



BRB No. 20-0038

JON DAVIS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 06/30/2020
)	
SSA TERMINALS, LLC)	
)	
and)	
)	
HOMEPORT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	ORDER on MOTION
)	for RECONSIDERATION
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	and
STATES DEPARTMENT OF LABOR)	
)	ORDER REGARDING
Respondent)	ATTORNEY’S FEE

Employer timely moves for reconsideration of the Board’s Decision and Order in this case, *Davis v. SSA Terminals, LLC*, BRB No. 20-0038 (Apr. 23, 2020). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant and the Director, Office of Workers’ Compensation Programs, respond, urging affirmance of the Board’s decision.¹ We deny employer’s motion.

Employer argues the plain language of the statute shifts liability for an attorney’s fee only if its refusal to pay “any compensation” is accompanied by additional evidence that its reason for refusing to pay is “there is no liability for

¹ In accordance with the Board’s previous Order dated June 9, 2020, we received the Director’s response brief and accept it into the record. Claimant’s response brief was filed out of time, 20 C.F.R. §802.219(e); nevertheless, we accept it into the record.

compensation.” Emp. Motion for Recon at 7-8. Thus, employer asserts it can avoid fee liability because it offered no explanation for its refusal to pay any compensation.

Employer’s plain language argument is unavailing. In responding to the claim, employer sought medical proof from claimant but did not explicitly concede or dispute liability; however, all actions have meaning under the plain language of the statute. Under Section 28(a), 33 U.S.C. §928(a), if an employer refuses to pay “any compensation” with no explanation as in this case, it must be inferred the employer believes it is not liable. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008). Even if an employer purports to accept liability, but declines to pay anything until the claimant produces evidence, it must be inferred the employer actually believes it may not be liable. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

In either instance, the grounds for declining to pay are the same: disputed liability. If liability is not the issue, and the matter is simply the degree of impairment, the employer could avoid an attorney’s fee under Section 28(a) by paying some of the award while contesting the total amount owed. *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir.), *cert. denied*, 574 U.S. 932 (2014); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Employer’s other contentions likewise are without merit. Therefore, we deny its motion for reconsideration. 20 C.F.R. §§801.301(b); 20 C.F.R. §802.409.

Claimant’s counsel has filed a petition for an attorney’s fee for work performed before the Board. 20 C.F.R. §802.203. Employer requests the Board hold consideration of the fee in abeyance due to its anticipated appeal of the Board’s decision. We deny the motion to hold the fee decision in abeyance. A fee award is not final and enforceable until all appeals have been exhausted, *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987), and in the interest of judicial economy, on the facts of this case, it is efficient to enter a fee award. As claimant’s counsel does not object to employer’s alternative request to set a briefing schedule so it may file objections to the fee petition, we afford employer 10 days from its receipt of this order in which to file any objections to counsel’s fee petition. 20 C.F.R. §802.203(g).

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge