BRB No. 05-0211

JOHN F. MENARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMS STAFF LEASING	)	DATE ISSUED: 11/15/2005
	)	
and	)	
	)	
AMERICAN CASUALTY INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Compensation Order of David A. Duhon, District Director, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Maurice Bostick (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order (Case No. 07-162024) of District Director David A. Duhon denying an attorney's fee 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). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Marks v. Trinity Marine Group*, 37 BRBS 117 (2003).

On July 10, 2001, claimant was hired by AMS Staff Leasing (employer) as a welder. Claimant was assigned to work for Coastline, Incorporated (Coastline), pursuant to a leasing agreement. Coastline furnished the work location and tools, but claimant

worked under the direction and control of employer. On July 29, 2001, claimant received an electrical shock during the course of his employment. Claimant fell on his right side and elbow and injured his lower back and hip. He reported the injury that day to his supervisor, Randy Burke. Claimant never returned to work for employer. Claimant received his regular salary until August 5, 2001, when he was discharged.

On November 9, 2001, claimant filed a claim form seeking compensation under the Act, on which he designated Coastline as his employer. Coastline's insurance carrier controverted the claim on November 21, 2001, on the basis that it did not provide Coastline with coverage under the Act. The parties agree that an informal conference was held in August 2002, which was attended Randy Burke. Claimant's Brief at 2; Employer's Response Brief at 2. The claim was referred for a hearing to the Office of Administrative Law Judges (OALJ) on November 5, 2002. Thereafter, claimant filed a claim under the Act against employer. On February 14, 2003, employer filed a Form LS-202, First Report of Injury, and on February 18, 2003, employer filed a Form LS-207, Notice of Controversion.

In his decision, the administrative law judge found that claimant was not an employee of Coastline, but was employed by employer. The administrative law judge found that claimant's back and leg complaints are related to his July 29, 2001, work injury, that claimant is unable to return to his usual employment for employer as a welder, and that employer failed to establish the availability of suitable alternate employment. Claimant was awarded continuing compensation for temporary total disability from July 29, 2001, based on an average weekly wage of $314.34. 33 U.S.C. §908(b).

Claimant's counsel subsequently filed a fee petition for work performed before the district director in which he requested an attorney's fee of $5,591.25. Employer objected to its fee liability at the district director level on the basis that it did not receive written notice of the claim until January 2003, after the claim had been transferred to the OALJ. Employer also objected to the hourly rates requested and to counsel's use of a quarter-hour minimum billing method. In his Compensation Order, the district director determined that, because employer did not receive written notice of the claim for compensation from claimant until after the case had been transferred to the OALJ, no attorney time expended while the case was before the district director can be assessed against employer. Accordingly, claimant's counsel was denied a fee payable by employer.

On appeal, claimant challenges the denial of an attorney's fee payable by employer.[1] Claimant argues that employer received actual notice of a claim for

[1] Claimant also argues that the district director erred by finding that $175 is a reasonable hourly rate. The district director, however, expressly declined to address employer's objection to the requested hourly rate. Compensation Order at 2-3.

compensation when its employee, Randy Burke, attended the informal conference. Alternatively, claimant asserts that notice of his claim against Coastline should be imputed to employer based on their contractual relationship. Employer responds, urging affirmance.

Section 28(a) of the Act 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 . . . 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, . . . a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner . . . which shall be paid directly by the employer or carrier to the attorney . . . .

33 U.S.C. §928(a). The Act was amended in 1972 to provide for employers' liability for claimants' attorneys' fees. Prior to the 1972 amendments, any claim for legal services was assessed against the claimant as a lien upon compensation. *See Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Section 28(a), (b) of the 1972 Act has been interpreted as reflecting Congressional intent that attorney's fees not diminish the recovery of a claimant when compensation liability is contested and claimant successfully prosecutes his claim. *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974); *Jones v. The Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979).

In this case, claimant satisfied the prerequisites for an employer-paid attorney's fee pursuant to Section 28(a). He filed a claim for benefits with the district director on November 9, 2001. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). Liability for this claim was controverted first by Coastline and then by employer. Thereafter, claimant successfully prosecuted his claim for benefits, including the identification of the liable employer.[2] *See generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

Moreover, the employer liable for claimant's benefits is liable for his attorney's fee. This holding is derived from responsible employer rule, which states that the liable employer is fully liable for compensation and/or medical benefits for claimant's work-

[2] Claimant argues that employer and Coastline have the same carrier so employer had imputed notice of the claim, pursuant to Section 35. 33 U.S.C. §935. The record, however, indicates that these employers do not share the same compensation carrier. CX 2. Employer and Coastline entered into a contractual relationship whereby employer provided it with labor. Employer further agreed to provide its employees with insurance coverage, and hold harmless Coastline for all loss or expense sustained by work injuries. Decision and Order at 4; EX 14 at 1-2. Due to the terms of this contract, Coastline did not have insurance coverage for injuries arising under the Act.

related injury. *See New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *see also Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004). In view of the responsible employer rule, the Board recently held that an administrative law judge properly held the responsible employer liable for an attorney's fee for all necessary services performed, including those services performed before the liable employer controverted the claim. *Lopez v. Stevedoring Services of America*, __ BRBS __, BRB No. 05-0160/S (Oct. 26, 2005). Indeed, it is well established that claimant's counsel is entitled to a fee for all reasonable and necessary attorney work that leads to the successful prosecution of the claim. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39 (2000). The fact that this case involved a borrowing and a lending employer, rather than consecutive employers, does not alter the reasoning that the responsible employer is fully liable for claimant's attorney's fee where the prerequisites for fee liability are otherwise satisfied. Under such circumstances, we hold that the employer ultimately held liable for claimant's benefits under the Act is also liable for claimant's fee under Section 28(a) for all attorney work that led to the successful prosecution of the claim. *See Lopez*, slip op. at 14-15; *see also Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981) (Section 13 limitations do not begin to run against previous employer until later employer is exculpated). Therefore, we must reverse the district director's finding that employer is not liable for claimant's attorney's fee and we remand the case for the district director to address counsel's fee petition and employer's objections thereto, and to award claimant a reasonable attorney's fee in accordance with 20 C.F.R. §702.132.

Accordingly, the district director's Compensation Order is Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge