

JIMMY ADAM BAILEY, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ALLISON MARINE CONTRACTORS, INCORPORATED)	DATE ISSUED: 01/20/2012
)	
and)	
)	
LOUISIANA OILFIELD CONTRACTORS ASSOCIATION)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney’s Fees of David A. Duhon, District Director, United States Department of Labor.

Charles E. Lavis, Jr., New Orleans, Louisiana, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney’s Fees (Case No. 07-176748) of District Director David A. Duhon 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

The following history of this claim has been gleaned from the briefs submitted to the Board by the parties. Claimant sustained a fractured ankle while working for employer on March 24, 2005. On February 27, 2006, claimant filed an LS-203 Employee's Claim for Compensation form and, on or about March 8, 2006, employer received notice from the Office of Workers' Compensation Programs that a claim had been filed against it. Claimant returned to work in January 2007. On or about September 20, 2010, employer filed its LS-202 First Report of Injury form. Thereafter, in a Memorandum of Informal Conference dated November 30, 2010, the claims examiner stated that the parties were willing to stipulate to claimant's entitlement to permanent partial disability benefits for a twenty-four percent impairment to claimant's left foot. In an LS-206 Payment of Compensation Without Award form dated December 17, 2010, employer stated that it had commenced the payment of weekly permanent partial disability benefits to claimant on December 7, 2010, retroactive to October 27, 2010.

Claimant's counsel subsequently filed a fee petition to the district director requesting an attorney's fee of \$3,256.26, representing 13.67 hours of attorney time at an hourly rate of \$225, and costs of \$350. Employer objected to its liability for an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. The district director found employer liable for claimant's counsel's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), approved 11.65 hours of the services requested, and awarded claimant's counsel a fee of \$2,621.25, plus \$350 in expenses.

On appeal, employer challenges the district director's award of an attorney's fee, contending that it cannot be held liable for the fee under either Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Claimant responds, urging affirmance.

Employer's liability for an attorney's fee is governed by Section 28(a) and (b) of the Act.¹ In holding employer liable for claimant's attorney's fee, the district director

¹Section 28(a), (b) states:

(a) 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 [district director], 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. . . .

found that employer was served with formal notice of claimant's claim for benefits under the Act on or about March 8, 2006, and that employer failed to respond to this notice within 30 days. Consequently, the district director determined that, pursuant to Section 28(a) of the Act, employer became liable for claimant's attorney's fee on or about April 8, 2006. Compensation Order at 3. For the reasons that follow, we vacate the district director's application of Section 28(a) and we remand the case for further findings.

In finding that employer is liable for counsel's fee pursuant to Section 28(a) of the Act, the district director did not fully address employer's specific contention that, at the time claimant filed his LS-203 Claim for Compensation form on February 27, 2006, it was voluntarily paying claimant benefits as a result of his work injury.² See Employer's

(b) 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 [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within 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 on the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(a), (b).

²The claims examiner's Memorandum of Informal Conference states that "indemnity benefits were terminated when the claimant returned to work in January 2007." See Memorandum at 2. This document does not explicitly state, however, the type of benefits provided nor the commencement date of those benefits to claimant, findings which are necessary to determining the applicability of Section 28(a). In responding to employer's appeal, claimant correctly states that the dispositive issue is not whether employer paid claimant benefits before he filed his claim but, rather, whether any benefits were paid within the 30 day period following the date employer received notice of the claim from the district director. See *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). In his brief, claimant makes no reference to his

Opposition to Fee Petition at 3, 6. If employer's assertion is accurate, employer cannot be held liable under Section 28(a) for the attorney's fee awarded in this case as it would not have declined to pay any compensation within 30 days of its receipt of claimant's claim for compensation. *See Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997). Accordingly, as the district director did not address employer's objection to its being held liable for claimant's counsel's fees pursuant to Section 28(a), *i.e.*, that it was voluntarily paying claimant benefits at the time claimant filed his claim for compensation under the Act, we vacate the district director's determination that employer is liable for claimant's counsel's attorney's fees pursuant to Section 28(a) and remand the case to the district director for further findings. Should, on remand, the district director determine that Section 28(a) is not applicable on the facts of this case, he must address employer's liability for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), consistent with law. *See Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT).

Accordingly, the district director's assessment of an attorney's fee against employer is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

receiving benefits from employer following his work injury; rather, claimant states only that employer filed no forms establishing that temporary total disability benefits had been paid to claimant during the applicable period of time.