

JOHN C. LIGGETT	)	BRB No. 97-0219
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CRESCENT CITY MARINE WAYS & DRYDOCK COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier- Respondents	)	

JOHN C. LIGGETT	)	BRB No. 97-0371
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CRESCENT CITY MARINE WAYS & DRYDOCK COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeals of the Compensation Order - Approval of Attorney Fee Application of Karen P. Staats, District Director, and the Supplemental Order Awarding Attorney's Fees and Costs of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carrier.

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

BROWN, Administrative Appeals Judge:

Claimant appeals the Compensation Order (Case No. 14-116332) of District Director Karen P. Staats awarding an attorney's fee and expenses and employer appeals the Supplemental Order Awarding Attorney's Fees and Costs (95-LHC-2279) of Administrative Law Judge Paul A. Mapes 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 law. See, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On May 24, 1996, claimant was awarded compensation for a work-related hearing loss on a claim filed on May 17, 1994. Because of the successful prosecution of this claim, both the district director and the administrative law judge awarded claimant's counsel an attorney's fee and costs for legal work performed before those tribunals. The district director assessed an attorney's fee and expenses of \$1887.50 against employer, and held claimant responsible for a fee of \$255, representing 1.5 hours at an hourly rate of \$160 and .25 hours at an hourly rate of \$60, for legal services rendered prior to the filing of this claim. The administrative law judge awarded an attorney's fee of \$2,902.50 and \$24.86 in costs, all of which was to be paid by employer.

Claimant challenges the district director's ruling that he is responsible for the attorney's fee for legal work which, while necessary and reasonable for the successful prosecution of this claim, was performed prior to the time this claim was filed. Claimant also contests the disallowance by the district director of 1.75 hours on the grounds that claimant failed to respond to employer's objection to that time. BRB No. 97-219. In a separate appeal, employer asserts that the administrative law judge erred in awarding a fee at an hourly rate of \$175. BRB No. 97-371.<sup>1</sup> For the reasons that follow, we reverse the district director's ruling that claimant is responsible for the payment of a fee for pre-controversion legal services, and we modify the Compensation Order to reflect that employer is responsible for these fees. We also vacate her reduction of the contested 1.75 hours and remand this aspect of the claim to the district director for reconsideration of that issue. We affirm in its entirety the administrative law judge's Supplemental Order Awarding Attorney's Fees and Costs.

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<sup>1</sup>These appeals were consolidated by Order dated November 27, 1997.

Claimant contends that the district director improperly held him responsible for the payment of attorney's fees for legal work rendered prior to the filing of his claim. In view of the Board's recent 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.), interpreting Section 28(a), 33 U.S.C. §928(a), of the Act,<sup>2</sup> we reverse the district director's assessment against claimant of legal fees for pre-controversion work and hold that employer is liable for the full amount of the attorney's fee for work before the district director.

Section 28 of the Act states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall *thereafter* have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier....

33 U.S.C. §928(a) (emphasis added); *see Davis v. U.S. Department of Labor*, 646 F.2d 609, 613 (D.C. Cir. 1980); *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Section 28(a) is a mandatory "fee-shifting" provision that constitutes a statutory exception to the "American Rule," under which a successful litigant ordinarily is not entitled to collect legal fees from the losing adversary. *See Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 1004, 29 BRBS 43, 48 (CRT)(5th Cir. 1995); *Toscano v. Sun Ship*, 24 BRBS 207, 212 (1991). By enacting scores of "fee-shifting" provisions in federal legislation, however, *see Alyeska*, 421 U.S. at 260-61 n. 33, Congress chose a substantive departure from the "American Rule" by permitting a "reasonable" award of attorneys' fees to prevailing parties. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-84 (1983); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Prior to the decision in *Jackson*, the Board interpreted Section 28(a) as providing that employer was liable for claimant's reasonable attorney's fee only for 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 benefits, whichever came first. Claimant was liable for a reasonable fee for services performed prior to employer's controversion of the claim, or before the 30th day after the employer received

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<sup>2</sup>Section 28(a) of the Act is incorporated into the Black Lung Act by 30 U.S.C. §932(a). *See United States Department of Labor v. Triplett*, 494 U.S. 715 (1990).

written notice of the claim from the district director. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980)(Miller, J., concurring in part and dissenting in part); *Jones v. Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb.26, 1980), *amended*, (D.C. Cir. March 31, 1980). This holding was premised on the interpretation of the word “thereafter” in Section 28(a).

Upon reconsideration of the Board’s prior decisions on this issue, a majority of the Board held in *Jackson* that employers in cases arising under the Black Lung Act are to be held liable pursuant to Section 28(a) for a fee for work performed prior to employer’s controversion of the claim once the conditions for shifting the fee to employer are met, *i.e.*, once employer has controverted the claim. The Board held that this result follows from the decisions of the United States Supreme Court regarding the award of a reasonable fee under federal fee-shifting statutes. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also City of Burlington v. Dague*, 505 U.S. 557 (1992). The rationale in *Jackson* applies equally to cases arising under the Act.

The United States Courts of Appeals for the Ninth and District of Columbia Circuits have applied the holdings of *Hensley* and *Dague* to the interpretation of Section 28(a) of the Act. *Anderson v. Director, OWCP*, 91 F.3d 1922, 30 BRBS 67 (CRT)(9th Cir. 1995); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). In *Dague*, the Supreme Court considered the issue of enhancement of fees in federal fee-shifting statutes as it related to case law construing what is a “reasonable” fee. The Court held that this case law “applies uniformly to all [federal fee-shifting statutes].” *Dague*, 505 U.S. at 562; *see also Farrar v. Hobby*, 506 U. S. 103 (1992); *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Riverside v. Rivera*, 477 U.S. 561 (1986). In *Hensley*, the Supreme Court outlined the two-step process for evaluation of fee requests in fee-shifting statutes, holding that once it is determined whether the lawsuit was successful, the fact-finder must consider whether the requested fee is reasonable in view of the success obtained. *Hensley*, 461 U.S. at 436. The Ninth Circuit in *Anderson* applied the holding in *Dague* to the definition of what is a reasonable fee under the Act at Section 28(a), *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT), and the D.C. Circuit in *Brooks* held that “the [Act]’s substantive language demands application of *Hensley*’s two-step inquiry.” *Brooks*, 961 F.2d at 1537, 25 BRBS at 167(CRT). The emphasis in all these cases is that a prevailing claimant or plaintiff is entitled to a “reasonable fee.” Citing the dissenting opinions by Judge Miller in both *Baker* and *Jones*, and observing that “the Board [in those cases] did not have the benefit of the decisions of the Supreme Court and the courts of appeals that adopted the *Hensley* principle,” *Jackson*, 21 BLR at 1-32-33, the Board reasoned that the applicability of the Supreme Court’s fee-shifting case law to cases arising under the Act warranted a departure from its holdings in *Baker* and *Jones*. The

Board thus adopted the position articulated in the dissents in those cases and held that:

the provisions about notice of a claim and declination to pay, plus the utilizing *thereafter* of an attorney, plus a successful prosecution of the claim simply trigger the liability of the employer for a reasonable fee for *all* services rendered in the successful prosecution of the claim, not only for the services rendered after the date of notice of the claim and declination to pay.

*Jackson*, 21 BLR at 1-32 (emphasis in original). The Board therefore held that Section 28(a) provides conditions precedent to a claimant's recovery of a reasonable fee from employer: once employer controverts a claim which is then successfully prosecuted, employer is liable for the totality of a reasonable fee to claimant's counsel, regardless of the date on which the work was performed. *Id.* This, incidentally, was the prior position of the district directors. See, e.g., *Couch v. The Pittston Co.*, 4 BLR 1-651 (1982), *rev'd on other grounds*, 7 BLR 1-514 (1984); *O'Quinn v. The Pittston Co.*, 4 BLR 1-25 (1981); *McReynolds v. The Pittston Co.*, 3 BLR 1-827 (1981); *Baker*, 12 BRBS at 309; *Jones*, 11 BRBS at 7.

Similarly, we now hold 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 to the determination that such fees are incurred for legal work that is both reasonable and necessary to the successful prosecution of the claim. In so holding, we adopt the reasoning of Judge Miller's dissents in *Jones* and *Baker*. In his dissent in *Jones*, Judge Miller noted that Section 28(a) refers to an attorney's fee awarded against the employer or carrier, and he concluded that Section 28(a)

establishes a procedure for determining under what circumstances the employer, as opposed to the claimant, shall be responsible for the payment of the attorney fee [and o]nce the source [of payment] has been established, Section 28(a) limits the amount of the fee awarded by the term "reasonable" and not by the date on which services are rendered.

*Jones*, 11 BRBS at 20. In his dissent in *Baker*, 12 BRBS at 319, Judge Miller noted that while the majority's construction of the term "thereafter" may be grammatically correct, it is inconsistent with the content of another provision of that section. Section 28(d) of the Act, provides, in pertinent part:

The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses *shall not in any respect affect or diminish the compensation payable under this chapter.*

33 U.S.C. §928(d)(emphasis added). Judge Miller stated that any interpretation of Section 28(a) that results in a claimant's liability for a portion of the fee thus is contrary to the overall meaning of Section 28. *Id.*

We concur in this view, see *Jackson*, 21 BLR 1-27, and we therefore conclude that the overarching purpose of the Act, to insure adequate compensation, is furthered by an interpretation of Section 28 that holds employer liable for pre-controversion legal fees, because that is essential to make claimant whole.<sup>3</sup> Section 28(d) and the rationale behind it find support in the view that a significant purpose of fee-shifting statutes in general is to make whole the prevailing party who has suffered an injury.<sup>4</sup> See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 657-

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<sup>3</sup>At first blush, this view might be seen to conflict with pertinent language of Section 28(c), which recognizes that there may be “cases in which the obligation to pay the fee is upon the claimant.” 33 U.S.C. §928(c). The conditional language of Section 28(a), however, limits employer’s liability to those situations where employer controverts the claim or otherwise declines to pay benefits. See *also* 33 U.S.C. §928(b).

<sup>4</sup>Indeed, the concern that a fee award not erode an award on the merits is further supported by the view that fee awards in general are made on behalf of claimants, even though they are directed toward counsel, and Section 28(a) requires employer to pay the fee directly to counsel. As noted by the Ninth Circuit, “[t]he Supreme Court has made it clear that, in general, statutes bestow fees upon parties, not upon attorneys.” *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.*, 89 F.3d 574, 577 (9th Cir. 1996), *citing Evans v. Jeff D.*, 475 U.S. 717, 731-33 (1986).

59. If the total fee and expenses awarded by the district director of \$2,142.50 represents a reasonable fee, to assess \$1887.50 against employer and to allocate \$255 to claimant results in a fee award to claimant that is \$255 less than a reasonable fee.

We likewise recognize that Section 39 of the Act, 33 U.S.C. §939, governs the provision of legal assistance to a claimant by the Secretary of Labor. This section demonstrates congressional awareness of the need for legal assistance for a claimant during the time the claim is being developed prior to employer's receipt of the claim from the district director. Nevertheless, the Department's ability to provide legal assistance pursuant to Section 39(c)(1) is limited. Indeed, while the Secretary "shall" provide information to a claimant pursuant to Section 39(c), she may exercise her discretion in providing legal assistance. 33 U.S.C. §939(c). Thus, in the case where a claimant is not accorded legal assistance, and the procedure for initiating and investigating a claim may be beyond a claimant's capabilities, pre-controversion assistance of counsel may indeed be "reasonable and necessary" for the prosecution of a claim in a given case.<sup>5</sup>

Of great significance are the observations of the United States Court of Appeals for the Third Circuit in *Bethenergy Mines v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988). Although the main issue in the case did not involve pre-controversion versus post-controversion fees, the court held that 33 U.S.C. §928(a) and 20 C.F.R. §725.367 are rather straight forward fee-shifting devices, designed to ensure that a claimant's disability benefits are not eroded by legal fees. *Markovich*, 854 F.2d at 637. The court went on to state:

An operator is given 30 days to evaluate the claim and decide whether or not to pay it. If the operator chooses to contest the claim, it must pay the claimant's attorney's fees if the claimant is successful. We conclude that notification of an initial finding of non-entitlement, at least where coupled with

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<sup>5</sup>In affirming the Board's prior interpretation of Section 28(a), the Fourth Circuit stated that it was consistent with stated congressional intent that "disputes be resolved in the first instance without the necessity of relying on assistance other than that provided by the Secretary of Labor," citing Section 39(c)(1) of the Act and its legislative history. *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 1153, 19 BRBS 50, 53 (CRT) (4th Cir. 1986). Nonetheless, the court referred to the language of Section 28(a) as ambiguous, and in view of the realization that claimants often must obtain counsel to pursue their claims, we do not feel constrained by *Kemp* from revisiting this issue.

a statement that the claimant continues to press the claim, is a sufficient notification of liability to trigger the 30 day period in which the operator must decide, at the risk of paying the claimant's attorney's fees, whether to contest the claim.

*Id.* The court in *Markovich* looked upon Section 28(a) of the Act and the pertinent regulation as fee-shifting devices, not fee-splitting provisions. It made no mention of the term "thereafter" in Section 28(a) of the Act, but held that if employer allowed the 30 day notice provision to pass without accepting liability, employer would be liable for all of claimant's attorney fees, not only those for services rendered after controversion.

In sum, we hold that the pursuant to Section 28(a), an employer is liable for an attorney's fee for services performed prior to employer's receipt and controversion of a claim upon a claimant's successful prosecution of that claim, and we expressly overrule our prior decisions to the contrary. Section 28(a) therefore does not preclude the assignment to employer of responsibility for the payment of the full extent of claimant's attorney's fees in this case, and we therefore reverse the district director's ruling that claimant is liable for the payment of the pre-filing fees. We modify the district director's Compensation Order to hold that employer is liable for the payment of those fees to claimant's counsel. See Compensation Order at 2 ¶ 3.2.

Claimant also contests the district director's disallowance of 1.75 hours for services rendered by counsel in resisting employer's attempt to interview claimant prior to a deposition. The district director disallowed this time because claimant's counsel failed to respond to employer's objection to this 1.75 hours, implying finding that claimant effectively

waived the issue. See Compensation Order -- Approval of Attorney Fee Application at 2 ¶ 3.

Claimant's argument has merit. The district director's finding that claimant effectively waived this issue is incorrect and constitutes an abuse of discretion. Counsel requested this time in the fee petition, and his failure to respond to employer's objection to these services cannot be construed as a waiver of his assertion for a reasonable fee for this legal work. Accordingly, we vacate this provision of the Compensation Order and remand the case to the district director for consideration of whether the 1.75 hours were reasonable and necessary.

We now turn to employer's challenge to the administrative law judge's Supplemental Order. Employer contests the administrative law judge's award of fees at an hourly rate of \$175, contending that counsel's services should be remunerated at an hourly rate of \$150 to reflect services which were allegedly "improperly billed" because a mistake on the part of claimant's counsel in calculating the alleged average weekly wage resulted in "duplicative" and unnecessary services.<sup>6</sup>

Employer's argument is without merit. The administrative law judge did not abuse his discretion in awarding counsel a fee at an hourly rate of \$175 for the hours claimed. The administrative law judge found counsel to be experienced and competent as evidenced by the relatively few number of hours billed. Moreover, the administrative law judge adequately considered employer's argument that unnecessary hours were billed on the average weekly wage issue, but rejected the contention in light of his finding that the higher average weekly wage was appropriate. Inasmuch as employer has failed to demonstrate that the administrative law judge abused his discretion in awarding counsel's fee at the

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<sup>6</sup>Claimant, through counsel, filed a claim for occupational hearing loss on May 17, 1994. Initially, counsel averred that claimant's average weekly wage was \$777.14. Employer voluntarily tendered compensation based on that amount. Subsequently, claimant's counsel informed employer that he had erred in calculating claimant's average weekly wage, and instead claimed a compensation rate based on an average weekly wage of \$982.79.

hourly rate of \$175, the fee award is affirmed.<sup>7</sup> See generally *Muscella*, 12 BRBS at 272.

Accordingly, we reverse the district director's assessment of legal fees for pre-controversion work against claimant and hold that employer is liable for the full amount of the attorney's fee awarded by the district director in this case. We also vacate the district director's disallowance of 1.75 hours on the basis that counsel failed to respond to employer's objections as constituting an abuse of discretion, and we remand the case to the district director for consideration of whether the services represented by those hours were reasonable and necessary. We affirm the remainder of the district director's Compensation Order and administrative law judge's Supplemental Order in all respects.

SO ORDERED.

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JAMES F. BROWN  
Administrative Appeals Judge

We concur:

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

SMITH and DOLDER, Administrative Appeals Judges, concurring in part and dissenting in part:

We agree with our colleagues that the district director improperly disallowed 1.75

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<sup>7</sup>We thus reject employer's contention that the administrative law judge should reduce the fee awarded for responding to employer's objections. See generally *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325, 30 BRBS 67, 69 (CRT) (9th Cir. 1996).

hours claimed in the fee petition on the grounds that claimant failed to respond to employer's objection. We also concur in the decision to affirm the administrative law judge's Supplemental Order in all respects.

We respectfully dissent, however, from our colleagues' holding that claimant is not responsible for the payment of attorney's fees for work rendered prior to the filing of the claim. We believe that the plain language of Section 28(a) mandates that employers are responsible for the payment of attorney's fees that are incurred by claimant only after the employers receive notice of the claim. *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27, 1-36 (1997)(*en banc*)(dissenting opinion of Smith and Dolder, JJ.), *appeal pending*, No. 97-2161 (4th Cir.). As stated by the Fifth Circuit, it is the language of Section 28(a), as an exception to the American Rule, which "must guide courts in the award of ... fees." See *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 1004, 29 BRBS 43, 48 (CRT)(5th Cir. 1995). In this instance, we believe the language of Section 28(a) is clear, and we would adhere to the Board's longstanding interpretation of this provision. Thus, we believe that reference to factors other than the language of the statute does not provide an adequate rationale to overturn Board precedent.

Prior to its decision in *Jackson*, the Board had consistently interpreted Section 28(a). See, e.g., *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 185 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103, 104 (1986); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980)(Miller, J., concurring in part and dissenting in part); *Jones v. Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb.26, 1980), *amended*, (D.C. Cir. March 31, 1980). This interpretation is founded on the wording of Section 28(a):

If the employer or carrier *declines to pay* any compensation on or before the thirtieth day *after receiving written notice* of a claim . . . *and* the person seeking benefits *shall thereafter have utilized the services of an attorney at law* in the successful prosecution of his claim, there shall be awarded . . . a reasonable attorney's fee against the employer or carrier...."

33 U.S.C. §928(a) (emphasis added). Giving full effect to the word "thereafter," the Board thus held that employer's liability under Section 28(a) commences 30 days after employer receives 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. *Id.* Thus, fee liability cannot shift to employer until two prerequisites are met: 1) employer must receive notice of the claim for benefits from the district director; and 2) employer must actually or constructively decline to pay benefits. If claimant chooses to obtain an attorney during the informal period prior to formal notice of the claim, he is liable for fees incurred during this time. *Watkins*, 26 BRBS at 185.

The Board's consistent interpretation of Section 28(a) has been upheld by two

circuit courts of appeals. In *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50 (CRT)(4th Cir. 1986), the claimant challenged the Board's interpretation of Section 28(a) which held him responsible for the payment of attorney's fees for pre-controversion legal services, asserting that the Board's ruling "place[d] an onerous burden on a claimant [and] diminish[ed] the compensation payable ... ." 805 F.2d at 1153, 19 BRBS at 52 (CRT). The Fourth Circuit declared that "[the Board's construction of Section 28(a)] is consistent with congressional intent that disputes be resolved in the first instance without the necessity of relying on assistance other than that provided by the Secretary of Labor [under Section 39(c), 33 U.S.C. §939(c)]."<sup>8</sup> *Id.* In affirming the Board's decision in *Watkins*, the Fifth Circuit in an unpublished decision<sup>9</sup> rejected the employee's argument that, pursuant to the strict interpretation of Section 28(a) rendered by the Board in that case, it would be unfair to hold him responsible for the payment of pre-controversion legal fees where employer had not been notified of the claim by the district director for nearly eight months. According to the court of appeals,

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<sup>8</sup>*Kemp* is cited by the United States Court of Appeals for the Ninth Circuit in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991). In that case, the Ninth Circuit reversed the Board's holding, *inter alia*, that employer was responsible for an attorney's fees pursuant to Section 28(b). The Ninth Circuit ruled that the employer was not liable for the claimant's attorney's fee under Section 28(b) in that case because there was no dispute after the informal conference at which employer agreed that the claimant is entitled to permanent total disability benefits. The case was remanded for consideration of employer's liability under Section 28(a). In citing *Kemp*, the Ninth Circuit noted by way of parenthetical that the Fourth Circuit's decision indicates that "Congress intended that disputes first be resolved without the parties having to rely on assistance other than that provided by the Department of Labor." *Watts*, 950 F.2d at 611, 25 BRBS at 70 (CRT).

<sup>9</sup>We note that pursuant to the local rules of the Fifth Circuit, "[u]npublished opinions issued before January 1, 1996 are precedent." 5th Cir. Local R. 47.5.3.

[the Board] ... properly applied the law *as it is written* in denying compensation for attorneys' fees that were incurred before the formal notice of claim was filed upon the employer by the district director. Like the BRB, this court has no power to rewrite the statute.

*Watkins v. Ingalls Shipbuilding, Inc.*, No. 93-4367, slip op. at 2 (5th Cir. Dec. 9, 1993)(emphasis added). More telling is the court's conclusion that, despite the "equitable" appeal of claimant's argument, his "position has no legal foundation." *Id.* The court continued that the "statute preclude[d]" an award of attorney's fees against the employer which were incurred by claimant prior to employer's receipt of written notice of the claim. *Id.*

This precedent and the clear language of Section 28(a) support the Board's prior holding that employer is liable for a fee only for work performed after the requirements for notice and controversion are met. We disagree with our colleagues' conclusion that the principles espoused in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and the other cases cited regarding the determination of a reasonable fee under fee-shifting statutes, including the Act, are pertinent to the issue here. The determination as to how a fee shifts is one of statutory interpretation of the requirements of a particular fee-shifting statute. When employer's liability commences in this case is thus governed by Section 28(a). Once the prerequisites are satisfied, *i.e.*, employer is notified of a claim and actively or constructively declines to pay, then "thereafter" employer is liable for a reasonable fee, with the determination of the amount governed by *Hensley* and its progeny. The principles regarding a reasonable fee simply do not apply to questions regarding employer's liability, including the statutory interpretation issue presented here.

Similarly, we believe Section 28(d) is inapposite to the issue presented in this case. Section 28(d) states that "amounts awarded against an employer or carrier as attorney's fees" may not diminish a claimant's compensation. See also 20 C.F.R. §702.135. This section, however, like the *Hensley* line of cases, is of no significance in determining when an employer's liability for claimant's attorney's fee commences. Indeed, Section 28(d) cannot be accorded the interpretation of our colleagues in view of Section 28(c), which provides that when claimant has the obligation to pay the attorney's fee, such may be made a lien on his compensation. It is therefore apparent that the Act contemplates a claimant's liability for his attorney's fee and that such a fee can properly diminish the compensation received.

Lastly, the majority's reliance on *Bethenergy Mines, Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff'g Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987), is misplaced. At issue in *Markovich* was employer's liability for a \$125 attorney's fee for work performed before the administrative law judge in a case arising under the Black Lung Act. *Markovich*, 11 BLR at 1-106 n.1. The first issue addressed by the court of appeals was: where an employer receives an initial determination by a district director that a claimant is ineligible for benefits, and claimant disputes the denial, does the

employer's controversion of the claim constitute a declination to pay benefits within the meaning of Section 28(a)? The court held in the affirmative: a notice of an initial finding of ineligibility coupled with a statement that claimant continues to press his claim is sufficient to trigger the 30-day period in which the employer must decide whether to controvert the claim. 854 F.2d at 637. If employer controverts the claim as it did in *Markovich*, and the claimant is successful in obtaining benefits, employer is liable for claimant's attorney's fee.<sup>10</sup> The court's opinion in no way addresses liability for fees incurred prior to employer's controversion of the claim, and it is clear from the Board's opinion that the fees at issue were post-controversion fees for services rendered before the administrative law judge. *Markovich*, 11 BLR 1-106 n.1. The court's opinion, therefore, is not useful in determining when fee liability shifts to employer.

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<sup>10</sup>The court answered a second question in the affirmative: whether a claimant is successful when the employer subsequently withdraws its controversion? 854 F.2d at 638.

In conclusion, the Board has consistently followed an interpretation of Section 28(a) for almost 20 years. During that time, this interpretation has been accepted by the United States Courts of Appeals that have addressed the issue and it is a well established principle of Longshore practice. Our colleagues' decision flies in the face of *stare decisis*, and we are not persuaded that their reasoning for this dramatic departure is well-founded. Because we would apply what we believe is the plain language of Section 28(a), and would thus affirm the district director's order that claimant bears responsibility for the payment of the "pre-filing" attorney's fee in this case, we respectfully dissent from that portion of the Board's decision. In all other respects, we agree with our colleagues.

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge