



BRB No. 17-0139

SIMUEL GREEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BOLLINGER SHIPYARDS,)	
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>Sept. 8, 2017</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Award of Attorney Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

Employer appeals the Compensation Award of Attorney Fees on Reconsideration (Case No. 07-307044) 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 fee award of the district director must be affirmed unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for benefits for a work-related hearing loss on October 20, 2015. On November 2, 2015, the district director sent a notice to employer informing it that the claim had been filed. DX 1 (attached to Director's Brief). Employer filed a first report of injury on November 10, 2015, noting it had received the claim form from claimant's attorney. DX 3. Employer filed a Notice of Controversion of the claim on November 24, 2015. DX 4. The district director sent a second notice of the claim to employer on November 24, 2015. DX 5. Employer started paying claimant disability benefits on December 18, 2015, and it paid benefits through September 19, 2016. DXs 6, 7.

Claimant's attorney filed a petition for an attorney's fee on February 19, 2016. Employer objected to the fee petition, averring that no fee was payable by employer because employer made a "conditional payment" to claimant on December 18, 2015 and thereafter paid the remaining permanent partial disability benefits once the exact percentage of impairment was known. DX 13.

The district director found that Section 28(a), 33 U.S.C. §928(a), applies to the issue of employer's liability for claimant's attorney's fee. Comp. Order at 2. The district director stated that employer received notice of the formal claim on or about November 2, 2015 and filed a notice of controversion on November 24, 2015. *Id.* The district director concluded that November 24, 2015 is the date on which employer became responsible for claimant's attorney's fee and that the conditional payment employer made on December 18, 2015 was not within 30 days of formal notice of the claim. *Id.* Accordingly, the district director awarded claimant's counsel a fee of \$4,012.50 payable by employer. *Id.*

Employer filed a motion for reconsideration, alleging that it paid claimant benefits within 30 days of its receipt of the claim from the district director on November 24, 2015, and is therefore not liable for claimant's attorney's fee. Employer contended the date used by the district director to commence the 30-day period was the date employer received the claim from claimant. Employer filed an affidavit stating that it did not receive the district director's first LS-215 form dated November 2, 2015.

The district director denied employer's motion for reconsideration. He found that employer received claimant's claim form, LS-203, on November 10, 2015, controverted claimant's entitlement to benefits on November 24, 2015, and did not make its first payment of compensation until December 18, 2015. Comp. Order on Recon. at 1. The district director reiterated that employer did not pay benefits within 30 days of notice of the claim and accordingly held employer liable for claimant's attorney's fee. *Id.*

Employer appeals the district director's Order holding it liable for claimant's attorney's fee. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, urging affirmance. Employer filed a reply brief. Claimant has not responded to this appeal.

As an initial matter, we address the Director's argument that employer's appeal should be rejected for inadequate briefing. 20 C.F.R. §802.211(b) requires that a brief "[s]pecifically state the issues to be considered by the Board . . . with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer . . . and any authorities upon which the petition relies to support such proposed result." If a brief fails to meet this standard for adequate briefing, the Board will not address the issue. *See, e.g., Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 166 (1988).

We reject the Director's contention. Employer has made an adequate argument as to why the district director erred in holding it liable for claimant's attorney's fee under Section 28(a). *See* Emp. Pet. for Rev. at 2; Emp. Br. at 3-4, 7. Employer's argument is cognizable and will be addressed on the merits.

Employer contends that the district director's conclusion that employer did not pay benefits within 30 days of its receipt of notice of the claim is erroneous because the district director did not commence the 30-day period from the date employer received notice of the claim from the district director. Employer specifically argues that the district director erroneously relied upon the date employer received the claim from the claimant.

Section 28(a) provides for an attorney's fee payable by employer after the successful prosecution of a claim "[i]f 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]...." 33 U.S.C. §928(a). The district director found that employer received Form LS-203, claimant's claim for compensation, on November 10, 2015 and controverted liability on November 24, 2015, citing employer's LS-202 (first report of injury) and LS-207 (notice of controversion) forms. Comp. Order on Recon. at 1. The district director concluded that because

employer did not make its first payment until December 18, 2015, it “declined to pay any benefits” within 30 days of notice of the claim, i.e., within 30 days of November 10, 2015. *Id.*

We agree with employer that this decision cannot be affirmed. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has affirmed the Board’s holding that Section 28(a) requires the employer to receive notice of the claim from the district director in order to commence the 30-day period. The fact that employer had prior notice of the claim from claimant’s form LS-203 is immaterial. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff’d mem.*, 12 F.3d 209 (5th Cir. 1993) (table) (holding that only written notice of the claim from the district director triggers employer’s liability for an attorney’s fee under Section 28(a)); *see also Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002) (affirming the court’s *Watkins* decision as having precedential value within the Fifth Circuit). This law was not applied in addressing employer’s liability for claimant’s attorney’s fee.

With its motion for reconsideration, employer submitted an affidavit from Denice Borne, employer’s Corporate Risk Manager, who averred that employer did not receive the first LS-215 form sent by the district director on November 2, 2015. Employer asserted that the district director sent this first LS-215 form to the wrong division of the company and emphasized that the district director has not produced a certified mail receipt indicating employer’s receipt of this document.¹ In addition, employer’s LS-202, first report of injury form dated November 10, 2015, states that employer received notice due to “LS-203 received from Attorney,” and, notably, not the LS-215 form sent by the district director. Employer alleged it did not receive the written notice of the claim from the district director until the district director sent a second LS-215 form on November 24, 2015. Employer made its first payment of compensation on December 18, 2015, within 30 days of receiving the second notice from the district director.

Because the district director did not specifically address employer’s argument under applicable law, or evidence regarding its non-receipt of the first LS-215 form, we must vacate the district director’s award of an attorney’s fee payable by employer.² We remand the case for the district director to address the documentation submitted and to make a specific finding as to the date on which employer first received notice of the

¹ Employer stated that there is a certified mail receipt for the second LS-215 form.

² In his Compensation Order Award of Attorney Fees on Reconsideration, the district director acknowledged receipt of the affidavit but found that employer’s argument failed because of the forms LS-202 and LS-207 previously filed by employer.

claim from the district director as required by Section 28(a). *Watkins*, 26 BRBS 179. In this regard, it may be necessary for the district director to explain why he sent a second LS-215 form to employer. The district director should address employer's liability for an attorney's fee under Section 28(a) with respect to the 30-day period commencing with the date employer received written notice of the claim from the district director. *Id.* If employer cannot be held liable for an attorney's fee under Section 28(a), the district director should address employer's contention that it cannot be held liable under Section 28(b).

Accordingly, the Compensation Order Award of Attorney Fees on Reconsideration is vacated, and the case remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge