BRB Nos. 99-1270
and 99-1270A

MICHAEL MEIER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order -- Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Robert K. Udziela, Portland, Oregon, for claimant.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant cross-appeals the Compensation Order -- Approval of Attorney Fee Application (OWCP No. 14-84101) of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 12, 1985, while working for employer, claimant fell out of a jeep hitting the left side of his head, causing a chronic inner ear injury. Employer paid benefits for periods of disability primarily due to inner ear problems which have required several surgical interventions. Various disputes allegedly arose between the parties, and the district director

conducted an investigation. No formal hearing was held.

Claimant's counsel filed an Application for Attorney Fees with the district director, requesting an attorney's fee of $11,908.13, representing 52.925 hours at $225 per hour, for services rendered on claimant's behalf between July 19, 1985, and June 30, 1999. Employer objected. The district director found that attorney services were instrumental in getting medical benefits for claimant approved. Thus, after reducing the requested hourly rate of $225 to $185, the district director awarded claimant's counsel a fee of $9,804.62.

On appeal, employer asserts that this case is governed by Section 28(b) of the Act, 33 U.S.C. §928(b), as employer accepted and voluntarily paid benefits, and argues that it is not liable for a fee under the provisions of that section. Claimant responds, urging affirmance of the fee award. On cross-appeal, claimant contends that Section 28(a), 33 U.S.C. §928(a), supports an award of a fee against employer, as employer declined to pay medical expenses. Employer replies, maintaining that it is not liable for an attorney's fee under Section 28(a), as that section is inapplicable given its voluntary payment of medical and disability benefits over a 13-year period.

Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving a claim from the district director and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee award payable by employer. 33 U.S.C. §928(a). Under Section 28(b), 33 U.S.C. §928(b), in general, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer is liable for claimant's attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *Hawkins v. Harbert Int'l, Inc.,* 33 BRBS 198 (1999); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Employer contends that the precise language of Section 28(b) requires the holding of an informal conference and employer's rejection of the district director's recommendation after the conference before its fee liability commences.[1] Employer therefore argues that the

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[1]Section 28(b) states, in pertinent part,

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to Section 14(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the

district director erred in assessing an attorney's fee against it for services rendered by claimant's counsel. We reject employer's contention that Section 28(b) requires an informal conference and written recommendation in all instances. The Board has held that liability may be imposed even if the district director does not hold an informal conference, as conferences are a discretionary act by the district director. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). A written recommendation by the district director is also not a necessary precondition to the imposition of liability for attorney's fees. *See Nat'l Steel & Shipbuilding Co. v. United States Department of Labor [Holston]*,

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> deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *see also Matulic,* 154 F.3d at 1052, 32 BRBS at 148(CRT). Therefore, employer's contention that it is not liable for an attorney's fee on this ground is rejected.[2]

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[2]Employer cites *FMC Corp. v. Perez,* 128 F.3d 908, 31 BRBS 162 (CRT) (5th Cir. 1997), for the proposition that it is not liable because the prerequisites for imposing liability, *i.e.,* an informal hearing with the district director and recommendation, have not been met. *Perez,* however, only requires that the parties utilize "the Department of Labor's informal dispute resolution mechanism," which was done in this case. *Perez,* 128 F.3d at 910, 31 BRBS at 164 (CRT). The district director stated that her Finding of Facts followed an "investigation" and that she reviewed the file. Therefore, an informal process, short of a conference, has been followed here.

Nevertheless, under Section 28(b) employer is liable only for a fee covering those services performed after the date a controversy arises between the parties through the date it is resolved. *See Caine*, 19 BRBS at 180. Employer maintains that it has been paying claimant compensation benefits, including medical treatment, all along, and that it did not refuse treatment, but merely delayed approval for surgery for legitimate reasons.[3] Employer asserts that the only unresolved issue after the district director's investigation in this case was claimant's right to an attorney's fee.[4] In awarding claimant's counsel an attorney's fee, the

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[3]In its reply brief, employer asserts that it has paid for ten separate surgeries on claimant's ear which all involved repeating the same procedure and that it "understandably" questioned the need for the eleventh procedure, suggesting that the treatment should be reevaluated. Employer alleges that it has paid $95,296.92 of claimant's medical expenses, mostly for the surgeries. Er. Reply Br. at 2 n.1. At the district director level, employer apparently argued that the delay was necessitated by its not receiving medical information which established a relationship between the treatment and the injury. Finding of Fact #4.

[4]Employer cites *Todd Shipyards Corp. v. Director, OWCP [Watts],* 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991), in support of its argument. In *Watts,* the court held that employer was not liable for an attorney's fee under Section 28(b), where there was no controversy over the amount of additional compensation following an informal conference, and the only unresolved issue was liability for an attorney's fee. In *Matulic,* the Ninth

district director stated that "[w]hile the carrier has been prompt in the payment of wage loss, there have been delays in the approval of surgery for the ear." According to the district director's order, claimant thereafter was forced to utilize the services of an attorney in order to ensure that his medical benefits were approved. While a delay in approving benefits may suffice to show a controversy existed for purposes of Section 28(b), the order in this case does not provide any findings regarding the date that the controversy arose, or when it was resolved. Claimant's counsel's fee petition in this case, moreover, covers services rendered from July 19, 1985, the date of counsel's initial interview with claimant, through 1999. Since under Section 28(b) employer's liability for fees does not arise until a controversy develops, we remand the case for the district director to make findings as to when the controversy arose in this case. Employer is liable only for fees incurred in resolving the controversy. It cannot be liable for fees incurred when employer was voluntarily and timely paying benefits.

Claimant argues, in the alternative, that fee liability in this case also arises under Section 28(a). Analysis under this section leads to a similar result. Under Section 28(a), an employer is liable for a fee if it declines to pay "any" benefits within 30 days after they become due. 33 U.S.C. §928(a); *Oilfield Safety & Machine Specialties,* 625 F.2d at 1248, 14 BRBS at 356; *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975). In *National Steel,* the court noted the potential application of Section 28(a) where employer voluntarily paid temporary total disability but declined to pay "any" permanent partial disability benefits. Although not necessary to resolution of that case, as the court upheld the award under Section 28(b), the court noted that since the claim was for compensation different in kind and amount from that previously paid, Section 28(a) could well apply. *National Steel,* 606 F.2d at 883, 11 BRBS at 74. In this case, Section 28(a) could similarly apply to any medical benefits employer declined to pay within 30 days. Claimant alleges, and the district director found,

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Circuit stated that "The holding of [*Todd Shipyards*] is simply that Section 928(b) is inapplicable when, following an informal conference, there is no longer any dispute regarding the employee's right to disability compensation *or other benefits or reimbursements."* 154 F.3d at 1060, 32 BRBS at 152 (CRT) (emphasis added). *Watts* thus does not preclude an award for work during the period when a controversy over medical benefits existed, although once employer agrees to pay all medical and other benefits, employer cannot be held liable for a fee for work performed thereafter.

that employer delayed approval for claimant's surgery. If employer did not pay within 30 days upon receiving claimant's request for approval of medical benefits, it effectively "declined" to pay. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Accordingly, employer in this case could be liable for an attorney's fee under Section 28(a) for the period when medical benefits were claimed until they were paid.

The district director in this case did not specify whether she was awarding the attorney's fee pursuant to Section 28(a) or 28(b).[5] In either event, employer is only liable for fees incurred from the date benefits were sought through the date any delayed payment was made.[6] If employer delayed in only one requested surgery, as it asserts, it cannot be held liable for a fee covering over 10 years of services performed while it was paying benefits. Claimant may be liable for fees during these periods under Section 28(c), 33 U.S.C. §928(c).

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[5]We reject employer's argument that claimant cannot rely on Section 28(a) because he requested the fee award under Section 28(b). *See Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor [Holston],* 606 F.2d 875, 883 n.4, 11 BRBS 68, 74 n.4 (9th Cir. 1979).

[6]Fee liability includes services performed after the date payment is made which are necessary to "wind up" the claim in controversy. *See Everett v. Ingalls Shipbuilding, Inc.,* 33 BRBS 38 (1999).

Accordingly, the district director's Compensation Order -- Approval of Attorney Fee Application is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge