BRB Nos. 02-0395
and 02-0515

ROBERT TERRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED: Feb. 25, 2003
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Order Awarding Attorney's Fees and Order Granting Motion for Reconsideration of Stuart A. Levin, Administrative Law Judge, United States Department of Labor, and the Supplemental Award of Attorney Fees of Charles L. Green, Associate Director, United States Department of Labor.

Bruce M. Bender (Van Grack, Axelson & Williamowsky, P.C.), Rockville, Maryland, for claimant.

Alan D. Sundburg (Friedlander, Misler, Sloan, Kletzkin & Ochsman, PLLC), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Order Awarding Attorney's Fees and Order Granting Motion for Reconsideration (93-DCW-11, 12) of Administrative Law Judge Stuart A. Levin and the Supplemental Award of Attorney Fees (Case Nos. 40-116007, 40-122218) of Associate Director Charles L. Green 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq*. (the Act).

The procedural history of this case has previously been set forth, and need not be recounted in full. *See Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000) (decision on the merits); 36 BRBS 69, *modified in part on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring) (fee award for work performed before the Board). After the Board remanded the case to the administrative law judge for a hearing on claimant's motion for modification, with employer being allowed to participate, the administrative law judge awarded claimant permanent total disability benefits commencing January 18, 1996, payable by the Special Fund pursuant to Section 8(f), 33 U.S.C. §908(f). Before the Board now are employer's appeals of the fee awards of the administrative law judge and the district director, in which employer was held liable for claimant's attorney's fees.[1]

On appeal of the administrative law judge's fee award, BRB No. 02-0395, employer contends that this case falls within the purview of Section 28(b) of the Act, 33 U.S.C. §928(b), and that it cannot be held liable for any fee under this subsection. Employer further contends that the administrative law judge erred in holding it liable for claimant's attorney's fee for the period when it was prohibited from participating in this case under the terms of the administrative law judge's Order Granting, In Part, Motion for Protective Order. Claimant responds, urging affirmance of the administrative law judge's finding that employer is liable for the full fee awarded. Employer has filed a reply brief. On appeal of the district director's fee award, BRB No. 02-0515, employer contends that it cannot be liable for a fee under either

[1]The administrative law judge initially found employer liable for an attorney's fee and costs of $14,086.81. On claimant's motion for reconsideration, the administrative law judge awarded counsel an additional $983 in costs. The district director assessed an attorney's fee of $1,212 against employer.

Section 28(a) or (b), 33 U.S.C. §928(a), (b). Claimant responds, urging affirmance of the district director's fee award. Employer has filed a reply brief.

We first address employer's appeal of the district director's fee award. An employer is liable for claimant's attorney's fee pursuant to Section 28(a) if, within 30 days of receiving notice of a claim from the district director, it declines to pay benefits and claimant thereafter is successful in prosecuting his claim or pursuant to Section 28(b) if claimant obtains greater compensation than employer paid or tendered. *See generally* *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). The district director did not state under which subsection of Section 28 he assessed claimant's attorney's fee against employer, but summarily stated that employer is liable for the fee. Employer contends, as it did below, that it did not receive notice of the claim for modification from the district director until October 9, 1997, and thus, under Section 28(a), it cannot be held liable for any of the fee. Alternatively, if Section 28(b) applies, then employer contends that it is not liable for the fee as it was not aware of a "controversy" between the parties until October 9, 1997, after all the services were performed.

We need not decide if employer's liability for the fee awarded by the district director is governed by Section 28(a) or Section 28(b), as the case must be remanded for further findings regardless of which subsection applies. The district director's attorney's fee award covers services performed by claimant's counsel from July 26, 1997, to October 1, 1997. We agree with employer that it cannot be held liable for claimant's attorney's fee under Section 28(a) if all fees were incurred before employer received notice of the claim from the district director and had the opportunity to decline to pay.[2] *See*

[2]Contrary to the view of our dissenting colleague, it is possible to view Section 28(a) as applicable here. Section 22 of the Act states that a claim for modification is to be processed as if it were an initial claim, 33 U.S.C. §922; 20 C.F.R. §702.373, and claimant filed such a claim seeking permanent total disability benefits. Thus, the fact that claimant

Weaver v. Ingalls Shipbuilding, Inc., 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Childers v. Drummond Coal Co.*, *Inc.*, 22 BLR 1-148 (2002) (*en banc*) (McGranery and Hall, JJ., dissenting). Alternatively, if this is viewed as a Section 28(b) case, employer correctly contends that it

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was receiving permanent partial disability benefits pursuant to the prior award does not compel the conclusion that Section 28(a) is inapplicable. Indeed, the Fifth Circuit's decision in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001), has held that voluntary payments made before a claim was filed do not preclude the applicability of Section 28(a). Although the payments to claimant herein were not voluntary, they did precede the new claim made pursuant to Section 22.

cannot be held liable for fees incurred before a controversy arose between the parties.[3] *Caine v. Washington Metropolitan Area Transit Authority,* 19 BRBS 180 (1986)*; Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). A controversy cannot be said to exist between claimant and employer prior to the date employer received notice of the claim for additional benefits on modification. As the district director did not address employer's liability contentions, and as it is not apparent from the record when the district director provided employer with notice of claimant's Section 22 claim for permanent total disability benefits, we vacate the district director's finding that employer is liable for claimant's attorney's fee and remand the case to the district director for findings in this regard, and to reassess employer's liability for a fee in light of those findings.[4] *Lonergan v.*

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[3]We reject, however, employer's contention, which it raises in regard to both the district director's and the administrative law judge's fee awards, that it cannot be held liable for claimant's attorney's fee under Section 28(b) because of the lack of an informal conference. The Board, following the Ninth Circuit's decision in *National Steel & Shipbuilding Co. v. U. S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), has held that an informal conference is not a prerequisite to employer's liability for a fee pursuant to Section 28(b). *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that informal conference is prerequisite to employer's liability for a fee under Section 28(b), but holds employer is liable for the fee pursuant to Section 28(a) on the facts of that case). We reject our dissenting colleague's reliance on Fifth Circuit law holding that the lack of an informal conference is an absolute bar to employer's liability for claimant's attorney's fee. The Board has accepted the Director's interpretation that the obligation to convene an informal conference is on the district director. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002). Thus, inaction by the district director in this case cannot be a basis for finding that employer is not liable for claimant's attorney's fee. Moreover, the administrative law judge rationally found that an informal conference would have served no purpose in this case, as employer could not agree to commit the Special Fund to pay benefits to claimant. Order Awarding Attorney's Fees at 5. If, as may have occurred here, the parties waive an informal conference, it is inconsistent with the purpose of the statute to hold that employer is relieved of all fee liability thereafter. *See National Steel*, 606 F.2d at 882, 11 BRBS at 73. Finally, although the Fifth Circuit in *Pool Co.* felt bound by precedent to find Section 28(b) inapplicable due to the lack of an informal conference, it noted claimant's contentions that a strict interpretation was not warranted, but declined to address them because it held employer liable under Section 28(a). The opinion of our dissenting colleague would preclude employer's liability under either subsection in this case, in which employer contested claimant's claim and claimant prevailed.

Ira S. Bushey & Sons, 11 BRBS 345 (1979).

Turning to employer's appeal of the administrative law judge's fee award, employer contends that due to the operation of Section 8(f), it was prohibited from paying or tendering to claimant additional benefits for which the Special Fund would be liable. We reject this premise. The fact that the Special Fund is liable for the claimant's benefits does not necessarily preclude employer's liability for claimant's attorney's fee. If employer continues to contest a claim in spite of its entitlement to Section 8(f) relief, it will be liable for claimant's fee. *See Terrell,* 36 BRBS at 70-71, discussing *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990), and *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *see also Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

Applying this law to the case at bar, employer is properly held liable for claimant's attorney's fee at the administrative law judge level from the time the case was transferred from the district director to the Office of Administrative Law Judges until the time the administrative law judge dismissed employer from the proceedings. Employer actively opposed claimant's claim for modification, and it was in response to employer's discovery requests that claimant sought to have employer excluded from the proceedings. The administrative law judge's order excluding employer from participating is dated June 24, 1998. Thus, employer is properly held liable for those services performed before this date, as well as for those after the date the Board remanded the case to the administrative law judge with instructions that employer be allowed to participate as it had standing to contest the modification claim. *See Rihner*, 41 F.3d at 1006-1007, 29 BRBS at 50-51(CRT); *Finch*, 22 BRBS at 202; *Coats*, 21 BRBS at 82.

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[4]Claimant contends that employer's knowledge of the claim or controversy is immaterial since the Special Fund, pursuant to Section 8(f), would be liable for any benefits awarded on claimant's motion for modification. We reject this contention. If employer is to be held liable for claimant's fee pursuant to Section 28(a) or (b), regardless of the applicability of Section 8(f) to the award of benefits, employer must be given notice of the claim or controversy.

We hold, moreover, that the services performed before the administrative law judge in the period between these two dates cannot be the liability of employer, for the reasons stated in the Board's fee order in this case, *Terrell*, 36 BRBS at 71-72, discussing *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), and *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). Specifically, employer was granted Section 8(f) relief in the initial case, was dismissed from the modification proceedings by the administrative law judge on claimant's motion and did not participate thereafter before the administrative law judge or on the Director's appeal to the Board. Thus, employer was not an active litigant during this time frame, *see Rihner*, 41 F.3d at 1006-1007, 29 BRBS at 50-51(CRT); *Finch*, 22 BRBS at 202, and cannot be held liable for claimant's attorney's fee during the period it was excluded from the proceedings. *Terrell*, 36 BRBS at 72; *see Holliday*, 654 F.2d at 419, 13 BRBS at 743-744; *Ryan*, 19 BRBS at 212.

Therefore, we vacate the administrative law judge's finding that employer is liable for the entire fee awarded for work performed the administrative law judge, and hold that employer is not liable for claimant's attorney's fee for the work performed during the period employer was excluded from the case. Inasmuch as claimant successfully obtained an award of permanent total disability benefits, claimant may be liable for his attorney's fee for work performed during this period, pursuant to Section 28(c), 33 U.S.C. §928(c).[5] The case is remanded for the administrative law judge to address claimant's liability for this attorney's fee, taking into account claimant's ability to pay the fee. 20 C.F.R. §702.312(a).

Accordingly, the district director's Supplemental Award of Attorney Fees is vacated, and the fee request is remanded to the district director for further findings consistent with this decision. The administrative law judge's finding that employer is liable for claimant's attorney's fee for the period after June 24, 1998 and before the Board remanded the case to the administrative law judge is vacated. The case is remanded to the administrative law judge for consideration of claimant's liability for his attorney's fee for this period.

SO ORDERED.

NANCY S. DOLDER, Chief

[5]Section 28(c) states that, in cases in which the obligation to pay the fee is upon the claimant, the fee may be made a lien upon the compensation due under the award of benefits. *See also* 20 C.F.R. §702.132(a).

Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's determination that employer can be held liable for an attorney's fee pursuant to 33 U.S.C. §928. Because the Longshore and Harbor Workers' Compensation Act strictly limits the authority to impose attorney fee liability on employers to Section 28(a) and (b) and the facts of the instant case do not satisfy the requirements of either subsection, employer cannot be held liable. The plain words of the statute must be given their meaning: "In all other cases [than those described in subsection (a) or (b)] any claim for legal services shall not be assessed against the employer or carrier." 33 U.S.C. §928(b). Accordingly, I would vacate the attorney's fee awards against employer ordered by both the district director and the administrative law judge.

Employer cannot be liable for an attorney's fee award pursuant to Section 28(a) because claimant continued to receive compensation payments after filing his claim for a permanent total disability award.[6] The law is clear that Section 28(a) "only applies to employers who fail to pay any compensation within 30 days of receiving notice of a claim for compensation."[7] *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889,

[6]Claimant's compensation was paid by employer until its liability transferred to the Special Fund.

[7]Section 28(a) provides:

> 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 chapter 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 in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

13 BRBS 294, 296 (5th Cir. 1981). *Accord Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001);[8] *see Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Holliday v. Todd Shipyards Corp.,* 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). The majority nonetheless suggests that because a petition for modification is processed like a new claim employer may be liable for an attorney fee under Section 28(a), because employer has declined to pay compensation on that claim. The fallacy of that position is demonstrated by reference to the statute which imposes liability only if employer "declines to pay any compensation . . .;" it does not specify the compensation claimed. The majority's interpretation was set forth in *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), in which the Ninth Circuit speculated that Section 28(a) could apply to hold an employer liable for an attorney's fee when employer continued to pay compensation after receiving written notice of a claim, if the compensation paid is different in kind or amount from that claimed. The court was untroubled by the clear conflict of this view with the terms of the statute. The court explained that Section 28(a) authorized finding National Steel liable for the attorney's fee because it had declined to pay the compensation sought, "[a]lthough National Steel did not decline to pay '*any* compensation'. . . ," as the statute expressly required. *Id.*, 606 F.2d at 883, 11 BRBS at 74 (emphasis added). Since the *National Steel* court's analysis cannot be reconciled with the terms of the statute, its decision is not persuasive authority to establish employer's liability under Section 28(a). Hence, Section 28(a) cannot be reasonably construed to authorize an attorney's fee award for work performed by claimant's counsel at any level.

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33 U.S.C. §928(a).

[8]The majority misplaces its reliance upon *Pool Co.* as authority for an attorney's fee award under Section 28(a). In *Pool Co.*, employer had terminated all compensation payments *prior* to the filing of the relevant claim. Thus, employer had declined to pay any compensation after receiving written notice of the claim, as provided in Section 28(a). In contrast, claimant in the instant case continued to receive compensation payments *after* the claim at issue was filed.

Likewise Section 28(b) does not authorize an attorney's fee award against employer because the instant case does not satisfy the requirements of that section. The Fifth Circuit has declared: "An award of attorney's fees under Section 28(b) is appropriate only if the dispute has been the subject of an informal conference with the Department of Labor."[9] *FMC Corp. v. Perez*, 128 F.3d 908, 910, 31 BRBS 162, 164(CRT) (5th Cir. 1997), citing *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT)(9th Cir. 1991). *Accord Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *rev'd on other grounds*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).[10]

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[9]Section 28(b) provides:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . . If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

[10] It is undisputed that no informal conference was held in the case at bar. Review of the record suggests that claimant's counsel deliberately by-passed the informal conference procedure: when he wrote to the claims examiner advising him that claimant sought permanent total disability compensation from the Special Fund, counsel asked that claimant's request for a hearing, Form LS-18, be forwarded to an administrative law judge. EX 1.

The majority holds, however, that an informal conference is not a prerequisite to imposition of employer's liability for an attorney's fee pursuant to Section 28(b), citing *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180, 182 (1986), in which the Board expressed agreement with the reasoning of the Ninth Circuit in *National Steel*, 606 F.2d 875, 11 BRBS 68. The Board quoted the Ninth Circuit's rationale:

> The purpose of the statute is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel. . . We do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees. The congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, whether or not the employer had actually rejected an administrative recommendation.

Id., 606 F.2d at 882, 11 BRBS at 73.

Defense of the Ninth Circuit's interpretation of Section 28(b) requires interpreting as precatory the clearly mandatory language of the statute: DOL "shall set the matter for an informal conference and following such conference. . . [DOL] shall recommend in writing a disposition of the controversy." 33 U.S.C. §928(b). When the District of Columbia Court of Appeals was called upon to interpret a provision of District law similar to Section 28(b) of the Longshore Act, it followed the interpretation of the Fifth Circuit in *FMC Corp.,* 128 F.3d 908, 31 BRBS 162(CRT), and the Ninth Circuit in *Watts,* 950 F.2d 607, 25 BRBS 65(CRT). *See National Geographic Society v. District of Columbia Department of Employment Services,* 721 A.2d 618, 623 n.3 (D.C. CV. App. 1998). The District of Columbia Court of Appeals expressly rejected the holding of *National Steel*: "The difficulty with the analysis of *National Steel* is that the court resorted to legislative intent without addressing the statutory language or determining whether the statute was clear and unambiguous." *Id.*[11]

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[11]In *Watts,* the Ninth Circuit implicitly overruled *National Steel* when it held:

> Section 928(b) authorizes a payment of attorneys' fees only if the employer refuses to pay the amount of compensation recommended by the claims

examiner following an informal conference."

950 F.2d at 610, 25 BRBS at 69(CRT). But in *Matulic*, the Ninth Circuit again affirmed an attorney's fee award under Section 28(b) where there had been no informal conference and employer had not rejected any recommendation of OWCP. 154 F.3d at 1601, 32 BRBS at 154(CRT). The *Matulic* court has been justly criticized for amending the statute to provide that "the claimant is entitled to attorney's fees where the extent of liability is controverted and the claimant successfully obtains increased compensation, 'whether or not the employer had actually rejected an administrative recommendation.'" *Matulic*, 154 F.3d at 1061, 32 BRBS at 154(CRT), quoting *National Steel*, 606 F.2d at 882, 11 BRBS at 73. *See* Kenneth J. Engerrand, *Pursuing and Defending Attorney's Fees Claims: Recent Changes in the Fifth and Ninth Circuits,* 14 U.S.F. Mar. L. J. 155, 174 (2001).

The majority and the administrative law judge hold employer liable for claimant's attorney's fee under Section 28(b), notwithstanding the lack of an informal conference, a written recommendation by DOL and rejection of the written recommendation by employer. They point out that any compensation owed was the responsibility of the Special Fund and employer is not authorized to bind the Special Fund; thus, employer's participation in an informal conference would have been a pointless exercise. That is simply another way of saying that the facts of the case do not meet the requirements of Section 28(b). Any doubt about whether Congress intended those requirements to be understood as options, despite the mandatory language of the statute, should be eliminated by reference to the last sentence of Section 28(b): "In all other cases any claim for legal services shall not be assessed against the employer or carrier."

It is not surprising that Section 28(b) does not "fit" a case in which liability for any additional benefits is borne by the Special Fund, because Section 28(b) sets forth the conditions necessary to impose liability on employers, not the Special Fund. In fact, nowhere in the Act did Congress authorize an award of attorney's fees against the Special Fund. *See Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). It may be that Congress did not anticipate what happened in the case at bar: employer opposed a claim for additional benefits where employer had no liability. The instant case must be one of those "other cases [where] any claim for legal services shall not be assessed against the employer or carrier." Furthermore, Congress expressly provided for "cases in which the obligation to pay the fee is upon the claimant [and authorized that an approved attorney's fee] may be made a lien upon the compensation due under an award . . . ."[12]

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[12]Section 28(c) provides:

> In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or

In sum, because employer's attorney's fee liability under the Longshore Act is limited to the express terms of Section 28(a) and (b) and the facts of the instant case remove it from both provisions, there is no authority for the orders of the district director, the administrative law judge or the Board, holding employer liable for claimant's attorney fee. Congress contemplated that there would be cases where employer would not be liable under Section 28(a) or (b) and where claimant would be liable; for those cases Congress authorized in Section 28(c) that an approved attorney's fee may be made a lien on compensation due under an award. This is one of those cases.

REGINA C. McGRANERY
Administrative Appeals Judge

> court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

33 U.S.C. §928(c).