on a decision rendered by another administrative law judge, as fees for legal services must be approved at each level of the proceedings by the tribunal before which the work was performed. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Board held that claimant failed to meet her burden of proving that the administrative law judge abused her discretion in reducing the number of hours requested and the hourly rates of lead and associate counsel. Moreover, the Board rejected claimant's assertion that the administrative law judge improperly limited the amount of the awarded fee to that commensurate with the amount of the settlement agreed to by employer. The amount of benefits obtained is a proper consideration in determining the amount of an attorney's fee award. *Brown v. Marine Terminals Corp.*, 30 BRBS 29, 33 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

Where claimant was successful in obtaining $26,000 in benefits, in addition to those previously paid by employer, the Board determined that a fee of $2,548.12, which is based on a reduced hourly rate, is not excessive or “exorbitant” and it rejected employer’s argument as frivolous. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

The Board rejected counsel’s argument that the administrative law judge incorrectly reduced his fee award. The Board held that, as it affirmed the administrative law judge’s determination that the claim was filed in an untimely manner and his denial of disability benefits, the administrative law judge properly reduced the fee request based on claimant’s partial success in obtaining medical benefits. Therefore, the Board affirmed the administrative law judge’s 75% reduction. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff’d sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied,* 120 S.Ct. 2215 (2000).

After modifying the administrative law judge's calculation of the number of hours counsel asserted for work before the administrative law judge, the Board held that the administrative law judge properly considered employer's *Hensley* argument, and, in light of claimant's limited success, properly reduced counsel's fee request. While the administrative law judge did not specify which of counsel's entries were excessive, other than five, the Board affirmed the administrative law judge's across the board 90 percent reduction. The Board, however, rejected employer's contention that the fee award should be further reduced, based on the amount of benefits awarded to claimant. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board affirmed the district directors finding that she could proportionately reduce claimant's requested attorney's fees based on his degree of ultimate success in the entire case, and was not limited to considering claimant's success before her. *Berezin v. Cascade General, Inc.,* 34 BRBS 163 (2000).

The Board rejected employer's argument that claimant's unsuccessful prosecution before one administrative law judge rendered those services non-compensable, whereas the services rendered in a successful prosecution before another administrative law judge are compensable. Rather, the Board held that a fee for services rendered by counsel are determined by claimant's ultimate degree of success. Here, however, as the Board vacated the administrative law judge's decision regarding claimant's extent of disability, claimant's ultimate degree of success is unknown. Therefore, the Board vacated the fee award with instructions to reconsider the fee petition and objections, including those objections made but not previously discussed by the administrative law judge, in light of any award made on remand. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

The Third Circuit held that the administrative law judge's decision to award counsel's full fee with no "limited success" reduction was supported by substantial evidence, and moreover was in accordance with the Supreme Court's decision in *Hensley*. Specifically, the court observed that claimant prevailed against his employer's contesting issues of coverage, extent of disability, and entitlement to future medical benefits, and that counsel, by securing future medical benefits and a *de minimis* award, obtained a substantial benefit for claimant. In addition, the court held that as the administrative law judge's decision applied the correct legal standards, the Board was required to affirm the award of an attorney's fee as a matter of law. Accordingly, the Third Circuit reinstated the initial award of an attorney's fee of $71,000. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001).

The administrative law judge reduced the number of compensable hours by 50 percent, in part, because claimant was found liable for the fee under Section 28(c). In view of the Board's holding that employer is liable for the fee pursuant to Section 28(b), the fee award is remanded for the administrative law judge to reconsider the number of compensable hours and claimant's contentions in support of a larger fee. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

Hourly Rate

The Board affirms the administrative law judge's award of a $125 rate as reasonable for the New Orleans area considering the quality of counsel's representation, the work performed and the complexity of the case. *Mijangos v. Avondale Shipyards, Inc.,* 19 BRBS 15 (1986), *rev'd on other grounds,* 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

An administrative law judge may take judicial notice of firms' requested hourly rate in similarly complex cases, and may award higher rate based on unusual issue, substantial benefits to claimant, and inflation as well as well-prepared witnesses, case, and brief. *Powell v. Nacirema Operating Co., Inc.,* 19 BRBS 124 (1986).

The Ninth Circuit affirms the Board's refusal to augment the hourly rate in this case in order to compensate the attorney for a delay in his receiving payment of an awarded fee, as any delay in payment is neither so extreme nor unexpected. The court states, however, that in a case of extreme delay, reliance on historical rates may render unreasonable an otherwise reasonable fee by cutting too deeply into the fee award. *Hobbs v. Director, OWCP,* 820 F.2d 1528 (9th Cir. 1987), *aff'g Hobbs v. Stan Flowers Co., Inc.,* 18 BRBS 65 (1986).

The Board holds that in light of the decisions of the Supreme Court in *Missouri v. Jenkins*, 491 U.S. 274 (1989) and *City of Burlington v. Dague*, 505 U.S. 557 (1992), when the issue of delay in payment of an attorney's fee is timely raised, the body awarding the fee must consider this factor in awarding the attorney's fee. The fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate counsel for the delay. To the extent that the Board's decisions in *Fisher*, 21 BRBS 323 (1988) and *Blake*, 21 BRBS 49 (1988) state that it is an abuse of discretion to award an increased rate due to delay, they are overruled. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Adopting the Board's position in *Nelson,* 29 BRBS 90 (1995), the Ninth Circuit holds that enhancement of an attorney's fee for delay is appropriate under Section 28 of the Act, as general fee shifting law is applicable. The Ninth Circuit, therefore, acknowledges that its holding in *Hobbs* regarding the availability of delay awards is no longer good law. In a footnote, the court questions whether enhancement would be appropriate in cases of ordinary delay. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

When a question of delay in award of an attorney’s fee is timely raised, the body awarding the fee must address this factor. The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel’s services and payment of the fee. The factfinder may adjust the fee based on historical rate to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant for the delay. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

The Board affirmed, as rational, the administrative law judge’s augmentation of the hourly rate awarded to claimant’s counsel for services performed in pursuing claimant’s claim in

1991, given the six year delay between the date of the initial hearing and the date of the ultimate award of death benefits which was caused by employer's successful appeal to the Fourth Circuit of the administrative law judge's original Decision and Order Awarding Benefits. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

The Board held that timely requests for fee enhancement are to be treated as supplemental fee petitions, thereby allowing the body awarding the fee to give full effect to the law on enhancement of fees when there has been a delay in payment. The body awarding the fee must not only consider if the enhancement request is timely, but whether the delay in payment warrants an enhancement award. In this case, the Board held that the request was timely and it remanded the case for the administrative law judge to consider counsel's enhancement request in the form of a greater hourly rate than that which was previously awarded. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Ninth Circuit concurs with the Board's decision in *Bellmer*, 32 BRBS 245 (1998), holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney's fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT)(9th Cir. 1999).

The Fourth Circuit holds that it has jurisdiction to consider claimant's petition for enhancement of an attorney's fee for a six year payment delay. The timing of the various decisions in the case below precluded its consideration of an appeal of the administrative law judge's denial of certain items on claimant's original fee petition and supplemental fee petition until the court issued a final order on the liability issue, requiring payment of attorney's fees by employer. The court remands the case to the administrative law judge for consideration of the merits of claimant's supplemental fee request, inasmuch as the current law is that enhancement for delay is allowed in appropriate cases. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

The Board modifies a portion of the administrative law judge's fee awards to award a fee at a higher hourly rate account for delay in payment of the attorney's fee. *B.C. v. Stevedoring Service of America,* 41 BRBS 107 (2007).

The Board reaffirms its holding in Hobbs, 18 BRBS 65 (1986), aff'd 820 F.2d 1528 (9th Cir. 1987), that attorney's fee awards made at the deputy commissioner or administrative law judge level which remain unpaid at the time of appeal may not be adjusted to reflect hourly rates in effect at the time the Board issues its decision. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

Augmentation of the hourly rate to reflect delay in payment constitutes an abuse of discretion under the Act because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988).

Noting that the Ninth Circuit, under whose jurisdiction the case arises, did not foreclose consideration of an augmented hourly rate in *Hobbs*, 820 F.2d 1528 (9th Cir. 1987), the Board, based upon the administrative law judge's discussion of the unique circumstances presented in the case (the case had been pending for over six years since the initial formal hearing) concluded, on the facts of this case, that the administrative law judge did not abuse his discretion in awarding counsel an hourly rate greater than that which prevailed at the time that his services were rendered. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

A fact-finder may not award different hourly rates for trial and non-trial work as there is no basis for such a distinction in the Act. Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989)(en banc) (Brown, J., concurring), aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989) (en banc) (Brown, J. concurring), aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).

The Board affirmed the administrative law judge's reduction in the hourly rate from $150 to $125 as he stated that this is the usual rate allowed by administrative law judges in San Francisco and that this case does not warrant a higher rate. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

Where the administrative law judge rejected employer's contention that the hourly rate should be between $65 and $70 and claimant's request for a rate of $125, and instead he awarded a fee based on an hourly rate of $100 because of the lack of complex issues, the Board rejected employer's contentions that the hourly rate and the total award were excessive as employer had not satisfied its burden of showing that the administrative law judge abused his discretion. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Claimant's assertion that administrative law judge erred in reducing hourly rate from $145 to $125 rejected as claimant did not met her burden of showing $125 hourly rate awarded was unreasonable. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Where administrative law judge specifically determined that the requested hourly rate of $150 was excessive considering the complexity of the case, and that a $100 hourly rate was reasonable and appropriate for the geographic locality involved, employer has not met its burden of showing that the hourly rate awarded is unreasonable. *Moody v. Ingalls Shipbuilding, Inc.,* 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

The Board affirmed the administrative law judge’s award of a fee based on an hourly rate of

$200 for a claim prosecuted in South Carolina, stating that such decision was reasonable and within her discretion. *McKnight v. Carolina Shipping Co.*, 32 BRBS165, *aff'd on recon. en banc,* 32 BRBS 251 (1998).

The Board affirmed the administrative law judge's award based on hourly rates of $175 and $190, as the administrative law judge took into consideration that this case concerned a complex issue of first impression with regard to whether tips are to be included in the calculation of claimant's average weekly wage, and the facts concerning whether the parties contemplated that tips would be part of claimant's compensation were in dispute. The Board denied claimant's request that counsel's hourly rate be increased to $235, as this request was made in a response brief, not a formal cross-appeal. *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

The Board affirmed the administrative law judge's award of a fee based on an hourly rate of $200 where counsel's office was located in Atlanta and the formal hearing was held in Savannah. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The Board affirms the hourly rate of $200, as the administrative law judge considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

The Fourth Circuit held that evidence of fee awards in comparable cases is generally sufficient to establish the "prevailing market rates" in "the relevant community." Thus, the court held that the request of claimant's counsel, for an hourly rate of $225 per hour in the Hampton Roads area is reasonable, where counsel cited several recent orders in which administrative law judges and the Board awarded him an hourly rate of $225 in cases under the Act, and employer did not submit evidence to the contrary. *Newport News Shipbuilding & Dry Dock Co v. Brown,* 376 F.3d 245, 38 BRBS 37(CRT)(4th Cir. 2004).

The Board affirms the administrative law judge's reduction of the hourly rate from $215 to $200, based on the rate customarily awarded in the geographic area for similarly complex cases, and in view of the regulatory criteria. *Baumler v. Marinette Marine Corp.,* 40 BRBS 5 (2006).

Claimant failed to establish that the administrative law judge abused his discretion in reducing the hourly rate from $250 to $225 based on the nature of the work, the complexity of the issues, and typical billing rates in the geographic area. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

The Board rejects claimant's argument that the administrative law judge's reduction of the requested hourly rate from $350 to $250 is inconsistent with the Ninth Circuit's decision in an ERISA attorney's fee case, *Welch v. Metropolitan Life Ins. Co.,* 480 F.3d 942 (9th Cir. 2007). In *Welch,* the court held that the plaintiff's evidence was sufficient to meet her burden of demonstrating that her attorney's requested hourly rates were consistent with the prevailing market rate whereas in this case the administrative law judge rationally found that the evidence submitted by claimant's attorney was insufficient to support his assertion that $350 represents the prevailing community rate. *B.C. v. Stevedoring Service of America,* 41 BRBS 107 (2007).

The Board states that in longshore cases evidence of fee awards in comparable cases remains sufficient to establish prevailing market rates in the relevant community, citing *Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 38 BRBS 37 (CRT) (4th Cir. 2004). The Board thus reject's counsel's reliance on *Student Public Research Group of New Jersey v. AT&T Bell Laboratories,* 842 F.2d 1436 (3d Cir. 1988), for the proposition that a micro-market, such as the longshore claimants' bar, cannot set the prevailing community rate. In this case, the administrative law judge addressed and rationally rejected the evidence counsel submitted in support of his petition for an hourly rate of $350, such as the "Laffey Matrix" and the "Morones Survey." The Board affirms the award of an hourly rate of $250 based on awards to counsel by other administrative law judges and the Board and on the complexity of the case. *D.V. v. Cenex Harvest States Cooperative,* 41 BRBS 84 (2007).

In a black lung case, the Sixth Circuit addressed the hourly rate prong of the lodestar calculation. The guideline is the "prevailing market rate," which is defined as the rate that an attorney of comparable skill and experience can reasonably expect to attain in the venue in which he is appearing. Rates awarded in other cases do not set the market rate but provide inferential evidence of what the rate is. If there are a large number of similarly experienced attorneys in a geographic area, it may be less necessary to rely on prior awards than in a small market. The "market rate" is not a single figure, but may change to reflect the individual practitioner's experience and the complexity of the case. Evidence of the market rate can be established by an affidavit from an experienced attorney in the same or similar field attesting to that attorney's customary rate and the rates prevalent in the market. In this case, there was no error in the district director's ($200), administrative law judge's ($250), and Board's ($225) awards of fees at three different rates, as the rates were not widely divergent and each adjudicator provided a rational basis for the rate selected. The court also stated that there was no error in ignoring evidence of rates paid to defense attorneys as such are more likely than claimants' attorneys to have a higher volume of work and to be paid promptly. *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008).

Compensable Services
General

Administrative law judge may properly disallow attorney's fees for excessive work. Davenport v. Apex Decorating Co., Inc., 18 BRBS 194 (1986).

Counsel is entitled to an attorney's fee, since establishing coverage under the Act constitutes a "successful prosecution;" however, counsel, in order to be awarded a fee, must file an application which conforms to the requirements of either 20 C.F.R. §702.132 or 20 C.F.R. §802.203. Olson v. Healy Tibbits Construction Co., 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds), remanded, No. 89-70306 (9th Cir. Mar. 20, 1991)(due to claimant's death, court held that underlying coverage issue was moot and remanded fee, finding petition had been filed).

The proper test to determine whether an attorney's work is compensable is whether, at the time the attorney performed the work in question, he or she could reasonably regard it as necessary to establish entitlement. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds). Under this standard, award of time spent interviewing potential but ultimately unused witnesses is affirmed. *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

The Board remands the case for the administrative law judge to consider the reasonableness of "wind-up" services performed after the date of filing of the decision. The administrative law judge erred in finding she lacked jurisdiction to consider the compensability of such services as reading the decision and calculating the amount of benefits due. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *see also Bazor v. Boomtown Belle Casino,* 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

Citing *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), the Board vacated the district director's denial of an attorney's fee for all time requested for services performed after the date that employer voluntarily paid benefits, and remanded for the district director to assess the necessity and reasonableness of the work involved in order to discern whether these entries represent "wind-up" services for which counsel may be entitled to a fee payable by employer. *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon*. *en banc*, 33 BRBS 38 (1999)(distinguishing case from *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997)).

The test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. Thus, although claimant was not entitled to reimbursement for the medical charges of Dr. Gunter under Section 7, the Board affirmed the administrative law judge's decision to award counsel a fee for the time spent deposing that physician since employer scheduled the deposition and counsel's presence was reasonable and necessary. *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000).

In a black lung case, the Fourth Circuit holds that claimant's counsel is entitled to an attorney's fee for successfully obtaining an enhanced fee. The court cites *Anderson,* 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), with approval. *Kerns v. Consolidation Coal Co.,* 247 F.3d 133 (4th Cir. 2001).

The Board reversed the administrative law judge's award, payable by employer, of the amount of the New Mexico gross receipts tax assessed on the attorney's fee and costs awarded. The Board follows cases involving other federal fee-shifting statutes in which the amount of the tax was disallowed, noting that cases awarding the tax have not provided a rationale for the award. The claimant is not required to pay this tax to his attorney, and thus is not properly shifted to the employer. Moreover, the tax is a part of counsel's overhead and should be included in his hourly rate. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting).

The Board reversed the administrative law judge's award of time spent by claimant's counsel in reading the Act and its annotations as an abuse of discretion since time spent by counsel in familiarizing himself with the Act is not compensable. Time for research specific to this case is affirmed. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting).

The Ninth Circuit held that the district court acted within its discretion in disallowing a fee for hours it found duplicative. The court gave a sufficient explanation of the disallowance, in view of its "superior understanding" of the underlying litigation. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 95, 41 BRBS 53(CRT) (9th Cir. 2007).

Fee Petition

In a fee petition for work performed before the Board, the Board disallowed time spent preparing an attorney's fee petition, as this service was not reasonably necessary to protect claimant's interests. The Board rejected counsel's reliance on Ninth Circuit cases arising under other statutes and under bankruptcy law, as they do not stand for the proposition that all fee-shifting statutes require that an attorney be compensated for time spent on the fee petition. Moreover, fee petitions in the cases cited are necessarily more detailed than those under the Act. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994), *rev'g in part and aff'g in part on recon. en banc* 25 BRBS 100 (1991)(Brown, J., concurring and dissenting), *aff'd in part and rev'd in part on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996)*, cert. denied*, 520 U.S. 1155 (1997); *see also Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995)(affirming administrative law judge's disallowance of time spent preparing fee petition).

Applying general fee shifting law, the Ninth Circuit holds that time spent in preparing fee applications is compensable. The time awarded, however, must be reasonable. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

In a case arising within the jurisdiction of the Ninth Circuit, relying on *Anderson,* 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996), the Board vacated and modified the administrative law judge's disallowance of an hour of services requested by counsel for the preparation of an attorney's fee petition. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Board follows *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT), in a case arising in the Fifth Circuit, and modifies the fee award to allow a fee for preparation of the fee petition. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT)(5th Cir. 1999), *cert. denied,* 530 U.S. 1213 (2000); *see also Bazor v. Boomtown Belle Casino,* 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

The Seventh Circuit rejected employer's contention that the administrative law judge erred in awarding fees to counsel for their work defending their fee application and answering interrogatories. The court held that under fee-shifting statutes such as the Act, such work is compensable to ensure that fees awarded under the Act are not diminished by the cost of bringing a legitimate petition for attorney fees. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003).

The Board modifies the fee award to allow a reasonable fee for preparation of the fee petition. *Baumler v. Marinette Marine Corp.,* 40 BRBS 5 (2006).

The Board cites *Thompson v. Gomez,* 45 F.3d 1365 (9th Cir. 1995), as support for its holding that where claimant files a reply to employer's objections to the fee petition and is partially successful in defeating employer's objections to the fee petition, claimant's attorney is entitled to a fee for preparation of his reply that is proportionate to his degree of success in prosecuting his fee petition. The Board modifies to award an additional fee. *B.C. v. Stevedoring Service of America,* 41 BRBS 107 (2007).

Losing on an Issue

The Board will not allocate fee between successful and unsuccessful issues, where claimant is partially successful. An attorney fee is allowable for unsuccessful pursuit of a Section 49 claim where claimant succeeds in gaining compensation. Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986).

The Board held that the administrative law judge had not erred in considering the extent of the claimant's success in rendering his attorney's fee determination. Although an administrative law judge may not mechanically disallow a fee for work relating to issues on which the claimant has not prevailed, he may reduce the overall fee award on grounds that the claimant has obtained only a small portion of the compensation sought. The Board reasoned that reducing the attorney's fee award on such grounds is consistent with the principles delineated by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), as well as with the Board's decisions in Battle, 16 BRBS 329 (1984), and Cherry, 8 BRBS 857 (1978). Stowars v. Bethlehem Steel Corp., 19 BRBS 134 (1986).

The Board declined to reduce an attorney's fee for work before it where claimant was successful in defending against employer's appeal of the finding of causation and consequent award of medicals but was unsuccessful in defending the award of disability benefits, which the Board reversed as time-barred. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

The First Circuit denied enforcement of the Board's order awarding attorney's fees to respondent for work expended on respondent's unsuccessful claim of retaliatory discharge and upheld the administrative law judge's award of partial attorney's fees only on respondent's successful disability claim. The court held that since the claims for disability and retaliatory discharge involved very disparate legal theories and factual situations, were filed separately, and could have been separated for hearing, the preparatory work should be separated and partial success should mean partial fees. General Dynamics Corp. v. Horrigan, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), cert. denied, 488 U.S. 992 (1988).

The D.C. Circuit holds that *Hensley* applies to claims under the Act. The court holds that counsel is not entitled to a fee for work performed on the Section 8(a) claim as it was unsuccessful. With regard to the award under Section 8(c), which the administrative law judge raised *sua sponte*, the court held that the administrative law judge must apply the two-step *Hensley* analysis to the fee request. The court rejects the presumption that the Section 8(a) and (c) claims are interrelated under the Board's holdings in *Cherry*, *Battle*, and *Stowars*, and states that many claims are severable and that no fee is allowable on unsuccessful issues under such circumstances. *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

In case arising in the D.C. Circuit, the Board vacated the $3,000 attorney's fee awarded by the administrative law judge, where claimant was successful in obtaining $611.50 in medical benefits but unsuccessful on his unrelated disability claim and remanded for reconsideration of the fee award in light of claimant's limited success consistent with *Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C Cir. 1992) and *Hensley*, 461 U.S. 424 (1983). *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

The Fifth Circuit rejected employer's argument that since claimants had no measurable hearing impairment, they could not receive medical benefits. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

After the Fifth Circuit reversed the Board's previous affirmance of an administrative law judge's award of compensation, the Board rejected employer's contention that the administrative law judge's second fee award violated Rule 41 of the Federal Rules of Appellate Procedure, or the Mandate Rule, holding that the absence of a remand order by the Fifth Circuit did not affect the administrative law judge's jurisdiction. Where a claimant's award is reduced due to the employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with claimant's ultimate degree of success once the award is final. The Board affirmed the administrative law judge's fee award, as counsel prevailed on the issues of causation and medical benefits, and the administrative law judge's 50 percent reduction in counsel's fee was reasonable in relation to the results obtained. *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

The Board reversed the administrative law judge's award of fees and costs associated with claimant's motion for sanctions as an abuse of discretion since the motion was denied and resulted in no additional benefits for claimant. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds).

The Third Circuit held that the administrative law judge's decision to award counsel's full fee with no "limited success" reduction was supported by substantial evidence, and moreover was in accordance with the Supreme Court's decision in *Hensley*. Specifically, the court observed that claimant prevailed against his employer's contesting issues of coverage, extent of disability, and entitlement to future medical benefits, and that counsel, by securing future medical benefits and a *de minimis* award, obtained a substantial benefit for claimant. In addition, the court held that as the administrative law judge's decision applied the correct legal standards, the Board was required to affirm the award of an attorney's fee as a matter of law. Accordingly, the Third Circuit reinstated the initial award of an attorney's fee of $71,000. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001).

Clerical Work

The Board rejected employer's objections to specific items in the fee petition for work performed before the Board, stating that the notice and acknowledgment of appeal are not clerical tasks, although they may be relatively simple, and that they are necessary to permit Board review of an administrative law judge decision. The Board determined that completion, filing, and review of the notice and the acknowledgment require attorney involvement, and that the charges for these items comply with the regulations. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Seventh Circuit rejected employer's contention that the administrative law judge abused his discretion in awarding an attorney's fee for the attorneys' performance of what employer deemed clerical tasks. The court stated that the administrative law judge had reviewed the entries that employer contended constituted "clerical tasks" and rationally found that counsel's work was more than just clerical as counsel conducted telephone conferences with doctors and reviewed doctor's reports. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003).

Miscellaneous

Fees for travel time (as opposed to expenses) may be awarded only where the travel is necessary, reasonable and in excess of that normally considered to be a part of overhead. Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

Counsel's counsel bears the burden of demonstrating the need for co-counsel in order for co-counsel's services to be compensable. Abbott v. Director, OWCP, 13 BLR 1-15 (1989).

Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. The administrative law judge acted within his discretion in finding that counsel's travel from Norfolk, Virginia, to the hearing in Hampton, Virginia, was local in nature, and not in excess of that normally considered overhead for the Tidewater region. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

The Board affirmed the administrative law judge's finding that counsel's travel time between Atlanta and Savannah was reasonable, necessary and in excess of normal office overhead. *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000).

There is nothing objectionable to several attorneys participating in the litigation of a claim where the complexity of the case or other factors warrant it. The administrative law judge rationally found that it is common to delegate work to an associate. *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000).

The Board held that although the administrative law judge had the discretion to raise *sua sponte* the issue of the compensability of a fee and costs for counsel's travel time and expenses, he erroneously failed to provide the parties with reasonable notice of this issue and to afford claimant the opportunity to present evidence relevant to the compensability of the travel charges. The Board also held that there must be a factual foundation supporting an administrative law judge's disallowance of counsel's travel time and expenses on the basis that claimant retained counsel from outside his locality despite the availability of competent counsel within his locality. In this case where there was no evidence that claimant could have retained local counsel, the Board reversed the administrative law judge's disallowance of counsel's travel time and expenses, and remanded for a determination of the reasonableness and necessity of the specific charges. *Baumler v. Marinette Marine Corp.,* 40 BRBS 5 (2006).

Attorney's Fees for Work before the Board

The Board held that a $125 hourly rate is reasonable for work performed before the Board. Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

The Board holds that $125, rather than $150, represents a reasonable hourly rate for the services rendered by a Boston-area attorney in connection with an appeal to the Board. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

Where a claimant has been successful in defending against employer's appeal, his counsel is entitled to a fee for work before the Board. Board reduces hourly rate to $125. Cutting v. General Dynamics Corp., 21 BRBS 108 (1988).

Where, as here, claimant appealed twice to the Board, and prevailed only on the first appeal, claimant's attorney is entitled to a fee for only the work performed before the Board for the first appeal. Bonds v. Smith & Kelly Co., 21 BRBS 240 (1988).

Attorney's fee is awarded for work on appeal, where claimant alleged entitlement to compensation and medical benefits and successfully established entitlement to medical benefits. The Board affirmed a finding compensation was time-barred, but reversed the finding of no causation and therefore awarded medical benefits. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

Where the Board affirms claimant's entitlement to benefits on the second appeal, employer is liable for attorney's fees for work performed before the Board on the first appeal. Lindsay v. Bethlehem Steel Corp., 22 BRBS 206 (1989).

Board finds hours rate of $152.17 excessive and reduces it to $125. Also disallows time spent preparing the motion for an award of an attorney's fee for appellate work. *Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989).

Claimant's counsel is not entitled to a fee for work performed before the Board, since the only issue before the Board involved Section 8(f), *i.e.,* whether employer or the Special Fund is liable for benefits. *Shaw v. Todd Pacific Shipyards Corp.,* 23 BRBS 96 (1989).

Board reduced hourly rate of $150 to $125. Board holds that to the extent that a request for photocopying expenses is found to be reasonable and necessary to the work performed before the Board, these expenses will not be automatically disallowed on the ground that such expenses are part of office overhead. *Picinich v. Lockheed Shipbuilding,* 23 BRBS 128 (1989)(Order).

The Board held that the requested hourly rate of $250 for work performed before it is excessive considering the circumstances in the case, and reduced it to $125. The entire award is contingent upon an award of benefits on remand. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

Claimant's counsel is entitled to a fee for work performed before the Board as her attorney successfully defended the award on appeal. The Board allows $150 per hour, noting that employer did not object to this rate, and states that as this rate accounts for all relevant factors, counsel is not entitled to a bonus. The Board also finds that all the work performed was necessary. As the request for costs was not itemized, however, the Board cannot review the request and counsel must supplement the fee petition if the Board is to consider the request for costs. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Claimant's counsel is entitled to a fee for successfully defending the award on appeal. The Board disallows time pre-dating the notice of appeal, and awards a fee based on an hourly rate of $150. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Because the Board affirmed the administrative law judge's award of benefits, and employer did not object to the fee petition, the Board awarded claimant's counsel a fee of $697.50 for 7.75 hours at $90 per hour, finding the fee reasonably commensurate with the necessary work done. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

"Unit" or "increment" billing, which encompasses all services associated with an identified task, including all work performed by the attorney, paralegal and support staff, does not satisfy the requirements of the regulations at 20 C.F.R. §802.203(d). Specifically, it does not relate to actual work performed on a particular date or to the services of a specified person. Further, it makes it impossible to discern whether counsel is billing for traditional clerical work, which is not separately compensable. the Board will not award a fee for work performed before it for time charged using this billing method. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993).

The Board rejected employer's argument that it should base its fee award in this case on an unpublished court of appeals fee order in a different case or on a decision rendered by an administrative law judge in another case, as it noted that fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. Additionally, the Board rejected employer's objection to the quarter-hour minimum billing method as the regulation at 20 C.F.R. §802.203 approves this method, and it concluded that hourly rates of $125 and $150 are reasonable. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Board rejected employer's objections to specific items in the fee petition, stating that the notice and acknowledgment of appeal are not clerical tasks, although they may be relatively simple, and that they are necessary to permit Board review of an administrative law judge decision. The Board determined that completion, filing, and review of the notice and the acknowledgment require attorney involvement, and that the charges for these items comply with the regulations. Further, the Board determined that 6 hours of attorney time to prepare for oral argument was not excessive given the novelty and complexity of the issues in this case. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Board rejected employer's objections to the fee petition and awarded claimant's counsel an attorney's fee for work performed before the Board on a successful appeal. The Board disagreed that employer did not oppose the claim where it filed a brief seeking affirmance of the administrative law judge's award of benefits to the Special Fund rather than to claimant's estate. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Board disallows time for correspondence with doctors and a pharmacy as it relates to ongoing medical treatment. Counsel must seek payment before the district director, who oversees medical care. The Board also disallows time spent in correspondence with the administrative law judge and with "DOL" as this is not time before the Board. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993)(McGranery, J., dissenting) (decision on remand), *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP,* 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Board disallowed time spent preparing an attorney's fee petition, as this service was not reasonably necessary to protect claimant's interests. The Board rejected counsel's reliance on Ninth Circuit cases arising under other statutes and under bankruptcy law, as they do not stand for the proposition that all fee-shifting statutes require that an attorney be compensated for time spent on the fee petition. Moreover, fee petitions in the cases cited are necessarily more detailed than those under the Act. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994), *rev'g in part and aff'g in part on recon. en banc* 25 BRBS 100 (1991) (Brown, J., concurring and dissenting), *aff'd in part and rev'd in part on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996).

The Ninth Circuit held that the Board provided an adequate justification for its reduction of the $175 hourly rate requested by claimant's attorney on the ground that such rate was excessive for the work performed. *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121 (CRT)(9th Cir. 1995).

Claimant is entitled to an attorney's fee payable by employer for work performed before the Board by successfully prosecuting his claim and defending against employer's appeal. The Board awards the fee at the requested hourly rate of $150. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

Claimant's counsel is entitled to a fee for work performed before the Board, as his attorney successfully defended the award on appeal. The Board awards the entire amount requested, because employer's allegations that the petition entries are unrelated to the work performed are unfounded. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 159 (1996).

Because the Act requires a showing of success on the merits before any attorney's fee becomes appropriate, a claimant who successfully defends on appeal the approval of the voluntary dismissal of his claim has not yet established entitlement to benefits so as to entitle counsel to an award of attorney's fees. *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997)(Order).

The Board awards claimant's counsel an attorney's fee for work performed before the Board defending his award of housekeeping assistance for a specified period. Even though the award was later terminated on modification, the award for the initial period was not overturned and employer did not pursue its appeal of the initial award after modification proceedings ended. *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring).

The Board awarded claimant's counsel a fee at the hourly rate of $200, rather than the $300 rate requested, for work performed before the Board, as that is the rate the Board previously awarded in the geographic area for similarly complex cases. Fee is contingent upon claimant's obtaining an award of benefits on remand. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

The Board rejected employer's assertion that claimant's counsel's request for an attorney's fee for services performed before the Board was inadequate. Though the fee petition did not specifically state who performed the work or the qualifications of such attorney, the petition was signed by lead counsel who filed the brief before the Board and who solely litigated the case before the administrative law judge, and this attorney has litigated numerous cases before the Board. As claimant successfully defended his award against employer's appeal, the Board awards claimant's counsel a fee. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001).

The Board rejected employer's objection to the requested hourly rate and awarded a fee based on an hourly rate of $200. However, because of claimant's limited success on appeal, the Board approved 8.65 hours of services, representing half of the requested time. Consequently, the Board awarded claimant's counsel a fee of $1,730 for work performed before it. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998), *aff'g on recon en banc* 32 BRBS 165 (1998).

In this "borrowed employee" case, the Board denied the attorney's fee petition submitted by counsel for Trinity, a borrowing employer, for work performed before the Board, citing *Jourdan*, 32 BRBS 200 (1998) [*aff'd sub nom. Equitable Equip. Co. v. Director, OWCP,* 191 F.3d 630, 33 BRBS 167 (CRT)(5th Cir. 1999)]. The question of whether TESI, the lending employer, is liable to Trinity for its attorney's fees is not a "question in respect of a claim" within the meaning of Section 19(a) of the Act. Moreover, neither Section 28 nor any other provision of the Act provides for an award of an attorney's fee to an employer. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd on other grounds sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Board holds that employer cannot be held liable for claimant's attorney's fee for work performed before the Board. Employer was excluded from the modification proceedings by the administrative law judge. Employer did not participate in the Director's appeal before the Board, and claimant's argued in response to the Director's appeal for employer's continued exclusion from the case. The Board distinguished this case from *Finch*, 22 BRBS 196 (1989), and *Rihner*, 24 BRBS 84 (1990), *aff'd,* 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), wherein the employers were held liable for the attorney's fee where they continued to contest the claims despite grants of Section 8(f) relief. In this case, as in *Holliday,* 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), and *Ryan,*19 BRBS 208 (1987), employer was not an active litigant and did not contest the compensability of the claim. The fact that employer had an economic interest in the outcome (change in Section 44 assessment) is not sufficient for employer to be held liable. The Board holds that claimant is liable for his attorney's fee as a lien on his compensation, pursuant to Section 28(c). *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.,* 36 BRBS 133 (2002)(McGranery, J., concurring).

In holding claimant liable for his attorney's fee for work performed before the Board, the Board applies 20 C.F.R. §802.203(e) which states that a fee should be "reasonably commensurate with the necessary work done. . ." The Board disallows a fee for work performed on the unsuccessful motion to dismiss for lack of standing, and the response brief, as the status quo was not maintained by virtue of the Board's decision on the merits. Claimant is held liable for the necessary work for telephone calls and conferences with client. *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.,* 36 BRBS 133 (2002)(McGranery, J., concurring).

The Board grants claimant's motion for reconsideration of the amount of the attorney's fee for which claimant is liable pursuant to Section 28(c). Although claimant was unsuccessful before the Board, on remand the administrative law judge again awarded claimant permanent total disability benefits. Claimant's ultimate success entitles his attorney to a fee for all necessary work performed at each stage of the adjudicatory process. The Board awards the entire fee requested, taking into account claimant's ability to pay the fee, as all the work counsel performed before the Board was necessary in that he advocated a position protective of his client's interest in this novel case. *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 133 (2002) (McGranery, J., concurring), *modifying in part on recon.* 36 BRBS 69 (2002).

Liability - In General

The Board held that employer was liable for claimant's counsel's attorney fees from the time it stopped making voluntary payments of compensation. Since the nature and extent of claimant's disability were at issue at the informal conference, employer was on notice of a claim for permanent partial disability. Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988).

An attorney for a medical provider is not entitled to an attorney's fee paid by employer under Section 28(a) of the Act, as a medical provider is not a "person seeking benefits," *i.e.,* a person who filed a claim for compensation under Section 8 or 9, or for medical benefits under Section 7, within the meaning of Section 28(a). Moreover, the provider is not a "claimant" within the meaning of 20 C.F.R. §701.301(16). The medical provider's right to reimbursement is derivative of the employee's entitlement to medical benefits. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993).

In reversing the Board's decision, the Ninth Circuit noted that while medical providers seeking reimbursement of medical expenses who retained their own counsel and intervened in the claim for benefits, have no independent entitlement to medical benefits they do have a derivative right based on claimant's entitlement to recover medical benefits. Consequently, they can seek medical benefits under Section 7(d)(3), and if they do so, they are "person[s] seeking benefits" under Section 28(a) and they are entitled to an attorney's fee. Moreover, claimant had no incentive to show compliance with Section 7(g) and actually would fare better by remaining neutral. Therefore, the court determined it was reasonable and necessary for the doctors to retain separate counsel. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991).

Explaining that it is bound by controlling law of the circuit in which the claim arises, the Board rejects employer's contention that the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993) is in error, and follows that precedent to hold that pursuant to the court's interpretation of Section 7(d)(3) claimant's medical provider is a "person seeking benefits" within the meaning of Section 28(a), entitling the provider's counsel to an attorney's fee payable by employer. *Buchanan v. International Transportation Services,* 31 BRBS 81 (1997).

The Board sets forth the general "American Rule" that litigants pay their own attorney's fees and the exceptions to that rule, both statutory and common law. Section 28 is a statutory exception that shifts liability to employer under certain circumstances. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

Given the Board's holding that the Special Fund cannot be held liable for an attorney's fee under Section 26, and the fact that it is unclear if employer ever voluntarily paid benefits, the case is remanded for consideration of employer's liability for claimant's attorney's fee. Employer cannot escape liability for the fee if it only agreed to claimant's entitlement at the hearing, as a controversy remained until that time. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

The Board affirmed the administrative law judge's denial of a fee to claimant as a lay representative, stating that, whether she is a *pro se* claimant or a lay representative, she is not an attorney; therefore, employer cannot be held liable for a fee pursuant to Section 28 and it would be meaningless to award claimant a fee out of her own benefits. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT)(5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

The Fifth Circuit affirmed the denial of a representative's fee to claimant in addition to her compensation, stating that non-attorneys proceeding *pro se* cannot receive attorney's fees under the Act. *Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *aff'g Galle v. Ingalls Shipbuilding, Inc.,* 33 BRBS 141 (1999), *cert. denied*, 534 U.S. 1002 (2001).

The Board holds that employer cannot be held liable for claimant's attorney's fee for work performed before the Board. Employer was excluded from the modification proceedings by the administrative law judge. Employer did not participate in the Director's appeal before the Board, and claimant's argued in response to the Director's appeal for employer's continued exclusion from the case. The Board distinguished this case from *Finch*, 22 BRBS 196 (1989), and *Rihner*, 24 BRBS 84 (1990), *aff'd,* 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), wherein the employers were held liable for the attorney's fee where they continued to contest the claims despite grants of Section 8(f) relief. In this case, as in *Holliday,* 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), and *Ryan*,19 BRBS 208 (1987), employer was not an active litigant and did not contest the compensability of the claim. The fact that employer had an economic interest in the outcome (change in Section 44 assessment) is not sufficient for employer to be held liable. The Board holds that claimant is liable for his attorney's fee as a lien on his compensation, pursuant to Section 28(c). *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.,* 36 BRBS 133 (2002)(McGranery, J., concurring).

The Board held that the Louisiana state law regarding the scope of LIGA's liability precludes LIGA's liability for the payment of claimant's attorney's fees incurred prior to the insolvency of carrier, notwithstanding LIGA's liability for claimant's compensation benefits. Moreover, the Board held that as the issue under the Longshore Act concerns counsel's entitlement to a fee and employer's liability therefor, and as these issues are not addressed by the Louisiana laws regarding LIGA, the Longshore Act and the Louisiana statute are not inconsistent with each other and thus a pre-emption analysis need not be applied in this case. The Board remanded for the district director to determine whether claimant's counsel is entitled to an attorney's fee payable directly by employer under Section 28(a) or (b) of the Act. *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003).

In a case in which the widow and the girlfriend each claimed death benefits, the Board held that employer cannot be held liable for an attorney's fee for the widow's attorney as employer continued to pay full benefits to that claimant and did not contest her entitlement to benefits under the Act. Thus, the Board remanded to determine whether an attorney's fee should be assessed against the widow as a lien on her compensation. *Reed v. Holcim, (US) Inc.*, 40 BRBS 34 (2006)

Employer's Liability - Section 28(a)

Successful Prosecution

The Second Circuit held that Section 28(a), which allows for an award of an attorney's fee only if the employer "declines to pay any compensation," does not authorize an award of fees where the employer unsuccessfully contests a Section 14(f) penalty payment. The court holds that an assessment pursuant to Section 14(f) is a "penalty" and not "compensation." Accordingly, the court denied the claimant's request for fees, costs and interest for defending the employer's appeal. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied,* 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Fourth Circuit held that a Section 14(f) late payment award constitutes the payment of additional compensation under the Act. Thus, the court held that claimant "successfully prosecuted" her claim and employer was liable for her attorney's fees under Section 28. *Newport News Shipbuilding & Dry Dock Co v. Brown,* 376 F.3d 245, 38 BRBS 37(CRT)(4th Cir. 2004).

The Ninth Circuit held that the Act authorizes attorney's fees for work an attorney performs to secure a late payment award under Section 14(f). In making this determination, the Ninth Circuit, referring in part to the reasoning espoused by the Fourth Circuit in *Brown*, 376 F.3d 245, 38 BRBS 37(CRT), held that the plain language of the Act, as well as its general compensation scheme and legislative history, supports the finding that a Section 14(f) late payment award is "compensation." *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

An award of medical benefits under Section 7 constitutes a successful prosecution sufficient to support an attorney's fee award. Gardner v. Railco Multi Construction Co., 19 BRBS 238 (1987), vacated and remanded on other grounds, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990).

The Board held that the administrative law judge properly denied counsel an award of attorney's fees against the employer/carrier for work performed on remand. Given that counsel's success in establishing claimant's entitlement to D.C. Act benefits occurred at a prior stage of the proceedings and that claimant obtained no additional compensation as a result of the remand proceedings, the claim was not "successfully prosecuted" at the remand stage and an attorney's fee award for work performed at this stage was thus not warranted. Murphy v. Honeywell, Inc., 20 BRBS 68 (1986).

Although claimant was only awarded $250 in benefits, attorney's fees were awarded since claimant's counsel had been successful to a degree. Arrar v. St. Louis Shipbuilding Co., 837 F.2d 334, 20 BRBS 79 (CRT) (8th Cir. 1988).

Establishing the right to past, present, and future medical benefits by stipulation constitutes a "successful prosecution" under the Act. Frawley v. Savannah Shipyard Co., 22 BRBS 328 (1989); Powers v. General Dynamics Corp., 20 BRBS 119 (1987).

Attorney's fees can be assessed against an employer when employer has controverted some aspect of the claim and claimant successfully obtains an award of disability or medical benefits. Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988), aff'd, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990).

The Board reverses the administrative law judge's fee award, as claimant did not successfully prosecute his claim for disability benefits, and employer had agreed to pay outstanding and future medical benefits. *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.,* 21 BRBS 87 (1988).

Employer is liable for a fee as it contested claimant's right to medical benefits and claimant prevailed on this issue. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Claimant's counsel is entitled to an attorney's fee for an appeal to the court only when the court addresses and resolves in claimant's favor a dispute over liability for compensation. As this appeal only addressed a question of procedure*, i.e.,* the deputy commissioner's authority to modify a decision of an administrative law judge, no contested claim for benefits was resolved. Thus, counsel is not entitled to a fee. Director, OWCP v. Palmer Coking Coal Co., 867 F.2d 552 (9th Cir. 1989).

The Tenth Circuit reverses the Board's holding that claimant is entitled to attorney's fees under Section 28(a) because he reasonably believed he had a valid claim under Part C of the Black Lung Act, even though he entered into a stipulation after several administrative proceedings stating his intention not to pursue recovery of offset benefits, the apparent purpose for which he file his Part C claim in 1981 after having been awarded Part B disability and Part C medical benefits. Court holds that attorney's fees may only be recovered if the claimant receives increased compensation or other benefits from the action, and since claimant received no benefits from pursuing his 1981 claim, he is not entitled to attorney's fees. *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir. 1991).

Notwithstanding the amount of employer's credit under Section 33(f), claimant's attorney is entitled to a fee for work performed before the administrative law judge. Although claimant may never receive any benefits due to the large credit, claimant successfully established an inchoate right to compensation under the Act. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd,* 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied,* 512 U.S. 1219 (1994).

Where the record is unclear as to when employer completed its voluntary payment, before or after the case's referral to OALJ, and therefore is unclear regarding employer's liability for a fee, the case must be remanded for further findings. *Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990).

The Board notes that an employer's liability for funeral expenses alone may make employer liable for an attorney's fee. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

The Fifth Circuit held that claimant, who succeeded in recovering an award of prejudgment interest could be awarded an attorney's fee as employer had denied interest on the claim. *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

The Board affirms the administrative law judge's fee award against employer as employer controverted the claim, and claimant obtained benefits under Section 8(c)(13), the right to medical treatment from his own physician, an attorney's fee payable by employer, and, by virtue of the Board's decision, a Section 14(e) penalty. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds).

The Board holds that claimant's counsel is entitled to an attorney's fee payable by employer pursuant to Section 28(a). Although by operation of the Section 3(e) credit, claimant does not realize any actual compensation benefits under the Act, claimant's counsel has engaged in a "successful prosecution." Claimant succeeded in establishing employer's liability under the Act and thus received an inchoate right to various benefits under the Act. Moreover, claimant requested a formal hearing before filing her state claim and before she received any benefits pursuant to the state claim, and employer did not concede its liability for the longshore claim until the case was referred to a hearing. Finally, an attorney's fee should not be limited solely by the amount of compensation gained. Claimant's counsel represented claimant's best interests by simultaneously pursuing a state award and requesting a formal hearing under the Act after the deputy commissioner issued a recommendation for employer. *Murphy*, 20 BRBS 68 (1986), is distinguished. *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

Where an administrative law judge determines that a claim is not barred, claimant is successful before the administrative law judge and is therefore entitled to a fee payable by employer. *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

The court rejected employer's argument that since claimants had no measurable hearing impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting that one doctor recommended annual evaluations and stated claimant was "a candidate for amplification" but another found that a hearing aid would not help him. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Where claimant prevailed on the issue of causation, entitling him to medical benefits, there was a successful prosecution and claimant's counsel is entitled to an attorney's fee. Case distinguishes *Baker*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993), because in this case, unlike in *Baker,* employer did not challenge claimant's entitlement to medical benefits. The only relevant medical opinion indicated that claimant should have yearly re-evaluations and was a candidate for amplification, and there were outstanding past medical benefits. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Employer's liability for the fee is governed by Section 28(a) because employer made no voluntary payments of compensation, and claimant prevailed on all contested issues. Employer's payment of compensation pursuant to the administrative law judge's award is not a voluntary payment of compensation. *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

In a black lung case, the Seventh Circuit states that a victory on appeal that merely keeps the claim alive, but does not establish entitlement is not "successful prosecution" under Section 28(a). *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT) (7th Cir. 1993).

The Board holds that the administrative law judge erred in denying claimant's counsel a fee because of his award of benefits to the Special Fund. As the Board held that claimant's estate is to receive benefits and as employer did not voluntarily pay compensation, employer is liable for a fee to claimant's counsel under Section 28(a). The case is remanded for consideration of the fee petition. *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114 (1992), *rev'd mem. sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (5th Cir. March 10, 1993).

Because claimant's counsel successfully prosecuted this case and established employer's liability for benefits, the Board reaffirmed its conclusion that counsel is entitled to an attorney's fee payable by employer. Therefore, it reversed the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee and remanded the case for consideration of counsel's fee petition. *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994)(decision on remand).

Where claimant's counsel successfully prosecuted the case by establishing employer's liability for decedent's benefits, he is entitled to an attorney's fee payable by employer. Therefore, the Board vacated the administrative law judge's denial of a fee and remanded the case to the administrative law judge for consideration of the fee petition. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., concurring and dissenting).

In this black lung case, the court held that an attorney's fee may be recovered only if there has been a final decision awarding the claimant an economic benefit as a result of his claim. Thus, the application in this case was premature. *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997).

Although employer declined to pay benefits after its receipt of the claim, it is not liable for an attorney's fee under Section 28(a) as claimant did not successfully prosecute his claim. Although it was found that he did not fabricate his back injury, he did not obtain any additional benefits for this injury. Although claimant need not obtain monetary benefits in order to be "successful," the court holds that he must obtain "some actual relief that materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the claimant." *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

In a case where employer declined to pay benefits initially and controverted the claim, and where claimant hired an attorney and obtained payment of the benefits sought pursuant to the recommendation of the claims examiner, claimant met the plain language requirements of Section 28(a), making employer liable for an attorney's fee under Section 28(a). The Board rejected employer's argument that the Supreme Court's decision in *Buckhannon*, 532 U.S. 598, applies to preclude an attorney's fee in this case due to the absence of a "prevailing party." The Board held that *Buckhannon* does not apply to determine liability for a fee in cases arising under the Act, as the Act does not contain the "prevailing party" language, and as liability must be ascertained from the directives of the specific applicable statute and within the procedures of the applicable forum. Moreover, the Board held that even if *Buckhannon* were to apply, its requirement for a "material change" in the relationship of the parties would be satisfied, as claimant obtained a sanctioned result when the claim was resolved via the Act's informal procedures. Therefore, the Board affirmed the district director's award of an attorney's fee payable by employer. *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

In a case where employer declined to pay any benefits until after claimant had hired an attorney and an informal conference had been held, the Board affirmed the district director's award of an attorney's fee, relying on the plain language of Section 28(a) and on the Ninth Circuit's decision in *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). The Board held that claimant was successful in his claim because he actually obtained the benefits he sought. This tangible relief satisfies the Ninth Circuit's holding that "successful prosecution" under the Act requires a claimant to obtain something of substance and not just the possibility of future relief. *Clark v. Chugach Alaska Corp.*,38 BRBS 67 (2004).

When Employer's Liability Accrues

The Fourth Circuit affirms the Board's interpretation of Section 28(a), which holds employer liable for attorney's fee incurred after employer receives notice of the claim and declines to pay benefits. This interpretation can be reconciled with the statute and legislative history and is consistent with congressional intent that disputes be resolved without legal assistance other than that provided by the Secretary. *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50 (CRT) (4th Cir. 1986).

Under Section 28(a), employer is not liable for services rendered prior to the date it received notice and declined to pay benefits. In this case, employer is deemed to have declined to pay on the date its notice of controversion was prepared and dated and not, as employer would suggest, the date the controversion was filed with the deputy commissioner. *Luter v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 103 (1986).

Where claimant filed his claim on April 8, 1987 and employer filed a notice of controversion on April 20, 1987, but the district director did not formally notify employer of the claim until December 1, 1987, the Board affirmed the administrative law judge's finding that employer was not liable for an attorney's fee until after December 1, 1987. The Board rejected claimant's contention that written notice from claimant to employer should satisfy the provisions of Section 28(a) and held, in accordance with the plain language of Section 28(a), that employer is liable for an attorney's fee for those services rendered to claimant after 30 days from the date employer received written notice of the claim from the district director or, within the 30 day period, from the date it declined to pay, whichever comes first. The Board noted its holding is consistent with the legislative intent that employer is not to be held liable for an attorney's fee at the early, informal stages of the proceedings. The Board also noted the district director's duties under Section 19(b) to notify employer of the claim within 10 days but acknowledged there is no provision in the Act concerning the consequences in the event the district director delays performance of those duties. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.,* 12 F.3d 209 (5th Cir. 1993).

The Fifth Circuit holds that employer is not liable for attorney fees under Section 28(a) for pre-controversion legal work. Specifically, the court held that it was bound by precedent holding that receipt of written notice of the compensation claim by employer is a prerequisite to the recovery of attorney fees from employer for fees incurred thereafter. *See Watkins v. Ingalls Shipbuilding, Inc.*, 12 F.3d 209, No. 93-04367 (5th Cir. Dec. 9, 1993) (unpublished). Moreover, the circuit court interprets Section 28(a) to hold that employer is not liable for attorney fees incurred before it controverts the claim or before 30 days after receiving written notice of the claim, whichever event arises first. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

The Board holds that employer is liable to claimant under Section 28(a) for attorney's fees for pre-controversion legal work. Following its decision in *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting), *appeal pending*, No. 97-2161 (4th Cir.), and reasoning that its action in this case follows from interpretations of federal fee-shifting statutes by the Supreme Court, the Board holds that in cases arising under the Longshore Act, Section 28(a), when read consistently with other fee-shifting provisions generally and Section 28 as a whole, provides for employer's liability for pre-controversion legal services, subject only to the determination that such fees are incurred for legal work that is both reasonable and necessary to the successful prosecution of the claim. The overarching purpose of the Act, to insure adequate compensation, is furthered by this interpretation and is consistent with Section 28(d) which provides that amounts awarded against an employer or carrier "shall not in any respect affect or diminish the compensation payable ... ." The Board thus holds that Section 28(a) provides only a condition precedent to employer's liability for all reasonable and necessary fees, and overrules prior Board decisions to the contrary. *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(*en banc)*(Smith & Dolder, JJ., dissenting)*; but see Clinchfield Coal Co. v. Harris*, 149 F.3d 307 (4th Cir. 1998).

The Board, in effect, overrules *Liggett*, 31 BRBS 135, holding in a black lung case that the plain language of Section 28(a), as interpreted by the Board and Fifth Circuit in *Watkins,* 26 BRBS 179 (1993), *aff'd mem.,* 12 F.3d 209 (5th Cir. 1993) and *Weaver*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002), states that employer's fee liability accrues only after: (1) employer declines to pay any compensation on or before the 30th day after receiving notice of the claim from the district director; and (2) *thereafter*, the claimant utilizes the services of an attorney in the successful prosecution of the claim. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (*en banc*) (McGranery and Hall, JJ., dissenting).

The Sixth Circuit held that employer may be not be held liable for pre-controversion fee under Section 28(a). The court explained that the word "thereafter" in Section 28(a) places a temporal limitation on the fee-shifting mechanism, as, prior to controversion, the claimant does not require the services of an attorney in the pre-adjudication stages of the case. The court also rejected the contention that pre-controversion fees shift to employer after the claim is, in fact, controverted. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008).

The "response" filed by employer does not affect its liability under Section 28(a); although employer purported to accept liability, employer did not pay or tender until almost a year after it filed the response, thus effectively declining to pay until that time. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Under Section 28(a), the liability for an attorney's fee attaches to employer from the date employer <u>or</u> carrier declines to pay benefits, or after 30 days from the date employer <u>or</u> carrier declines to pay benefits. Thus, even though the carrier on the risk was not identified until a later date, employer is liable for claimant's attorney's fee on the date 30 days from the date that it received notice of the claim and failed to begin payment of benefits. This interpretation is bolstered by Section 4 and 35 of the Act which make employers primarily liable and imputes knowledge to the carriers. The administrative law judge's finding that carrier is liable for the fee only from the date it was joined is therefore modified. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board affirmed the administrative law judge's application of the last employer rule to his determination regarding liability for an attorney's fee, and thus affirmed his finding that SSA is liable for all attorney's fees, including those incurred prior to its controversion of the claim, so long as he found them necessary to claimant's successful prosecution of the case. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

Decline to Pay

Employer initially voluntarily paid disability benefits before any claim was filed, but ceased making all such payments, disclaiming further liability. Moreover, employer declined to pay any further benefits within thirty days after receiving written notice of the claim and thus is liable for an attorney's fee pursuant to Section 28(a) of the Act, as claimant obtained an award of benefits. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Ninth Circuit, following the Fifth Circuit's decision in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), holds that employer's voluntary payment of compensation before claimant filed a claim does not preclude employer's liability under Section 28(a) if it "declines to pay" after claimant files a claim. If employer takes no action within the 30-day period, it has "declined to pay. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT)(9th Cir. 2003).

The Board holds that "claim for compensation" need not include any competent evidence of disability in support of the claim in order to be "valid;" a claim need only be a writing evincing an intent to seek compensation. Thus, a claim for hearing loss benefits need not be accompanied by an audiogram or other evidence demonstrating a loss of hearing. Moreover, in two of the three cases involved here, the claimants provided uninterpreted audiograms with their claim forms. Pursuant to Section 28(a), employer must pay benefits or decline to pay benefits within 30 days of its receipt of notice of the claim from the district director. This 30-day period provides employer sufficient time to have an audiogram interpreted or to have the degree of claimant's impairment evaluated prior to employer's deciding to pay or to decline to pay. As the employer did not pay benefits to any of the three claimants within 30 days of its receipt of the claim from the district director, the Board holds that employer is properly held liable for claimants' attorney's fees from the date the district director served the claim until employer paid benefits. *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Fifth Circuit rejects employer's argument that a valid claim for hearing loss benefits for purposes of triggering employer's liability for attorney fees under Section 28(a) has not been made until the claimant has provided an audiogram and interpretive report that qualify as presumptive evidence of the amount of hearing loss under Section 8(c)(13)(C). The court further rejects employer's argument that it did not decline to pay compensation, holding that, pursuant to *Weaver*, 282 F.3d 357, 36 BRBS 12(CRT), the fact that employer filed its notices of controversion before receiving formal notice of the claims from the district director is irrelevant. *Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Industries, Inc.,* 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002).

Employer voluntarily paid temporary total disability compensation subsequent to the claimant's injury, and continued to make such payments after the claimant reached maximum medical improvement until the parties reached a settlement regarding the amount of weekly compensation. After the district director approved the parties settlement pursuant to Section 8(i), the district director awarded claimant's counsel an attorney's fee. The Fifth Circuit held that claimant's counsel was not entitled to an attorney's fee under Section 28(a), as the employer did not refuse to pay permanent disability, but in effect, made such payments by virtue of its temporary total disability compensation payments. The court further held that an attorney's fee under Section 28(b) was inappropriate, as the parties settled their dispute as to the amount of compensation prior to imposition of the Department of Labor's informal dispute resolution mechanism. Thus, the Fifth Circuit reversed the district director's award of an attorney's fee. *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

The Board held that employer cannot be liable under Section 28(a) for the attorney's fee awarded in this case, as employer did not decline to pay compensation within 30 days of receipt of claimant's claim for compensation. Employer was voluntarily paying benefits when it received claimant's claim. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The Fourth Circuit holds that claimant is not entitled to an attorney's fee paid by employer pursuant to Section 28(a), as employer voluntarily paid compensation within 30 days of it receipt of the claim. That claimant later sent a letter requesting additional compensation did not trigger employer's obligation to pay under Section 28(a), as the claim refers only to a formal action initiating the proceedings. Moreover, such an interpretation would nullify Section 28(b), which applies where employer pays compensation voluntarily and claimant thereafter seeks additional compensation. The court therefore reversed the Board's holding that employer is liable for claimant's fee under Section 28(a). *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied* 126 S.Ct. 478 (2005).

When the employer initially pays compensation voluntarily after the filing of a claim, but then refuses a later request for additional benefits on the same claim, employer is not liable for an attorney's fee pursuant to Section 28(a) for claimant's obtaining additional benefits, as employer did not decline to pay *any* compensation within 30 days of receipt of the claim. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

Employer is not liable for a fee under Section 28(a) inasmuch as employer was voluntarily paying claimant compensation of permanent partial disability when he filed his claim for permanent total disability compensation. *Andrepont v. Murphy Exploration & Prod. Co.,* 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring).

The Board rejects claimant's contention on reconsideration that he is entitled to an employer-paid fee under Section 28(a) since employer did not timely pay the exact benefits claimed by claimant. Employer was voluntarily paying claimant compensation for scheduled permanent partial disability when he filed his claim for permanent total disability compensation. Claimant's contention is not consistent with the plain language of Section 28(a), which states that employer will be liable for claimant's attorney's fee if it "it declines to pay *any* compensation" within 30 days of its receipt of the claim from the district director. *Andrepont v. Murphy Exploration & Prod. Co.,* 41 BRBS 73, (2007) (Hall, J., concurring), *aff'g on recon.*, 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds).

Pursuant to the plain language of Section 28(a), the Board held that as employer did not pay benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for the entire claim is governed by Section 28(a). Claimant's subsequent request for additional benefits, although timely paid after the informal conference, does not implicate Section 28(b). The Board therefore reversed the district director's finding that employer is not liable for an attorney's fee under Section 28(b), and holds employer liable under Section 28(a). *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

The Sixth Circuit held that when an employer does not pay any benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for work involving all benefits due on the claim must be determined pursuant to Section 28(a). Employer is not relieved of fee liability by voluntarily paying some benefits before the claim was filed or after it filed a notice of controversion if it declined to pay benefits within the 30 days after it received written notice of the claim. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008).

As employer declined to pay any benefits within 30 days of its receipt of the claim, and claimant thereafter successfully obtained additional benefits, albeit at different periods, the Board held, based on the plain language of the statute, that employer is liable for counsel's fee pursuant to Section 28(a). The Board discussed its prior decision in *W.G.*, 41 BRBS 13, as well as the Sixth Circuit's decision in *Day*, 518 F.3d 411, supporting this result. The Board stated that employer's prompt payment additional disability and medical benefits when the need for claimant's surgery arose in 2007 did not alter the fact that it initially declined to pay benefits within 30 days of its receipt of the claim in 2002, which subjected it to potential attorney's fees under Section 28(a). The Board declined to address the issue reserved by the First Circuit in *Barker*, 138 F.3d 431, 32 BRBS 171(CRT), as to whether medical benefits are "compensation," since employer's liability for a fee in this case does not turn on its payment of medical benefits alone. *A.M. v. Electric Boat Corp.*, 42 BRBS 30 (2008).

Employer's Liability - Section 28(b)

Controversy

The Board holds that employer's liability for an attorneys' fee pursuant to Section 28(b) commences at the time a controversy arises between the parties, i.e., at the time employer stops making voluntary payments. The Board rejects employer's contention that the language of Section 28(b) requires the holding of an informal conference, and employer's rejection of the deputy commissioner's recommendation after the conference, before fee liability commences. Caine v. Washington Metropolitan Area Transit Authority, 19 BRBS 180 (1986).

Employer is liable for claimant's attorney's fee under Section 28(b) after the date of controversion because employer voluntarily paid compensation without an award, and thereafter terminated these payments upon a belief that the Special Fund should be liable for continuing payments. That employer is discharged of its liability for some compensation due to the operation of Section 8(f) does not affect its obligation under Section 28(b). Moreover, employer cannot escape liability on the ground that it stipulated to claimant's entitlement at the hearing, as a controversy remained until that time. *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

The Fifth Circuit affirms the Board's holding that employer is liable for counsel's fee under Section 28(b) as it discontinued payment of benefits, and contested the compensability of the claim at the hearing, despite contending it is entitled to Section 8(f) relief. That employer is discharged from liability pursuant to Section 8(f) does not affect its obligation for an attorney's fee. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

Tender of Compensation

Pursuant to Section 28(b), a tender of compensation without an award does not require an actual proffer of funds. Rather, a tender of voluntary payments means a readiness, willingness and ability on the part of employer or carrier expressed in writing to make such payment to claimant. To the extent the Board's prior decisions in Granstrom, 6 BRBS 745 (1977), and Hadel, 6 BRBS 519 (1977), are inconsistent, they are overruled. Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986).

An "offer to stipulate" may constitute a "tender" under the Act sufficient to relieve employer of subsequent liability for claimant's fee. However, Section 28(b) requires that employer either pay or "tender to the employee is writing" the additional compensation it believes the employee is entitled to. In the case, employer's offer to stipulate was not contained in a "writing" sufficient to satisfy the "tender" requirement under the Act. *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990).

The Board rejected employer's argument that the administrative law judge erred in holding it liable for claimant's attorney's fees because claimant refused a settlement offer and was ultimately awarded less than the tendered amount. The Board found that as the two letters which employer had submitted in support of its asserted tender offer indicated only that employer's counsel was willing to recommend a settlement, and not that she was authorized to agree to a settlement of $1,500 plus medicals to her client, they did not establish a readiness, willingness, and ability on employer's part to make payment to claimant. The Board accordingly affirmed the administrative law judge's finding that employer had not made a valid tender of compensation and that inasmuch as claimant was successful in establishing his right to medicals, employer was liable for claimant's attorney's fees under Section 28(b). *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Payment of compensation pursuant to a settlement agreement does not constitute a voluntary payment of benefits under Section 28(b). *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

Employer voluntarily paid temporary total disability compensation subsequent to the claimant’s injury, and continued to make such payments after the claimant reached maximum medical improvement until the parties reached a settlement regarding the amount of weekly compensation. After the district director approved the parties settlement pursuant to Section 8(i), the district director awarded claimant’s counsel an attorney’s fee. The Fifth Circuit held that claimant’s counsel was not entitled to an attorney’s fee under Section 28(a), as the employer did not refuse to pay permanent disability, but in effect, made such payments by virtue of its temporary total disability compensation payments. The court further held that an attorney’s fee under Section 28(b) was inappropriate, as the parties settled their dispute as to the amount of compensation prior to imposition of the Department of Labor’s informal dispute resolution mechanism. Thus, the Fifth Circuit reversed the district director’s award of an attorney’s fee. *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

The Board held that the instant case was governed by Section 28(b) because when employer took the matter of increased compensation payments to a claims examiner, it was effectively controverting claimant's entitlement to any dependency benefits on behalf of her son after he reached the age of eighteen, and in fact, ceased paying such benefits. Thereafter, claimant was forced to utilize the services of an attorney in order to recover her asserted full compensation, and successfully asserted her entitlement to dependency benefits for the time her son attended a vocational school. As counsel's services resulted in claimant's partially successful defense of her death benefits, the Board held that employer is liable for claimant's attorney's fee under Section 28(b), and affirmed the administrative law judge's attorney's fee award. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

The Board held that employer cannot be liable for an attorney's fee under Section 28(b) on the facts of this case as it paid benefits voluntarily without resort to informal or formal proceedings, and as claimant did not pursue or obtain additional benefits thereafter. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The court rejected claimant's argument that employer's $5,000 settlement offer was not a tender under section 28(b), because it was contingent on his agreeing to drop his back claim. The court stated that the condition of dropping a claim is implicit in all tenders because they are made to satisfy a debt or obligation. The court concluded that a tender is called an "unconditional" offer under the Act, only because there are no *additional* contingencies. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The Board holds that in order to constitute a "tender" of compensation under Section 28(b), employer's offer must be a written, *unconditional* offer to pay compensation. In these cases, employer offered to pay compensation if claimants would agree to certain stipulations. Claimants rejected the stipulations and the administrative law judge looked to the validity of claimants' actions to determine if the tenders were valid. The Board holds that this approach impermissibly shifted to claimants the burden of establishing that the tenders were valid when the burden is on employer to establish it is not liable for an attorney's fee. As the offers to pay were conditioned on claimants' accepting the stipulations, the Board holds that they were not "tenders" under Section 28(b) and that employer therefore is liable for claimants' attorneys' fees because claimants obtained greater compensation than employer paid or tendered. *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004); *see also Hitt v. Newport News Shipbuilding & Dry Dock Co.,* 38 BRBS 47 (2004).

The Fourth Circuit held that where employer conditioned its offer to pay claimant by requiring him to sign a stipulation, employer's offer was not a valid tender because it was not "unconditional." The stipulation stated, "That the parties are aware of no other outstanding compensation issues as of the date of execution of these Stipulations." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

Informal Conference and Deputy Commissioner's Recommendation

The Board affirmed the administrative law judge's determination that claimant is entitled to an attorney's fee paid by employer even though employer paid compensation pursuant to the deputy commissioner's recommendation, since claimant obtained additional compensation in proceedings before the administrative law judge. *Mason v. Baltimore Stevedoring Co.,* 22 BRBS 413 (1989).

The Ninth Circuit holds that employer is not liable for claimant's attorney's fee under Section 28(b) as there was no dispute after the informal conference concerning the amount of compensation to be awarded. Although employer voluntarily paid benefits after it controverted the claim, at the conference employer agreed claimant is entitled to permanent total disability benefits. Section 28(b) authorizes a fee only is employer refuses to accept the recommendation of the deputy commissioner and claimant thereafter obtains greater compensation. The case is remanded for consideration of employer's liability for a fee under Section 28(a). *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991).

The Ninth Circuit reversed the administrative law judge's denial of an attorney's fee and held that employer is liable for an attorney's fee under Section 28(b) even though employer did not reject OWCP's recommendation, as claimant prevailed on issues that remained in dispute following the informal conference (average weekly wage calculation and amount of disability compensation) and obtained a greater award on appeal. The court distinguished the case of *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT)(9th Cir. 1991), from the instant case in that in *Watts* claimant was not entitled to an attorney's fee since after the informal conference there was no issue in dispute other than claimant's entitlement to an attorney's fee. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

The Fifth Circuit initially reversed the Board's affirmance of the administrative law judge's award of an attorney's fee. However, upon rehearing, the court determined that the recommendation of the claim's examiner, which called for payments to continue at the referenced compensation rate, was rejected by employer when it later raised average weekly wage as an issue for the first time. Thus, employer did not accept the recommendation, and claimant's use of an attorney to resolve the controversy and obtain greater benefits entitled him to an attorney's fee under Section 28(b). *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g* 237 F.3d 404, 34 BRBS 44(CRT)(5th Cir. 2000).

The Fifth Circuit rejected employer's argument that it was not liable for a fee under Section 28(b) because it complied with the district director's recommendation to reinstate temporary total disability compensation following the informal conference as the record reflects that several other disputed issues remained, and claimant obtained greater compensation by virtue of proceedings before the administrative law judge. The exact nature of the recommendations was not admitted into the record. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Board, following a discussion of the Fifth Circuit's decisions in *Staftex Staffing,* 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), and *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), affirmed the administrative law judge's finding that the requirements of Section 28(b) were met and thus affirmed the award of an attorney's fee payable by employer. Specifically, the Board held that the record establishes that following an informal conference, claimant used the services of an attorney to successfully recover an award of additional compensation. In its decision, the Board also observed that, contrary to employer's contention, the Fifth Circuit has not held that a written recommendation by the district director is required in order for an employer to be liable for an attorney's fee under Section 28(b); as in *Gallagher*, employer herein offered no evidence concerning the substance of the district director's recommendations. *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

No informal conference took place in this case, and under the law of the Fifth Circuit, that fact poses an absolute bar to an award of attorney's fees under Section 28(b). The court does not address the contentions that the law of the Fifth Circuit actually provides otherwise, as the court holds that an attorney's fee award is proper under Section 28(a). *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Fourth Circuit holds that claimant is not entitled to an attorney's fee payable by employer pursuant to Section 28(b) because of the absence of an informal conference and written recommendation by the district director, which are mandatory statutory pre-conditions to fee liability. That the convening of an informal conference is within the discretion of the district director does not nullify the statutory requirements. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied* 126 S.Ct. 478 (2005).

In Fourth Circuit case, the Board states it is compelled to follow *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), and affirm administrative law judge's finding that employer is not liable for an attorney's fee under Section 28(b). Although an informal conference was held and the district director issued a recommendation, the recommendation was that claimant was entitled to no further benefits, a finding which employer accepted. Although claimant was successful before the administrative law judge, the requirement of Section 28(b), delineated by the *Edwards* Court, that employer refuse to adopt the district director's recommendation was not met. The Board affirmed the administrative law judge's finding that in absence of employer's refusal to adopt the district director's recommendation employer cannot be held liable for a fee but discusses the arising from the *Edwards* holding in cases such as this where claimant is the party refusing to accept the recommendation and is successful before the administrative law judge. *Wilson v. Virginia Int'l Terminals,* 40 BRBS 46 (2006).

The Board holds that the administrative law judge erred in finding that employer is not liable for claimant's attorney fee pursuant to Section 28(b). Pursuant to *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), an informal conference was held via written correspondence between the parties and the district director, 20 C.F.R. §702.311, the district director issued a written "supplemental recommendation," employer refused to adopt the recommendation, and claimant succeeded on the issue before the administrative law judge. The Board rejected the administrative law judge's finding that the issues before the district director and administrative law judge were different, as a claim for total disability benefits includes a claim for any lesser disability. The Board notes that it need not reach the legal issue of whether the issues before the district director and the administrative law judge *must* be the same. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

The Sixth Circuit holds that the plain language of Section 28(b) states that in order for fees to be assessed under its terms the district director must issue a written recommendation containing a suggested disposition of the same controversy that claimant successfully prosecutes before the administrative law judge. At the informal conference, claimant asserted a claim for permanent total disability. The district director issued a "recommendation" stating he was not recommending anything because the parties were pursuing a settlement. The administrative law judge awarded claimant permanent total disability benefits. The court held that employer is not liable for claimant's fee because there was no written recommendation on the controversy at the district director level. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP,* 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Employer is liable for an attorney's fee under Section 28(b) as the district director held an informal conference and issued a recommendation which employer did not accept. Employer refused to pay the recommended medical bills on the ground of no causation. Claimant obtained a favorable award from the administrative law judge. Nonetheless, the court agrees with the Board that the fee is not payable until claimant undergoes the proposed surgery and suffers a period of disability, citing *Adkins*, 109 F.3d 307. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

Employer refused the district director's written recommendation that employer should begin payments for a 19 percent impairment and that claimant was not required to sign the disputed stipulation as a condition to receive the compensation. The court noted that employer never changed its initial offer to pay condition on the challenged stipulation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

The Fourth Circuit, citing 20 C.F.R. §702.311, held that the letters between the parties and the district director serve as the "functional equivalent of an informal conference." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

The Board holds that the administrative law judge erred by holding employer liable for a fee under Section 28(b). After the informal conference, the district director recommended that no further benefits were due claimant. Employer accepted this recommendation and paid or tendered no further benefits. Thus, notwithstanding the administrative law judge's award of greater compensation, employer is not liable for claimant's attorney fee pursuant to Section 28(b). The Board notes that it is following the lead of the Fifth Circuit in strictly interpreting Section 28(b). *Andrepont v. Murphy Exploration & Prod. Co.,* 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.,* 41 BRBS 73 (2007) (Hall, J., concurring).

Given the recent trend in the case law, *i.e., Edwards, Pittsburgh & Conneaut,* and *Pool Co. v. Cooper*, the Board adopts a strict construction of Section 28(b) and will apply it in all circuits that have not addressed the issue. In this case, claimant requested an informal conference, but, following a conversation with employer, instead requested that the case be transferred to an administrative law judge. The parties subsequently stipulated that no informal conference was held. Pursuant to the plain language of Section 28(b), the absence of an informal conference precludes employer's liability for claimant's attorney's fee. The administrative law judge's assessment of fee liability on employer therefore is reversed. *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

Employer voluntarily paid benefits from the date of the injury. An informal telephone conference was conducted at the conclusion of which the district director gave the parties additional time to discuss a settlement and did not write a recommendation. Claimant's counsel notified the district director that the parties were unable to reach agreement and requested the case be transferred to the OALJ. The district director complied and did not write a recommendation. Pursuant to *Davis,* 41 BRBS 58 (2007), which follows the Fourth, Fifth and Sixth Circuits on the analysis of Section 28(b), the Board held, in this Third Circuit case, that employer cannot be held liable for an attorney's fee due to the absence of a written recommendation, and it reversed the administrative law judge's fee award payable by employer. *Devor v. Dep't of the Army,* 41 BRBS 77 (2007).

In this case arising in the Fourth Circuit, the Board held that employer is not liable for claimant's fee pursuant to Section 28(b) because the district director did not issue a recommendation on the issue favorably decided by the administrative law judge. The district director recommended that employer pay scheduled benefits for a 52 percent impairment, which employer ultimately accepted. This issue was not adjudicated before the administrative law judge. The administrative law judge adjudicated the compensability of claimant's back impairment, finding for claimant, but the district director never addressed any issues concerning claimant's back injury. Thus, the Board reversed the administrative law judge's finding that employer is liable for claimant's attorney's fee. *R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

Additional Compensation

Counsel is entitled to an attorney's fee when modification of compensation award results in additional compensation above the amount of voluntarily paid by employer. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1982), aff'd on recon., 20 BRBS 26 (1987), aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The Board holds that, under Section 28(b), claimant's counsel is entitled to payment of his attorney's fee by employer where he establishes claimant's right to payment of past medical benefits and the right to additional future medical benefits inasmuch as he has established claimant's right to additional compensation within the meaning of the Act. Previous cases reached this result under Section 28(a). Employer is liable even though due to its large overpayment, claimant may not realize the award for many years. Geisler v. Continental Grain Co., 20 BRBS 35 (1987).

Even though employer did not contest claimant's modification request, presumably because it assumed that any additional amount awarded claimant as a result of the request would be paid by the Special Fund pursuant to a prior award of Section 8(f) relief, the Board affirmed the administrative law judge's determination that employer was liable for a fee for claimant's attorney's work during the modification proceedings. The Board reasoned that since claimant obtained additional compensation as a result of the modification proceedings and had been required to be represented by an attorney throughout the proceedings due in part to employer's failure to concede liability for the additional amount requested and given that employer actively participated in the proceedings, the administrative law judge's imposition of attorney's fee liability on the employer was proper. Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988).

The Board concludes that the administrative law judge did not err in holding employer liable for the attorney's fee incurred with claimant's motion for modification where claimant by virtue of the modification proceedings obtained in inchoate right to additional compensation equivalent to the amount of the Section 3(e) credit awarded to employer in the original Decision and Order. *McDougall v. E.P. Paup Co.,* 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

The Ninth Circuit rejected employer's argument that claimant is not entitled to an attorney's fee under Section 28(b) because only the source of his benefits was at issue, not the amount of compensation. The court affirmed the Board's holding that claimant was entitled to an attorney's fee because, by virtue of the modification proceedings, claimant successfully secured an inchoate right to additional compensation equivalent to the amount of Section 3(e) credit awarded to employer. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co*, 21 BRBS 204 (1988).

Even though employer voluntarily paid both temporary total disability and permanent total disability benefits, it refused to enter into any stipulations at the hearing, actively litigated all of the issues in the claim, and argued that it had an economic interest in the outcome of the case. Claimant's successful prosecution of the claim thus satisfies the requirements of Section 28(b) and supports the administrative law judge's award of attorney's fees. Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

The Board states that it need not decide if claimant ultimately will receive more or less money under Section 8(c)(13) or Section 8(c)(23) as it holds that the value of receiving a large lump sum under Section 8(c)(13) is sufficient to establish that claimant obtained "greater compensation" under Section 28(b). Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), rev'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Fifth Circuit reverses the attorney's fee award based on its holding that claimant is entitled to benefits under Section 8(c)(23). The court remands the case for consideration of whether counsel is entitled to a fee on grounds other than those initially relied upon. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), rev'g in pert. part Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown, J., concurring).

Although claimant's award was modified from Section 8(c)(13) to Section 8(c)(23), employer remains liable for a Section 14(e) penalty, and this will support an award of an attorney's fee payable by employer, even though the penalty may be subsumed by employer's overpayment of benefits, as employer's credit may one day run out and it again will be liable for weekly payments to claimant. As the Section 14(e) penalty results in the accrual of a benefit to claimant greater than that voluntarily paid by employer, employer is liable for an attorney's fee. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand).

Inasmuch as the Board affirmed the causation finding and the finding that claimant is unable to perform his usual work, the Board affirms the fee awards, because, at a minimum, claimant established entitlement to medical benefits which employer controverted. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Under the facts of this case, claimant's counsel is not entitled to a fee for services rendered in connection with decedent's *inter vivos* claim. Claimant's right to decedent's disability compensation and unpaid medical benefits was extinguished by employer's Sections 33(f) and 3(e) credits. Accordingly, counsel's efforts did not ultimately result in claimant's receiving additional benefits. Counsel's entitlement to a fee in connection with the claim for death benefits is contingent on the resolution of the Section 33(g) issue on remand. *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992).

In a hearing loss case, employer initially controverted the claim but then began making voluntary payments of compensation to claimant based on the rate to which he was ultimately found entitled. Where claimant's counsel was unsuccessful in gaining claimant any additional benefits beyond that which employer voluntarily paid before the case came before the administrative law judge and Board, the Fifth Circuit denied counsel's request for an attorney's fee pursuant to Section 28(b). *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

The First Circuit holds that the applicability of Section 28(b) turns on whether the claimant succeeds in securing additional compensation. The court rejected claimant's contention that he is entitled to a fee because, overall, his claim was compensable, even though he did not succeed in obtaining greater compensation than employer paid. Moreover, the court declined to answer the question of whether medical benefits are (or are not) subsumed within the phrase "additional compensation" for purposes of awarding attorney fees under Section 28(b), as the record is bereft of any credible evidence indicating that claimant's petition brought about a payment of medical bills that would not have otherwise occurred. *Barker v. U.S. Dept. of Labor,* 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

The Fifth Circuit rejected employer's argument that it was not liable for a fee under Section 28(b) because it complied with the recommendation to reinstate temporary total disability compensation following the informal conference as the record reflects that several other disputed issues remained, and claimant obtained greater compensation by virtue of proceedings before the administrative law judge. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Fifth Circuit initially reversed the Board's affirmance of the administrative law judge's award of an attorney's fee. However, upon rehearing, the court determined that the recommendation of the claim's examiner, which called for payments to continue at the referenced compensation rate, was rejected by employer when it later raised average weekly wage as an issue for the first time. Thus, employer did not accept the recommendation, and claimant's use of an attorney to resolve the controversy and obtain greater benefits entitled him to an attorney's fee under Section 28(b). *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g* 237 F.3d 404, 34 BRBS 44(CRT)(5th Cir. 2000).

The Board, following a discussion of the Fifth Circuit's decisions in *Staftex Staffing,* 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), and *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), affirmed the administrative law judge's finding that the requirements of Section 28(b) were met and thus affirmed the award of an attorney's fee payable by employer. Specifically, the Board held that the record establishes that following an informal conference, claimant used the services of an attorney to successfully recover an award of additional compensation. In its decision, the Board also observed that, contrary to employer's contention, the Fifth Circuit has not held that a written recommendation by the district director is required in order for an employer to be liable for an attorney's fee under Section 28(b); as in *Gallagher*, employer herein offered no evidence concerning the substance of the district director's recommendations. *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

The Ninth Circuit denied claimant an attorney's fees under Section 28(b), as he did not establish that the compensation awarded is greater than the amount tendered by employer. Claimant was awarded $932 as compensation for his knee injury, after rejecting employer's $5,000 offer to settle both the knee and back injury claims. The court rejected claimant's argument that the Board erred in comparing his $932 recovery with the $5,000 employer offered to settle both claims. The court stated that it was claimant's burden to establish how much of the lump-sum offer was for each claim. As claimant did not establish how the offer could be allocated separately as to the knee and back claims nor did the record contain such evidence, he is not entitled to an employer-paid attorney's fee. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The Fourth Circuit rejected employer's contention that claimant was not entitled to an employer-paid attorney's fee award under Section 28(b). Employer argued that claimant failed to obtain greater compensation by litigating the case, because employer tendered payment of compensation for a 19 percent impairment after ceasing voluntary payments and claimant ultimately was awarded compensation based on that rating. Nonetheless, the court held, although claimant did not receive a higher dollar award in benefits from the administrative law judge, Section 28(b) applies because employer refused to accept the district director's written recommendation after an informal conference and continued to condition its tender offer of payment on claimant's signing a stipulation. Thus, the court concluded that claimant received an award "greater than the amount paid or tendered" by employer because he received an award of benefits without having to sign the stipulation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

Amount of the Award - *see also* p. 28-20a *et seq.*

The Board holds that the administrative law judge erred by relying on language in Section 28(b) to summarily limit the attorney's fee award to the amount of additional compensation obtained on appeal, citing Battle, 16 BRBS 329 (1984), Brown, 6 BRBS 244 (1977), and Barber, 3 BRBS 244 (1976). Jarrell v. Newport News Shipbuilding & Dry Dock Co, 19 BRBS 216 (1987).

The amount of the fee is not limited to the amount of additional compensation gained; an administrative law judge considers factors in addition to the amount of benefits and awards a fee which is reasonable considering the facts of the particular case. *Mason v. Baltimore Stevedoring Co.,* 22 BRBS 413 (1989).

In rejecting employer's motion for reconsideration of the Board's affirmance of the administrative law judge's fee award, the Board rejects employer's contention that the fee should be limited by the amount of compensation gained, and that claimant had only limited success in the case on the merits. The Board states that Section 28(b) provides one means for establishing employer's liability for claimant's attorney's fee in cases in which there is a dispute as to claimant's entitlement to benefits. Under this section, employer's liability for a fee is predicated on the fact that claimant obtained more than employer voluntarily paid or tendered, and the fee is to be for the work done to increase compensation. Thereafter, in determining the reasonableness of the fee for which employer is liable, the regulation at 20 C.F.R. §702.132 provides the criteria for determining the reasonableness of the amount of the fee. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting) (decision on recon.).

The Board rejected employer's arguments that counsel's fee should be limited to the difference between the amount voluntarily paid and the amount awarded by the administrative law judge, that counsel's efforts resulted in only a nominal award, and that claimant was only partially successful because employer did not raise these issues before the administrative law judge and cannot raise them for the first time on appeal. Moreover, the Board noted that it has consistently rejected the argument that fee awards must be limited to the difference between the amount of benefits awarded and the amount paid or tendered. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Fifth Circuit held that in conjunction with *Hensley*, 461 U.S. 421 (1983), Section 28(b) specifically requires that an attorney's fee award be based "solely upon the difference between the amount awarded and the amount tendered or paid." In light of this, the court observed that the fee award of $15,500 may be excessive in light of the fact that claimant's recovery of benefits beyond those tendered by employer is limited to future medical costs for psychiatric care, plus $736.50 in penalties and interest. In particular, the court held the administrative law judge erred in not attempting to quantify the award of future medical benefits when determining the amount of the attorney's fee award. The court therefore vacated the Board's affirmance of the administrative law judge's fee award and remanded for further consideration. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003). 28-30h

Claimant's Liability - Section 28(c)

Where employer does not contest claimant's appeal and claimant is successful on appeal, the reasonable attorney's fee will be assessed against claimant, citing Flowers, 19 BRBS 162 (1986). Ryan v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 208 (1987).

The Board rejects claimant's argument that he should not be responsible for payment of his attorney's fee. Claimant contended that he detrimentally relied on the administrative law judge's order awarding attorney's fees payable by employer. The Board holds that the amount of the attorney's fees award against claimant is not unduly burdensome, and that claimant had no basis for relying on the administrative law judge's Order, as all possibilities for review were not exhausted. Armor v. Maryland Shipbuilding & Dry Dock Co., 22 BRBS 316 (1989).

In a case where the Board held that employer could not be held liable for claimant's fee because it had voluntarily made payments and had not controverted any aspect of the claim, the Board held that claimant is liable for the fee as a lien on his compensation, given that the Special Fund also cannot be held liable for the fee. *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990), *overruled in part Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991) (attorney's fee may not be assessed against Special Fund under Section 26).

The Board reversed the district director's award of an attorney's fee assessed against employer and remanded for consideration as to whether counsel is entitled to a fee assessed against claimant as a lien on the compensation pursuant to Section 28(c) of the Act since claimant did obtain some compensation in this case. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The Board holds that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to the regulations at 20 C.F.R. §702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.,*702.234-236. The case is remanded for reconsideration of claimant's liability for a fee under Section 28(c) and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

The Board holds that employer cannot be liable for claimant's attorney's fee for work performed before the Board, as it did not participate in the case before the administrative law judge or the Board. Claimant is held liable for the fee as a lien on his compensation pursuant to Section 28(c), as well as for the requested costs. *Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002)(order), *modified on other grounds on recon.,* 36 BRBS 133 (2002)(McGranery, J., concurring).

The district director erred in assessing an attorney's fee against claimant pursuant to Section 28(c). The district director did not find that employer is not liable for an attorney's fee under Section 28(a) or (b), but rather found that LIGA is not liable for the fee due to Louisiana law. The Board held that this finding is not a proper basis for imposing the fee on claimant as a lien against compensation, and thus remanded for further findings regarding counsel's entitlement to a fee for reasonable and necessary work and employer's liability for that fee. The Board noted that employer's insolvency does not affect its liability for a fee, but may present an enforcement issue. *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003).

The Board grants reconsideration in part and remands the case to the administrative law judge for consideration of a fee payable by claimant pursuant to Section 28(c) in view of the holding that neither Section 28(a) nor Section 28(b) applies. *Andrepont v. Murphy Exploration & Prod. Co.,* 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.*, 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds).

Liability of Special Fund

The case is remanded to the administrative law judge to determine whether fees can be assessed against the Special Fund as costs under Section 26 where the Director's non-participation caused unnecessary litigation. Such a result should be limited to cases where no issues were ever contested between claimant and employer, all payments have been voluntarily made, and all of the administrative law judge's findings are supported by the uncontradicted evidence of record. In any event, attorney's fees can never be assessed against the Special Fund under Section 28; nor against employer, under the circumstances of this case. *Medrano v. Bethlehem Steel Corp.*, 18 BRBS 229 (1986), *decision after remand*, 23 BRBS 223 (1990), *overruled in part Toscano v. Sun Ship, Inc.,* 24 BRBS 207 (1991)(attorney's fee may not be assessed against Special Fund under Section 26). *See also Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994).

The Board agrees with Director that administrative law judge erred in assessing the fees of claimant's counsel against the Special Fund. The Special Fund cannot be held liable for attorney's fees under Section 28. Inasmuch as employer contested liability and was an active litigant in the proceedings, Board held employer rather than Director liable for claimant's attorney's fees. Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

Inasmuch as attorney's fees are not "compensation" within the meaning of the Act, an employer is not relieved of liability for the payment of attorney's fees merely because it has previously discharged its responsibility for the payment of 104 weeks of "compensation" pursuant to Section 8(f). Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

The Special Fund cannot be held liable for claimant's fee under Section 28. Employer is held liable for claimant's fee under Section 28(b) after the Board reverses the administrative law judge's finding that the Fund is liable for the fee under Section 26. *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

The Board held that the administrative law judge acted outside his authority in finding the Director liable for an attorney’s fee pursuant to Section 26. It is well-established that the Special Fund cannot be held liable for an attorney’s fee under Section 28, and neither the Board nor an administrative law judge has the authority to award fees and costs pursuant to Section 26. *Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000).

Costs - Section 28(d)

Introduction

As the request for costs was not itemized, the Board cannot review the request and counsel must supplement the fee petition if the Board is to consider the request for costs. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

In light of the lack of specificity exhibited by the fee petition concerning the costs requested by claimant's counsel, and the administrative law judge's cursory consideration of this issue, the Board vacates the administrative law judge's award of costs and remands for further consideration of this aspect of counsel's fee petition. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

The Board affirmed the administrative law judge's award of costs for witness fees, hearing and deposition transcripts, medical reports and travel expenses. In so holding, the Board rejected employer's argument that a *Hensley* analysis should have been applied to the award of costs. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board rejected employer's contention that a number of the expenses should be disallowed as they were not used at the hearing as the test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 124 S.Ct. 65 (2003).

The Ninth Circuit held that where claimant is not entitled to recover attorney's fees from employer under 28(a) or 28(b), he also is not entitled to costs under Section 28(d). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

Medical Reports and Testimony

Employer is liable for costs incurred prior to the date that employer it declines to pay benefits. Costs may be awarded under Section 28(d) for a physician's report submitted in support of claimant's case where benefits are awarded. The prohibition on pre-controversion fees under Section 28(a) is not applicable to costs under Section 28(d). Luter v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 103 (1986).

In a black lung case, the Board affirmed the administrative law judge's requiring employer to reimburse claimant for the costs of obtaining a physician's deposition, as the Act provides for the taking of depositions in lieu of hearing testimony. Moreover, the administrative law judge properly held employer liable for mileage costs claimant's counsel incurred when attending two depositions as he found the travel expenses necessary in establishing claimant's case. *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994).

The administrative law judge erred in awarding claimant a day's lost wages for attending a deposition at employer's request. Under Section 25 and the regulation at 20 C.F.R. §702.342, witnesses whose depositions are taken are limited to an attendance fee of $40 per day. There is no federal case authority to support an award of lost wages to a witness. Moreover, the general rule is that a party is not entitled to witness fees and *per diem* expenses related to taking his own testimony. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Seventh Circuit held that Section 28(d) provides for employer's liability for the fees of medical experts who submit medical reports in lieu of providing live testimony at the hearing. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003).

In his Decision and Order, the administrative law judge found that Dr. Meyers, claimant's medical provider, was entitled to be paid by employer the sum of $1,575 for his appearance at his deposition. As the 1994 Order of the initial administrative law judge stated that Dr. Meyers should be paid $300 per hour, "provided that such testimony is limited to Dr. Meyers' knowledge as a non-party percipient witness to Claimant's medical condition," this sum represented an increase in Dr. Meyers' payment from $300 per hour to $450 per hour. The Board held that the administrative law judge acted within his discretion in denying any additional payment to Dr. Meyers for his appearance at the deposition, as the questions Dr. Meyers was asked did not go beyond the scope of the 1994 Order. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Travel Expenses

The Board affirmed the administrative law judge's holding that claimant is not entitled to reimbursement of his air fare for travel expenses to hearing. The Board noted that 20 C.F.R. §702.337(a) gives claimant option of having hearing within 75 miles of home. Stokes v. George Hyman Construction Co., 19 BRBS 110 (1986).

The Board holds that counsel is not entitled to bill for travel time to and from a "nearby"

Hampton courthouse (from Newport News) because fees from travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. The administrative law judge acted within his discretion in finding that counsel's travel from Norfolk, Virginia, to the hearing in Hampton, Virginia, was local in nature, and not in excess of that normally considered overhead for the Tidewater region. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

The Board affirmed, as within his discretion, the administrative law judge's denial of travel expenses for a trip between Norfolk and Hampton, Virginia. The administrative law judge found that this 20 mile trip is part of normal office overhead and not separately compensable because it is routine and not out of the ordinary, not unique to this case, and was made by claimant's counsel on innumerable occasions over the past ten years. *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995).

The Board affirms the award of costs associated with travel between claimant’s home in New Mexico and the hearing site in Dallas, as they are reasonable, necessary and in excess of that normally considered to be part of overhead. *Brinkley v. Dep’t of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds).

The Board held that although the administrative law judge had the discretion to raise *sua sponte* the issue of the compensability of a fee and costs for counsel’s travel time and expenses, he erroneously failed to provide the parties with reasonable notice of this issue and to afford claimant the opportunity to present evidence relevant to the compensability of the travel charges. The Board also held that there must be a factual foundation supporting an administrative law judge’s disallowance of counsel’s travel time and expenses on the basis that claimant retained counsel from outside his locality despite the availability of competent counsel within his locality. In this case where there was no evidence that claimant could have retained local counsel, the Board reversed the administrative law judge’s disallowance of counsel’s travel time and expenses, and remanded for a determination of the reasonableness and necessity of the specific charges. *Baumler v. Marinette Marine Corp.,* 40 BRBS 5 (2006).

Miscellaneous

It is within the discretion of the deputy commissioner or administrative law judge to find, in any given case, based upon the record, that photocopying expenses are, or are not, part of the attorney's overhead or that such expenses were unnecessary or unreasonable. The Board's decision in *Cahill*, 14 BRBS at 483, holding photocopying expenses compensable, is inconsistent with *Pritt*, 9 BLR at 1-159, affirming the deputy commissioner's denial of photocopying expenses as overhead, only to the extent that *Cahill* suggests such expenses must be awarded. The Board clarifies that such a determination is within the discretion of the office awarding the fee. *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order).

The administrative law judge exceeded his authority in awarding claimant one day's lost wages for attending a pre-hearing deposition requested by employer, as there is no authority under the Act, applicable regulations, or case law, to support such an award. Section 28(d), the only statutory provision authorizing the administrative law judge to assess litigation costs, provides for an assessment against employer, where an attorney's fee is awarded, for necessary witnesses attending the hearing at the instance of claimant, whereas here, the award of lost wages was not part of attorney's fee award and costs were incurred by claimant's attendance at employer's instance. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Seventh Circuit affirmed, as reasonable, the administrative law's acceptance of counsel's assertion that the postage and photocopying costs were necessary to successfully prosecute this case as the physicians needed a complete copy of the record to provide a written report on claimant's behalf. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003).

Attorney's Fees and Settlements

The Board affirmed an administrative law judge's rejection of agreement requiring that claimant pay attorney's fee out of his award in consideration for employer's stipulations. No actual consideration was provided by employer since the evidence overwhelmingly supported liability and the administrative law judge stated that he would not automatically accept the stipulations. Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986), aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In a black lung case, the Seventh Circuit holds that where the parties agree to settle the attorney's fee issue, there must be administrative or judicial approval of the fee. The court approves the settlement as it does not diminish claimant's compensation. *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT) (7th Cir. 1993).

The Board rejects claimant's assertion that he is entitled to the fee awarded by the Board in a 1997 order, rather than only the fee provided for in the subsequent settlement agreement. The Board's fee award was not enforceable, and as the issue of an attorney's fee to be paid by employer to claimant's counsel for the work performed in this case at all levels was listed as a contested issue in the settlement, the district director rationally construed the settlement as completely resolving the fee issue for all levels of adjudication. Claimant has not put forth any argument or evidence that the attorney's fee agreed to is inadequate or that the settlement was procured by duress. *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002).

Interest

There is no statutory authorization for assessment of prospective post-judgment interest on attorney's fee awards. Section 1961, 28 U.S.C. §1961, allows assessment of interest on money judgments in a civil case recovered in a district court. Section 1961 does not however, apply to agency awards. Hobbs v. Director, OWCP, 820 F.2d 1528 (9th Cir. 1987), aff'g Hobbs v. Stan Flowers Co., Inc., 18 BRBS 65 (1986); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Johnson v. Director, OWCP,* 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999)*; Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

Interest is not awarded on outstanding attorney's fee. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

Since an attorney's fee is not considered compensation under the Act, interest is not awarded on fee awards. Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988).

In an appeal of a district court's ruling allowing employer to offset an overpayment of compensation against the attorney's fee award, the Fifth Circuit reverses the offset, and holds that employer is liable for pre- and post-judgment interest on the fee, as it provides an incentive for attorneys to represent claimants. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

The Board rejects claimant's contention that employer is liable for interest on the attorney's fee award under *Guidry*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990), as *Guidry* is distinguishable. In the instant case, the attorney's fee award was not final and enforceable, and employer was not yet required to pay the fee. Moreover, the *Guidry* court did not note contrary precedent (*Hobbs* -9th Cir.). *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand); *see also Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

The Fifth Circuit follows *Hobbs* and holds that there is no indication in the statute or in case law that interest is available on an attorney's fee award. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).