

BRB No. 02-0153S

VERNON J. WILLIAMS)
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 Claimant-Petitioner)
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 v.)
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 FRIEDE GOLDMAN OFFSHORE) DATE ISSUED: JUN 26, 2003
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 and)
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 AIGCS)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Louis Fondren (Fondren and Fondren), Pascagoula, Mississippi, for claimant.

Michael J. McElhaney, Jr. and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (2000-LHC-913) of Administrative Law Judge Richard D. Mills 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. See, e.g., *Muscella v. sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a first class electrician for Atlantic Marine/Alabama Shipyard from the fall of 1996 through April 1998. On or about May 1, 1998, claimant commenced employment with employer in that same capacity. On May 7, 1998, claimant experienced discomfort in his shoulder and neck while in the course of his employment. Claimant declined medical treatment from employer's medical staff; however, that night claimant was taken to the hospital where he was diagnosed as having sustained a neck strain with radiculopathy. Claimant subsequently underwent a cervical fusion at C5-6 on May 19, 1998. On July 27, 1998, Dr. Middleton, the neurologist who performed the surgical procedure on claimant's neck, released claimant to return to work. On March 11, 1999, claimant filed a claim for benefits under the Act. Thereafter, on March 31, 1999, employer filed its First Report of Injury. On September 14, 1999, and October 27, 1999, employer and claimant respectively filed their pre-hearing statements listing multiple issues as being unresolved.

On January 21, 2000, without an informal conference being held, the district director transferred claimant's claim to the Office of Administrative Law Judges. Thereafter, in an LS-208 Notice of Final Payment dated June 9, 2000, employer stated that on June 6, 2000, it had made to claimant a last payment of temporary total disability compensation, at a weekly rate of \$208.94, for the period of May 8, 1998 to July 30, 1998. See Emp. Ex. 22.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement as of July 27, 1998, and that as of that date claimant was capable of resuming his usual employment duties. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from May 7, 1998, until July 27, 1998, based upon an average weekly wage of \$543.40, as well as medical benefits.

Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of \$7,110.57, representing 38.375 hours of services rendered at \$165 per hour, and \$778.70 in expenses. Employer submitted objections to this fee petition. In his Supplemental Decision and Order Denying Attorney Fees, the administrative law judge agreed with employer that, as employer voluntarily paid disability benefits to claimant and no informal conference had been held in this case, claimant's counsel's fee should not be assessed against employer pursuant to Section 28(b) of the Act. Accordingly, the administrative law judge denied claimant's counsel's request for a fee payable by employer.

Claimant appealed the administrative law judge's decisions to the Board which, after severing claimant's supplemental appeal of the administrative law judge's denial of his requested fee, affirmed his award of disability and medical benefits to claimant in its entirety. *Williams v. Friede Goldman Offshore*, BRB No. 02-0153 (Oct. 24, 2002)(unpub.).

In his present supplemental appeal, claimant challenges the administrative law judge's determination that his counsel's requested fee should not be assessed against employer. Employer responds, urging affirmance of the administrative law judge's supplemental decision.

The Act provides two avenues by which a successful claimant's attorney may recover attorney's fees from the employer or carrier. Specifically, Section 28(a) of the Act, 33 U.S.C. §928(a), provides that:

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

33 U.S.C. §928(a). Alternatively, Section 28(b) of the Act provides that attorney fees shall be awarded under the following circumstances:

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 . . . 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 . . . shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b).¹

¹ Sections 14(a) and (b) of the Act, referenced in Section 28(b), state:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments

33 U.S.C. §914(a), (b).

After reviewing the record in this case, we conclude that the case must be remanded for further consideration of whether fee liability lies under Section 28(a), as we cannot determine from the record whether employer timely paid the benefits due claimant.² In support of his contentions on appeal, claimant avers that employer declined to pay his medical expenses and that thus, pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001), employer should be held liable for his counsel's fee pursuant to Section 28(a) of the Act. Claimant's position was summarily rejected by the administrative law judge who, citing *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105(CRT)(5th Cir. 2000), *modifying on reh'g* 237 F.3d 407, 34 BRBS 44(CRT)(5th Cir. 2000), thereafter denied claimant's request for a fee payable by employer based upon a finding that employer voluntarily paid claimant temporary total disability benefits from May 8, 1998 to July 30, 1998, and that as an informal conference was not held before the district director, Section 28(b) of the Act bars assessment of a fee against employer. See Supplemental Decision and Order at 1-2. However, employer's LS-208 Final Payment of Compensation form states only that voluntary payments of disability compensation were last made to claimant on June 6, 2000; that form and the remaining record are silent as to whether those voluntary payments commenced in a timely manner as mandated by the plain language of Section 28(a) and the first clause in Section 28(b). If employer commenced timely voluntary payment of benefits to claimant, then the administrative law judge is correct that fee liability is governed by Section 28(b), and employer is not liable under the holding in *Staftex*. However, if employer declined to pay any compensation on or before the thirtieth day after receiving written notice of the claim having been filed, employer is liable for a reasonable attorney's fee pursuant to the express statutory language of Section 28(a) of the Act. See 33 U.S.C. §928(a); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(court, referring to the plain language of the statute, states that Section 28(a) awards attorney's fees where "the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving notice of a claim for compensation from the deputy commissioner, on the ground that there is not liability for compensation"); *Nat'l Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (1979). Although employer made voluntary payments, it is impossible for us to determine

² Although the record contains claimant's claim form and employer's first report of injury form, it does not contain a controversion form by employer. Although the administrative law judge stated that the parties stipulated that employer controverted claimant's claim on March 11, 1999, that is the date entered on claimant's claim form. The parties' respective stipulation forms indicate that employer controverted the claim on April 26, 1999.

whether its payments were timely and thus whether Section 28(a) or (b) applies. Accordingly, we vacate the administrative law judge's denial of an attorney's fee payable by employer, and we remand this case for the administrative law judge to consider all of the evidence and address claimant's contention that Section 28(a) is the applicable subsection to be utilized in determining employer's liability for his counsel's fee.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees is vacated, and the case remanded for further consideration in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge