SECTION 28--ATTORNEY'S FEES

Introduction

Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney. Only fees approved under Section 28 may be received by claimant's attorney. Any person receiving any unapproved consideration for work performed as a representative of claimant in a claim under the Act is subject to criminal prosecution. 33 U.S.C. §928(e).

The Act does not provide for an attorney's fee award to employer's counsel. *See Ricks v. Temporary Emp't Serv., Inc.*, 33 BRBS 81 (1999), *rev'd on other grounds sub nom. Temporary Emp't Services v. Trinity Marine Grp., Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001); *Jourdan v. Equitable Equip. Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999); *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994); *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991); *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990). While the Board initially held that employer could pursue a claim against its carrier for fees based on an alleged breach of the duty to defend under an insurance contract, *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978), in *Jourdan*, 32 BRBS 200, the Board overruled this precedent and held that this question is not one in respect of a claim and thus cannot be addressed by the administrative law judge or Board.

Not only may claimant's counsel seek a fee, but counsel for his medical providers may also be entitled to a reasonable fee under the Act. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). In *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015), the Board held that employer may be held liable for the attorney's fee of the ILWU-PMA under Section 28(a) to the extent that it intervened to be reimbursed for covered medical benefits it paid claimant. However, employer cannot be held liable for ILWU-PMA's attorney's fee for work in conjunction with the Plan's Section 17 lien because Section 17 creates a legal relationship between the Plan and claimant; the lienholder is not pursuing disability benefits on behalf of a claimant.

Claimant's attorney is entitled to a fee only upon successful prosecution of a claim. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Wilhelm v. Seattle Stevedore Co.*, 15 BRBS 432 (1983); *Director, OWCP v. Hemingway Transp., Inc.*, 1 BRBS 73 (1974). Thus, claimant must establish entitlement to some form of relief in order for his attorney to receive any fee.

The Board has held the term "compensation" as used in Section 28 is a generic term encompassing all forms of relief potentially available under the Act, including medical and surgical benefits, pecuniary compensation for injury, and death benefits. *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975).

Section 28 authorizes the assessment of an attorney's fee against the employer under specific circumstances, 33 U.S.C. §928(a), (b), and against the claimant as a lien on his compensation, 33 U.S.C. §928(c). The Special Fund can never be held liable for claimant's attorney's fee under Section 28. *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980); *Still v. Todd Pac. Shipyards*, 14 BRBS 890 (1982). Costs may be recovered from employer where it is liable for a fee pursuant to Section 28(d).

Subsections (a) and (b) providing for employer liability for claimant's counsel's fee create an exception to the American Rule under which a party is liable for his own attorney's fees. Employer cannot be held liable unless the requirements of Section 28(a) or (b) are met. *See, e.g. R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008) (holding statutory requirements are not met and rejecting claimant's contention that employer should be held liable for his attorney's fees pursuant to FRCP 11(c)).

Claimant need not be represented by an attorney but may choose a lay representative. However, as Section 28(a), (b) refers to an *attorney's* fee, employer cannot be held liable for work performed by a lay representative who is not working under the guidance of an attorney. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). Thus, any fees awarded to such lay representatives are the responsibility of claimant. Work performed by paralegals and other support staff working under the guidance of an attorney and charged at a lower rate may properly be included in the attorney's fee for which employer is liable. *Id.*

Claimant may also proceed *pro se, i.e.,* without legal representation. Non-attorney claimants who represent themselves are not entitled to a fee; employer cannot be liable, and there is no point in having claimant pay himself from his compensation award. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

The regulations for attorney's fee awards for work before the deputy commission or administrative law judge are at 20 C.F.R. §§702.132-702.135. Fees for work before the Board are governed by 20 C.F.R. §802.203. Fees for work at each level of the proceedings must be approved by the body before which the work was performed. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979).

Under Sections 702.132 and 802.203, in order to receive a fee claimant's attorney must file an application describing the necessary work performed and specifying the number of hours and hourly rate of the individual performing the work. The regulations further state that no contract regarding the amount of the fee shall be recognized. *See Moyer v. Director,*

OWCP, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). This framework thus does not permit the award of a fee based solely on a percentage of claimant's benefits. *Enright v. St. Louis Ship*, 13 BRBS 573 (1981); *Ashton v. Dieners, Inc.*, 9 BRBS 539 (1978); *Lebel v. Bath Iron Works Corp.*, 3 BRBS 216 (1976), *aff'd*, 544 F.2d 1112, 5 BRBS 90 (1st Cir. 1976).

Thus, awards under the Act, like other fee-shifting statutes, are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). *See also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"). As Section 28 provides for a "reasonable attorney's fee" to be paid to claimant's counsel, case law addressing appropriate factors under other federal fee-shifting statutes applies in addition to the regulatory criteria. *See City of Burlington v. Dague*, 505 U.S. 557 (1992).

As an attorney's fee order does not award "compensation," it is not a "compensation order" under Section 22. Thus, fee awards are not subject to modification. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982). However, supplemental fee petitions may be filed where claimant seeks an increased fee to compensate for delay after appeals are exhausted. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). *See also Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

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Section 28(a) of the Act is an example of an instance where Congress has made an exception to the American Rule, under which litigants pay their own attorney's fees, but the Board held that medical providers do not fall into that exception. Thus, the Board held that attorneys for claimant' medical providers could not obtain a fee for their services in securing the payment of medical expenses. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). In reversing the Board's decision, the Ninth Circuit construed Section 28(a) as including medical providers and stated that permitting medical providers who prevail under the Act to recover their reasonable attorney's fees provides an incentive for employers to pay valid claims rather than to contest them, and it supports the goal of ensuring that the employee's benefits are not diminished through the increased costs of

medical care. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993); *see also Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997).

Applying its ruling in *Toscano*, 24 BRBS 207, the Board reversed the administrative law judge's award of an attorney's fee to employer's counsel, payable by the Special Fund, pursuant to Section 26. Attorney's fees may not be considered costs within the meaning of Section 26. The Board also rejected employer's argument that it is entitled to an attorney's fee award payable by the Special Fund under Section 18.29(a)(8) and (9) of the Administrative Law Judges' Rules of Practice and Procedure, 29 C.F.R. §18.29(a)(8), (9), and by reference, Rules 37 and 11 of the Federal Rules of Civil Procedure, and the Equal Access to Justice Act, since the Act contains no specific provision whereby the Special Fund can be liable for an attorney's fee. *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994).

The Fifth Circuit, without addressing whether the Equal Access to Justice Act could apply to cases arising under the Longshore Act, rejected employer's attempt to hold the Special Fund liable for an attorney's fee on this basis as claimant did not follow the required procedures under that Act. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

In addressing whether an employer's claim for attorney's fees against its carriers based on an alleged breach of an insurer' duty to defend under the terms of its insurance policy with employer is a question "in respect of a claim" as is required to fall within the administrative law judge's jurisdiction under Section 19(a), the Board reconsidered and overruled *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978), and affirmed the administrative law judge's finding that he lacked jurisdiction to address employer's request for a fee payable by its carriers. Whereas in cases involving insurance contract disputes where the Board has found jurisdiction the dispute bore a relationship to an issue either necessary or related to the compensation award, the Board determined that in retrospect *Gray* is an anomaly in that it is the only case in which the Board found that the administrative law judge had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to, any other issue necessary to resolution of the claim. Moreover, neither Section 28 nor any other provision of the Act provides for an award of attorney's fee to an employer or addresses how the assessment of a reasonable fee is to be made. *Jourdan v. Equitable Equip. Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

Affirming this decision, the Fifth Circuit held that, based on the express language of Section 28(a), only a "person seeking benefits" may assert an attorney's fee claim. Consequently, the Fifth Circuit concluded that Section 28(a) does not confer a federal cause of action on an employer for the prosecution of, or vest jurisdiction in the administrative law judges to resolve, an attorney's fee claim against its carriers. *Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

The Board rejected claimant's contention that employer should be held liable for his attorney's fees pursuant to FRCP 11(c). The Federal Rules are not applicable to proceedings before the district director, administrative law judge, or Board. Fee liability may shift to employer only if the requirements of Section 28(a) or (b) are met; these criteria are not met in this case. *R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

The Board affirmed the administrative law judge's finding that a physician is not entitled to an employer-paid attorney's fee, finding *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), distinguishable. The physician was not seeking the payment of benefits for his treatment of the claimant, but was seeking a fee for his own services for an appearance at a deposition. Thus, it is not a derivative claim for medical benefits under Section 7(d)(3) as in *Hunt* and the doctor is not a "person seeking benefits" under Section 28(a). Section 28 does not provide for an attorney's fee for a witness's attempt to obtain payment for an appearance at a deposition. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Board held that employer may be held liable for the attorney's fee of the ILWU-PMA to the extent that it intervened to recover medical benefits it paid to claimant. The ILWU-PMA is a "party-in-interest" within the meaning of Section 7(d)(3) and thus is a "person seeking benefits" under Section 28(a) when it seeks reimbursement for claimant's covered medical expenses. However, employer cannot be held liable for ILWU-PMA's attorney's fee for work in conjunction with the Plan's Section 17 lien because Section 17 creates a legal relationship between the Plan and claimant; the lienholder is not pursuing disability benefits on behalf of a claimant. *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015).

Claimant was injured in Afghanistan and awarded benefits by an administrative law judge based in Louisiana. The Board affirmed the administrative law judge's finding that counsel's entitlement to a fee under Section 28 is governed by Ninth Circuit law because the district director who filed the administrative law judge's award in this DBA case has his office in San Francisco, pursuant to Section 3(b) of the Defense Base Act, 42 U.S.C. §1653(b). *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

Appeals of Administrative Law Judge and District Director Fee Awards

Standard of Review

The amount of an attorney's fee award is discretionary and may only be set aside if the challenging party shows the award is arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980); *Linnell, Choate & Webber v. Heyde*, 330 F. Supp. 170 (D.Me. 1971); *Offshore Food Serv., Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv., Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975).

It is well settled that the party challenging the award bears the burden of showing the award is unreasonable, *i.e.*, arbitrary, capricious, or an abuse of discretion. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980); *Branda v. Universal Mar. Serv. Corp.*, 7 BRBS 546 (1978); *McCue v. Int'l Terminal Operating Co.*, 4 BRBS 235 (1976). *See also Doty v. Farmer's Export Co.*, 12 BRBS 784 (1980) (award is not *per se* unreasonable where administrative law judge awards all attorneys in consolidated cases the same fee).

Employer has not met its burden of showing that an award is unreasonable when it attacks the award as excessive or makes general allegations that it is unreasonable, but does not challenge specific findings or provide support for its allegations. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984); *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984); *Stockman v. S & M Traylor Bros.*, 13 BRBS 640 (1981); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980); *LeBatard v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 10 BRBS 317 (1979) (employer's mere assertion that rate is not a customary local rate is insufficient).

Similarly, claimant does not show an award is inadequate merely by arguing that a greater fee is due because of results obtained. *See Lopez v. Atl. Container Line, Ltd.*, 6 BRBS 458 (1977); *Weber v. Gen. Dynamics Corp.*, 5 BRBS 112 (1976). *Cf. Jaqua v. Pro-Football, Inc.*, 12 BRBS 572 (1980) (claimant met his burden where administrative law judge's specific findings did not support his reductions).

Generally, if the Board finds the administrative law judge's award of an attorney's fee was erroneous, the Board will vacate and remand the award for reconsideration or sufficient explanation. *Beacham v. Atl. & Gulf Stevedores, Inc.*, 7 BRBS 940 (1978). The Board has occasionally modified the administrative law judge's award on its own instead of remanding the case. *Tornabene v. Marine Repair Serv., Inc.*, 12 BRBS 532 (1980) (summary reduction of fee by 50 percent vacated and modified to the requested 8.25 hours at $100/hour); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *aff'd in part, rev'd in part on other grounds sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (1983) (Board modified fee to award greater amount in view of results where

administrative law judge had died); *DeFelice v. Pittston Stevedoring Corp.*, 8 BRBS 206 (1978) (Board modified to allow claimant hours on brief where it disagreed with the administrative law judge's description of it as "canned").

The courts have questioned the Board's authority to modify an attorney's fee award and, in a case arising under the Black Lung Act, the Third Circuit found the Board exceeded its authority when it modified an administrative law judge's award of an attorney's fee since the record did not contain sufficient findings by the administrative law judge concerning the factors he relied upon in making the award. *Director, OWCP v. U. S. Steel Corp. [Baluh]*, 606 F.2d 53, 10 BRBS 975 (3d Cir. 1979). However, in *Hilyer v. Morrison-Knudsen Constr. Co.*, 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981), *rev'd on other ground sub nom. Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983), the court held the Board has the authority to modify an attorney's fee award where the determination of the attorney's fee is based solely on the record and the complete record is before the Board. *See also Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981) (Board finds remand is unnecessary in the interest of judicial economy when the Board is presented with a full factual record in the case).

If the administrative law judge fails to address an attorney's fee application for services rendered before him, the Board will remand to the administrative law judge to make a determination on the fee request. *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975).

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The Board rejected employer's argument that claimant's counsel's application was unreasonable in that 17 hours were charged for telephone conversations with the client in February and March where counsel's daily delineation of work included other activities besides telephone conversations, such as file review and trial preparation, during the time at issue. Employer therefore failed to meet its burden of showing that the administrative law judge abused his discretion. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The Board held that where employer provided no support for its allegations of excessiveness, it had not met its burden of showing a fee award was unreasonable. *Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988).

The administrative law judge did not abuse his discretion in awarding an attorney's fee at the rate of $175 for the hours claimed, as he found counsel competent and experienced as evidenced by the few hours billed, and he reasonably rejected employer's contention that there was excess billing due to an error on counsel's part on the average weekly wage issue. *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997) (en banc) (Smith & Dolder, JJ., dissenting on other grounds).

In a black lung case, the Fourth Circuit stated that agency adjudicators are afforded wide latitude in crafting appropriate fee awards because they are in a better position to make this determination in the first instance. The court added that in reviewing for abuse of discretion, the court reviews more closely any challenges relating to the criteria used by adjudicators in fashioning such awards. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

Timely Appeal to the Board/Finality of Fee Awards

As with any decision, Board review of an attorney's fee award must be sought within 30 days after the award is filed. 33 U.S.C. §921(a); 20 C.F.R. §802.205. *See Hawkins v. Golden Commissary*, 8 BRBS 664 (1978). If the notice of appeal is not timely filed, the Board will grant a motion to dismiss the appeal. *Beavers v. Lockheed Shipbuilding & Constr. Co.*, 1 BRBS 490 (1975).

If a timely appeal of the fee award or the underlying compensation order is filed pursuant to Section 21(a), the attorney's fee award is not enforceable. An attorney's fee award is not a "compensation order" and thus does not become effective until all appeals are exhausted. *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987); *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982); *Jenkins v. Fed. Marine Terminals*, 14 BRBS 380 (1981). Such awards are not subject to enforcement under Section 18 during the pendency of an appeal, *Wells*, 693 F.2d 663, 15 BRBS 47(CRT); *Jenkins*, 14 BRBS 380, but may be enforced under Section 21(d) after all appeals are exhausted. Therefore, no stay of payments is necessary. *Jenkins*,14 BRBS 380; *Bruce v. Atl. Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Nonetheless, a fee award may be issued despite the fact that the merits of the case are on appeal. Such an award is not premature; it can be entered but is not enforceable until all appeals are exhausted. *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986); *cf. Zaradnik v. The Dutra Grp.*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518, 54 BRBS 45(CRT) (9th Cir. 2020), wherein the Board held that an administrative law judge did not abuse her discretion in declining to enter an award while an appeal was pending. The Board explained that the Act requires an administrative law judge to consider the degree of claimant's success and the amount of benefits awarded in assessing attorney fees, and these factors may not be quantifiable until all appeals are exhausted.

Moreover, as attorney's fees are not compensation, Section 22 does not apply, and fee awards may not be modified. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982). However, supplemental fee petitions may be filed where claimant seeks an increased fee to compensate for delay after appeals are exhausted. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

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The Board rejected claimant's counsel's request that it order employer to pay attorney's fees awarded by the administrative law judge and deputy commissioner. Employer is not required to pay the attorney's fee award embodied in the compensation order until the order becomes final, *i.e.*, when all appeals are exhausted. *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

An administrative law judge can award an attorney's fee during the pendency of an appeal, but the award is not enforceable until the compensation order becomes final. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986); *see also Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

An administrative law judge may render an attorney's fee determination when he issues his decision, even though his Decision and Order may be overturned on appeal, since any determination regarding attorney's fees is not enforceable until all appeals have been exhausted. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

The Ninth Circuit held it had jurisdiction to hear a petition for enforcement of an attorney's fee award which was dismissed as premature by the district court. The Ninth Circuit affirmed the district court's dismissal, however, holding that the attorney's fee award was not enforceable while the appeal of the compensation award was pending before the Board. *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987).

The Board rejected employer's contention that the administrative law judge's and deputy commissioner's attorney's fee awards were "premature" because the issues of attorney's fee liability and the proper calculation of claimant's hearing loss benefits were on appeal. It is well-established that a fact-finder may render an attorney's fee determination when he issues his decision, in order to further the goal of administrative efficiency. Any such award of an attorney's fee does not become effective and is thus not enforceable until all appeals are exhausted. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (en banc) (Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Board agreed with claimant that the administrative law judge's fee award was due and payable even though the proceedings in the case had not been concluded. Employer did not challenge claimant's entitlement to benefits on appeal, and the Board's remand for reconsideration of suitable alternate employment did not affect claimant's entitlement to at

least permanent partial disability benefits exceeding employer's voluntary payment. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

The Ninth Circuit held that an administrative law judge's compensation award was not final under Section 28(a) during the pendency of the *claimant's* appeal of the award to the Board; thus, the district court properly determined that it lacked jurisdiction to hear claimant's petition for enforcement of the administrative law judge's attorney fee award under Section 21(d). Citing *Vonthronsohnhaus*, 24 BRBS 154, claimant had argued that the attorney fee award should be enforceable when the underlying compensation order has not been appealed by the employer on the basis that, regardless of the outcome of claimant's appeal, employer is liable for at least the amount of compensation originally awarded by the administrative law judge. The Ninth Circuit rejected claimant's argument, noting *Vonthronsohnhaus* is procedurally distinguishable, and because the plain language of Sections 21(a) and 28(a) does not distinguish between appeals by one party or the other. *Christensen v. Stevedoring Services of Am.*, 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2005).

The Board may issue a fee award prior to the time that an award becomes final but the award is not enforceable until such time as all appeals are exhausted. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (en banc) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993) (McGranery, J., dissenting) (decision on remand), *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Board rejected employer's argument that the fee award was premature and held that the administrative law judge may enter a fee award during the pendency of an appeal; however, the fee is not enforceable until the compensation order becomes final. Nevertheless, the Board held that employer's related argument that the fee was excessive had merit in light of the Board's decision to vacate the award of benefits and remand the case for further consideration of the nature and extent of claimant's disability. Therefore, the Board also vacated the fee award and remanded for further consideration in light of the benefits awarded on remand. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Because an administrative law judge has the authority to enter a fee award during the pendency of an appeal, the administrative law judge erred in denying counsel's supplemental fee petition, which was submitted while an appeal of the compensation award was pending before the Ninth Circuit. The Board held that it was neither unreasonable nor premature for claimant's attorney to have filed the supplemental fee petition and a legal memorandum addressing the attorney fee issues that previously had been remanded to the administrative law judge by the Board. The Board modified to award a fee for these services. *B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107 (2007).

In these consolidated cases, claimants' attorneys filed fee petitions for work performed before the Ninth Circuit following issuance of the court's decisions invalidating the methodology used by DOL adjudicators in determining reasonable hourly rates and remanding the cases for an hourly rate determination based on prevailing market rates rather than past LHWCA fee awards. Employers objected that the fee requests filed with the Ninth Circuit were premature, asserting that claimants have not necessarily prevailed in these appeals as they might be awarded the same hourly rate on remand as they previously received. In rejecting the contention that the fee petitions were premature, the Ninth Circuit held that regardless of whether claimants' attorneys are awarded a higher hourly rate on remand, claimants prevailed in these appeals in that, on remand, the requested hourly rate will be evaluated based on market considerations, which is the relief claimants sought on appeal. *Christensen v. Director, OWCP*, 576 F.3d 976, 43 BRBS 37(CRT) (9th Cir. 2009).

The Board held that an administrative law judge has the authority to consider a request for enhancement of a fee if the request is filed within a reasonable time after the fee becomes enforceable. In this regard, the Board clarified the distinction between when a fee becomes "final" for appeal purposes and when it becomes "final" for payment purposes. Therefore, counsel's enhancement request in this case, which was made shortly after employer paid the fee award but before the fee became enforceable due to the completion of the appellate process, was timely. Consequently, the Board remanded the case for the administrative law judge to consider counsel's fee enhancement request. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Fourth Circuit held that it had jurisdiction to consider claimant's petition for enhancement of an attorney's fee for a six year payment delay. The timing of the various decisions in the case below precluded its consideration of an appeal of the administrative law judge's denial of certain items on claimant's original fee petition and supplemental fee petition until the court issued a final order on the liability issue, requiring payment of attorney's fees by employer. The court remanded the case to the administrative law judge for consideration of the merits of claimant's supplemental fee request, inasmuch as the current law allows enhancement for delay in appropriate cases. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802 (4th Cir. 1999).

The Ninth Circuit concurred with the Board's decision in *Bellmer*, 32 BRBS 245, holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney's fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999).

The Board vacated the fee awarded on two grounds. First, the case was being remanded to determine if employer received statutory notice of the hearing as required by Section 19(c). If the award of benefits must be vacated due to a lack of such notice, the fee award

also must be vacated. Regardless, the fee award cannot stand as the administrative law judge merely awarded the fee requested due to the lack of objections. The administrative law judge must review the fee petition in light of the regulatory criteria of 20 C.F.R. §702.132(a) and applicable case law whether or not employer has objected to the fee petition. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

The Board rejected employer's contention that the administrative law judge's fee award was premature. Claimant was successful before the administrative law judge. Although the fee award is not enforceable, as all appeals have not been exhausted, the administrative law judge did not err in issuing a fee award. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

The Board held that, although an administrative law judge may issue a fee award while an appeal on the merits is pending, she is not required to do so. The Board explained that the Act requires an administrative law judge to consider the degree of claimant's success and the amount of benefits awarded in assessing attorney fees, and these factors may not be quantifiable until all appeals are exhausted. *Zaradnik v. The Dutra Grp.*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518, 54 BRBS 45(CRT) (9th Cir. 2020).

Direct Appeal of District Director's Fee Awards

Since the amount of an attorney's fee awarded by the district director/deputy commissioner involves a discretionary act, review of such an award generally is properly sought by filing a notice of appeal directly with the Board. *See* 20 C.F.R. §802.201(a). The administrative law judge has no jurisdiction to review the adequacy of an attorney fee approved or awarded by the deputy commissioner/district director for work at that level. *Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978); *Ellis v. Blake Constr. Co.*, 8 BRBS 650 (1978); *Hawkins v. Golden Commissary*, 8 BRBS 664 (1978); *Campbell v. Blake Constr. Co.*, 8 BRBS 667 (1978). *See Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 523 U.S. 1133 (2000). When the appeal regarding the attorney's fee involves a purely legal issue, the proper route for the appeal is also directly to the Board. *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT); *Taylor v. Cactus Int'l, Inc.*, 13 BRBS 458 (1981); *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979).

If a factual issue is disputed, the case must be referred to an administrative law judge. *Mazzella*, 8 BRBS 755. Initially, the Board held that liability for attorney's fees involves a question of fact end that, consequently, where liability for the fee is at issue, resort must be had to formal hearing procedures. *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 423 (1979). *See Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980). In *Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986), however, the Board held that direct appeal to the Board of issues involving attorney's fee liability is appropriate where no factual issues are disputed. The Board overruled *Jarrell*, 10 BRBS 423, as well as *Taylor*, 13 BRBS 458, to the extent those decisions are inconsistent with this holding.

See also Due Process/Hearing Requirements, *infra*. Direct appeals of other types of district director orders are covered in Section 21.

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The Board affirmed the holding in *Glenn*, 18 BRBS 205, that unless an issue of fact is presented, attorney's fee awards by the deputy commissioner regarding both amount and liability should be appealed directly to the Board. *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 216 (1987).

The Ninth Circuit affirmed the holding that a district director's attorney's fee award may be directly appealed to the Board. The court held that not all decision-making by the district directors is subject to a hearing before an administrative law judge. Section 19(d) does not establish an absolute right to a hearing before an administrative law judge; thus, purely legal disputes or those that do not require fact-finding are not within the jurisdiction of the OALJ. The court affirmed the Board's decision that the fee award here did not

involve disputed facts, stating that as the fee award was within the district director's discretion, the only conceivable dispute could concern when claimant's attorney's representation commenced and that could not affect the award here. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 523 U.S. 1133 (2000).

Requirements Regarding Objections Below

An employer must raise its objections to an attorney's fee application in a timely fashion, exhausting remedies at the level of the award in order to preserve issues for appeal. *Monahan v. Portland Stevedoring Co.*, 8 BRBS 653 (1978). Generally, if the employer does not object to the award of an attorney's fee below, it cannot challenge the fee on appeal. *Wells v. Int'l Great Lakes Shipping Co*., 14 BRBS 868 (1982); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983): *Ganish v. Sealand Services Inc.*, 13 BRBS 419 (1981), *aff'd sub nom. Sea-Land Services, Inc. v. Director, OWCP*, 685 F.2d 1121 (9th Cir. 1982); *DeNoble v. Mar. Trans. Mgmt., Inc.*, 12 BRBS 29 (1980); *Morris v. Washington Metro. Area Transit Auth.*, 12 BRBS 208 (1979); *Caraballo v. Ne. Marine Terminal Co.*, 11 BRBS 514 (1979); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979). If employer objects to the fee below based on one issue, but raises a new issue on appeal, the Board will not consider the new issue. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980).

The refusal to consider issues not raised below, however, does not extend to legal issues arising after the administrative law judge's Decision is issued. The Board therefore considered the Director's objection to the assessment of an attorney's fee against the Special Fund, raised for the first time on appeal, when the administrative law judge made the assessment in a supplementary order. *Monaghan v. Portland Stevedoring Co*., 11 BRBS 190 (1979). Similarly, in *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980), the Board considered the propriety of awarding an attorney's fee in the same decision as that awarding compensation, finding that the issue could not have been raised below as it did not arise until the administrative law judge's decision was issued.

While the duty to object is generally that of employer, when claimant fails to object to the administrative law judge's award of an attorney's fee and costs at the first administrative hearing but raises an objection after the administrative law judge issues a decision on remand, the Board has refused to consider the objection, finding it was raised out of time. *Morgan v. Marine Corps Exch.*, 14 BRBS 784 (1982).

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The Board will not consider objections to an attorney's fees petition which were not raised before the administrative law judge. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Employer cannot raise an objection to the specificity of the fee petition for the first time on appeal. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

In rejecting employer's motion for reconsideration of the Board's affirmance of the administrative law judge's fee award, the Board rejected employer's contentions that the fee should be limited by the amount of compensation gained, and that claimant had only

limited success in the case on the merits. As claimant was fully successful and as employer did not object below to the number of hours or hourly rate, a prerequisite to raising the issues on appeal, the fee award was affirmed. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.).

The Board held that since employer did not raise the issue of claimant's "nominal" award in its objections to claimant's counsel's fee petition below, it would not remand the case for reconsideration of the amount of the attorney's fee award. Nonetheless, the Board held that given claimant's success in the case, the administrative law judge's fee award was consistent with the requirements set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Where employer did not raise arguments before the administrative law judge regarding the amount of the fee in relation to the amount of benefits or premised on claimant's limited success, the Board majority held it would not address them for the first time on appeal, but would limit itself to the reviewing the specific objections to the fee which were properly before it. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

The Board rejected employer's arguments that counsel's fee should be limited to the difference between the amount voluntarily paid and the amount awarded by the administrative law judge, that counsel's efforts resulted in only a nominal award, and that claimant was only partially successful because employer did not raise these issues before the administrative law judge and cannot raise them for the first time on appeal. Moreover, the Board noted that it has consistently rejected the argument that fee awards must be limited to the difference between the amount of benefits awarded and the amount paid or tendered. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

In denying a motion for reconsideration, the Board stated that it should not have addressed employer's arguments regarding the amount of the fee in relation to the benefits awarded, as this objection was not raised before the administrative law judge. The Board's discussion in the initial case thus was *dicta*. *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1993) (Brown, J., dissenting).

The Board declined to address LIGA's contention that it cannot be held liable for claimant's attorney's fee, as LIGA did not raise this objection before the administrative law judge. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53 (5th Cir. 2010).

The Ninth Circuit determined that claimant did not raise the issue of augmentation of the fee for delay with the district director either initially or in his motion for reconsideration. Accordingly, the court held that the issue was properly left unaddressed. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), *aff'g in pert. part and vacating on other grounds D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007).

Proper Application

In General

An attorney's fee award cannot be made without the filing of a fee application. *See Smith v. Ingalls Shipbuilding Div., Litton Sys. Inc.*, 22 BRBS 46 (1989). Sections 702.132 and 802.203 of the regulations, 20 C.F.R. §§702.132, 802.203, provide similar requirements for fee applications to the administrative law judge or deputy commissioner and to the Board.

Section 702.132 requires that an attorney's fee application must be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status, *e.g.*, attorney, paralegal, law clerk, or other person assisting an attorney, of each person performing such work, with the normal billing rate for such person and the hours devoted by each such person to each category of work. *See Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); *Morris v. Washington Metro. Area Transit Auth.*, 12 BRBS 208 (1979); *Crauthers v. Nw. Constr. Co.*, 9 BRBS 880 (1979); *Woodham v. U. S. Navy Exch.*, 2 BRBS 185 (1975).

The Board's requirements in Section 802.203 are similar but more detailed. With regard to the professional status of each person performing work, the regulation states that if the person is not an attorney, the application must include a "definition" of the person's professional status, including a statement of his or her professional training, education and experience. With regard to attorneys, a statement that the attorney was a member of the bar in good standing at the time the work was performed is required. 20 C.F.R. §802.203(d)(2). With regard to the number of hours, the Board's regulation states that they shall be in quarter-hour increments. 20 C.F.R. §802.203(d)(3). *But see Bullock v. Ingalls Shipbuilding, Inc.*, 29 BRBS 131 (1995) (en banc). While Section 802.203 also requires the "normal billing rate" for each person performing services, it goes on to say that the rate awarded "shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status." 20 C.F.R. §802.203(d)(4). *See* Fees for Work Before the Board, *infra*.

Thus, in general the application must include an hourly breakdown of the time spent in a particular activity, the professional status of each person performing work, and the customary hourly billing rate of each such person. *See Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Atl. & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976), *aff'g and rev'g in part* 1 BRBS 541 (1975); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982) (Miller and Kalaris, concurring and dissenting); *Stockman v. S & M Traylor Bros.*, 13 BRBS 640 (1981); *Jaqua v. Pro-Football, Inc.*, 8 BRBS 825 (1978); *Lynn v. Nacirema*

Operating Co., 6 BRBS 314 (1977), *aff'd*, 577 F.2d 852, 8 BRBS 464 (3d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

Although the fee request need not be sworn to, *McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979), the Board has held that an attorney's fee request in the form of an affidavit is sound evidence and the affidavit must be given considerable weight in determining the attorney fee. *Cuevas v. Ingalls Shipbuilding Corp.*, 5 BRBS 739 (1977).

The usual remedy for a fee request that is incomplete, lacks specificity, or fails in any other way to meet the standards of the regulations is to withhold the fee award until a complete statement is received. *Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981); *O'Keefe v. Morris Boney, Inc.*, 2 BRBS 363 (1975), *rev'd on other grounds*, 545 F. 2d 337, 4 BRBS 563 (3d Cir. 1976). *See Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994) (where administrative law judge gave counsel the opportunity to revise his petition, he was not required to give him another opportunity to do so where revised petition used disapproved "unit" billing). When a fee has been awarded and, on appeal the Board has found itself unable to review the award due to an inadequate petition, the Board has vacated the attorney's fee award and remanded for counsel to submit a proper statement. *Smith v. Aerojet Gen. Shipyards*, 16 BRBS 49 (1983); *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981); *McCloud*, 11 BRBS 194.

Construing an older regulation, the Board had previously held that an attorney's fee request could be made orally if it complied with the requirements of Section 702.132. *Vaden v. Maude-James Inc..*, 8 BRBS 760 (1978). The Board, however, also noted in *Vaden* that the current regulation requires a written attorney's fee application.

Although the parties may agree on an appropriate attorney's fee in a settlement or otherwise, the Board still requires the attorney to submit an itemized fee application. *Rohm v. Republican Nat'l Comm.*, 14 BRBS 266 (1981); *Ballard v. Gen. Dynamics Corp.*, 12 BRBS 966 (1980). *See* Attorney's Fees and Settlements, *infra*.

The Act and Section 702.132 do not specify a time period for filing an attorney's fee petition. Section 702.132 provides that the petition shall be filed within the time limits specified by the deputy commissioner, administrative law judge, Board or court. In a black lung case involving a similar regulation, 20 C.F.R. §725.366, the Board affirmed a denial of an award by the deputy commissioner where counsel failed to file within the time specified. *Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81 (6th Cir. 1985). In *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974), the Board held that an application for approval and award of an attorney's fee pursuant to Section 28 of the Act has no time limitation. Thus, an attorney's fee application may be made subsequent to the filing of a decision.

The Board in some early cases required that a fee request for services rendered before it be received within 30 days from receipt of the Board's decision in order to promote administrative efficiency. *See Smith v. Ceres Terminals*, 9 BRBS 121 (1978). The Board's regulation now provides that a fee application may be filed within 60 days of the issuance of the Board's decision. 20 C.F.R. §802.203(c). This language provides no sanction where the petition is not filed in this time period. The employer has 10 days from receipt of claimant's fee request in which to respond. 20 C.F.R. §802.203(g). Effective March 1, 2017, the Board issued a policy that all attorney fee petitions and responses thereto shall be filed within the timeframes set forth in these regulations. The Board will not consider an untimely fee petition or response thereto unless it is accompanied by a request to accept the untimely filing that sets forth the reasons for the request.

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The Board held that the deputy commissioner abused his discretion in denying all attorney's fees for failure to submit a fee petition within 30 days of the date of the award of benefits. The Board noted that the time limit was included in the findings of fact and not in the Order, that counsel had rendered three years of services and that counsel had rectified his failure to file immediately upon learning of his error. *Paynter v. Director, OWCP*, 9 BLR 1-190 (1986).

The Board held that an attorney's fee petition which stated generally that all services were performed by an attorney with counsel's firm was sufficiently specific to satisfy 20 C.F.R. §702.132. The Board held that in light of the generally well-detailed nature of the petition, it was not impossible for the administrative law judge to determine whether certain costs and services were necessary. *Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988).

Raising the issue of an attorney's fee at the hearing is insufficient for an award to issue. No fee award can be made until a fee petition is filed. *Smith v. Ingalls Shipbuilding Div., Litton Sys. Inc.*, 22 BRBS 46 (1989).

Counsel is entitled to an attorney's fee, since establishing coverage under the Act constitutes a "successful prosecution;" however, in order to be awarded a fee, counsel must file an application which conforms to the requirements of 20 C.F.R. §§702.132, 802.203. *Olson v. Healy Tibbits Constr. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds), *remanded*, 928 F.2d 1136 (9th Cir. 1991) (table) (due to claimant's death, court held that underlying coverage issue was moot and remanded fee, finding petition had been filed).

"Unit" or "increment" billing, which encompasses all services associated with an identified task, including all work performed by the attorney, paralegal and support staff, does not satisfy the requirements of the regulation at 20 C.F.R. §802.203(d). Specifically, it does not relate to actual work performed on a particular date or to the services of a specified

person. Further, it makes it impossible to discern whether counsel is billing for traditional clerical work, which is not separately compensable. The Board held it would not award a fee for work performed before it for time charged using this billing method. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993).

The administrative law judge did not err in relying on *Pullin*, 27 BRBS 218, to deny requested attorney time generated pursuant to counsel's practice of "unit" or "increment" billing. The Board held that this practice is incompatible with 20 C.F.R. §702.132, as it is with 20 C.F.R. §802.203. *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Billing in quarter-hour increments is in compliance with 20 C.F.R. §§702.132, 802.203. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

In an unpublished opinion, the Fifth Circuit held that its unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is circuit precedent. The court stated that the quarter-hour minimum billing method cannot be utilized if less time was actually expended, and that generally, attorneys may not bill more than one-eighth of an hour for reviewing a one-page letter and one-quarter of an hour for writing a one-page letter. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table), *aff'g and modifying Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), and *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994).

On remand from the Fifth Circuit's decision in *Biggs*, 46 F.3d 66, the Board remanded the case to the administrative law judge for reconsideration of counsel's quarter-hour minimum billing method, in light of the Fifth Circuit's decision that counsel's use of a quarter-hour minimum billing method was improper. *Bullock v. Ingalls Shipbuilding, Inc.*, 29 BRBS 131 (1995) (en banc).

The Board rejected employer's objection to the use of the quarter-hour minimum billing method where the administrative law judge reduced certain entries of the petition in compliance with the Fifth Circuit's holdings allowing one-quarter hour for preparing one-page letters and one-eighth hour for reading one-page letters. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Fifth Circuit declined to definitively reiterate its (unpublished) prohibition on the quarter-hour minimum billing method, as the fee awarded in the instant case was not based

on mechanical application of a minimum billing method. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).
Where the administrative law judge accepted claimant's counsel's voluntary reduction of eight one-quarter hour billing charges, thereby giving tacit approval to the remaining one-quarter hour charges, the Board held that the administrative law judge's attorney's fee award conformed to the criteria set forth by the Fifth Circuit regarding minimum billing. *Doucet v. Avondale Indus., Inc.*, 34 BRBS 62 (2000).

In a black lung case, the Fourth Circuit held that in their respective fee awards, the administrative law judge and the Board did not abuse their discretion by approving counsel's requested hours which were billed in quarter-hour minimum increments. The court noted that quarter-hour billing method complies with 20 C.F.R. §802.203(d)(3), and that there is no authority prohibiting this method in black lung cases. The court rejected employer's argument that there was no proof that it took 15 minutes to perform each itemized task, holding that such a requirement would improperly escalate a fee applicant's present burden to show that the rate claimed and the hours worked were reasonable. The court stated, however, that counsel's use of quarter-hour minimum billing does not relieve the adjudicator of ensuring that excessive fees are not awarded. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

As claimant's counsel was not successful in obtaining additional benefits for claimant, and counsel's fee petition, which requested an attorney's fee of "$3,000 if claimant is to pay," did not conform with the requirements of Section 702.132 of the regulations, the Board affirmed the administrative law judge's denial of an attorney's fee. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Tenth Circuit held that an attorney representing a claimant before the district director did not have a property interest in the hourly rate or number of hours submitted for approval pursuant to a fee contract between him and claimant, as under 20 C.F.R. §702.132(a) contracts relating to the amount of a fee are not recognized. An attorney who must seek regulatory approval of the reasonableness of his fee has a property interest only in a reasonable fee, not in an amount specified in a fee contract. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

The Board held that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to Section 702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.*, 702.234-236. The case was remanded for reconsideration of claimant's liability for a fee under Section 28(c)

and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

Claimants in these consolidated cases were represented before the Ninth Circuit by Attorneys Robinowitz and Gillelan, who each submitted fee requests for work performed before the court. Employers objected that Gillelan's fee petitions should be denied because he did not submit evidence that claimants authorized his representation. The Ninth Circuit rejected employers' argument, holding that as employers had not objected to Gillelan's notice of appearance or suggested prior to oral argument that he had failed to comply with 20 C.F.R. §702.131(a), they waived any objection they might have as to whether Gillelan was authorized to represent the claimants under Section 702.131(a). The court expressly declined to decide whether an attorney may recover a fee if the employer *timely* objects and the attorney then fails to provide documentation that the claimant authorized the representation. *Christensen v. Director, OWCP*, 576 F.3d 976, 43 BRBS 37(CRT) (9th Cir. 2009).

There is no requirement that counsel establish the credentials of his support staff in a fee petition sent to the administrative law judge. Rather, Section 702.132 requires that the professional status of the person performing the work be identified. In this case, the fee application identified the staff as paralegals, which satisfies the regulation. *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

Having found that counsel's fee petition did not provide the Board with sufficient information to determine reasonable hourly rates, the Board granted counsel additional time in which to submit an amended fee petition. Specifically, counsel's fee petition did not contain "the normal billing rate for each person who performed services on behalf of the claimant" as required by 20 C.F.R. §802.203(d)(4). Further, counsel, who is located in the New London/Groton, Connecticut area, did not provide sufficient information regarding the prevailing market rates in the relevant community. *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010) (Order).

Claimant's counsel filed his fee petition nine months after the ordered deadline. The administrative law judge declined to consider counsel's fee petition based on a finding of untimeliness without excusable neglect, and the Board affirmed. Citing 29 C.F.R. §18.32(b) and the four-factor test for determining whether circumstances constitute excusable neglect set forth in *Pioneer Investment Services Co.*, 507 U.S. 380 (1993), the Ninth Circuit held that the excusable neglect analysis is the proper standard to use when evaluating untimely fee petitions. These factors include: 1) prejudice; 2) length of delay; 3) the reasons for delay; and 4) good faith. The court affirmed the administrative law judge's analysis of the factors and the denial of an attorney's fee. *Iopa v. Saltchuk-Young Bros., Ltd.*, 916 F.3d 1290, 53 BRBS 17(CRT) (9th Cir. 2019).

Due Process: Notice and the Opportunity to Respond

When a fee request is submitted, the failure to hold a formal hearing on the matter is not a violation of due process when the fee request is to the judicial or administrative body before whom the work was performed. *Jacksonville Shipyards v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79 (5th Cir. 1978); *Carroll v. Hullinghorst Indus., Inc.*, 12 BRBS 401 (1980), *aff'd*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Lukar v. Ingalls Shipbuilding*, 3 BRBS 321 (1976). If employer challenges the fee request for work performed at the deputy commissioner/district director level, an evidentiary hearing is only necessary if employer raises a bona fide factual issue in challenging the fee request. A bald challenge to an item in a fee application or a mere assertion that the fee is excessive is insufficient. *See McCloud v. George Hyman Constr. Co.*, 11 BRBS 194 (1979); *Monahan v. Portland Stevedoring Constr. Co.*, 8 BRBS 653 (1978).

Due process requires only that the fee request be served on employer and that employer be given a reasonable time to respond. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976)**,** *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974) (holding employer was not entitled to notice of fee petition reversed); *Ortega v. Bethlehem Steel Corp.*, 7 BRBS 639 (1978); *Green v. Atl. Container Lines Ltd.*, 2 BRBS 385 (1975) (Board held notice requirement implicit in regulations). In *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978), the Board held that granting employer five days to respond to an attorney's fee request was not reasonable. When the fee request is mailed to the employer but the employer never receives it, the Board has remanded the case for reconsideration of the fee. *Lumsdon v. Portland Stevedoring Co.*, 4 BR5S 397 (1976). In a similar case, remand was found unnecessary as the administrative law judge heard employer's objections after he awarded the fee, but stood by his original fee award. *Glover v. C & P Tel. Co.*, 4 BRBS 23 (1976), *rev'd on other grounds sub nom. C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

In *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980), the Board did not find a denial of due process where the administrative law judge included the fee award in his decision awarding compensation. The Board stated that there is nothing in the statute or regulations requiring an administrative law judge to issue either separate decisions on the compensation and fee or a combined decision. *See* 33 U.S.C. §928; 20 C.F.R. §§702.134, 702.348. In response to employer's argument that it is not able to make timely objection to the requested attorney's fee until after it is apprised of the amount of compensation awarded, the Board stated that if an employer has adequate notice of the fee request and is given a reasonable time to respond, due process is satisfied. *See Harbour*, 10 BRBS 732; *Green*, 2 BRBS 385. The Board further found that employer had an adequate basis on which to file objections to the requested fee, since the "amount of benefits awarded" factor is only one of the factors listed under Section 702.132 which is considered by the adjudicator when awarding an attorney fee. Finally, the Board found that a requirement

that attorney's fee awards must be issued separately subsequent to the issuance of the administrative law judge's decision would result in unnecessary delay and could deter counsel from representing claimants under the Act.

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Since the Board affirmed the administrative law judge's award of compensation, claimant's counsel was entitled to an attorney's fee. However, the Board vacated the administrative law judge's award of fees and costs as claimant had not served a copy of his fee petition on employer. The Board remanded the case to the administrative law judge for reconsideration of the fee after employer was given a reasonable time to respond to the petition. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

The Board held that the deputy commissioner erred in failing to give employer a reasonable opportunity to respond to claimant's request for a fee where the fee award was issued five days after the fee petition was mailed. Due process requires that a fee request be served on employer and that it be given a reasonable time to respond. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

It is counsel's responsibility to file a fee petition conforming to the requirements of 20 C.F.R. §702.132. In the instant case, the administrative law judge provided counsel two opportunities to file a conforming application. Accordingly, the administrative law judge's decision to rule on the validity of the amended petition, instead of offering counsel an opportunity to further amend the petition, was not an abuse of discretion. *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

The Board held that the administrative law judge erred in failing to allow employers SSA and South Stevedoring the opportunity to file objections to claimant's supplemental fee petition. In an order below, the administrative law judge had directed claimant's counsel to submit a supplemental fee petition, identifying the specific injury to which each itemized service was related, in order to properly apportion fee liability between the two employers. After claimant's counsel filed his supplemental fee petition, the administrative law judge issued his fee award four days later without allowing the employers the time or the opportunity to respond to the specific charges. Thus, the Board vacated the administrative law judge's fee award and remanded the case for the administrative law judge to reconsider the fee after allowing SSA a reasonable time to file a response to counsel's supplemental fee petition. *Codd v. Stevedoring Services of Am.*, 32 BRBS 143 (1998).

The Board held that the regulations at 29 C.F.R. Part 18, the general regulations for proceedings before an administrative law judge, support the administrative law judge's finding that employer did not file a timely response to claimant's petition for an attorney's fee. Specifically, Sections 18.4 and 18.6 together provide 15 days for the response to a motion, and employer's response was filed after this time frame. The Board affirmed the

fee award, finding no abuse of discretion in the administrative law judge's decision to not consider employer's untimely objection. *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997).

The court held that an attorney representing claimant was not deprived of due process where the district director reduced the number of hours billed and hourly rate without prior notification or an opportunity to submit additional materials before the reduction was made. The court rejected the argument that counsel had a property interest in the hourly rate and hours billed. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Noting that the administrative law judge presided over this case from the date of its transfer to OALJ, the Board affirmed his determination that a hearing on the issue of the fee petition would not be fruitful and his rejection of employer's request for a hearing. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

The Board rejected employer's contention that the administrative law judge violated Rule 201 of the Federal Rules of Evidence by taking judicial notice of the hourly rates of attorneys working in the south listed in the 1998 Survey of Law Firm Economics. Under Section 23(a) of the Act and Section 702.339 of the regulations, administrative law judges are not bound by statutory rules of evidence, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." The administrative law judge acted within her discretion in utilizing this information. *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

Authority to Award Fee

Level of Proceedings

Section 702.132 of the regulations, 20 C.F.R. §702.132, provides that any person seeking a fee shall make application to the district director (formerly, the deputy commissioner), administrative law judge, Board, or court, as the case may be, before whom the services were performed. This result follows from language in Section 28(c) stating that the Board or reviewing court may approve an attorney's fee for the work done before it by claimant's attorney. *See Ayers Steamship Co. v. Bryan*t, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977). This language is also consistent with that in Section 28(a) that a reasonable attorney's fee may be awarded against the employer or carrier "by the deputy commissioner, Board, or court, as the case may be." 33 U.S.C. §928(a).

Initially, the Board held that the administrative law judge could award a fee to claimant's attorney for work performed before the deputy commissioner, if the administrative law judge conducted an evidentiary hearing on the matter so as to comply with due process. *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223 (1976). However, an administrative law judge was not required to award a fee for work at the deputy commissioner level since claimant's attorney could apply directly to the deputy commissioner for the fee. *Sierra v. Maher Terminals, Inc.*, 7 BRBS 20 (1977).

The Board followed *Fino* in numerous cases, modifying it somewhat to require that the administrative law judge hold a hearing only where employer specifically objected to the request and the objection raised a bona fide factual question. *See, e.g., Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978). The Fourth Circuit, however, held that an administrative law judge lacks authority to award a fee for work performed at the deputy commissioner level. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979), *rev'g Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978); *see also Jones v. The Chesapeake & Potomac Tel. Co.*, 11 BRBS 771 (1979), *rev'd in pert part sub nom. The Chesapeake & Potomac Tel. Co. v. Director, OWCP*, 615 F.2d 1368 (D.C. Cir. 1980) (table).

In light of the Fourth Circuit's decision in *Watkins*, the Board reconsidered its prior holdings allowing an administrative law judge to award a fee for work performed before the deputy commissioner and, in *Owens v. Newport News & Shipbuilding Dry Dock Co.*, 11 BRBS 409 (1979), held that each administrative level should award the attorney's fee for services performed at that level where an attorney's fee is otherwise proper.

Thus, it is now well settled that an administrative law judge can only award an attorney's fee for work performed before the administrative law judge, *i.e.*, the hours spent between the close of the informal conference proceedings before the deputy commissioner and the issuance of the administrative law judge's Decision and Order. *Revoir v. Gen. Dynamics*

Corp., 12 BRBS 524 (1980). The Board has held that the letter of referral from the district director to the Office of Administrative Law Judges provides the best indication of the date informal proceedings terminated. *FitzgeraId v. RCA Int'l Serv. Corp.*, 15 BRBS 345 (1983); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982).

Time for services performed after the Decision and Order is issued should also not be awarded by the administrative law judge, *Smith v. Aerojet Gen. Shipyards*, 16 BRBS 49 (1983); *Lumsdon v. Portland Stevedoring Co.*, 7 BRBS 415 (1978); s*ee also Collins v. Todd Shipyards Corp.*, 11 BRBS 232 (1979), except to the extent this work involves services necessary to "wind up" the case at that level. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995).

In cases where the parties are unable to resolve a case at the district director level but reach a settlement before the administrative law judge hearing is held, claimant's attorney must apply to the administrative law judge for all services performed from the date after the informal conference proceedings ended to the date the administrative law judge issues a decision or remands the case for consideration of the settlement. *Revoir*, 12 BRBS 524; *Brown v. Gen. Dynamics Corp.*, 12 BRBS 528 (1980); *Ross v. Gen. Dynamics Corp.*, 11 BRBS 449 (1979).

If the order does not delineate between fees awarded for work performed at the administrative law judge level and those performed at the district director level, the entire award may be vacated and the case remanded. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). *Compare Miller*, 14 BRBS 811 (the Board modified award to cover only time claimed after date of referral letter).

The administrative law judge can award an attorney's fee for services performed before him even though the case is on appeal, *Bruce v. Atl. Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981); *Norat v. Universal Terminal & Stevedoring Co.*, 9 BRBS 875 (1979), although the award is not enforceable until all appeals are exhausted. *Cf. Zaradnik v. The Dutra Grp.*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518, 54 BRBS 45(CRT) (9th Cir. 2020) (administrative law judge did not abuse her discretion in declining to enter an award while appeals are pending). *See* Finality, *supra*.

The Board does not have the authority to award an attorney's fee for work performed before the administrative law judge. *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (table); *Dygert v. Mfg.'s Packaging Co.*, 10 BRBS 1036 (1979); *Thensted v. Litton Sys., Inc.*, 5 BRBS 231 (1976). Similarly, the circuit courts only have authority to award an attorney's fee for work done on appeal from the Board but not for work done before the administrative law judge or the Board. *Ford Aerospace & Commc'n Corp. v. Boling*, 684 F.2d 640 (9th

Cir. 1982); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977). *Cf. Hensley v. Washington Metro. Area Transit Auth.*, 690 F.2d 1054, 15 BRBS 43(CRT) (D.C. Cir. 1982) (D.C. Circuit awarded attorney's fee for work performed before the Supreme Court in light of the Supreme Court's explicit choice to leave the fee decision to the lower court, although the circuit court also stated it had no authority to award costs incurred for work done before the Supreme Court).

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The Ninth Circuit held it had the authority to grant fees for work done on appeal from the Board, but not for work done below. *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989).

The Board remanded the case for the administrative law judge to consider the reasonableness of "wind-up" services performed after the date of filing of the decision. The administrative law judge erred in finding she lacked jurisdiction to consider the compensability of such services as reading the decision and calculating the amount of benefits due. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995); *see also Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court held status and situs elements not met).

The Board stated it can award an attorney's fee only for services rendered before it. The Board thus disallowed time requested for services rendered before the administrative law judge's decision was filed and after the Board issued its decision. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

The Board held that a fee petition/affidavit submitted to it involving work relating to counsel's attempt to secure enforcement of the administrative law judge's award of benefits should be submitted to the district director, as enforcement issues fall within the province of the district director, 33 U.S.C. §918. The Board thus lacked jurisdiction to consider the petition. *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154, 160 (1996).

The Board held that an administrative law judge has the authority to consider a request for enhancement of a fee if the request is filed within a reasonable time after the fee becomes enforceable; the request should be handled as a supplemental fee petition. In this regard, the Board clarified the distinction between when a fee becomes "final" for appeal purposes and when it becomes "final" for payment purposes. Counsel's enhancement request in this case, which was made shortly after employer paid the fee award but before the fee became enforceable due to the completion of the appellate process, was timely. Consequently, the Board remanded the case for the administrative law judge to consider counsel's fee enhancement request. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Ninth Circuit concurred with the Board's decision in *Bellmer*, 32 BRBS 245 (1998), holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney's fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999).

After the Fifth Circuit vacated the Board's previous affirmance of an administrative law judge's award of compensation, the Board rejected employer's contention that the administrative law judge's second fee award violated Rule 41 of the Federal Rules of Appellate Procedure, or the Mandate Rule, holding that the absence of a remand order by the Fifth Circuit did not affect the administrative law judge's jurisdiction. Where a claimant's award is reduced due to the employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with claimant's ultimate degree of success once the award is final. The Board affirmed the administrative law judge's fee award, as counsel prevailed on the issues of causation and medical benefits, and the administrative law judge's 50 percent reduction in counsel's fee was reasonable in relation to the results obtained. *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

Where the administrative law judge awarded claimant's counsel a fee for work including that performed while the case was before the district director, the Board and the court of appeals, the Board excluded all services not rendered before the OALJ, as the administrative law judge does not have the authority to award a fee for services at other levels of the proceedings. The case was remanded to the administrative law judge. *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc).

The Ninth Circuit denied claimant's application for attorney's fees and costs incurred for successfully opposing employer's petition for writ of certiorari before the Supreme Court. The Supreme Court's order denying a fee, but permitting claimant to file with the Ninth Circuit, did not specifically delegate jurisdiction to the court. The court held that, pursuant to Section 28(c), the work performed was not "before" the court. The court also held that it was unclear under what rule the motion for fees should be viewed as timely, as Ninth Circuit Rule 39-1.6 was not applicable and the Supreme Court's rules are not applicable to proceedings before the court. *Stevedoring Services of Am. v. Price*, 432 F.3d 1112, 39 BRBS 85(CRT) (9th Cir. 2006); *but see Stevedoring Services of Am. v. Price*, 546 U.S. 1213 (2006) (Supreme Court subsequently stated, "Renewed motion of respondent Arel Price for attorney's fees and costs is referred to the United States Court of Appeals for the Ninth Circuit for adjudication.").

Citing Section 28(c), the Ninth Circuit rejected claimant's contention that he was entitled to a fee for the hours his attorney spent preparing his defense of a complaint brought by employer before the State of Hawaii Office of Disciplinary Counsel, as that work was not done "before" the district court which awarded a fee for work enforcing a default order. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claims Examiner's Authority

A claims examiner does not have the authority to approve or award an attorney's fee pursuant to Section 28. *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Hernandez v. Sealand Serv. Inc.*, 9 BRBS 1076 (1978); *Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978); *Perdomo v. Tug & Barge Dry Dock*, 8 BRBS 756 (1978). An assistant deputy commissioner has the authority to award an attorney's fee *only* if the assistant has been authorized to perform the functions of a deputy commissioner. *Hill v. Nacirema Operating Co.*, 12 BRBS 119 (1980), *appeal dismissed sub nom. Nacirema Operating Co. v. Director, OWCP*, No. 80-1366 (4th Cir. July 25, 1980). These rulings are based on the premise that, while administrative or ministerial acts may be delegated, the deputy commissioner lacks authority to delegate discretionary or quasi-judicial acts. *See Mazzella*, 8 BRBS 755; *Traina v. Pittston Stevedoring Corp.*, 8 BRBS 715 (1978), *aff'd on recon. sub nom. Mazzella v. United Terminals Inc.*, 9 BRBS 191 (1978). In a black lung case, *Bradley v. Director, OWCP*, 8 BLR 1-418 (1985), the Board held that a claims examiner properly issued an order setting a time limit for filing a fee petition, as that was a ministerial act.

Award Must be in an Order

A deputy commissioner's award of an attorney's fee must be contained in an order. A letter advising employer of its liability and stating the amount of the fee is insufficient. *Thornton v. Beltway Carpet Serv.*, 16 BRBS 29 (1983); *Carpenter v. Lockheed Shipbuilding & Constr. Co.*, 14 BRBS 382 (1981); *Hill v. Nacirema Operating Co.*, 12 BRBS 119 (1980), *appeal dismissed sub nom. Nacirema Operating Co. v. Director, OWCP*, No. 80-1366 (4th Cir. July 25, 1980); *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979). *See also Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981) (explanation for reductions must also be contained in Order).

In following this rule in *Keith*, 13 BRBS 404, the Board discussed the fact that while the award was in an order, the fee order itself did not explain the reduction, although a separate "brief" from the deputy commissioner contained an explanation. The Board stated that the explanation for the reduction should be set out in the hearing officer's order, and not a subsequent brief, although it did review the rationale in the brief in the interests of judicial economy. *Accord Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97 (1981). However, in *Cabral* and *Keith* the Board found the explanation insufficient even as supplemented by the brief.

Amount of Award

Sufficient Explanation

Early cases, discussed *infra*, focused on whether the deciding official provided a sufficient explanation of reductions in the requested fee. More recently, the Board has recognized that an administrative law judge has the duty to state why the fee is reasonable under the regulatory criteria, 20 C.F.R. 702.132(a). *See Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002). Moreover, where employer objects to the requested fee, the administrative law judge must address the objections. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Thus, all fee awards must be sufficiently explained.

Where an administrative law judge reduces the amount of the attorney's fee awarded from the amount requested, the administrative law judge must address the regulatory criteria and provide a sufficient explanation of the reasons for the reduction. *Beacham v. Atl. & Gulf Stevedores, Inc.*, 7 BRBS 940 (1978); *Bednarek v. I.T.O. Corp. of Baltimore*, 7 BRBS 708 (1978); *McCue v. Int'l Terminal Operating Co.*, 4 BRBS 235 (1976); *Palacios v. Campbell Indus.*, 3 BRBS 37 (1975). This requirement applies regardless of which party ultimately appeals, *Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97 (1981), and also applies to reductions by the deputy commissioner/district director. *Ellis v. Blake Constr. Co.*, 8 BRBS 650 (1978); *Campbell v. Blake Constr. Co.*, 8 BRBS 667 (1978); *Marrella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978).

In some early cases, the fee order itself did not explain the reduction but a separate "brief" from the deputy commissioner contained the explanation. The Board stated that the explanation for the reduction should be set out in the hearing officer's order, and not a subsequent brief, although it did review the rationale in the brief in the interests of judicial economy. *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981); *Cabral*, 13 BRBS 97. However, in *Cabral* and *Keith* the Board found the explanation insufficient even as supplemented by the brief.

An attorney's fee award is unreasonable if the deciding official fails to provide a sufficient explanation to support the reduction of the fee, *Bell v. Volpe Head Constr. Co.*, 11 BRBS 377 (1979), or an increase in the fee, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 830 (1978). The deputy commissioner or administrative law judge must state whether the hourly rate or number of hours were reduced and provide reasons for any disallowances or reductions. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Keith*, 13 BRBS 404; *Cabral*, 13 BRBS 97; *Nicholson v. Intercounty S&M*, 9 BRBS 466.2 (1978). He must state which hours are compensable and specify an hourly rate. *Keith*, 13 BRBS 404; *Adams v. Brady-Hamilton Stevedore Co.*, 10 BRBS 174 (1979).

The deputy commissioner or administrative law judge must discuss how the regulatory criteria in 20 C.F.R. §702.132 apply to the reduction; mere reference to one factor has been

held insufficient. *Speedy v. Gen. Dynamics Corp.*, 15 BRBS 448 (1983); *Fitzgerald v. RCA Int'l Serv. Corp.*, 15 BRBS 345 (1983) (Ramsey, concurring and dissenting); *Huf v. Nw. Constr. Inc.*, 13 BRBS 730 (1981); *Palmore v. Washington Metro. Area Transit Auth.*, 9 BRBS 388.22 (1978).

Merely adopting employer's objections is insufficient, *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982), as is a statement that time spent was excessive. *Collins v. Gen. Dynamics Corp.*, 14 BRBS 458 (1981); *Eaddy v. R. C. Herd & Co.*, 13 BRBS 455 (1981); *Ballard v. Gen. Dynamics Corp.*, 12 BRBS 966 (1980).

The Board will affirm reductions which are fully explained and reasonable. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BR3S 231 (1984); *Jensen v. Maryland Shipbuilding & Dry Dock*, 15 BRBS 400 (1983); *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981); *Doty v. Farmer's Export Co.*, 12 BRBS 784 (1980).

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Since the administrative law judge provided an adequate rationale for her reduction of the hourly rate and considered the regulatory factors, the Board affirmed her award of an attorney's fee. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

The Board held that remand was required where the deputy commissioner recited the regulatory criteria of 20 C.F.R. §702.132, but failed to specifically state how these criteria applied to the fee reduction. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

The Board affirmed reductions in both the hourly rate and the number of hours requested which were fully explained and reasonable. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

The administrative law judge reduced the number of hours sought by counsel in preparing the original fee petition, but rejected all other objections to the fee petition "on the grounds recited in the responses to the objections." The Board declined to further reduce or disallow the hours addressed by the administrative law judge, as employer's assertions were insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Where the district director applied the regulatory criteria, discussed how the factors applied in the fee reduction, and explained the reduction she made in the hourly rate and number of hours awarded, her rationale was adequate to support the decision. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

The Board vacated the fee award, as the administrative law judge did not fully discuss and render adequate findings regarding employer's numerous objections to the fee petition. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Given the cursory nature of the administrative law judge's supplemental decision, and in particular his failure to adequately and independently set out and discuss the reasons for his reduction in both the hourly rate and number of hours of attorney work requested, the Board vacated the fee award and remanded for further consideration. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Board held that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to the regulations at 20 C.F.R. §702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.*,702.234-236. The case was remanded for reconsideration of claimant's liability for a fee under Section 28(c) and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

The Board vacated the fee awarded on two grounds. First, the case was being remanded to determine if employer received statutory notice of the hearing as required by Section 19(c). If the award of benefits must be vacated due to a lack of such notice, the fee award also must be vacated. Regardless, the fee award cannot stand as the administrative law judge merely awarded the fee requested due to the lack of objections. The administrative law judge must review the fee petition in light of the regulatory criteria of 20 C.F.R. §702.132(a) and applicable case law whether or not employer has objected to the fee petition. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

The Ninth Circuit held that the district court acted within its discretion in disallowing a fee for hours it found duplicative. The court gave a sufficient explanation of the disallowance, in view of its "superior understanding" of the underlying litigation. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The Fourth Circuit held that the Board did not abuse its discretion in reducing the hours requested for services determined to be "insufficiently related to appellate work." When reconsidering the fee on remand, the court held that the Board need not reconsider the total hours awarded. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

In a black lung case, the Fourth Circuit held that the fact that the administrative law judge did not distinguish a few prior fee awards submitted by employer awarding lower hourly rates did not violate the duty of explanation under the APA. The administrative law judge was not required to address specifically each contrary fee award, and the court could discern what the administrative law judge did and why he did it. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

The Ninth Circuit held that the district court erred as a matter of law by reducing counsel's attorney's fee requested by 37 percent without sufficiently explaining its rationale for the reduction. The Ninth Circuit stressed that when a district court significantly reduces a fee request, it must explain with specificity its reasons for the reduction. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *see* No. C11-1472, 2015 WL 1938431 (N.D. Cal. Apr. 28, 2015) (decision after remand).

Factors Considered in an Award

Sections 702.132(a) and 802.203(e) of the regulations provide that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §§702.132(a), 802.203(e). *See Newport News Shipbuilding & Dry Dock Co v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). If the attorney's fee is to be assessed against the claimant, the regulations also provide that the award should also take into account the financial circumstances of the claimant. Claimant's financial circumstances are irrelevant if the employer is responsible for the attorney's fee. *Thornton v. Beltway Carpet Serv.*, 16 BRBS 29 (1983); *Hildebrand v. Bergstrom Fiscal Control Office*, 9 BRBS 176 (1978).

The regulations also require a description of the professional status of persons performing work, 20 C.F.R. §§702.132(a), 802.203(d)(2). Both regulations state that the fee petition must provide the "normal" billing rate for each person performing work, while Section 802.203(d)(4) goes on to say that the rate awarded by the Board "shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status."

Where claimant is represented by counsel, work necessary to the case performed by paralegals or other support staff working under the direction of counsel is compensable at the appropriate rates. *Luce v. Bath Iron Works*, 12 BRBS 162 (1979) (work by law student should not be treated differently than support work by legal assistant and was appropriately compensated at a lower rate). However, where claimant is represented by a lay representative who is not working under the guidance of an attorney, the lay representative is not entitled to an employer-paid fee under Section 28(a) or (b) but may be compensated by claimant at a lower rate. *Todd Shipyards Corp. v. Director, OWCP*, 545 F. 2d 1176, 5 BRBS 23 (9th Cir. 1976), *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974). Thus, independent lay representatives may be compensated at a lower rate than attorneys, their services must be separately delineated and employer cannot be held liable for the fee. *Id.*

While counsel may thus be compensated for work performed by support staff at lower rates, counsel may not, however, bill for purely clerical services, as such is considered part of overhead. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

Section 28 provides for a "reasonable attorney's fee" to be paid to claimant's counsel. In addition to the regulatory criteria for determining a fee, case law addressing appropriate factors under other federal fee-shifting statutes applies, based on the Supreme Court's holding that the definition of a reasonable attorney's fee is the same for all federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557 (1992). This precedent has

been specifically applied in cases under the Act. *E.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday,* 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

Moreover, awards under the Act, like most fee-shifting awards, are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended. *Id. Accord Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) ("most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate). Various other factors have been held relevant in determining a reasonable attorney's fee, including: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Holiday,* 591 F.3d at 228, 43 BRBS at 71(CRT); *see Christensen v. Stevedoring Services of Am.*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

The "risk of loss," *i.e.,* the fact that claimant's counsel cannot receive a fee unless he successfully prosecutes claimant's claim for benefits, is a factor incorporated into the lodestar (*see* factor (6) above), and thus is not a basis for enhancing a fee. *Dague,* 505 U.S. 557.

In *Christensen,* 557 F.3d 1049, 43 BRBS 6(CRT), moreover, the court cited *Blum v. Stenson,* 465 U.S. 886 (1984), wherein the Supreme Court held that reasonable fees should be calculated according to the prevailing market rates in the relevant community. Relying on *Blum* and the relevant factors for calculating the lodestar, the Ninth Circuit also held that the novelty of the case and the complexity of the issues are considered in arriving at a reasonable number of hours to award and not in assessing an appropriate hourly rate. *Van Skike v. Director, OWCP,* 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

In accordance with *Dague,* the Board has applied cases decided under other federal fee shifting statutes holding that claimant's fee award is appropriately reduced to account for limited success in pursuing a claim, *Hensley,* 461 U.S. 424; *see Farrar v. Hobby,* 406 U.S. 103 (1992); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999), and that enhancement for delay in payment is part of a reasonable attorney's fee in appropriate cases. *Missouri v. Jenkins,* 491 U.S. 274 (1989); *see Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995); Hourly Rate, *infra.*

In *Nelson,* the Board acknowledged that a reasonable fee must account for delay. The Board addressed an earlier decision in *Hobbs v. Stan Flowers Co., Inc.,* 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP,* 820 F.2d 1528 (9th Cir. 1987), holding that augmentation of an hourly rate to reflect delay is not necessary under the Longshore Act because factors such as risk of loss and delay in payment occur generally in longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. In affirming the Board's decision in *Hobbs,* the Ninth Circuit stated that the Board's decision implied that awards based upon the standard hourly rates charged by attorneys in Longshore Act cases at the time their services are performed are presumptively reasonable. However, the court noted that other courts had allowed the augmentation of hourly rates to compensate for delay in payment, and suggested that reliance on historical rates may render unreasonable an otherwise reasonable attorney's fee by cutting too deeply into the attorney's ultimate award in cases where the delay in payment is extreme. *Hobbs,* 820 F.2d at 1530. The court concluded that in *Hobbs,* the delay was neither so extreme nor unexpected as to render an otherwise reasonable fee unreasonable. *Id.* In *Nelson,* 29 BRBS at 96-97, the Board held that *Jenkins,* 491 U.S. at 284, was dispositive and required "an appropriate adjustment for delay in payment -- whether by application of current rather than historic hourly rates, or otherwise." The Ninth Circuit subsequently agreed with this holding. *Anderson v. Director, OWCP,* 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

The Board in early cases, *infra,* affirmed administrative law judge's decisions allowing claimant's counsel a greater fee than that supported by the lodestar calculation. This issue has also been addressed by the Supreme Court in a case under a fee-shifting statute. In *Perdue v. Kenny A.,* 559 U.S. 542 (2010), the district court judge enhanced a fee award by 75 percent above the lodestar amount, stating that counsel advanced expenses without on-going reimbursement, counsel were not paid as the work was being performed, counsel's ability to recover a fee was completely contingent on the outcome of the case, counsel exhibited a higher degree of skill, professionalism and similar attributes than the judge had seen in any other case, and the results obtained were extraordinary. The Court noted the 12 factors above and stated six rules derived from its prior decisions in fee-shifting cases: (1) a reasonable fee is a fee sufficient to induce a capable attorney to undertake representation; (2) the lodestar method yields a fee that is presumptively sufficient to obtain this result; (3) enhancements may be awarded in "rare" and "exceptional" circumstances, although the court stated it had never sustained an enhancement of a lodestar amount for exceptional performance; (4) the lodestar amount includes most, if not all of the relevant factors for determining a reasonable fee; (5) the burden of proving an enhancement is necessary is on counsel seeking the fee; and (6) an attorney seeking an enhancement must produce "specific evidence" supporting the award. *Id.* at 1672-1673. In this case, the Court rejected the contention that a fee determined by the lodestar method may never be enhanced, but it vacated the enhancement awarded and remanded the case. The Court stated that superior results are only relevant insofar as they result from superior attorney performance, and such superior performance justifies enhancement only in rare cases

requiring specific evidence that the lodestar fee is not adequate to attract competent counsel, such as where the hourly rate used does not measure the attorney's true market value, where performance includes an extraordinary outlay of expenses and litigation is protracted and where there is an exceptional delay in the payment of fees, citing *Jenkins*, 491 U.S. 274. The Court concluded that the selection of a 75 percent enhancement appeared to be arbitrary, as its effect was to raise counsel's rate with no evidence in the record that the resulting figure was appropriate and that while the judge cited counsels' extraordinary outlays for expenses and delay in reimbursement, he did not calculate the amount of enhancement due to this factor or the cost of the delay. Finally, the district court's reliance on a comparison of the performance of counsel in this case with that in unnamed other cases did not employ a methodology permitting meaningful review. The case was remanded for the trial judge to provide a reasonably specific explanation for all aspects of the fee, including enhancement.

Accordingly, the Board's prior holdings regarding awards higher than the amount calculated by multiplying the hourly billing rate by the number of compensable hours must be viewed in light of *Perdue*. The Board relied on the proposition that an administrative law judge has wide discretion in awarding an attorney's fee and affirmed increased awards where the administrative law judge found them justified by excellent results or other relevant factors. *See LaPlante v. Gen. Dynamics Corp., Elec. Boat Div.*, 15 BRBS 83 (1982) (employer did not establish abuse of discretion where administrative law judge awarded a $5,000 attorney's fee based on time and the expenses totaling $3,056.25 where the additional amount of the award requested was for the complexity of the issues, the benefits obtained by claimant and the contingent nature of attorney's fee awards); *Muscella,* 12 BRBS 272 (administrative law judge did not err in awarding $3,600 in fees, double that based on hours times rate of $60 per hour, based on the complexity of the case and the fact that counsel was a highly skilled specialist who presented the case efficiently; Board held that although the award if computed on an hourly basis would be at the rate of $120 an hour that was not excessive and was based on appropriate factors); *White v. Old Dominion Marine Ry.*, 4 BRBS 279 (1976) (no abuse of discretion where administrative law judge awarded claimant's attorney $3,050--$1,950 for 39 hours of work at $50 per hour and $1,100 in recognition of the result obtained as claimant obtained a substantial award of death benefits).

Similarly, the Board held that an administrative law judge may also award a higher fee than that which the attorney requested if the administrative law judge finds a higher award is justified. *Lilly v. Moon Eng'g Co.*, 5 BRBS 132 (1976). *See Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd on other grounds sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988) (Board remanded as administrative law judge did not explain why a fee three times the size of the itemizations was warranted). Furthermore, the Board has held an administrative law judge may consider his experience and personal knowledge of fee rates and the practice of

law when he makes a discretionary determination of the reasonableness of an attorney's fee. *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

On the other hand, the Board has rejected the argument that the administrative law judge erred in failing to award a fee higher than the itemizations would justify where he found that the lower fee appropriately compensated counsel. In *Lebel v. Bath Iron Works Corp.*, 3 BRBS 216 (1976), *aff'd*, 544 F.2d 1112, 5 BRBS 90 (1st Cir. 1976), the Board rejected claimant's counsel's contentions that, since the potential award of benefits was approximately $130,000, a fee based on 20 percent of that amount ($26,000) would be reasonable and that the administrative law judge erred in basing the fee only on the itemized hours multiplied by an hourly rate plus expenses. The Board stated that the administrative law judge did not err in this regard, as claimant did not show that the fee awarded was not reasonably commensurate with the necessary work performed or was unreasonable. Further, the fee award cannot be contingent or based on a fixed percentage of the compensation award. *Id. Accord Enright v. St. Louis Ship*, 13 BRBS 573 (1981); *Ashton v. Dieners, Inc.*, 9 BRBS 539 (1978). *See Jensen v. Maryland Shipbuilding & Dry Dock Co.*, 15 BRBS 400 (1983) (claimant itemized 31 hours and stated his normal rate was $75 per hour but requested $20,000 in view of results obtained; Board affirmed administrative law judge's award of $2,325 representing all hours at counsel's customary rate as administrative law judge fully explained award consistent with relevant factors). In *Memmer v. ITT/Sheraton Washington*, 18 BRBS 123 (1986), *aff'd in part and vacated in part mem.*, 816 F.2d 8 (D.C. Cir. 1987), the Board reversed a $3,000 bonus as an abuse of discretion as it was based on claimant's inability to communicate with counsel. On appeal, the court affirmed the Board's decision that the award of a bonus was not justified by claimant's inability to communicate, but it remanded for consideration of whether other factors such as amount of benefits, quality of representation or contingent nature of the case warranted the bonus.

While the amount of benefits is a relevant factor, there is no requirement that the amount of the fee award be commensurate with or less than claimant's award of benefits, *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). The Board has held that the amount of the attorney's fee may not be limited by the amount of compensation gained since to do so would drive competent counsel from the field. *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd on other grounds sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Kelley v. Handcor, Inc.*, 1 BRBS 319 (1975), *aff'd on other grounds*, 568 F. 2d 143, 7 BRBS 413 (9th Cir. 1978). Similarly, where an attorney's fee is awarded for work on appeal of an attorney's fee award made below, the amount of the attorney's fee for appellate work should not be limited based on the amount of the attorney's fee ultimately awarded below. *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). Moreover, it was error for the administrative law judge to deny a fee request in its entirety based on his comparison of the amount of a settlement offer and the award of benefits, as this calculation

did not reflect the true value of the award. *Stokes v. George Hyman Constr. Co.*, 14 BRBS 698 (1981) (but note that a valid tender offer may affect employer's liability for a fee under Section 28(b), *infra*).

Cases on the effect of the amount of benefits in evaluating claimant's degree of success are addressed, *infra,* in the Section on *Hensley*—Partial Success and Amount of Fee in relation to Benefits. Cases addressing the Section 28(b) requirement that the fee be based on the difference between the award and the amount tendered or paid is also discussed with *Hensley* as well as in Section 28(b) of the desk book.

Although the amount of the fee is not limited to the amount of the award, the amount of benefits awarded is a relevant factor in a fee award, *see Muscella*, 12 BRBS 272; *White*, 4 BRBS 279, including the amount of future benefits. *Roach v. New York Protective Covering*, 16 BRBS 114 (1984). Thus, where a disability award was reversed on appeal, the Board held that the deputy commissioner may consider this action on remand of his determination of the attorney's fee as only the award of medical benefits remained. *Speedy v. Gen. Dynamics Corp.*, 15 BRBS 448 (1983). *See Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984) (case remanded where Board's decision affected the amount of benefits and the administrative law judge relied on this factor in awarding the attorney's fee); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (fee remanded where administrative law judge's determination of total amount of award was in error); *Phillips v. California Stevedore & Ballast Co*., 14 BRBS 498 (1981) (fee reduction based on low amount of benefits vacated and remanded as award was being remanded for reconsideration); *Bell v. Volpe/Head Constr. Co.*, 13 BRBS 41 (1980) (fee remanded where the administrative law judge's determination of the amount of benefits might be erroneous); *Mitchell v. Bath Iron Works Corp.*, 11 BRBS 770 (1980) (Board remands for further proceedings to determine the extent of partial disability). Additionally, if the Board remands the case for a redetermination of issues which could affect the amount of benefits, the Board may not consider the attorney's fee application for work performed before the Board until the amount of benefits is decided. *Perkins v. Marine Terminals Corp.*, 16 BRBS 84 (1984). *See* Fees for Work before the Board, *infra.*

When fees are settled, due consideration must be given to the fact that the amount of the attorney's fee was agreed to by the parties in the course of arms length negotiation. *Ballard v. Gen. Dynamics Corp.*, 12 BRBS 966 (1980). *See* Attorney's Fees and Settlements, *infra*.

The administrative law judge may not reduce claimant's counsel's fee award in order to compensate employer for time spent objecting to the fee; this constitutes an attorney's fee award to employer which is not allowed. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

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The Board affirmed the administrative law judge's award of $4,400 in attorney's fees, despite the fact that only two weeks of temporary total disability benefits were awarded. The administrative law judge noted that there would be a substantial recovery in the future when extent of permanent disability was determined and therefore found that, considering all factors, the award was not unreasonable. In affirming, the Board noted that the status issue raised on appeal involved an issue of first impression and that the amount of the fee was not limited by the amount of the award of benefits. *Parrott v. Seattle Joint Port Labor Relations Comm. of the Pac. Mar. Ass'n*, 22 BRBS 434 (1989).

The Board rejected claimant's argument that the fee award should be increased to one-third of the amount of claimant's recovery, as there is no requirement that the amount of an attorney's fee award be commensurate with claimant's award of benefits. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

There is no requirement that the amount of the fee award be limited to the amount of the award of benefits. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

A different billing standard need not be applied to trial work and appellate work. Thus, billing in quarter hour increments may be suitable for both types of work and the administrative law judge did not abuse his discretion in approving this method. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

The administrative law judge did not abuse his discretion in reducing the number of hours claimed for telephone calls, as he found the request unreasonably high. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

An attorney's fee is awarded for time spent and services rendered which are reasonably necessary to the award of benefits. Although the amount of benefits awarded is a valid consideration, the amount of the fee is not limited to the amount of compensation gained, since to do so would drive competent counsel from the field. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds).

The Board held that intervention by an attorney for a medical provider was not necessary in this case, as there was no indication that the doctor's attorney performed a function that could not have been fulfilled by the claimant's attorney. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

The Ninth Circuit reversed the Board's holding that claimant's attorney could have adequately represented the doctors' interests, as claimant's counsel has no incentive to prove issues regarding prevailing community charges under Section 7(g). *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

The Board rejected employer's contention that the fee was excessive in light of the doctrine of *de minimis non curat lex.* and an unpublished Board opinion. The Board held that claimant's settlement for a lump sum payment of $1,371.62, $170 in interest, $19.79 in a penalty, and continuing bi-weekly payments of $12.10 was not a *de minimis* award, nor was it evidence of an unsuccessful claim under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

The Fifth Circuit rejected employer's argument that since claimants had no measurable hearing impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

The Board rejected employer's argument that the lack of complexity warranted further reduction of counsel's fee. Complexity of a case is but one of the factors to consider in awarding a fee, and the administrative law judge reduced the hourly rate because of the lack of complex issues. The Board also rejected employer's argument that the fee award should be based on a decision rendered by another administrative law judge, as fees for legal services are properly approved by the tribunal before which the work was performed. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Board held that claimant failed to meet her burden of proving that the administrative law judge abused her discretion in reducing the number of hours requested and the hourly rates of lead and associate counsel. Moreover, the Board rejected claimant's assertion that the administrative law judge improperly limited the amount of the awarded fee in view of the amount of the settlement agreed to by employer. The amount of benefits obtained is a proper consideration in determining the amount of an attorney's fee award. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting).

Where claimant was successful in obtaining $26,000 in benefits, in addition to those previously paid by employer, the Board determined that a fee of $2,548.12, which was based on a reduced hourly rate, was not excessive or "exorbitant," and it rejected employer's argument as frivolous. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

The Board held that employer's argument that the fee was excessive had merit in light of the Board's decision to vacate the award of benefits and remand the case for further consideration of the nature and extent of claimant's disability. Therefore, the Board also vacated the fee award and remanded for further consideration in light of the benefits awarded on remand. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Relying on cases under other federal fee-shifting statutes in which the amount of a New Mexico gross receipts tax assessed on an attorney's fee and costs was disallowed, the Board reversed the administrative law judge's award of these amounts payable by employer. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting).

The Board rejected employer's argument that claimant's lack of success before the first administrative law judge rendered the services at that level non-compensable where claimant successfully pursued his claim before a second judge on remand, as a fee for services rendered by counsel at all levels is determined by claimant's ultimate degree of success. Here, however, as the Board vacated the administrative law judge's decision regarding claimant's extent of disability, claimant's ultimate degree of success was unknown. Therefore, the Board vacated the fee award with instructions to reconsider the fee petition and objections, including those objections made but not previously discussed by the administrative law judge, in light of any award on remand. *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc).

The administrative law judge reduced the number of compensable hours by 50 percent, in part because claimant was found liable for the fee under Section 28(c). In view of the Board's holding that employer was liable for the fee pursuant to Section 28(b), the fee award was remanded for the administrative law judge to reconsider the number of compensable hours and claimant's contentions in support of a larger fee. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

Where the district director reduced the hourly rate due to the lack of complexity of the case, the Ninth Circuit vacated the fee award and remanded the case for further consideration. The court stated that the novelty of the case and the complexity of the issues are considered in arriving at a reasonable number of hours to award and not in assessing an appropriate hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), *vacating in pert. part D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007).

In vacating the fee awarded by the district director in this case pursuant to the decisions of the Ninth Circuit in *Christensen*, 557 F.3d 1049, and *Van Skike*, 557 F.3d 1041, the Board advised that any reduction of the fee due to a lack of complexity in the case must be reflected in the hours awarded and not in the hourly rate awarded. *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

In this case where employer's carrier was declared impaired by TPCIGA and employer was bankrupt – its assets in trust – the Board held that TPCIGA was liable for a portion of claimant's attorney's fee. The Board rejected TPCIGA's arguments that the fee approved by the administrative law judge was excessive. Specifically, the Board rejected the arguments that the hourly rate was too high, as employer presented no evidence establishing that the administrative law judge's award of an hourly rate of $225 was excessive or that the quarter-hour minimum billing rule was violated. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009).

In a black lung case, the Fourth Circuit held that the "lodestar" analysis is the starting point in calculating a fee award and is presumptively reasonable. After the lodestar amount is calculated, however, the adjudicator may adjust that figure based on consideration of other factors, including those listed in the applicable DOL regulation. The court stated, however, that to the extent that any of these regulatory factors already has been incorporated into the lodestar analysis, they should not be considered a second time. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

The Ninth Circuit noted that while the district court has latitude in determining fee awards, the award and any reductions must be supported by specific explanations of the reasons for both the award and any reductions. The Ninth Circuit added that tribunals must reach an attorney's fee decision by addressing the factors enumerated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), which include: the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal services properly, the preclusion of other employment due to the acceptance of the case, and the attorney's customary fees. While the district court in this case referred to some of the *Kerr* factors in its analysis, it did not explain which factors justified a significant (37%) reduction in the fee request or how it arrived at an hourly rate of $400. The district court's award of an attorney's fee was therefore vacated and the case remanded for further consideration. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *see* No. C11-1472, 2015 WL 1938431 (N.D. Cal. Apr. 28, 2015) (decision after remand).

***Hensley*--Partial Success and Amount of Fee in Relation to Benefits Awarded**

The Board initially held that an administrative law judge may not refuse to award a fee for services rendered on issues upon which the claimant did not prevail. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986); *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984); *Bouchard v. Gen. Dynamics Corp.*, 14 BRBS 839 (1982); *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981); *Hilyer v. Morrison-Knudsen Constr. Co.*, 12 BRBS 87 (1980), *aff'd in pert. part*, 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981), *rev'd on other grounds sub nom. Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624 (1983); *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978).

In *Battle*, 16 BRBS 329, the Board held claimant's counsel could be compensated for time spent on an unsuccessful Section 49 discrimination claim where disability benefits were obtained. The Board acknowledged an unpublished decision of the D.C. Circuit, *Director, OWCP v. Brandt Airflex Corp*., No. 78-2309 (D.C. Cir. Sept. 20, 1982), in which the court rejected the Board's decision in *Cherry*, 8 BRBS 857, and found claimant's attorney entitled to a fee only on the issues on which claimant prevailed. However, the only issue on which claimant lost in *Brandt* was the application of Section 8(f). Since the Board has consistently held that claimants' attorneys are not entitled to a fee for work on Section 8(f), the Board held the decision in *Brandt Airflex* was not inconsistent with Board case law. *Battle*, 16 BRBS at 331, n.2. Therefore, the Board held it would continue to apply *Cherry*.

The Board subsequently abandoned the approach taken in *Battle* and *Cherry* in light of the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), based on the holdings in *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), and *Gen. Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988), applying *Hensley* to awards of attorney's fees under the Act where there is an issue of partial or limited success. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, it created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

461 U.S. at 434. Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of the hours expended on the litigation as a whole, times a reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. In *Hensley*, the Court remanded the case to the district court as it failed to explicitly apply the second prong of the test.

In *Bullock*, the Board noted that the Court's decision in *Hensley* did not define the "success" of an action in terms of the monetary amount awarded, but, rather, in terms of how successful the plaintiff was in achieving the claims asserted. In cases arising under the Longshore Act, the Board noted, claimant's success must be measured against the amount of benefits voluntarily paid by employer. *Bullock*, 27 BRBS at 96; *see also Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Subsequently, the Board addressed the argument, raised in a dissent, that *Hensley* mandates a lower attorney's fee where claimant's monetary recovery is small. *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993). The Board majority disagreed, noting that the merits in *Hensley* did not concern monetary damages at all, but the constitutionality of treatment and conditions at a state hospital. The Board acknowledged that subsequent Supreme Court cases relying on a *Hensley* analysis did involve claims for monetary damages, citing *Farrar v. Hobby*, 506 U.S. 103 (1992). In *Farrar*, the court reversed a fee award in a civil rights suit for damages where the plaintiff prevailed on his legal theory, but received one dollar in damages in a suit seeking $17 million. The Court stated that although the plaintiff was a prevailing party, in a civil rights suit for damages a nominal award highlights the plaintiff's failure to prove he sustained an actual compensable injury, which is an essential element of a claim for monetary relief. In holding that the district court erred in awarding a fee of $280,000, the court stated that the plaintiff "accomplished little beyond…moral satisfaction." *Id.* at 114. Thus, in applying the second step of *Hensley*, the Court held that the plaintiff was not entitled to an attorney's fee because the degree of success was nil. In contrast, in *Rogers*, claimant prevailed on every issue presented to the administrative law judge, with the exception of which subsection under which he would be compensated, and the degree of success was thus total. The Board concluded that

> The statutory scheme, and particularly the schedule at Section 8(c)(1)-(20), clearly contemplates that some awards will be "small" as it provides for compensation for the proportional loss or loss of use of a member, based on a medical evaluation. It is unconscionable to suggest that attorneys who

> represent claimants with claims that are known to be small from the outset should be penalized for successfully prosecuting a controverted claim.

Rogers, 28 BRBS at 93.

In applying *Hensley*, the administrative law judge and district director may make proportional across-the-board fee reductions to account for limited success. *See, e.g., Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Note that the argument that the fee award is limited to an amount lower than the benefits awarded has also been raised under Section 28(b), which provides that where the requirements of that subsection for employer liability are met, claimant is entitled to a "reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid." The Board has rejected the argument that this language limits the amount of the fee award, stating that Section 28(b) involves employer liability and the administrative law judge must set a reasonable fee after consideration of all of the relevant factors. *See Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd on other grounds sub nom. Tri -State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Kelley v. Handcor, Inc.*, 1 BRBS 319 (1975). *See also Avondale Indus., Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003) (case remanded where claimant was awarded only $736.50 in past benefits and future medial benefits as administrative law judge made no effort to quantify value of future medicals, which is necessary under *Hensley* and Section 28(b)); Section 28(b), *infra*.

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The Board rejected claimant's contention that the administrative law judge erred in considering the extent of the claimant's success in reducing his attorney's fee request. The Board stated that the administrative law judge's rationale for reducing the requested fee was consistent with *Hensley*, 461 U.S. 424, wherein the Court stated that the starting point for determining the amount of a reasonable attorney's fee should be the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate but that the attorney's fee award could properly be reduced where the results obtained were "limited in comparison to the scope of the litigation as a whole." *Id*. at 441. In such a case of partial or limited success, the hours multiplied by a reasonable hourly rate may result in an excessive amount. The Board stated that while the Court held that the district court had not erred in refusing to apportion the fee award mechanically on the basis of the plaintiffs' success or failure on particular issues, it remanded the case for consideration of the relationship between the degree of success and amount of the fee. The Board rejected the argument that the reduction here was inconsistent with the Board's decisions in *Battle*, 16 BRBS 329, and *Cherry*, 8 BRBS 857, stating that "the rule set forth in *Cherry*, that an

attorney entitled to a fee award must be compensated for his work on all issues, can be reconciled with the notion that the extent of a claimant's success is relevant in determining the amount of the award." Nonetheless, the Board remanded the case for reconsideration as the administrative law judge's failure to explain his summary reduction from $3360 to $1100 could not be reviewed. *Stowars v. Bethlehem Steel Corp.*, 19 BRBS 134 (1986).

The Board declined to reduce an attorney's fee for work before it where claimant was successful in defending against employer's appeal of the finding of causation and consequent award of medicals but was unsuccessful in defending the award of disability benefits, which the Board reversed as time-barred. Employer did not file objections to the fee request. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219 (1988).

The First Circuit denied enforcement of the Board's order awarding attorney's fees to respondent for work expended on respondent's unsuccessful Section 49 claim of retaliatory discharge and upheld the administrative law judge's award of partial attorney's fees only on respondent's successful disability claim. The court held that since the claims for disability and retaliatory discharge involved very disparate legal theories and factual situations, were filed separately, and could have been separated for hearing, the preparatory work should be separated and partial success should result in partial fees. *Gen. Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988).

The D.C. Circuit held that *Hensley* applies to claims under the Act. The court held that counsel was not entitled to a fee for work performed on a Section 8(a) claim as it was unsuccessful. With regard to the award under Section 8(c), which the administrative law judge raised *sua sponte*, the court held that the administrative law judge must apply the two-step *Hensley* analysis to the fee request. The court rejected the presumption that the Section 8(a) and (c) claims were interrelated, stating that many claims are severable and that no fee is allowable on unsuccessful issues under such circumstances. *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992).

In a case arising in the D.C. Circuit, the Board vacated the $3,000 attorney's fee awarded by the administrative law judge, where claimant was successful in obtaining $611.50 in medical benefits but unsuccessful on his unrelated disability claim and remanded for reconsideration of the fee award in light of claimant's limited success consistent with *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT), and *Hensley*, 461 U.S. 424. *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

The Board rejected employer's contention that the fee was excessive in light of the doctrine of *de minimis non curat lex.* and an unpublished Board opinion. The Board held that claimant's settlement for a lump sum payment of $1,371.62, $170 in interest, $19.79 in a penalty, and continuing bi-weekly payments of $12.10 was not a *de minimis* award. Nor

is such an award evidence of an unsuccessful claim under *Hensley*, 461 U.S. 424. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

The Fifth Circuit rejected employer's argument that since claimants had no measurable hearing impairment, they could not receive medical benefits. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

The Board held that since employer did not raise the issue of claimant's "nominal" award in its objections to claimant's counsel's fee petition below, it would not remand the case for reconsideration of the amount of the attorney's fee award. Nonetheless, the Board held that given claimant's success in the case (he ultimately prevailed in obtaining disability compensation and medical benefits where none were voluntarily paid by employer, as well as a Section 14(e) amount), the administrative law judge's fee award was consistent with the requirements set forth in *Hensley*, 461 U.S. 424. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

As employer paid no compensation voluntarily, and claimant prevailed on every issue presented to the administrative law judge, the Board held that the administrative law judge's fee award was consistent with the requirements set forth in *Hensley*, 461 U.S. 424, despite the small amount of benefits. *Hensley* does not define success in monetary terms but rather by how successful a claimant is in achieving the claims asserted. The Board also stated that the administrative law judge reduced the hourly rate and that the fee was not excessive in light of the doctrine of *de minimis non curat lex.* and an unpublished Board opinion. *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993) (Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

In denying reconsideration, the Board stated that it should not have addressed employer's arguments regarding the amount of the fee in relation to the benefits awarded, as this objection was not raised before the administrative law judge. The Board's discussion in the initial case is *dicta*. *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1993) (Brown, J., dissenting).

The Board affirmed the administrative law judge's attorney's fee award against employer's challenge that the fee was too large in light of the nominal amount of benefits. The Board held that the award comported with *Hensley* and its progeny as employer had not paid benefits voluntarily and claimant was completely successful in obtaining an award in a contested case. Moreover, the second step of *Hensley* is met as the administrative law

judge specifically considered the amount of benefits as a factor in awarding the fee. *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting).

The Board rejected counsel's argument that the administrative law judge incorrectly reduced his fee award. The Board held that, as it affirmed the administrative law judge's determination that the claim was filed in an untimely manner and his denial of disability benefits, the administrative law judge properly reduced the fee request based on claimant's partial success in obtaining medical benefits. Therefore, the Board affirmed the administrative law judge's 75 percent reduction. *Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

After the Fifth Circuit reversed the Board's previous affirmance of an administrative law judge's award of disability benefits, vacating the initial fee award, the Board rejected employer's contention that the administrative law judge's second fee award violated Rule 41 of the Federal Rules of Appellate Procedure, or the Mandate Rule, holding that the absence of a remand order by the Fifth Circuit did not affect the administrative law judge's jurisdiction to issue a new fee award. Where a claimant's award of benefits is reduced due to the employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with claimant's ultimate degree of success once the award is final. The Board affirmed the administrative law judge's fee award, as counsel prevailed on the issues of causation and medical benefits, and the administrative law judge's 50 percent reduction in counsel's fee was reasonable in relation to the results obtained. *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

After modifying the administrative law judge's calculation of the number of hours counsel asserted for work before the administrative law judge, the Board held that the administrative law judge properly considered employer's *Hensley* argument, and, in light of claimant's limited success, properly reduced counsel's fee request. While the administrative law judge did not specify which of counsel's entries were excessive, other than five, the Board affirmed the administrative law judge's across the board 90 percent reduction. The Board, however, rejected employer's contention that the fee award should be further reduced, based on the amount of benefits awarded to claimant. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board affirmed the district director's finding that she could proportionately reduce claimant's requested attorney's fees by one-third based on his degree of ultimate success in the entire case, and was not limited to considering claimant's success before her. *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000).

The Board reversed the administrative law judge's award of fees and costs associated with claimant's motion for sanctions as an abuse of discretion since the motion was denied and

resulted in no additional benefits for claimant. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds).

The Third Circuit held that the administrative law judge's decision to award counsel's full fee with no "limited success" reduction was supported by substantial evidence, and moreover was in accordance with the Supreme Court's decision in *Hensley*. Specifically, the court observed that claimant prevailed against his employer's contesting issues of coverage, extent of disability, and entitlement to future medical benefits, and that counsel, by securing future medical benefits and a *de minimis* award, obtained a substantial benefit for claimant. In addition, the court held that as the administrative law judge's decision applied the correct legal standards, the Board was required to affirm the award of an attorney's fee as a matter of law. Accordingly, the Third Circuit reinstated the administrative law judge's initial award of an attorney's fee of $71,000. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

The Board stated that the administrative law judge and the district director did not err, *per se*, in reducing the fee requests to account for claimant's partial or limited success. However, as the case was being remanded for consideration of claimant's entitlement to additional benefits, the adjudicators should re-examine their fee awards in view of any additional success obtained on remand. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

The administrative law judge did not abuse his discretion in not reducing the fee award for limited success. Although claimant did not succeed in establishing a higher degree of impairment or in obtaining the more expensive hearing aids, the administrative law judge rationally found that claimant was fully successful in obtaining compensation and medical benefits in contested case. *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

The Board rejected employer's contention that the fee should be reduced due to claimant's limited success as claimant was wholly successful in his claim for benefits. The Board also rejected the contentions related to the administrative law judge's allowance of specific entries and costs as employer did not show that the amounts were duplicative, unreasonable, unnecessary or otherwise disallowable. The Board affirmed the administrative law judge's fee award. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Although employer timely raised the issue of claimant's partial success before the administrative law judge, the administrative law judge did not address *Hensley*, summarily stating he was "disinclined" to accept employer's argument to reduce counsel's fee request on this basis. The Board remanded for the administrative law judge to address the applicability of *Hensley*, as he is in the best position to assess whether the fee requested is commensurate with the success claimant obtained in relation to the benefits sought. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13 (2020).

Hourly Rate

The administrative law judge or deputy commissioner must state the hourly rate awarded and provide an adequate rationale indicating that he considered the appropriate factors *Thompson v. McDonnell Douglas Corp*., 17 BRBS 6 (1984). *See* 20 C.F.R. §702.132.

In *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986), the Board affirmed an $85 rate for counsel in Kentucky, rejecting employer's argument that the administrative law judge erred in refusing to set a rate based on a survey of rates in the state where the survey was out of date (5 years old) and covered the entire state (counsel worked in a metropolitan area). *See Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd on other grounds*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982) (rejecting argument $85 rate was unreasonable as administrative law judge found rate appropriate for legal services in the Boston area and was not excessive here where the case was complex, with numerous legal issues, and claimant was ably represented by his attorney, who obtained a substantial award in his favor); *Luce v. Bath Iron Works Corp*., 12 BRBS 162 (1979) (reduction in rate held reasonable where administrative law judge found rate excessive and lower rate more consistent with attorney's skills and experience). *See also Budinski v. Director*, 6 BLR 1-541 (1983) (award of $60 per hour vacated in black lung case pursuant to 20 C.F.R. §725.366 as it was "devoid" of any rationale).

However, the Board refused to affirm a rate it found so low as to be manifestly inadequate. *See Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97 (1981) ($35 per hour is inadequate); *Smith v. Aerojet Gen. Shipyards*, 16 BRBS 49 (1985) ($23 rate too low even though services performed in early 1970's); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983 ($50 rate too low in black lung case); *Palmore v. Washington Metro. Area Transit Auth.*, 14 BRBS 401 (1981) (reduction from $60 to $50 was unreasonable where attorney was an expert in the field and had not requested an unreasonable rate).

The appellate courts have also weighed in on the sufficiency of an explanation of an hourly rate awarded, and it is clear that the district director, administrative law judge and Board cannot base an hourly rate determination on a summary statement that a rate is appropriate for the relevant community.

In *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), the Fourth Circuit held that evidence of fee awards in comparable cases is generally sufficient to establish the "prevailing market rates" in "the relevant community." The Fourth Circuit reiterated this conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009), but provided additional guidance for determining the market rate in the appropriate geographic location. The court referenced the twelve factors recognized as guides in a lodestar analysis, *see* Factors to be Considered, *supra*, and held that the Board abused its discretion in finding that an hourly rate of $250 was appropriate as it stated only that that rate was the prevailing

rate for counsel in the geographic area where the case arose and cited in support a case over 10-years old awarding a rate of $200 which the Board adjusted upwards by the arbitrary amount of $50. On remand, the Board was directed to determine the appropriate geographic area, as counsel practiced in D.C. and claimant resided in Georgia, and then explain its determination of a reasonable rate within the appropriate market. *See Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010), digested *infra.*

In a black lung case addressing the hourly rate prong of the lodestar calculation, the Sixth Circuit stated that the guideline is the "prevailing market rate," which is defined as the rate that an attorney of comparable skill and experience can reasonably expect to attain in the venue in which he is appearing. *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008). The court stated that rates awarded in other cases cannot set the market rate although they provide inferential evidence of it, and the "market rate" is not a single figure, but may change to reflect the individual practitioner's experience and the complexity of the case. The court also stated that there was no error in ignoring evidence of rates paid to defense attorneys as they are more likely than claimants' attorneys to have a higher volume of work and to be paid promptly.

In *Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009), the Seventh Circuit affirmed an administrative law judge's award of an attorney's fee based on the hourly rate requested by claimant's Connecticut attorney where claimant lived in Indiana. The court stated that the attorney's actual billing rate for comparable work is presumptively appropriate and that there is a preference for awarding attorneys' fees that are commensurate with what an attorney would otherwise have earned from paying clients. The court held that there is no requirement that a claimant must first attempt to find local counsel before hiring an out-of-area attorney and stated with regard to the relevant "community" that, rather than referring to a local market area, it could also refer to a community of practitioners, particularly when, as is arguably true of Longshore cases, the subject matter of the litigation is such that the attorneys practicing it are highly specialized and the market for legal services in that area is a national market. The court found that the rate was supported by counsel's documentation of rates in Connecticut and there was no requirement that they be adjusted downward based on employer's evidence of Indiana rates.

The Ninth Circuit also held that "reasonable fees" are to be calculated according to the prevailing market rates. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). In *Christensen*, the court stated that the "relevant community" is broader than that derived simply from prior fee awards under the Act and should include fees attorneys could earn from private clients in other types of cases. The case was remanded for the Board to define the "relevant community," and explain the basis for its hourly rate determination, with the burden of proof on the fee applicant. In *Van Skike*, the court remanded the case for reconsideration in light of *Christensen*, but added that while

the adjudicators could properly reject the rate evidence provided by counsel, they erred in summarily relying on prior fee awards under the Act. Moreover, the Ninth Circuit stated that the novelty of the case and the complexity of the issues are considered in arriving at a reasonable number of hours and not in assessing an appropriate hourly rate. The Board applied these holdings in *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009), *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011) and *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

An attorney need not bill the time spent performing administrative work at a lower hourly rate, *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978), and similarly, the administrative law judge cannot reduce the attorney's hourly rate for office time as opposed to hearing or trial time. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Kauffman v. Brady-Hamilton Stevedore Co.*, 12 BRBS 544 (1980). However, an attorney can request two separate rates in his fee application. *Hilyer v. Morrison-Knudsen Constr. Co.*, 12 BRBS 87 (1980), *aff'd in pert. part*, 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981), *rev'd on other grounds sub nom. Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624 (1983).

While the rate in effect at the time services were performed may be a reasonable rate, the rate may be enhanced to account for extraordinary delay. *See Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (2 year delay not extraordinary; no enhancement).

The Board initially held that augmentation of an hourly rate to reflect delay is not necessary under the Longshore Act because factors such as risk of loss and delay in payment occur generally in longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *Blake v. Bethlehem Steel Corp*, 21 BRBS 49 (1988); *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987); *See also Smith v. Aerojet Gen. Shipyards*, 16 BRBS 49 (1983) (rate too low even considering years when services were performed); *Phillips v. California Stevedore & Ballast Co.*, 14 BRBS 498 (1981) (summarily stating rate at time work is performed applied).

In affirming the Board's decision in *Hobbs*, the Ninth Circuit stated, with regard to the Board's reasoning that delay is included in the basic fee structure for work under the Act, that the Board's decision implied that awards based upon the standard hourly rates charged by attorneys in Longshore Act cases at the time their services are performed are presumptively reasonable. However, the court noted that other courts have allowed the augmentation of hourly rates to compensate for delay in payment, and suggested that reliance on historical rates may render unreasonable an otherwise reasonable attorney's fee

by cutting too deeply into the attorney's ultimate award in cases where the delay in payment is extreme. *Hobbs,* 820 F.2d at 1530. The court concluded that in *Hobbs,* the delay was neither so extreme nor unexpected as to render an otherwise reasonable fee unreasonable. *Id. See also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982) (in context of determining that fee awards are not enforceable until final, court stated that delay in payment may be considered in setting fees).

In *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995), the Board addressed its earlier decisions and found they were inconsistent with case law applicable to federal fee-shifting statutes which hold that a reasonable fee must account for delay. *See Missouri v. Jenkins,* 491 U.S. 274 (1989). *See also City of Burlington v. Dague*, 505 U.S. 557 (1992). The Board held that *Jenkins,* 491 U.S. at 284, was dispositive and required "an appropriate adjustment for delay in payment -- whether by application of current rather than historic hourly rates, or otherwise." The Board concluded in *Nelson* that, where appropriate, the fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate counsel for delay. In that case, as 11 years had elapsed since many of the services were performed, the Board held that augmentation of the rate was warranted as a matter of law. The Ninth Circuit subsequently adopted the Board's holding in *Nelson,* although it questioned whether enhancement was appropriate in cases of ordinary delay. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table) (enhancement for 6-year delay); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997) (case remanded for enhancement where delay between date services performed and award issued was 11 years). The court also noted in *Anderson,* that claimant's counsel cannot recover for delay due to appeals of the fee award, as that would amount to an award of interest which is not authorized.

Where counsel is initially awarded a fee, but the merits of the claim are appealed, claimant may file a supplemental fee request for an enhanced hourly rate after appeals are exhausted, and the award is enforceable so long as he makes the request within a reasonable amount of time. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). *Accord Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802 (4th Cir. 1999).

While fee enhancement is appropriate to account for delay, counsel is not entitled to an award of interest on a fee award. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Hobbs,* 820 F.2d 1528. *See* Interest section of the desk book, *infra*.

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In General

The Board affirmed the administrative law judge's award of a $125 rate as reasonable for the New Orleans area considering the quality of counsel's representation, the work performed and the complexity of the case. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

An administrative law judge may take judicial notice of a firm's requested hourly rate in similarly complex cases, and may award a higher rate based on unusual issues, substantial benefits to claimant, and inflation as well as well-prepared witnesses, case, and brief. *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986).

A fact-finder may not award different hourly rates for trial and non-trial work as there is no basis for such a distinction in the Act. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (en banc) (Brown, J. concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Board affirmed the administrative law judge's reduction in the hourly rate from $150 to $125 where he stated that this is the usual rate allowed by administrative law judges in San Francisco and that this case did not warrant a higher rate. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

Where the administrative law judge rejected employer's contention that the hourly rate should be between $65 and $70 and claimant's request for a rate of $125, and instead he awarded a fee based on an hourly rate of $100 because of the lack of complex issues, the Board rejected employer's contentions that the hourly rate and the total award were excessive as employer had not satisfied its burden of showing that the administrative law judge abused his discretion. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Claimant's assertion that the administrative law judge erred in reducing the hourly rate from $145 to $125 was rejected as claimant did not met her burden of showing the $125 hourly rate awarded was unreasonable. *Ferguson v. S. States Coop.*, 27 BRBS 16 (1993).

Where the administrative law judge specifically determined that the requested hourly rate of $150 was excessive considering the complexity of the case, and that a $100 hourly rate was reasonable and appropriate for the geographic locality involved, employer did not meet

its burden of showing that the hourly rate awarded was unreasonable. *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

The Board affirmed the administrative law judge's award of a fee based on an hourly rate of $200 for a claim prosecuted in South Carolina, stating that such decision was reasonable and within her discretion. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The Board affirmed the administrative law judge's award based on hourly rates of $175 and $190, as the administrative law judge took into consideration that this case concerned a complex issue of first impression with regard to whether tips are to be included in the calculation of claimant's average weekly wage and the facts concerning whether the parties contemplated that tips would be part of claimant's compensation were in dispute. The Board rejected claimant's request that counsel's hourly rate be increased to $235, as this request was made in a response brief and not in a cross-appeal. *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

The Board affirmed the administrative law judge's award of a fee based on an hourly rate of $200 where counsel's office was located in Atlanta and the hearing was held in Savannah. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The Board rejected employer's argument and affirmed an hourly rate of $200 where the administrative law judge considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court holds status and situs elements not met).

The Fourth Circuit held that evidence of fee awards in comparable cases is generally sufficient to establish the "prevailing market rates" in "the relevant community." Thus, the court held that the request of claimant's counsel for an hourly rate of $225 in the Hampton Roads area was reasonable where counsel cited several recent orders in which the administrative law judges and the Board awarded him that hourly rate and employer did not submit evidence to the contrary. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

The Board affirmed the administrative law judge's reduction of the hourly rate from $215 to $200, based on the rate customarily awarded in the geographic area for similarly complex cases, and in view of the regulatory criteria. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

Claimant failed to establish that the administrative law judge abused his discretion in reducing the hourly rate from $250 to $225 based on the nature of the work, the complexity

of the issues, and typical billing rates in the geographic area. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

In a black lung case, the Sixth Circuit addressed the hourly rate prong of the lodestar calculation. The guideline is the "prevailing market rate," which is defined as the rate that an attorney of comparable skill and experience can reasonably expect to attain in the venue in which he is appearing. Rates awarded in other cases do not set the market rate but provide inferential evidence regarding the rate. If there are a large number of similarly experienced attorneys in a geographic area, it may be less necessary to rely on prior awards than in a small market. The "market rate" is not a single figure, but may change to reflect the individual practitioner's experience and the complexity of the case. Evidence of the market rate can be established by an affidavit from an experienced attorney in the same or similar field attesting to that attorney's customary rate and the rates prevalent in the market. In this case, there was no error in the district director's ($200), administrative law judge's ($250), and Board's ($225) awards of fees at three different rates, as the rates were not widely divergent and each adjudicator provided a rational basis for the rate selected. The court also stated that there was no error in ignoring evidence of rates paid to defense attorneys as such are more likely than claimants' attorneys to have a higher volume of work and to be paid promptly. *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008).

The Seventh Circuit affirmed an administrative law judge's award of an attorney's fee based on the hourly rate of $261 requested by claimant's Connecticut attorney. The court held that there is no requirement that a claimant must first attempt to find local counsel before hiring an out-of-area attorney. The court also held that the attorney's actual billing rate for comparable work is presumptively appropriate and that there is a preference for awarding attorneys' fees that are commensurate with what an attorney would otherwise have earned from paying clients. *Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009).

The Board rejected claimant's argument that the administrative law judge's reduction of the requested hourly rate from $350 to $250 was inconsistent with the Ninth Circuit's decision in an ERISA attorney's fee case, *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007). In *Welch*, the court held that the plaintiff's evidence was sufficient to meet her burden of demonstrating that her attorney's requested hourly rates were consistent with the prevailing market rate whereas in this case the administrative law judge rationally found that the evidence submitted by claimant's attorney was insufficient to support his assertion that $350 represented the prevailing community rate. *B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107 (2007).

The Board stated that in longshore cases evidence of fee awards in comparable cases is sufficient to establish prevailing market rates in the relevant community, citing *Brown*, 376 F.3d 245, 38 BRBS 37(CRT). The Board thus rejected counsel's reliance on *Student Pub.*

Research Grp. of New Jersey v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988), for the proposition that a micro-market, such as the longshore claimants' bar, cannot set the prevailing community rate. In this case, the administrative law judge addressed and rationally rejected the evidence counsel submitted in support of his petition for an hourly rate of $350, such as the "*Laffey* Matrix" and the "Morones Survey." The Board affirmed the award of an hourly rate of $250 based on awards to counsel by other administrative law judges and the Board and on the complexity of the case. *D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007), *vacated and remanded sub nom. Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

The Ninth Circuit vacated the fees awarded by the Board where claimant's attorney submitted evidence establishing market-based hourly rates in excess of $250 but the Board merely stated that $250 per hour was appropriate. The court stated that "reasonable fees" are to be calculated according to the prevailing market rates and that the "relevant community" is broader than simply prior fee awards under the Act and should include fees attorneys could obtain in other types of cases. As the Board must adequately justify its decisions, the Ninth Circuit stated that, on remand, the Board must define the "relevant community," which may be where the relevant district court sits, and determine a reasonable hourly rate, explaining the basis for this determination. While the Board was not required to re-determine the rate in every case, the court stated it must do so with sufficient frequency to be confident that its fee awards are based on current rather than merely historical market conditions. The burden of proof is on the fee applicant. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

The Ninth Circuit vacated the fee awards in a case where claimant's attorney submitted the *Laffey* matrix, the Morones Survey, and the Crow deposition as evidence that $350 per hour would be an appropriate rate, but the administrative law judge and district director awarded fees based on rates of $250 and $235, respectively, rejecting the evidence presented. The court stated that the adjudicators provided detailed analyses of their rejection of counsel's evidence, but that they erred in summarily relying on prior fee awards under the Act. The court concluded that the administrative law judge and the district director must reconsider the hourly rate issue in light of *Christensen*. Moreover, where the district director reduced the hourly rate due to the lack of complexity of the case, the Ninth Circuit rejected this reasoning and stated that the novelty of the case and the complexity of the issues are considered in arriving at a reasonable number of hours and not in assessing an appropriate hourly rate. The case was remanded for reconsideration of the hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), *vacating in pert. part D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007).

Applying the decisions of the Ninth Circuit in *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), and *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), the Board the Board vacated the decisions of the administrative law judge and the district director which summarily or

invalidly rejected counsel's evidence (Morones Survey; Crow deposition) and remanded the case for reconsideration based on the court's holding that the "relevant community rates" cannot be limited to longshore cases in a particular geographic region, that counsel may present evidence of current market rates in other areas of law to demonstrate an hourly rate for work under the Longshore Act, and that there must be sufficient explanation for any rejection of this evidence. On remand, the administrative law judge and the district director must consider all the market evidence to arrive at a reasonable hourly rate, and thus a reasonable fee, for work performed before each of them. Moreover, consistent with *Christensen* and *Van Skike*, the Board advised that any reduction of the fee due to a lack of complexity in the case must be reflected in the hours awarded and not in the hourly rate. *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

In accordance with the Ninth Circuit's decision in *Christensen,* 557 F.3d 1049, 43 BRBS 6(CRT), the Board held that the relevant community for determining an hourly rate in this case is Portland, Oregon. The Board addressed the documentation provided by the parties concerning the appropriate rate, and determined that use of the average of the rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases in the 2007 Oregon Bar Survey set the applicable "market." Given counsel's years of experience and reputation, the Board determined that counsel's rate should be set at the 90th percentile level of the rates reported in the survey. For 2006, this rate is $308. Thereafter, the rate is to be adjusted by the percentage increase in the Federal locality pay table for Portland: 2007=314.50, 2008=325.50, 2009=$338. *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied,* 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011).

On reconsideration, the Board modified its prior fee award in this case. The Board agreed with claimant that the rates for workers' compensation attorneys identified in the 2007 Oregon Bar Survey should not be used to set a market rate for claimant's counsel in Portland, Oregon, as these rates are either capped by statute or are judicially set. Therefore, the Board set the base market rate for 2006 on the 90th percentile rates for plaintiff general civil and personal injury litigation work. The rates for subsequent years are increased by the percentage increase in the federal locality pay rates for Portland. The rates are: 2006 - $350; 2007 – $357.50; 2008 – $370; 2009 - $384; 2010 - $392. The Board rejected claimant's contention that the fee should be enhanced for delay as, in *Anderson,* 91 F.3d 1322, 30 BRBS 67(CRT), the Ninth Circuit noted that enhancement for delay in payment of a fee award due to appeals of that award is not appropriate. *Christensen v. Stevedoring Services of Am.*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied,* 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011).

In denying employer's motion for reconsideration, the Board rejected employer's contention that the Supreme Court's decision in *Perdue v. Kenny A.*,559 U.S. 542 (2010),

demonstrates error in the Board's finding that claimant's counsel should be compensated in every case by use of the 95th percentile rates in the Oregon Bar Survey. The Board agreed that, generally, one factor like years since admission to the bar, does not control the hourly rate determination in every case in which the attorney participates. However, higher rates generally are warranted for experienced and skilled attorneys, and employer has not demonstrated that use of the 95th percentile rate is inappropriate in this case given claimant's high degree of success. *Christensen v. Stevedoring Services of Am.*, 44 BRBS 75, *denying recon. in* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011).

In this case arising in the Ninth Circuit, the Board stated that counsel was entitled to the market rate in Washington, D.C. Counsel's office is in D.C. and thus his overhead costs are based on market conditions in D.C. Counsel participated in this case only at the appellate level and did not have any contacts with the local area where claimant resides. The Board found this result consistent with *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), as the court stated the "generally" the relevant geographic area is where the district court sits. Pursuant to *Christensen*, the Board rejected the contention that only other longshore rates should be used to set the market rate. The Board stated that counsel demonstrated the appropriateness of using the *Laffey* Matrix to set the rate, as it is used in fee-shifting statutes in the District of Columbia. The Board overruled *D.V. [Van Skike]*, 41 BRBS 84, on the inapplicability of the *Laffey* Matrix in Ninth Circuit cases. Based on counsel's years of practice applied to the Matrix, the Board awarded the requested rate of $460. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

The Fourth Circuit vacated the Board's fee award and remanded for the Board to reconsider what constitutes a reasonable hourly rate for Attorney Gillelan in this case. The court reiterated 12 factors identified by the Supreme Court to consider when addressing the lodestar hourly rates and held that it was an abuse of discretion for the Board to merely state that the prevailing rate in the geographic area is $250, based on a 10-year-old case. On remand, the court advised the Board to consider whether Georgia, where the case was heard by the administrative law judge, or Washington, D.C., where Mr. Gillelan practices, is the appropriate geographic area. The court also instructed the Board to explain how it determines the reasonable rate within that geographic area, noting that the *Laffey* Matrix is a useful tool but is not a binding reference. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

On remand, the Board applied the Fourth Circuit's decisions in *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), and *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988), to conclude that Washington, D.C., is the appropriate geographic market for setting counsel's hourly rate in this case. Counsel is a Washington-based attorney whose first participation in this case was before the Board in Washington, D.C.; counsel did not have any contacts with the local area where claimant was injured (Newport

News) or now resides and the hearing was held (Georgia). The Board further found that counsel adequately justified his request for an hourly rate of $420 by reference to his years of experience, rates he receives from paying clients and the *Laffey* Matrix. Employer's citation to an outdated Altman Weil survey did not address with specificity rates in the D.C. market or counsel's evidence as to an appropriate rate in this case. *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010).

Having found that counsel's fee petition did not provide the Board with sufficient information to determine reasonable hourly rates, the Board granted counsel additional time in which to submit an amended fee petition. Specifically, counsel's fee petition did not contain "the normal billing rate for each person who performed services on behalf of the claimant" as required by 20 C.F.R. §802.203(d)(4). Further, counsel, who is located in the New London/Groton, Connecticut area, did not provide sufficient information regarding the prevailing market rates in the relevant community. The Board stated in this regard that counsel did not demonstrate the appropriateness of the use of the *Laffey* Matrix with respect to attorneys located in Connecticut or other locations other than Washington, D.C. Additionally, counsel did not demonstrate the reliability of the methodology used in the modified version of the *Laffey* Matrix she submitted to the Board to derive market rates for attorneys in various locations other than Washington, D.C., including Hartford, Connecticut. As a point of clarification, the Board stated that the Board's approval of consideration of the *Laffey* Matrix for Washington, D.C.-based attorneys in *Holiday*, 44 BRBS 67, and *Beckwith*, 43 BRBS 156, was based on the version of the Matrix prepared by the United States Attorney's Office and that the "Adjusted *Laffey* Matrix," found at http://www.laffeymatrix.com/see.html, which uses a different method for updating hourly rates, will not be accepted as reliable evidence by the Board. In support of a market rate, claimant's counsel may submit, for example, affidavits of other attorneys in the relevant community who are familiar with counsel's skill and experience attesting to the prevailing rates in that community of comparable attorneys for similar services. Other relevant evidence includes the rates received by counsel for work in cases of similar complexity. The Board rejected employer's contention that the $250 hourly rate awarded by the Board to claimant's attorney in another case is dispositive of the hourly rate determination in this case; while the rates awarded in recent cases are some inferential evidence of the prevailing market rates in the relevant community, the Board must also consider the evidence submitted by the parties regarding prevailing market rates. *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010) (Order).

The Board rejected employer's contention that the administrative law judge erred in awarding an hourly rate of $425 and in failing to hold a "prevailing rate hearing." Rather, when the fee petition is presented to the administrative body before whom the work was performed, the lack of a formal hearing on the prevailing rate is not a violation of due process. The Board affirmed the administrative law judge's hourly rate award, as it was supported by claimant's evidence, the administrative law judge has great discretion in awarding a fee for worked performed before him, and it was rational for him to reject

employer's hourly rate evidence consisting of prior cases issued without a market rate analysis. Accordingly, the Board affirmed the fee award based on an hourly rate of $425. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this DBA case, which is governed by the law of the Ninth Circuit, the Board affirmed the administrative law judge's award of a fee based on an hourly rate of $150 for counsel's law clerk, as that is a reasonable rate, absent any prevailing rate evidence. It also affirmed the administrative law judge's award of a fee based on an hourly rate of $375 for counsel, after his having found that San Francisco constitutes the relevant market and that the requested $475 per hour was excessive, as $375 per hour is supported by the evidence submitted. *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

In a black lung case, the Fourth Circuit reviewed the hourly rate determinations made by the administrative law judge and the Board in their respective fee awards for services performed by attorneys and legal assistants in claimant's counsel's law firm. The court noted the difficulty of establishing a prevailing market rate in the context of the Black Lung and Longshore Acts because of the prohibition on fee agreements. The court held that the agency adjudicators properly determined reasonable hourly rates for the work performed by the four attorneys -- $300, $250, $200, and $175. The court held that prior fee awards constitute evidence of a prevailing market rate that may be considered in black lung and longshore cases. Although prior fee awards do not themselves actually set the market rate and are not controlling authority establishing a prevailing market rate for later cases, they provide "inferential evidence" or a "barometer" of the prevailing market rate. Here, the hourly rate determinations were supported by numerous prior fee awards received by counsel in similar cases by seven different administrative law judges, and were consistent with the rates cited in the Altman Weil Survey for attorneys in the region with comparable experience. The court further held, however, that the adjudicators abused their discretion by approving the requested hourly rate of $100 for the work performed by the legal assistants. Although claimant's counsel submitted evidence of the legal assistants' training, education and experience, counsel did not submit any evidence to support a prevailing market rate for the legal assistants. As the only evidence of a market rate consists of prior fee awards submitted by employer approving a $50 hourly rate for legal assistants employed by claimant's counsel, the court modified the fee awards to reflect an hourly rate of $50 for the legal assistants. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

The Ninth Circuit, noting that identification of the "relevant community" is necessary in order to determine the prevailing market rate and that the "relevant community" in Longshore Act cases should focus on the location where the litigation took place, held that Portland, Oregon, is the "relevant community" for determining the prevailing market rate for claimant's counsel, Mr. Robinowitz, in this case. In reaching this conclusion, the Ninth Circuit noted that both counsel and employer maintain their offices there and that is where the hearing took place. The Ninth Circuit, however, also noted that the issue of "which is

the 'relevant community' need not necessarily be decided anew in each decision awarding fees." *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

The Ninth Circuit vacated the award of a $340 hourly rate for claimant's counsel, Mr. Robinowitz, holding the administrative law judge erred in applying a rate that has "no direct nexus" to the relevant community of Portland, Oregon. The Ninth Circuit stated that the proxy market rate adopted by the administrative law judge, based on five constituent rates from the Altman Weil Survey, bore no direct nexus to Portland because one rate encompassed the entire state of Oregon, while the others appeared to be national in scope. The Ninth Circuit added that if the relevant community had been identified differently, or if reliable data on the attorney's fees in the "relevant community" did not exist, using the Altman Weil data could be permissible. However, in this case, the Oregon State Bar Survey provided information specific to Portland. The Ninth Circuit further found no merit to the reasons provided by Judge Etchingham, in *DiBartolomeo*, implicitly relied on by the administrative law judge in this case, for favoring the Altman Weil Survey over the Oregon State Bar Survey. The court remanded the case for recalculation of a proxy market rate. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

The Ninth Circuit held it was error for the administrative law judge to include, and for the Board to affirm, rates for attorneys practicing state workers' compensation law in a proxy market rate calculation, because the billing rates reported by state workers' compensation lawyers do not necessarily represent market rates that are usable in a lodestar calculation. Citing the Board's decisions in *Christensen*, 44 BRBS 39 and 44 BRBS 75, the court explained that fees paid to workers' compensation claimants' attorneys in Oregon are not based on the market, but instead are typically capped by state law and often paid out of the compensation award, while insurers and employers are able to negotiate discounts with attorneys who defend workers' compensation claims because they supply a steady stream of work. The court remanded the case for recalculation of a proxy market rate. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

In a case arising in the Ninth Circuit, the Board vacated the administrative law judge's award of a $410 hourly rate. The Board stated the administrative law judge appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen*, 557 F.3d at 1054, 43 BRBS at 8(CRT), by dismissing without adequate reasoning all of the evidence offered by claimant's attorneys and adopting rates awarded by other administrative law judges. The Board determined the administrative law judge inaccurately described claimant's counsel evidence, specifically the Burdge declaration, failed to discuss in the proper context the relevant evidence counsel presented in support of his fee request, and erred in considering the complexity of the case when addressing the issue of counsel's hourly rate. The administrative law judge also did not state whether the other OALJ awards were market-based. The Board remanded the case for reconsideration of the hourly rate. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13 (2020).

The Ninth Circuit held the administrative law judge erred by concluding counsel failed to satisfy his initial burden of producing evidence of the prevailing market rate in 2016 for his services. The administrative law judge's concerns went to the weight of this evidence and not its sufficiency. Specifically, the administrative law judge improperly rejected as outdated the 2009 Goldsmith declaration, the 2009 Markowitz affidavit, and 2010 Morones Survey. Evidence of historical market conditions is relevant evidence of current market conditions and is particularly appropriate when it is the most current information available. The court noted that in future cases, counsel is "well advised" to offer more current practitioner fee data. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge must evenhandedly treat the parties' market rate evidence. Both parties relied on the 2012 Oregon State Bar Survey (OSB). Although the administrative law judge rejected all of counsel's evidence as "too dated to be convincing," she relied on the 2012 OSB as "the linchpin of her hourly rate determination." The administrative law judge adjusted the survey data to account for inflation, but she erred by not making similar adjustment to counsel's other market rate evidence. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge erred by rejecting the Goldsmith declaration, Markowitz affidavit, and Morones Survey because they concern rates charged by commercial litigation attorneys. The administrative law judge erred by summarily reasoning counsel's work is not analogous to that of a commercial litigator. The relevant inquiry is whether commercial litigation hourly rates involve similar services by lawyers of reasonably comparable skill, experience and reputation. It is reasonable to distinguish between complex and non-complex litigation. However, commercial litigation is not always complex litigation, and the administrative law judge erred by conflating the two. Moreover, if commercial litigation is more complex than litigation under the Act, then so too is plaintiff civil litigation and litigation handled by general practitioners, which rates the administrative law judge relied on. The court could discern no rational basis for the administrative law judge's elective concerns about the difference between formal and informal litigation and held the administrative law judge may not reject commercial litigation hourly rates as comparable because the rates are higher than those charged by attorneys in other practice areas. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The court distinguished its holding from the Board's rejection of commercial litigation rates in *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). The Board noted commercial litigators delegate certain work to paralegals and less experienced attorneys, whereas this longshore attorney was a sole practitioner. *Christensen*, 43 BRBS at 146. Assuming, arguendo, the persuasiveness of this distinction, it is inapplicable in this

case as counsel in fact delegated work to less experienced attorneys and paralegals. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge erred by rejecting counsel's reliance on the years of experience hourly rates from the 2012 OSB. The OSB reports hourly rates based only on either practice area or years of experience. The administrative law judge rejected as one dimensional counsel's reliance solely on the years of experience rates, but she then preceded to rely on the one dimensional practice area hourly rates. Assuming arguendo, the practice area rates are more probative, the years of experience rates are "at least relevant." *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge erred by placing counsel in the 75th percentile of attorneys in plaintiff civil litigation and general practice. Whether to place counsel in the 75th or 95th percentile is "a judgment call." However, in this case, the administrative law judge improperly relied on her "unwarranted irritation" with a brief counsel filed on remand from the Ninth Circuit on the merits case. Remand is necessary so that the proper percentile placement can be reexamined. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge's inclusion of the 2012 OSB hourly rates for general practice attorneys is not supportable. This fee data is applicable to attorneys who do not devote at least 50 percent of their time to any one practice area. Counsel devotes more than 50 percent of his time to litigation under the Act. The court noted that in 2017 the Oregon State Bar published an updated survey. These updated rates should be taken into account on remand. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The administrative law judge erred by awarding counsel's paralegal a rate of $150. The administrative law judge relied "almost exclusively" on the rates awarded by other ALJs. She also erred by relying on district court awards based on survey data from the western United States as a whole, rather than the relevant market of Portland. Employer did not submit any contrary evidence to the evidence counsel submitted in support of the requested hourly rate of $165. Accordingly, counsel is entitled to the requested hourly rate of $165 for paralegal work. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

Enhancement for Delay

Noting that the Ninth Circuit, under whose jurisdiction the case arises, did not foreclose consideration of an augmented hourly rate in *Hobbs*, 820 F.2d 1528, the Board, based upon the administrative law judge's discussion of the unique circumstances presented in the case (the case had been pending for over six years since the initial formal hearing), concluded that the administrative law judge did not abuse his discretion in awarding counsel an hourly rate greater than that which applied at the time his services were rendered. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

The Board held that in light of the decisions of the Supreme Court in *Jenkins*, 491 U.S. 274, and *Dague*, 505 U.S. 557, when the issue of delay in payment of an attorney's fee is timely raised, the body awarding the fee must consider this factor in awarding the attorney's fee. The fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate counsel for the delay. To the extent that the Board's decisions in *Fisher*, 21 BRBS 323, and *Blake*, 21 BRBS 49, state that it is an abuse of discretion to award an increased rate due to delay, they were overruled. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995).

Adopting the Board's position in *Nelson*, 29 BRBS 90, the Ninth Circuit held that enhancement of an attorney's fee for delay is appropriate under Section 28 of the Act, as general fee shifting law is applicable. The Ninth Circuit, therefore, determined that its holding in *Hobbs* regarding the availability of delay awards was no longer good law. In footnotes, the court questioned whether enhancement would be appropriate in cases of ordinary delay and noted that claimant's counsel cannot recover for delay due to appeals of the fee award, as that would amount to an award of interest which is not authorized. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

When a question of delay in award of an attorney's fee is timely raised, the body awarding the fee must address this factor. The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and payment of the fee. The fact finder may adjust the fee based on historical rate to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant for the delay. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

The Board affirmed, as rational, the administrative law judge's augmentation of the hourly rate awarded to claimant's counsel for services performed in pursuing claimant's claim in 1991, given the six year delay between the date of the initial hearing and the date of the ultimate award of death benefits which was due to employer's successful appeal to the Fourth Circuit which resulted in the remand of the administrative law judge's original award of benefits for reconsideration. The Board relied on the administrative law judge's rejection of employer's contention that augmentation of the attorney fee "punished" employer for its successful appeal, as he properly found that enhancement for delay has been approved without regard to who was responsible for the protracted nature of the litigation and that augmented fees are not punitive in nature, but rather merely reflect economic realities. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

The Board held that requests for fee enhancement filed after an initial fee order issued but within a reasonable time after appeals on the merits of the claim were exhausted must be treated as supplemental fee petitions and not as requests to re-open fee awards which have become final. In this way, the body awarding the fee can give full effect to the law on enhancement of fees when there has been a delay in payment. The body awarding the fee must not only consider if the enhancement request is timely, but whether the delay in payment warrants an enhancement award. In this case, counsel made his request to the administrative law judge shortly after employer paid the fee but before the fee award became enforceable as a result of the completion of the appellate process. Thus, the Board held that he made the request in a timely manner, and it remanded the case for the administrative law judge to consider counsel's enhancement request in the form of a greater hourly rate than that which was previously awarded. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

The Ninth Circuit concurred with the Board's decision in *Bellmer*, 32 BRBS 245 (1998), holding that the administrative law judge has jurisdiction to consider a request for enhancement of an attorney's fee to account for delay in payment if such request is made within a reasonable time after the award is paid. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999).

The Fourth Circuit held that it had jurisdiction to consider claimant's petition for enhancement of an attorney's fee for a six year payment delay. The timing of the various decisions in the case below precluded its consideration of an appeal of the administrative law judge's denial of certain items on claimant's original fee petition and supplemental fee petition until the court issued a final order on the liability issue, requiring payment of attorney's fees by employer. The court remanded the case to the administrative law judge for consideration of the merits of claimant's supplemental fee request, inasmuch as the current law allows enhancement for delay in appropriate cases. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802 (4th Cir. 1999).

The Board modified a portion of the administrative law judge's fee awards to award a fee at a higher hourly rate to account for delay in payment of the attorney's fee. *B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107 (2007).

The Ninth Circuit determined that claimant did not raise the issue of augmentation of the fee for delay with the district director either initially or in his motion for reconsideration. Accordingly, the court held that the issue was properly left unaddressed. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), *aff'g in pert. part and vacating on other grounds D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007).

The Ninth Circuit affirmed the Board's determination that a two-year delay in the payment of an attorney's fee is not long enough to merit a fee enhancement. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

In this case, the district director awarded a "delay enhancement" that, in 2012, awarded 2008 hourly rates for services performed in 2004 and 2005, which the Board affirmed. In an unpublished decision, the Ninth Circuit vacated the Board's affirmance and remanded the case, holding it was erroneous to affirm an award that reflected neither current rates nor present value of historical rates. The court cited cases, applicable to the Act, that "full compensation requires charging

current rates for all work done during the litigation." *Modar v. Mar. Services Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015).

The Act allows, in limited circumstances, an award of interest on costs to account for delay in payment of those costs. *Hobbs*, 820 F.2d 1528 (9th Cir. 1987), deals with post-judgment interest, which is not at issue here. The Ninth Circuit instructed that, on remand, it should be considered whether an award of interest on the costs is appropriate because of the "exceptionally protracted" period this case has been pending. The claim was filed in 2005 and costs were incurred between 2007 and 2016, a period of five to fourteen years ago. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

Compensable Services

In General

An attorney is entitled to compensation for all necessary work performed. The proper test for determining if the attorney's work is necessary is whether, at the time the attorney performs the work in question, he or she could reasonably regard it as necessary to establish entitlement. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); *Cabral v. Gen. Dynamics Corp.*, 13 BRBS 97 (1981); *Marcum v. Director , OWCP*, 12 BRBS 355 (1980) (same standard in Black Lung case); *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984) (time spent reading a memorandum compensable even though it ultimately had no bearing on the outcome); *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984) (unsuccessful settlement negotiations held compensable under this standard).

Claimant's attorney is entitled to a fee award for services rendered on appeal in successfully defending his fee or in establishing employer's liability for his fee. *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). Additionally, if counsel is ultimately successful in procuring compensation benefits under the Act, he is entitled to fees for all services rendered to claimant at each level of the adjudication process, even if he was unsuccessful at a particular level. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc). *See also Davis v. U. S. Dep't of Labor*, 646 F. 2d 609 (D.C. Cir. 1980). Attorney's fees, however, are only to be awarded for time spent and services rendered which are reasonably necessary to protect claimant's interests. *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980); *see also Marcum*, 12 BRBS 355. Thus, claimant's counsel cannot recover a fee for time spent obtaining a lien for another medical insurer, obtaining Medicare, or unsuccessfully attempting to obtain a section 14(f) penalty. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986).

Similarly, while an attorney can be compensated for time spent in conferences with claimant which is necessary and related to the claim, *Morris*, 10 BRBS 375, counsel may not be compensated for his social work or management of claimant's finances. *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981). *See also Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986) (travel expenses to confer with a claimant who was too disabled to come to the attorney's office held not compensable where a face-to-face conference was not necessary).

Where claimant's initial counsel retains co-counsel, claimant's counsel bears the burden of demonstrating the need for co-counsel in order for those services to be compensable.

Abbott v. Director, OWCP, 13 BLR 1-15 (1989). *Compare Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009) (rejecting argument initial counsel did not show need to associate co-counsel on the grounds that the case did not involve co-counsel as only one attorney appeared before the Board on claimant's behalf).

The Board has held that any time spent by claimant's attorney on the applicability of Section 8(f) is not necessary, since the source of claimant's compensation is irrelevant to him. Thus, such time must be disallowed. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984); *Avallone v. Todd Shipyards Corp.*, 13 BRBS 348 (1981); *Lostaunau v. Campbell Indus., Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Monaghan v. Portland Stevedoring Co.*, 11 BRBS 190 (1979); *Johnson v. Bender Ship Repair, Inc.*, 8 BRBS 635 (1978). Thus, where the only issue before the Board is the applicability of Section 8(f), claimant's counsel is not entitled to a fee for his work before the Board regarding this issue. *Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96 (1989); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). Counsel may receive a fee for initial services such as reviewing the notice of appeal in some cases.

However, where employer continues to contest a claim despite the award of Section 8(f) relief, employer may be held liable for claimant's counsel's fee. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Similarly, the Board held in *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981), that the administrative law judge erred in summarily reducing the fee on the basis that the issue was solely Section 8(f) and that employer conceded liability. However, claimant argued that employer did not concede liability until the date of the hearing, and the Board stated that the administrative law judge could not disallow the time expended to prosecute the claim on this basis if employer did not concede liability until the time of the hearing. *Cf. Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002)(McGranery, J., concurring) (employer not an active litigant and thus not liable for the fee); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) (fee for work before the Board and court could not be assessed against employer as it did not participate at those levels, and although due to the operation of Section 8(f), the Special Fund was liable for the benefits awarded, it could not be liable for the fee); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987) (same).

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An administrative law judge may properly disallow time charged by an attorney on the basis it is excessive. *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986).

The Board held that counsel was entitled to a fee for necessary work, since establishing coverage under the Act constitutes a "successful prosecution;" however, in order to be awarded a fee, counsel must file an application conforming to the requirements of 20 C.F.R. §§702.132, 802.203. *Olson v. Healy Tibbits Constr. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds), *remanded*, 928 F.2d 1136 (9th Cir. 1991) (table) (due to claimant's death, court held that underlying coverage issue was moot and remanded fee, finding petition had been filed).

Under the test for determining whether an attorney's work is compensable, *i.e.*, whether, at the time the attorney performed the work in question, he or she could reasonably regard it as necessary to establish entitlement, the Board affirmed the award of time spent interviewing potential but ultimately unused witnesses. *Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989).

The Board remanded the case for the administrative law judge to consider the reasonableness of "wind-up" services performed after the date of filing of the decision. The administrative law judge erred in finding she lacked jurisdiction to consider the compensability of such services as reading the decision and calculating the amount of benefits due. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995); *see also Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court holds status and situs elements not met).

Citing *Nelson*, 29 BRBS 90, the Board vacated the district director's denial of an attorney's fee for all time requested for services performed after the date that employer voluntarily paid benefits, and remanded for the district director to assess the necessity and reasonableness of the work involved in order to discern whether these entries represent "wind-up" services for which counsel may be entitled to a fee payable by employer. *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999). In its decision on reconsideration, the Board distinguished *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), in which employer began paying claimant compensation prior to transfer of the case to OALJ, and claimant was unsuccessful in obtaining any additional compensation; claimant was thus not entitled to a fee for work pursuing the unsuccessful claim. In contrast, in *Everett*, the claimant did not seek any additional compensation without success, but rather obtained a voluntary payment from employer and claimant thereafter was entitled to recover reasonable services necessary to "wind-up" the claim and ensure that claimant received everything to which she was entitled. *Everett v. Ingalls Shipbuilding, Inc.*, 33 BRBS 38 (1999), *aff'g on recon. en banc* 32 BRBS 279 (1998).

The Board rejected employer's contention that the administrative law judge erred in awarding an attorney's fee to more than one attorney. The Board stated there is nothing objectionable to several attorneys participating in the litigation of a single claim, especially

in view of the complexity of the underlying issues. In considering the fee petition, the administrative law judge took specific notice of employer's concern regarding the necessity for more than one attorney and made reductions in the hours requested by the attorneys on the grounds that their efforts were duplicative and/or unnecessary. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

Stating that there is nothing objectionable to several attorneys participating in the litigation of a claim where the complexity of the case or other factors warrant it, the Board rejected the assertion that the administrative law judge erred in awarding an attorney's fee for the time spent by an associate in claimant's counsel's office. The administrative law judge rationally found that it is common to delegate work to an associate and properly reviewed the time charged to determine whether it was reasonable. In addition, the test for compensability of specific charges concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. Here, although claimant was not entitled to reimbursement for the medical charges of Dr. Gunter under Section 7, the Board affirmed the administrative law judge's decision to award counsel a fee for the time spent deposing that physician since employer scheduled the deposition and counsel's presence was reasonable and necessary. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

In a black lung case, the Fourth Circuit held that claimant's counsel is entitled to an attorney's fee for work successfully obtaining an enhanced fee. The court cited *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT), with approval. *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001).

The Board reversed the administrative law judge's award, payable by employer, of the amount of the New Mexico gross receipts tax assessed on the attorney's fee and costs awarded. The Board followed cases involving other federal fee-shifting statutes in which the amount of the tax was disallowed, noting that cases awarding the tax have not provided a rationale for the award. The claimant is not required to pay this tax to his attorney, and thus the amount is not properly shifted to the employer. Moreover, the tax is a part of counsel's overhead and should be included in his hourly rate. The Board also reversed the administrative law judge's award of time spent by claimant's counsel in reading the Act and its annotations as an abuse of discretion since time spent by counsel in familiarizing himself with the Act is not compensable. Time for research specific to this case was affirmed. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting).

The Ninth Circuit held that the district court acted within its discretion in disallowing a fee for hours it found duplicative. The court gave a sufficient explanation of the disallowance, in view of its "superior understanding" of the underlying litigation. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The Fourth Circuit held that the Board did not abuse its discretion in reducing the hours requested for services determined to be "insufficiently related to appellate work." When reconsidering the fee on remand, the court held that the Board need not reconsider the total hours awarded. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

The Board rejected employer's contention that the fee should be reduced due to claimant's limited success as claimant was wholly successful in his claim for benefits. The Board also rejected the contentions related to the administrative law judge's allowance of specific entries and costs as employer did not show that the amounts were duplicative, unreasonable, unnecessary or otherwise disallowable. The Board affirmed the administrative law judge's fee award. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In a black lung case in which the Fourth Circuit reviewed the respective fee awards made by the administrative law judge and the Board, the court noted that both the administrative law judge and the Board thoroughly considered employer's objections to the itemized charges and disallowed several charges on various grounds. The court held that the number of hours awarded was reasonable and well-supported by the record. The court stated that where, as here, the employer lodges only a blanket objection to tasks billed in quarter-hour increments, employer is not entitled to an individualized showing that each itemized task took the precise amount of time claimed. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

The administrative law judge improperly reduced by half the 2.25 hours requested by counsel to file a supplemental brief on remand from the Ninth Circuit on the merits case. Counsel reasonably used the brief to take issue with the administrative law judge's interpretation of the court's decision, rather than addressing the issues called for in her supplemental briefing order. The administrative law judge erred by finding counsel's brief "non-responsive" to her order. Counsel appropriately presented claimant's interpretation of the scope of remand. The hours requested by counsel were neither excessive, redundant nor unnecessary. The administrative law judge's reduction of the time requested is not supportable. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

Fee Petition

The Board initially held that time spent preparing an attorney's fee application is not compensable. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984); *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981); *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980); *Le Batard v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 10 BRBS 317 (1979); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

However, in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), the Ninth Circuit held that a reasonable amount of time spent preparing the fee petition is compensable. The Board subsequently followed *Anderson* and held that claimant was entitled to a reasonable amount of time for work preparing the fee petition as well as responding to employer's objections. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107 (2007).

In *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (en banc), the Board officially overruled *Sproull*, noting that it had been following *Anderson* in all circuits.

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In a fee petition for work performed before the Board, the Board disallowed time spent preparing an attorney's fee petition, stating this work was not reasonably necessary to protect claimant's interests. The Board rejected counsel's reliance on Ninth Circuit cases arising under other statutes, finding they did not stand for the proposition that all fee-shifting statutes require that an attorney be compensated for time spent on the fee petition. Moreover, the Board found that fee petitions in the cases cited were necessarily more detailed than those under the Act. *Sproull v. Stevedoring Services of Am.*, 28 BRBS 271 (1994), *rev'g in part and aff'g in part on recon. en banc* 25 BRBS 100 (1991)(Brown, J., concurring and dissenting), *aff'd in part and rev'd in part on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *see also Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995) (affirming administrative law judge's disallowance of time spent preparing fee petition).

Applying general fee shifting law, the Ninth Circuit held that time spent in preparing fee applications is compensable. The time awarded, however, must be reasonable. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

In a case arising within the jurisdiction of the Ninth Circuit, relying on *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT), the Board vacated and modified the administrative law judge's disallowance of an hour of services requested by counsel for the preparation of an attorney's fee petition. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Board followed *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT), in a case arising in the Fifth Circuit, and modified the fee award to allow a fee for preparation of the fee petition. *Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *see also Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court holds status and situs elements not met).

The Seventh Circuit rejected employer's contention that the administrative law judge erred in awarding fees to counsel for their work defending their fee application and answering interrogatories. The court held that under fee-shifting statutes such as the Act, such work is compensable to ensure that fees awarded under the Act are not diminished by the cost of bringing a legitimate petition for attorney fees. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

The Board modified a fee award to allow a reasonable fee for preparation of the fee petition. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

The Board cited *Thompson v. Gomez*, 45 F.3d 1365 (9th Cir. 1995), as support for its holding that where claimant files a reply to employer's objections to the fee petition and is partially successful in defeating employer's objections to the fee petition, claimant's attorney is entitled to a fee for preparation of his reply that is proportionate to his degree of success in prosecuting his fee petition. The Board modified to award an additional fee. *B.C. [Christensen] v. Stevedoring Services of Am.*, 41 BRBS 107 (2007).

The Board granted a fee for time spent on the initial fee application as it was reasonable. The Board, however, disallowed a fee for 8.1 hours of services spent responding to fee objections. The Board stated that the parties failed to heed the Supreme Court's admonition in *Hensley* that, "A request for attorney's fees should not result in a second major litigation." The Board stated that counsel filed unnecessary pleadings regarding the fee objections and that such work is not reasonably commensurate with the necessary work performed in the appeal. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

In view of the now well-settled law that it is appropriate to award a reasonable fee for time spent preparing a fee petition in a case arising under the Act, the Board overruled that portion of *Sproull*, 28 BRBS 271, that holds to the contrary. The Board thus reversed the administrative law judge's disallowance of 1.1 hours requested by counsel to prepare his

fee petition as, based on the circumstances of the case, that amount of time is reasonable. *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (en banc).

The Board rejected employer's contention that the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S. Ct. 2158 (2015) precludes claimant's counsel's entitlement to an attorney's fee for defending his fee petition in a case governed by Section 28(a). The decision in *Baker Botts* distinguishes Section 330(a)(1) of the Bankruptcy Code from statutes that explicitly provide for fee-shifting, such as Section 28 of the Act. The case law construing a "reasonable fee" applies to all such fee-shifting statutes and it is established that claimant's counsel is entitled to a reasonable fee for the preparation and defense of his fee petition. *Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016) (black lung case).

The Ninth Circuit held that the Supreme Court's decision *Baker Botts*, 135 S. Ct. 2158 (2015), does not prevent an award of an attorney's fee for fee litigation work under the Act. Section 28(a) is a fee-shifting statute that departs from the American Rule and explicitly shifts to the employer the responsibility for payment of a reasonable fee for attorney services if the claimant successfully prosecutes the claim. Under fee-shifting statutes like Section 28(a), courts have consistently held that time spent establishing the entitlement to and amount of an attorney's fee is compensable. *Vortex Marine Constr. v. Grimm*, 878 F.3d 709, 51 BRBS 43(CRT) (9th Cir. 2017).

Collateral Actions

Generally, an attorney is not entitled to compensation under the Longshore Act for time spent in preparing a state workmen's compensation suit, *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Kimble v. Rock Hall Marine Ry., Inc.*, 4 BR8S 389 (1976), or for services performed in securing a third-party recovery for the claimant. *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (table).

However, the administrative law judge may award an attorney's fee for services performed in connection with collateral actions, if counsel shows that the same services and/or their products were necessary to, and in the prosecution of, the federal workers' compensation claim. *Roach v. New York Protective Covering*, 16 BRBS 114 (1984); *Eaddy v. R. C. Herd & Co.*, 13 BRBS 455 (1980); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978); *Johnson v. Treyja, Inc.*, 5 BRBS 464 (1977); *Turner v. New Orleans (Gulfwide) Stevedores*, 5 BR8S 418 (1977), *rev'd on other grounds*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Further, the fact that an attorney is compensated by claimant in the collateral action does not preclude the attorney's receipt of a fee award under the Longshore Act; however, if the work in the collateral action reduces the time the attorney would have had to spend on the federal claim, this must be reflected in the award. *Luke v. Petro-Weld, Inc.*, 8 BRBS 369 (1978), *aff'd in pert. part*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). An attorney may not be paid twice for the same work. *Roach*, 16 BRBS 114. *See Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). A charge incurred in filing and withdrawing a state claim, however, is not recoverable under the Act. *Jenkins v. Maryland Shipbuilding & Dry Dock Co.*, 6 BRBS 550 (1977), *rev'd on other grounds*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).

The Board remanded the case for the district director to address more specifically the compensability of services and costs that employer alleged were expended on claimant's state compensation claim. The Board stated the applicable law for determining the compensability of such services. *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010).

Clerical Work

The professional status of the person performing the work must be kept separate from the type of services the person performs. Time spent on traditional clerical duties by an attorney is not compensable and cannot be included as part of the attorney's reported number of hours. *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), incorporating guidelines set forth in *Marcum v. Director, OWCP*, 12 BRBS 355 (1980) (black lung case).

Likewise, traditional clerical duties performed by clerical employees are not compensable services for which separate billing is permissible but rather must be included as part of the attorney's overhead in setting the hourly rate requested. *See Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). However, if clerical employees perform work which is usually performed by attorneys, law clerks, or paralegals, the time spent by clerical employees performing such services is compensable and separately billable. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile*, 12 BRBS 895.

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The Board rejected employer's objections to specific items in the fee petition for work performed before the Board, stating that the notice and acknowledgment of appeal do not involve clerical tasks, although they may be relatively simple, and that they are necessary to permit Board review of an administrative law judge decision. The Board determined that completion, filing, and review of the notice and the acknowledgment require attorney involvement, and that the charges for these items comply with the regulations. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Seventh Circuit rejected employer's contention that the administrative law judge abused his discretion in awarding an attorney's fee for the attorneys' performance of what employer deemed clerical tasks. The court stated that the administrative law judge had reviewed the entries that employer contended constituted "clerical tasks" and rationally found that counsel's work was more than just clerical as counsel conducted telephone conferences with doctors and reviewed doctor's reports. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

Travel Time

Travel time is compensable where reasonable, necessary and in excess of that normally considered to be part of overhead. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981). The test is one of reasonableness. *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979). *See Swain*, 14 BRBS 657 (travel time between claimant's residence in Bath, Maine and counsel's office in Boston denied); *Doty v. Farmers Export Co.*, 12 BRBS 764 (1980) (case remanded where administrative law judge denied travel time from Galveston to Houston because counsel had an office in Houston). Factors to be considered include claimant's ability to travel and the availability of competent counsel in claimant's area. In *Jaqua v. Pro Football, Inc.*, 12 BR8S 572 (1980), the Board held travel time from Oregon to Washington, D. C. to attend a hearing was compensable where the administrative law judge requested that the hearing be held in Washington. The Board also held that travel time should not be reduced to a rate lower than counsel's usual rate. *Id.*

An attorney can be compensated for time spent in conferences with claimant which is necessary and related to the claim. *Morris*, 10 BRBS 375. *Cf. Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986) (travel expenses to confer with a claimant who was too disabled to come to the attorney's office held not compensable where a face-to-face conference was not necessary). However, an attorney may not be compensated for his social work or management of claimant's finances. *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981).

See Section 28(d) for cases regarding travel expenses.

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Fees for travel time for counsel may be awarded only where the travel is necessary, reasonable and in excess of that normally considered to be a part of overhead. The Board affirmed the administrative law judge's award of 2.5 hours of travel time to Washington, D.C., for a deposition, but held counsel could not receive travel time to Hampton, Virginia, where the hearing was held and which was nearby. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. The administrative law judge acted within his discretion in finding that counsel's travel from Norfolk, Virginia, to the hearing in Hampton, Virginia, was local in nature, and not in excess of that normally considered overhead for the Tidewater region. *Ferguson v. S. States Coop.*, 27 BRBS 16 (1993).

In a black lung case, the Board held that the administrative law judge properly held employer liable for mileage costs claimant's counsel incurred when attending two depositions as he found the travel expenses necessary in establishing claimant's case. *Branham v. E. Associated Coal Corp.*, 19 BLR 1-1 (1994).

The Board affirmed the administrative law judge's finding that counsel's travel time between Atlanta and Savannah was reasonable, necessary and in excess of normal office overhead. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The Board held that although the administrative law judge had the discretion to raise *sua sponte* the issue of the compensability of a fee and costs for counsel's travel time and expenses, he erroneously failed to provide the parties with reasonable notice of this issue and to afford claimant the opportunity to present evidence relevant to the compensability of the travel charges. The Board also held that there must be a factual foundation supporting an administrative law judge's disallowance of counsel's travel time and expenses on the basis that claimant retained counsel from outside his locality despite the availability of competent counsel within his locality. In this case where there was no evidence that claimant could have retained local counsel, the Board reversed the administrative law judge's disallowance of counsel's travel time and expenses, and remanded for a determination of the reasonableness and necessity of the specific charges. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

The administrative law judge and district director reduced the time claimed for attorney travel between Louisiana and claimant's home in Mississippi. The Board vacated the implicit findings of the administrative law judge and district director that competent, experienced local counsel was available to claimant because they were unsupported by any factual foundation. The Board noted that neither the administrative law judge nor the district director took judicial notice of any information relevant to this issue, made findings regarding the explicit geographic area constituting claimant's locality, or cited any information regarding attorneys available in that area; in this regard, Hurricane Katrina may have affected availability of counsel. The Board thus held that as there is no evidence that claimant could have retained local counsel, claimant's decision to retain counsel from Louisiana is not unreasonable and counsel is therefore entitled to reimbursement of her reasonable travel time and expenses. The Board instructed the administrative law judge and district director to determine, on remand, the reasonableness and necessity of each of counsel's specific travel charges. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

Attorney's Fees for Work before the Board

The same considerations generally apply in awarding a fee pursuant to the Board's regulation, 20 C.F.R. §802.203, as in other fee awards. As with Section 702.132, the fee must be approved and shall be reasonably commensurate with the necessary work performed, taking into account the quality of the representation, complexity of the case, amount of benefits awarded, and if the fee is to be assessed against claimant, claimant's financial circumstances. 20 C.F.R. §802.203(e). The Board's requirements for a fee petition are also similar but are more detailed in some respects. With regard to the professional status of each person performing work, the regulation states that if the person is not an attorney, the application must include a "definition" of the person's professional status, including a statement of his or her professional training, education and experience. With regard to attorneys, it must include a statement that the attorney was a member of the bar in good standing at the time the work was performed. 20 C.F.R. §802.203(d)(2). As to the number of hours, the Board's regulation states that they should be in quarter-hour increments. 20 C.F.R. §802.203(d)(3). On the hourly rate, similarly to Section 702.132, the regulation states that claimant must list the "normal billing rate" for each person performing services, but it goes on to say that the rate awarded "shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status." 20 C.F.R. §802.203(d)(4)

Section 802.203(c) provides that a fee petition *may* be filed within 60 days of the date a decision issues. This regulation does not provide a sanction where claimant does not file within 60 days. The employer has 10 days from receipt of claimant's fee request in which to respond. 20 C.F.R. §802.203(g). However, effective March 1, 2017, the Board issued a policy that all attorney fee petitions and responses thereto shall be filed within the timeframes set forth in the Section 802.203(c), (g). The Board will not consider an untimely fee petition or response thereto, unless it is accompanied by a request to accept the untimely filing that sets forth the reasons for the request.

The factors relevant in general to attorney's fee awards in other federal fee-shifting statutes are applicable to the Board's fee orders as they are to the awards of the administrative law judge or district director. *See* Relevant Factors, *supra.*

The Board awards an attorney's fees where claimant is successful in prosecuting an appeal or in defending against an appeal by an opposing party. *See* "Successful Prosecution," *infra*. Thus, the Board has refused to consider an attorney's fee petition where the case has been remanded for further findings until after the administrative law judge issues a decision on remand. *Whyte v. Gen. Dynamics Corp.*, 8 BRBS 706 (1978); *see Eckstein v. Gen. Dynamics Corp.*, 11 BRBS 781 (1980). Similarly, the Board has refused to consider the fee petition until after it issues its decision on reconsideration. *Minick v. Levin Metals Corp.*, 15 BRBS 110 (1982). Additionally, if the Board remands the case for a redetermination of issues which could affect the amount of benefits, the Board may not

consider the attorney's fee application for work performed before the Board until the amount of benefits is decided. *Perkins v. Marine Terminals Corp.*, 16 BRBS 84 (1984).

If claimant successfully appeals the termination of a Section 8(c)(21) award and is partially successful in defending employer's appeal to the Board, claimant is entitled to an attorney's fee award on both appeals. *Bouchard v. Gen. Dynamics Corp.*, 14 BRBS 839 (1982). But, where a case before the Board involves appeals by both claimant and employer and claimant is only successful in defending employer's appeal, the Board has awarded attorney's fees only for the successful defense. *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *aff'd in part, rev'd in part on other grounds sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (1983).

Work performed by claimant's counsel on the merits of Section 8(f) is not compensable. *Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96 (1989); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). However, the Board has awarded fees for review of a notice of appeal and similar minimal services necessary to oversee the litigation.

Relying on the holding in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), that where counsel is ultimately successful in procuring compensation for claimant, he is entitled to a fee for all services rendered to claimant at each level of the adjudication process, even if he was unsuccessful at a particular level, the Board held that counsel can receive a fee for work before the Board on an appeal which was dismissed and remanded for consideration of modification under Section 22. The Board held that claimant's success in obtaining an award of benefits on modification accorded claimant's counsel the economic benefit requisite to establish a successful prosecution of the claim, and reasoned that claimant's counsel could reasonably have regarded his work before the Board as necessary at the time the work was performed. *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993) (black lung case), *overruling Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

The Board will permit a fee for claimant's work on appeal in attorney's fee cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). In *Jarrell*, the Board also approved a $90 hourly rate and quarter-hour billing method.

The attorney's fee has been reduced when the Board finds the issue was not particularly complex as evidenced by the brevity of both employer's and claimant's briefs. *Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984); *Smelcer v. Nat'l Steel & Shipbuilding Co.*, 16 BRBS 117 (1984); *see Hill v. Nacirema Operating Co.*, 12 BRBS 119 (1980). The Board has reduced the attorney's hourly rate based on a finding that, of several issues raised in the appeal, only one issue required extensive research or discussion. *Smith v. Aerojet Gen.*

Shipyards, 16 BRBS 49 (1983). The Board has also awarded a lower attorney's fee than that requested where the brief of claimant's attorney failed to adequately discuss the issues before the Board and thus, was of limited value. *Morgan v. Marine Corps Exch.*, 14 BRBS 784 (1982).

While many of the fee awards in early cases summarily reduce the hourly rate or the overall fee, it is now clear that the Board must fully explain its fee awards in accordance with its regulation and the relevant factors. *See Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). Hourly rate determinations must be based on market rates in the relevant community, and the Board must explain its findings regarding the appropriate rate. *Id.*

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The Board rejected employer's objection and found that a $125 hourly rate was reasonable for work performed before it considering the length of the record and complexity of the issues. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

The Board held that $125, rather than $150, represented a reasonable hourly rate for the services rendered by a Boston-area attorney in connection with an appeal to the Board. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

Where a claimant was successful in defending against employer's appeal, the Board held his counsel was entitled to a fee for work before the Board, but reduced the hourly rate from $150 to $125. *Cutting v. Gen. Dynamics Corp.*, 21 BRBS 108 (1988).

Where, as here, claimant appealed twice to the Board, and prevailed only on the first appeal, claimant's attorney was entitled to a fee for only the work performed before the Board for the first appeal. *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988).

The Board awarded an attorney's fee for work on appeal, where claimant alleged entitlement to compensation and medical benefits and successfully established entitlement to medical benefits. The Board affirmed a finding that compensation was time-barred, but reversed the finding of no causation and therefore awarded medical benefits. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

Where the Board affirmed claimant's entitlement to benefits on the second appeal, employer was liable for attorney's fees for work performed before the Board on the first appeal. *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989).

The Board found an hourly rate of $152.17 excessive and reduced it to $125. It also disallowed time spent preparing the petition for an award of an attorney's fee for work on the appeal. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The Board held that claimant's counsel was not entitled to a fee for work performed before the Board where the only issue before the Board involved Section 8(f), *i.e.*, whether employer or the Special Fund was liable for benefits. *Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96 (1989).

The Board reduced an hourly rate of $150 to $125. The Board also held that to the extent that a request for photocopying expenses is found to be reasonable and necessary to the work performed before the Board, these expenses will not be automatically disallowed on the ground that such expenses are part of office overhead. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989) (Order).

The Board held that a requested hourly rate of $250 for work performed before it was excessive considering the circumstances in the case, and reduced it to $125. The entire award was made contingent upon an award of benefits on remand. *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting).

Claimant's counsel was entitled to a fee for work performed before the Board as her attorney successfully defended the award on appeal. The Board allowed $150 per hour, noting that employer did not object to this rate, and stated that as this rate accounted for all relevant factors, counsel was not entitled to a bonus. The Board also found that all the work performed was necessary. As the request for costs was not itemized, however, the Board stated it could not review the request and required counsel to supplement the fee petition in order for the Board to consider the request for costs. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Claimant's counsel was entitled to a fee for successfully defending the award on appeal. The Board disallowed time pre-dating the notice of appeal, and awarded a fee based on an hourly rate of $150. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Because the Board affirmed the administrative law judge's award of benefits, and employer did not object to the fee petition, the Board awarded claimant's counsel a fee of $697.50 for 7.75 hours at $90 per hour, finding the fee reasonably commensurate with the necessary work done. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

"Unit" or "increment" billing, which encompasses all services associated with an identified task, including all work performed by the attorney, paralegal and support staff, does not satisfy the requirements of the regulation at 20 C.F.R. §802.203(d). Specifically, it does

not relate to actual work performed on a particular date or to the services of a specified person. Further, it makes it impossible to discern whether counsel is billing for traditional clerical work, which is not separately compensable. The Board held it would not award a fee for work performed before it for time charged using this billing method. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993).

The Board rejected employer's argument that it should base its fee award in this case on an unpublished court of appeals fee order in a different case or on a decision rendered by an administrative law judge in another case, as it noted that fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. Additionally, the Board rejected employer's objection to the quarter-hour minimum billing method as the regulation at 20 C.F.R. §802.203 approves this method, and it concluded that hourly rates of $125 and $150 were reasonable. The Board also rejected employer's objections to specific items in the fee petition, stating that work relating to the notice and acknowledgment of appeal did not involve clerical tasks, although they may be relatively simple, and that they are necessary to permit Board review of an administrative law judge decision. The Board determined that completion, filing, and review of the notice and the acknowledgment require attorney involvement, and that the charges for these items complied with the regulations. Further, the Board determined that 6 hours of attorney time to prepare for oral argument was not excessive given the novelty and complexity of the issues in this case. Finally, the Board held claimant's counsel was entitled to an attorney's fee due to a successful appeal, rejecting employer's argument that it did not oppose the claim as it filed a brief seeking affirmance of the administrative law judge's award of benefits to the Special Fund rather than to claimant's estate. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994).

The Board disallowed time for correspondence with doctors and a pharmacy as this work was related to ongoing medical treatment, and counsel must seek approval from the district director, who oversees medical care. The Board also disallowed time spent in correspondence with the administrative law judge and with "DOL" as this was not time before the Board. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (en banc) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993)(McGranery, J., dissenting) (decision on remand), *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Board disallowed time spent preparing an attorney's fee petition, finding this service was not reasonably necessary to protect claimant's interests. The Board rejected counsel's reliance on Ninth Circuit cases arising under other statutes and under bankruptcy law, as they do not stand for the proposition that all fee-shifting statutes require that an attorney be compensated for time spent on the fee petition. Moreover, fee petitions in the cases cited are necessarily more detailed than those under the Act. *Sproull v. Stevedoring Services of Am.*, 28 BRBS 271 (1994), *rev'g in part and aff'g in part on recon. en banc* 25 BRBS 100 (1991) (Brown, J., concurring and dissenting), *aff'd in part and rev'd in part on other*

grounds sub nom. Sproull v. Director, OWCP, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996). *Cf. Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006) (reasonable time preparing fee petition is compensable).

The Ninth Circuit held that the Board provided an adequate justification for its reduction of the $175 hourly rate requested by claimant's attorney on the ground that such rate was "excessive" for the work performed. *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995).

The Board held claimant entitled to an attorney's fee payable by employer for work performed before the Board where he successfully prosecuted his claim and defended against employer's appeal. The Board awarded the fee at the requested hourly rate of $150. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

Claimant's counsel was entitled to a fee for work performed before the Board, as his attorney successfully defended the award on appeal. The Board awarded the entire amount requested, because employer's allegations that the petition entries were unrelated to the work performed were unfounded. *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154, 159 (1996).

Because the Act requires a showing of success on the merits before any attorney's fee becomes appropriate, a claimant who successfully defends on appeal the approval of the withdrawal and voluntary dismissal of his claim has not yet established entitlement to benefits so as to entitle counsel to an award of attorney's fees. *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997) (Order).

The Board awarded claimant's counsel an attorney's fee for work on appeal defending his award of housekeeping assistance for a specified period. Even though the award was later terminated on modification, the award for the initial period was not overturned and employer did not pursue its appeal of the initial award after modification proceedings ended. *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring).

The Board awarded claimant's counsel a fee at the hourly rate of $200, rather than the $300 rate requested, for work performed before the Board, as that was the rate the Board previously awarded in the geographic area for similarly complex cases. The fee was contingent upon claimant's obtaining an award of benefits on remand. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

The Board rejected employer's assertion that claimant's counsel's request for an attorney's fee for services performed before the Board was inadequate. Although the fee petition did not specifically state who performed the work or the qualifications of such attorney, the petition was signed by lead counsel who filed the brief before the Board and who solely litigated the case before the administrative law judge, and this attorney has litigated

numerous cases before the Board. As claimant successfully defended his award against employer's appeal, the Board awarded claimant's counsel a fee. *Marinelli v. Am. Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board rejected employer's objection to the requested hourly rate and awarded a fee based on an hourly rate of $200. However, because of claimant's limited success on appeal, the Board approved 8.65 hours of services, representing half of the requested time. Consequently, the Board awarded claimant's counsel a fee of $1,730 for work performed before it. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998), *aff'g on recon en banc* 32 BRBS 165 (1998).

In this "borrowed employee" case, the Board denied the attorney's fee petition submitted by counsel for Trinity, a borrowing employer, for work performed before the Board, citing *Jourdan v. Equitable Equip. Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999). The question of whether TESI, the lending employer, is liable to Trinity for its attorney's fees is not a "question in respect of a claim" within the meaning of Section 19(a) of the Act. Moreover, neither Section 28 nor any other provision of the Act provides for an award of an attorney's fee to an employer. *Ricks v. Temporary Emp't Services, Inc.*, 33 BRBS 81 (1999), *rev'd on other grounds sub nom. Temporary Emp't Services v. Trinity Marine Grp., Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Board held that employer cannot be held liable for claimant's attorney's fee for work performed before the Board in a case where the Special Fund was paying benefits and Director sought modification. Employer was excluded from the modification proceedings by the administrative law judge. Employer did not participate in the Director's appeal before the Board, and claimant argued in response to the Director's appeal for employer's continued exclusion from the case. As employer was not an active litigant and did not contest the compensability of the claim, it could not be liable for work on appeal even though it had an economic interest in the outcome in the form of a change in the Section 44 assessment. The Board held that claimant is liable for his attorney's fee as a lien on his compensation, pursuant to Section 28(c). In this regard, the Board applied 20 C.F.R. §802.203(e) which states that a fee should be "reasonably commensurate with the necessary work done." The Board disallowed a fee for work performed on an unsuccessful motion to dismiss for lack of standing and on the response brief, as the status quo was not maintained by virtue of the Board's decision on the merits. Claimant was held liable for the necessary work for telephone calls and conferences with client. *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002)(McGranery, J., concurring).

The Board granted claimant's motion for reconsideration of the amount of the attorney's fee for which claimant is liable pursuant to Section 28(c). Although claimant was

unsuccessful before the Board, on remand the administrative law judge again awarded claimant permanent total disability benefits. Claimant's ultimate success entitled his attorney to a fee for all necessary work performed at each stage of the adjudicatory process. The Board awarded the entire fee requested, taking into account claimant's ability to pay the fee, as all the work counsel performed before the Board was necessary in that he advocated a position protective of his client's interest in this novel case. *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 133 (2002) (McGranery, J., concurring), *modifying in part on recon.* 36 BRBS 69 (2002).

The Ninth Circuit vacated the fee awarded by the Board where claimant's attorney submitted evidence establishing market-based hourly rates in excess of $250 but the Board merely stated that $250 per hour is appropriate. The court stated that "reasonable fees" are to be calculated according to the prevailing market rates and that the "relevant community" is broader than simply prior fee awards under the Act and should include fees attorneys could obtain in other types of cases. As the Board must adequately justify its decisions, the Ninth Circuit stated that, on remand, the Board must define the "relevant community," which may be where the relevant district court sits, and determine a reasonable hourly rate, explaining the basis for this determination. While the Board was not required to re-determine the rate in every case, the court stated it must do so with sufficient frequency to be confident that its fee awards are based on current rather than merely historical market conditions. The burden of proof is on the fee applicant. The court also affirmed the Board's determination that a two-year delay in the payment of an attorney's fee is not long enough to merit a fee enhancement. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

In accordance with the Ninth Circuit's decision in *Christensen,* 557 F.3d 1049, 43 BRBS 6(CRT), the Board held that the relevant community for determining an hourly rate in this case is Portland, Oregon. The Board addressed the documentation provided by the parties concerning the appropriate rate, and determined that use of the average of the rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases in the 2007 Oregon Bar Survey set the applicable "market." Given counsel's years of experience and reputation, the Board determined that counsel's rate should be set at the 90th percentile level of the rates reported in the survey. For 2006, this rate is $308. Thereafter, the rate is to be adjusted by the percentage increase in the Federal locality pay table for Portland: 2007=314.50, 2008=325.50, 2009=$338. *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011).

On reconsideration, the Board modified its prior fee award in this case. The Board agreed with claimant that the rates for workers' compensation attorneys identified in the 2007 Oregon Bar Survey should not be used to set a market rate for claimant's counsel in Portland, Oregon, as these rates are either capped by statute or are judicially set. Therefore,

the Board set the base market rate for 2006 on the 90th percentile rates for plaintiff general civil and personal injury litigation work. The rates for subsequent years are increased by the percentage increase in the federal locality pay rates for Portland. The rates are: 2006 - $350; 2007 – $357.50; 2008 – $370; 2009 - $384; 2010 - $392. The Board rejected claimant's contention that the fee should be enhanced for delay as, in *Anderson,* 91 F.3d 1322, 30 BRBS 67(CRT), the Ninth Circuit noted that enhancement for delay in payment of a fee award due to appeals of that award is not appropriate. *Christensen v. Stevedoring Services of Am.*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied,* 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP,* 445 F. App'x 912 (9th Cir. 2011).

In denying employer's motion for reconsideration, the Board rejected employer's contention that the Supreme Court's decision in *Perdue v. Kenny A.,* 559 U.S. 542 (2010), demonstrates error in the Board's finding that claimant's counsel should be compensated in every case by use of the 95th percentile rates in the Oregon Bar Survey. The Board agreed that, generally, one factor like years since admission to the bard, does not control the hourly rate determination in every case in which the attorney participates. However, higher rates generally are warranted for experienced and skilled attorneys, and employer has not demonstrated that use of the 95th percentile rate is inappropriate in this case given claimant's high degree of success. *Christensen v. Stevedoring Services of Am.*, 44 BRBS 75, *denying recon. in* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011).

In this case arising in the Ninth Circuit, the Board stated that counsel is entitled to the market rate in Washington, D.C. Counsel's office is in D.C. and thus his overhead costs are based on market conditions in D.C. Counsel participated in this case only at the appellate level and did not have any contacts with the local area where claimant resides. This result is not precluded by *Christensen,* 557 F.3d 1049, 43 BRBS 6(CRT), as the court stated that "generally" the relevant geographic area is where the district court sits. The Board rejected the contention that only other longshore rates should be used to set the market rate, pursuant to *Christensen.* The Board stated that counsel demonstrated the appropriateness of using the *Laffey* Matrix to set the rate, as it is used in fee-shifting statutes in the District of Columbia. The Board overruled *D.V. [Van Skike],* 41 BRBS 84, on the inapplicability of the *Laffey* Matrix in Ninth Circuit cases. Based on counsel's years of practice applied to the Matrix, the Board awarded the requested rate of $460. The Board rejected employer's contention that counsel was not entitled to a fee for work performed before the Board because he did not successfully prosecute the case and obtained only a procedural victory, holding counsel successfully defended the award against employer's appeal, the effect of which was to keep the vocational rehabilitation award in place. This is not merely a procedural victory without monetary consequences. The Board granted a fee for time spent on the initial fee application as it was reasonable, but disallowed a fee for 8.1 hours of services spent responding to fee objections. The Board stated that the

parties failed to heed the Supreme Court's admonition in *Hensley* that, "A request for attorney's fees should not result in a second major litigation." Counsel here filed unnecessary pleadings regarding the fee objections and such work is not reasonably commensurate with the necessary work performed in the appeal. The Board rejected employer's contention that claimant's counsel was not entitled to an attorney's fee because he was co-counsel, the necessity of which was not established. Although claimant had a different attorney at the district director level, this attorney did not appear before the Board and thus did not seek a fee. Thus, this is not a "co-counsel" case. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

The Fourth Circuit vacated the Board's fee award and remanded for the Board to reconsider what constitutes a reasonable hourly rate for Attorney Gillelan in this case. The court reiterated 12 factors identified by the Supreme Court to consider when addressing the lodestar hourly rates and held that it was an abuse of discretion for the Board to merely state that the prevailing rate in the geographic area was $250, based on a 10-year-old case. On remand, the court advised the Board to consider whether Georgia, where the case was heard by the administrative law judge, or Washington, D.C., where Mr. Gillelan practices, is the appropriate geographic area. The court also instructed the Board to explain how it determines the reasonable rate within that geographic area, noting that the *Laffey* Matrix is a useful tool but is not a binding reference. With regard to the compensable hours, the court held that the Board did not abuse its discretion in reducing the hours requested for services determined to be "insufficiently related to appellate work." When reconsidering the fee on remand, the court held that the Board need not reconsider the total hours awarded. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

On remand, the Board applied the Fourth Circuit's decisions in *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), and *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988), to conclude that Washington, D.C., is the appropriate geographic market for setting counsel's hourly rate in this case. Counsel is a Washington-based attorney whose first participation in this case was before the Board in Washington, D.C.; counsel did not have any contacts with the local area where claimant was injured (Newport News) or now resides and the hearing was held (Georgia). The Board further found that counsel adequately justified his request for an hourly rate of $420 by reference to his years of experience, rates he receives from paying clients and the *Laffey* Matrix. Employer's citation to an outdated Altman Weil survey did not address with specificity rates in the D.C. market or counsel's evidence as to an appropriate rate in this case. *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010).

Having found that counsel's fee petition did not provide the Board with sufficient information to determine reasonable hourly rates, the Board granted counsel additional time in which to submit an amended fee petition. Specifically, counsel's fee petition did not contain "the normal billing rate for each person who performed services on behalf of

the claimant" as required by 20 C.F.R. §802.203(d)(4). Further, counsel, who is located in the New London/Groton, Connecticut area, did not provide sufficient information regarding the prevailing market rates in the relevant community. The Board stated in this regard that counsel did not demonstrate the appropriateness of the use of the *Laffey* Matrix with respect to attorneys located in Connecticut or other locations other than Washington, D.C. Additionally, counsel did not demonstrate the reliability of the methodology used in the modified version of the *Laffey* Matrix she submitted to the Board to derive market rates for attorneys in various locations other than Washington, D.C., including Hartford, Connecticut. As a point of clarification, the Board stated that the Board's approval of consideration of the *Laffey* Matrix for Washington, D.C.-based attorneys in *Holiday*, 44 BRBS 67, and *Beckwith*, 43 BRBS 156, was based on the version of the Matrix prepared by the United States Attorney's Office and that the "Adjusted *Laffey* Matrix," found at http://www.laffeymatrix.com/see.html, which uses a different method for updating hourly rates, will not be accepted as reliable evidence by the Board. In support of a market rate, claimant's counsel may submit, for example, affidavits of other attorneys in the relevant community who are familiar with counsel's skill and experience attesting to the prevailing rates in that community of comparable attorneys for similar services. Other relevant evidence includes the rates received by counsel for work in cases of similar complexity. The Board rejected employer's contention that the $250 hourly rate awarded by the Board to claimant's attorney in another case is dispositive of the hourly rate determination in this case; while the rates awarded in recent cases are some inferential evidence of the prevailing market rates in the relevant community, the Board must also consider the evidence submitted by the parties regarding prevailing market rates. *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010) (Order).

As claimant successfully defended his vocational rehabilitation plan, the Board awarded claimant's counsel a fee for work performed before the Board in that appeal. However, as the Board vacated its affirmance of the administrative law judge's total disability award by way of a summary decision, and remanded the case for further consideration, the Board denied a fee in that appeal, stating that claimant's counsel may reapply for a fee if he is successful before the administrative law judge on remand. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013) (decision on recon.).

In a black lung case, the Fourth Circuit reviewed the hourly rate determinations made by the administrative law judge and the Board in their respective fee awards for services performed by attorneys and legal assistants in claimant's counsel's law firm. The court noted the difficulty of establishing a prevailing market rate in the context of the Black Lung and Longshore Acts because of the prohibition on fee agreements. The court held that the agency adjudicators properly determined reasonable hourly rates for the work performed by the four attorneys -- $300, $250, $200, and $175. The court held that prior fee awards constitute evidence of a prevailing market rate that may be considered in black lung and longshore cases. Although prior fee awards do not themselves actually set the market rate and are not controlling authority establishing a prevailing market rate for later cases, they

provide "inferential evidence" or a "barometer" of the prevailing market rate. Here, the hourly rate determinations were supported by numerous prior fee awards received by counsel in similar cases by seven different administrative law judges, and were consistent with the rates cited in the Altman Weil Survey for attorneys in the region with comparable experience. The court further held, however, that the adjudicators abused their discretion by approving the requested hourly rate of $100 for the work performed by the legal assistants. Although claimant's counsel submitted evidence of the legal assistants' training, education and experience, counsel did not submit any evidence to support a prevailing market rate for the legal assistants. As the only evidence of a market rate consists of prior fee awards submitted by employer approving a $50 hourly rate for legal assistants employed by claimant's counsel, the court modified the fee awards to reflect an hourly rate of $50 for the legal assistants. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

In a black lung case, the Fourth Circuit held that in their respective fee awards, the administrative law judge and the Board did not abuse their discretion by approving counsel's requested hours which were billed in quarter-hour minimum increments. The court noted that quarter-hour billing method complies with 20 C.F.R. §802.203(d)(3), and that there is no authority prohibiting this method in black lung cases. The court rejected employer's argument that there was no proof that it took 15 minutes to perform each itemized task, holding that such a requirement would improperly escalate a fee applicant's present burden to show that the rate claimed and the hours worked were reasonable. The court stated, however, that counsel's use of quarter-hour minimum billing does not relieve the adjudicator of ensuring that excessive fees are not awarded. *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013).

Fee Liability—In General

Prior to the 1972 Amendments to the Longshore Act, there was no provision for assessing an attorney's fee award against an employer. Thus, after the amendments, there were numerous cases in which employers argued they could not be held liable for attorney's fees on claims filed prior to the amendments or on claims involving injuries which occurred prior to the Amendments. The courts and the Board, however, rejected the argument that such fee awards represented an impermissible retroactive application of the Act and allowed such awards. *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974); *LaPlante v. Gen. Dynamics Corp.*, 15 BRBS 83 (1982); *Bell v. Calumet Harbor Terminals, Inc.*, 6 BRBS 307 (1977). An attorney's fee award, however, could only be assessed against the employer for legal services incurred after the effective date of the 1972 Amendments, *Lombardi v. Gen. Dynamics Corp.*, 6 BRBS 786 (1977); *Faulkner v. U. S. Navy Exch.*, 2 BRBS 201 (1975); *Director, OWCP v. Gibbs*, 1 BRBS 40 (1974), and any fee for legal services prior to the effective date of the Amendments had to be paid by claimant. *See Walker v. Atl. & Gulf Stevedores, Inc.*, 1 BRBS 338 (1974).

Section 28(a),(b), provide a specific exception to the "American Rule," under which a party is responsible for the payment of its own attorney. Unless the specific requirements of these subsections are met, employer cannot be held liable. *See, e.g. R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008) (holding statutory requirements are not met and rejecting claimant's contention that employer should be held liable for his attorney's fees pursuant to FRCP 11(c)).

As these subsections do not provide for the liability of the Special Fund, it cannot be held liable for fees under Section 28 in cases where the Special Fund is liable for benefits. *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982), *rev'g Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 12 BRBS 582 (1980); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980). On some facts, the result of these holdings is that claimant is liable for the fee. In *Holliday*, the court held that the fee for work before the Board and court could not be assessed against employer as it did not participate at those levels. Although due to the operation of Section 8(f), the Special Fund was liable for the benefits awarded, it could not be liable for the fee. The court noted that the Act specifically provides for claimant's liability in some instances. *See Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). However, where employer continues to contest a claim despite the award of Section 8(f) relief, employer may be held liable for claimant's counsel's fee. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Finch v. Newport*

News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989); *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981).

If counsel is ultimately successful in procuring compensation for claimant, he is entitled to a fee for all services rendered to claimant at each level of the adjudication process, even if he was unsuccessful at a particular level. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). *See also Davis v. U. S. Dep't of Labor*, 646 F. 2d 609 (D.C. Cir. 1980). In *Hole*, the court held that as claimant successfully prosecuted his claim before the court, obtaining reversal of the Board's decision, he was entitled to a fee for work before the Board as well as the court. *Accord Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc) (rejecting employer's argument that as claimant was not successful while his claim was before the first administrative law judge, he was not entitled to a fee for those services).

The Board applied the principle from *Hole* in a black lung case where claimant's appeal of a denial of benefits was dismissed and the case was remanded for consideration of modification under Section 22, holding that success in obtaining an award of benefits on modification accorded claimant's counsel the economic benefit requisite to establish a successful prosecution of the claim and thus counsel was entitled to an attorney's fee for work before the Board. The Board reasoned that claimant's counsel could reasonably have regarded his work before the Board as necessary at the time the work was performed. *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993), *overruling Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

There is no requirement that the claim go to a formal hearing to entitle claimant to an attorney's fee award, *Thornton v. Beltway Carpet Serv.*, 16 BRBS 29 (1983), and the employer is still liable for the attorney's fee even though there was no formal compensation order embodying the award; the Board rejected the argument that claimant had not been "awarded" benefits where the claims examiner issued a memorandum which contained the parties' agreement and his recommendations. *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980). In *Baker*, the Board stated that once employer agrees to make the recommended payments, the format of the agreement is irrelevant, as Congress could not have intended to hinge the attorney's fee liability on a request by either party to "formalize" a memorandum by having a compensation order issued.

Furthermore, an administrative law judge can properly find two employers jointly and severally responsible for the attorney's fee where each denied its status as an employer and failed to voluntarily render medical payments to claimant. *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835 (1978), *reaff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980).

As Sections 28(a) and (b) refer to attorney's fees, employer cannot be held liable for work performed by a lay representative who is not working under the guidance of an attorney. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976), *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974). Thus, any fees awarded to such a lay representative are the responsibility of claimant. In contrast, services performed by paralegals and other support staff in an attorney's office are "attorney's fees" for which an employer can be liable. *Id.*

A non-attorney *pro se* claimant is not entitled to a fee. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

In considering the liability for an attorney's fee of an insurance guaranty association which assumes liability for benefits where an insurer is bankrupt, the state legislation creating the association may be determinative. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009); *Marks v. Trinity Marine Grp.*, 37 BRBS 117 (2003).

Digests

The Board held that an attorney for a medical provider is not entitled to an attorney's fee paid by employer under Section 28(a) of the Act, as a medical provider is not a "person seeking benefits," *i.e.*, a person who filed a claim for compensation under Section 8 or 9, or for medical benefits under Section 7, within the meaning of Section 28(a). Moreover, the provider is not a "claimant" within the meaning of 20 C.F.R. §701.301(16). The medical provider's right to reimbursement is derivative of the employee's entitlement to medical benefits. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), *rev'd sub nom. Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

In reversing the Board's decision, the Ninth Circuit noted that while medical providers seeking reimbursement of medical expenses who retained their own counsel and intervened in the claim for benefits had no independent entitlement to medical benefits they did have a derivative right based on claimant's entitlement to recover medical benefits. Consequently, such providers can seek medical benefits under Section 7(d)(3), and if they do so, they are "person[s] seeking benefits" under Section 28(a) and they are entitled to an attorney's fee. Moreover, claimant had no incentive to show compliance with Section 7(g) and actually would fare better by remaining neutral. Therefore, the court determined it was reasonable and necessary for the doctors to retain separate counsel. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

Explaining that it is bound by controlling law of the circuit in which the claim arises, the Board rejected employer's contention that the Ninth Circuit's decision in *Hunt*, 999 F.2d 419, 27 BRBS 84(CRT), was in error and followed that precedent to hold that pursuant to the court's interpretation of Section 7(d)(3), claimant's medical provider was a "person

seeking benefits" within the meaning of Section 28(a), entitling the provider's counsel to an attorney's fee payable by employer. *Buchanan v. Int'l Transp. Services,* 31 BRBS 81 (1997).

The Board held that employer may be held liable for the attorney's fee of the ILWU-PMA to the extent that it intervened to recover medical benefits it paid to claimant. The ILWU-PMA is a "party-in-interest" within the meaning of Section 7(d)(3) and thus is a "person seeking benefits" under Section 28(a) when it seeks reimbursement for claimant's covered medical expenses. However, employer cannot be held liable for ILWU-PMA's attorney's fee for work in conjunction with the Plan's Section 17 lien because Section 17 creates a legal relationship between the Plan and claimant; the lienholder is not pursuing disability benefits on behalf of a claimant. *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015).

Setting forth the general "American Rule" that litigants pay their own attorney's fees and the exceptions to that rule, both statutory and common law, the Board stated that Section 28 is a statutory exception that shifts liability to employer under certain circumstances. Given the Board's holding that the Special Fund cannot be held liable for an attorney's fee under Section 26, and the fact that it is unclear if employer ever voluntarily paid benefits, the Board remanded the case for consideration of employer's liability for claimant's attorney's fee. Employer cannot escape liability for the fee if it only agreed to claimant's entitlement at the hearing, as a controversy remained until that time. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

The Board affirmed the administrative law judge's denial of a fee to claimant as a lay representative, stating that, whether she is a *pro se* claimant or a lay representative, she is not an attorney; therefore, employer cannot be held liable for a fee pursuant to Section 28 and it would be meaningless to award claimant a fee out of her own benefits. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

The Fifth Circuit affirmed the denial of a representative's fee to claimant in addition to her compensation, stating that non-attorneys proceeding *pro se* cannot receive attorney's fees under the Act. *Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

The Board held that employer was not liable for claimant's attorney's fee for work performed before it in a case where the Director appealed an administrative law judge's finding that it could not seek modification of an award being paid from the Special Fund. Employer was excluded from the modification proceedings by the administrative law judge, it did not participate in the Director's appeal before the Board, and claimant argued in response to the Director's appeal for employer's continued exclusion from the case. The Board distinguished this case from those in which employers were held liable for claimant's attorney's fee where they continued to contest the claims despite grants of

Section 8(f) relief, relying on *Holliday*, 654 F.2d 415, 13 BRBS 741, and *Ryan*, 19 BRBS 208, where employer was not an active litigant and did not contest the compensability of the claim. The fact that employer had an economic interest in the outcome (change in Section 44 assessment) was held insufficient for employer to be liable. The Board thus concluded that claimant was liable for his attorney's fee as a lien on his compensation pursuant to Section 28(c). *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002)(McGranery, J., concurring).

The Board held that the Louisiana state law regarding the scope of LIGA's liability precluded LIGA's liability for the payment of claimant's attorney's fees incurred prior to the insolvency of carrier, notwithstanding LIGA's liability for claimant's compensation benefits. Moreover, the Board held that as the issue under the Longshore Act concerned counsel's entitlement to a fee and employer's liability therefor, and as these issues are not addressed by the Louisiana laws regarding LIGA, the Longshore Act and the Louisiana statute are not inconsistent with each other and thus a pre-emption analysis need not be applied in this case. The Board remanded for the district director to determine whether claimant's counsel was entitled to an attorney's fee payable directly by employer under Section 28(a) or (b) of the Act. *Marks v. Trinity Marine Grp.*, 37 BRBS 117 (2003).

In this case where employer's carrier was declared impaired by TPCIGA and employer was bankrupt – its assets in trust – the Board held that TPCIGA is liable for a portion of claimant's attorney's fee. The applicable 2001 Texas law states that TPCIGA is liable for "covered claims" and, in this case, "covered claims" does not include attorney fees incurred prior to the determination that carrier is impaired. Therefore, TPCIGA cannot be held liable for any fee incurred in 2000, but was liable for the fee generated in 2007-2008 as these fees are not excluded. As claimant successfully prosecuted his claim, and as TPCIGA cannot be held liable for the pre-insolvency fees incurred in 2000, the Board held that employer is liable for that portion of the awarded fee. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009).

In a case in which the widow and the girlfriend each claimed death benefits, the Board held that employer cannot be held liable for an attorney's fee for the widow's attorney as employer continued to pay full benefits to that claimant and did not contest her entitlement to benefits under the Act. Thus, the Board remanded to determine whether an attorney's fee should be assessed against the widow as a lien on her compensation. *Reed v. Holcim, (US) Inc.*, 40 BRBS 34 (2006), *vacated and remanded on other grounds*, 291 F. App'x 647 (5th Cir. 2008).

Employer's Liability—Section 28(a)

Introduction

Section 28(a) of the Act, 33 U.S.C. §928(a), provides that the employer is responsible for a reasonable attorney's fee in addition to the compensation award when it "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 "thereafter" claimant utilizes the services of an attorney in the successful prosecution of his claim. *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), *aff'g* 2 BRBS 178 (1975); *see* 20 C.F.R. §702.134(a).

Generally, Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim, while Section 28(b) applies where employer begins paying benefits voluntarily, *see* 33 U.S.C. §914, and a controversy then arises regarding claimant's entitlement to benefits. *See Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980).

The Ninth Circuit construed the phrase "person seeking benefits" in Section 28(a) and held that medical providers seeking reimbursement of medical expenses who retained their own counsel and intervened in the claim for benefits were entitled to payment of their attorney's fees by employer. The court reasoned that although the providers did not have an independent entitlement to medical benefits, they did have a derivative right based on claimant's entitlement to recover medical benefits. Such providers thus can seek medical benefits under Section 7(d)(3), and if they do so, they are "person[s] seeking benefits" under Section 28(a). *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

The Board held that employer may be held liable for the attorney's fee of the ILWU-PMA to the extent that it intervened to recover medical benefits it paid to claimant. The ILWU-PMA is a "party-in-interest" within the meaning of Section 7(d)(3) and thus is a "person seeking benefits" under Section 28(a) when it seeks reimbursement for claimant's covered medical expenses. However, employer cannot be held liable for ILWU-PMA's attorney's fee for work in conjunction with the Plan's Section 17 lien because Section 17 creates a legal relationship between the Plan and claimant; the lienholder is not pursuing disability benefits on behalf of a claimant. The administrative law judge rationally found that the work performed by the ILWU-PMA's attorney on the Section 7 and Section 17 issues were intertwined as both turned on whether claimant's disabling symptoms were work-related. The Board affirmed the administrative law judge's consequent finding that it would be too difficult to separate the work performed on each issue in terms of employer's liability for the Plan's fee. With respect to the issue of employer's liability for the Plan's fee after the parties stipulated to the Plan's entitlement to reimbursement, the Board remanded the case

for further findings. The Board stated that employer is "liable for the Plan's post-stipulation attorney services in this case only to the extent that the services protected an entitlement interest belonging to the claimant that was not otherwise protected." *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015).

Wardell Orthopaedics provided medical care for claimants' work injuries. Wardell submitted invoices to employer, and employer disputed the amounts and made lesser payments. Wardell filed notices with the district director, seeking payment in full. Upon investigation, the district director calculated that, under the OWCP Medical Fee Schedule, employer owed additional amounts to Wardell. Employer disagreed and requested hearings. After the cases were referred to the OALJ, employer agreed to pay the additional amounts before any hearings were conducted. Thereafter, Wardell filed fee petitions with the administrative law judge. The administrative law judge denied the fee requests under Section 28(a), finding that Wardell did not file "claims" as contemplated by that section and that employer did not "decline to pay any compensation" to claimants. Section 7(d)(3) requires the "party in interest" to file an "application" to be reimbursed the value of medical treatment. The Board held that Wardell's written "applications" to the district director constituted "claims for compensation" under Section 28(a). Moreover, the district director notified employer in writing of her calculations that it owed Wardell additional medical fees. Therefore, employer received written notices of Wardell's claims from the district director, and employer did not pay Wardell within the 30-day period following these notices. For the reasons in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017), wherein the Board held that any "decline" to pay compensation under Section 28(a) depends on what benefits were claimed and what benefits the employer paid or declined to pay, the Board held that employer "declined to pay any compensation" to Wardell. As Wardell used the services of an attorney to obtain the unpaid medical fees, Wardell is entitled to have its attorney's fees paid by employer, as its interests were not represented by claimants. The Board reversed the denials of employer-paid fees and remanded the case to the administrative law judge for consideration of the fee petitions and objections. *Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23 (2017).

Successful Prosecution

In order for a fee to be awarded to claimant's attorney under Section 28(a), he must engage in a "successful prosecution of his claim." 33 U.S.C. §928(a); 20 C.F.R. §702.134(a).

The Ninth Circuit has held that, although claimant need not obtain monetary benefits in order to be "successful," he must obtain "some actual relief that materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the claimant." *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The "successful prosecution" of a claim includes establishing claimant is disabled, *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); claimant's coverage under the Act, *Brattoli v. Int'l Terminal Operating Co.*, 2 BRBS 57 (1975); *Palumbo v. Int'l Terminal Operating Co.*, 2 BRBS 63 (1975); claimant's right to past medical expenses, *Reid v. George Hyman Constr. Co.*, 13 BRBS 408 (1981); *Hardrick v. Campbell Indus., Inc.*, 12 BRBS 265 (1980); *Dolge v. Navy Resale Sys. Office*, 7 BRBS 967 (1978); claimant's entitlement to future medical expenses, *Jackson v. Ingalls Shipbuilding Div.*, 15 BRBS 299 (1983); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 333 (1979); and a permanent disability thereby removing the pre-1972 Amendment Section 14(m) ceiling, *Landrum v. Air Am., Inc.*, 1 BRBS 268 (1975), *aff'd*, 534 F.2d 67, 4 BRBS 152 (5th Cir. 1976).

Where claimant obtains an ongoing award of benefits, he has successfully prosecuted his claim even though he may not receive any actual additional funds for many years due to employer's large credit. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). Such an "inchoate right" similarly establishes claimant obtained additional compensation under Section 28(b). *See infra*; *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Geisler v. Cont'l Grain Co.*, 20 BRBS 35 (1987); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

However, in order to support an award of medical benefits and a fee based on such an award, claimant must present evidence of medical expenses incurred in the past or treatment necessary in the future; where claimant failed to do so, the Fifth Circuit vacated the award of medical benefits and, since the fee award was dependent on this award, it was also reversed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Successful prosecution can also include a successful appeal by claimant, *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974), and a successful defense of an appeal. *LaPlante v. Gen. Dynamics Corp.*, 15 BRBS 83 (1982); *Morris v. Washington*

Metro. Area Transit Auth., 12 BRBS 208 (1979); *Atl. & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976).

Additionally, the Board found claimant's attorney successfully prosecuted his claim before the deputy commissioner where the claimant filed a claim for permanent total disability benefits even though these benefits were ultimately denied by the administrative law judge. Employer controverted the claim and paid compensation only after an informal conference was held. While an administrative law judge denied claimant permanent total disability benefits based on a finding that claimant was no longer disabled after a release to work, claimant was temporarily totally disabled through this date and employer paid no benefits within 30 days of receiving notice of the claim. Employer was thus liable under Section 28(a) for work before the deputy commissioner. *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982).

If claimant successfully appeals the termination of a Section 8(c)(21) award and is partially successful in defending employer's appeal to the Board, claimant is entitled to an attorney's fee award. *Bouchard v. Gen. Dynamics Corp.*, 14 BRBS 839 (1982). But, where a case before the Board involves appeals by both claimant and employer, claimant's attorney requests fees for defending employer's appeal and for prosecuting claimant's appeal, and claimant was only successful in defending employer's appeal, the Board has awarded attorney's fees only for the successful defense. *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *aff'd in part, rev'd in part on other grounds sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (1983).

In *Jenkins v. Fed. Marine Terminal*, 15 BRBS 157 (1982), the administrative law judge found the claim was timely filed but denied benefits because claimant suffered no loss in wage-earning capacity. The Board reversed the administrative law judge and deputy commissioner's fee awards as well as denied a fee for work before the Board, as claimant did not successfully prosecute his claim for disability benefits and employer never disputed his entitlement to medical benefits, which was unaffected by claimant's "success" on the timeliness issue. *Accord West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

Other cases in which claimant did not successfully prosecute his claim or an appeal include: *Redick v. Bethlehem Steel Corp*., 16 BRBS 155 (1984) (Board reversed the award of disability benefits and vacated the award of medical benefits); *Darling v. Nw. Marine Iron Works*, 15 BRBS 486 (1983) (Board affirmed the denial of the claim, thus no fee for work before Board); *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982) (Board vacated deputy commissioner's fee orders on appeal; thus claimant was not successful in his defense of employer's appeal); *Keatts v. Horne Bros. Inc.*, 14 BRBS 605 (1982) (Board reversed the administrative law judge and held the claim is barred by Section 13); *Bluhm v. Cooper Stevedoring Co.*, 13 BRBS 427 (1981) (Board found for employer on appeal and

vacated the benefits awarded); *Portland Stevedoring Corp. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), *rev'g Loiselle v. Portland Stevedoring Corp.*, 2 BRBS 214 (1975) (where claimant's success involved only the form of compensation, *i.e.*, defense of a lump sum commutation under a provision since repealed, and did not involve establishing employer's liability for the compensation, the court held employer was not liable for an attorney's fee).

In a case where the deputy commissioner issued a fee award following an informal conference even though the parties were not in agreement regarding an award of benefits and employer had requested a hearing, the Board vacated the fee award as there was not yet a successful prosecution of the claim. *Taylor v. Cactus Int'l, Inc.*, 13 BRBS 458 (1981). The Board discussed *Bruce v. Atl. Marine, Inc.*, 12 BRBS 65 (1980), which held that an administrative law judge may enter a fee award even though an appeal is pending as the fee is not enforceable until all appeals are exhausted, and distinguished it on the basis that in *Taylor*, the lack of an award of benefits rendered the fee award baseless.

Where the administrative law judge denies the claim for compensation in full, claimant's counsel not only cannot receive a fee from employer, but claimant cannot be held liable. *Karacostas v. Port Stevedoring Co., Inc.*, 1 BRBS 128 (1974); *Director, OWCP v. Hemingway Transp., Inc.*, 1 BRBS 73 (1974).

The circuit courts are divided on the question of whether successfully prosecuting a claim for a Section 14(f) assessment is the successful prosecution of a claim for "compensation," with the Fourth and Ninth Circuits holding it is "compensation," *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), and the Second Circuit stating that a Section 14(f) payment is a "penalty" and not "compensation." *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

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Obtaining an award of medical benefits under Section 7 constitutes a successful prosecution sufficient to support an attorney's fee award. *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989); *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated and remanded on other grounds*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990).

The Board held that the administrative law judge properly denied counsel an award of attorney's fees against employer for work performed on remand. Given that counsel's success in establishing claimant's entitlement to D.C. Act benefits occurred at a prior stage of the proceedings and that claimant obtained no additional compensation as a result of the remand proceedings, the claim was not "successfully prosecuted" at the remand stage and an attorney's fee award for work performed at this stage was thus not warranted. *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986).

Although claimant was only awarded $250 in benefits, attorney's fees were awarded since claimant's counsel had been successful to a degree. *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79(CRT) (8th Cir. 1988).

Establishing the right to past, present, and future medical benefits by stipulation constitutes a "successful prosecution" under the Act. *Powers v. Gen. Dynamics Corp.*, 20 BRBS 119 (1987).

Attorney's fees can be assessed against an employer when employer has controverted some aspect of the claim and claimant successfully obtains an award of disability or medical benefits. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990).

The Board reversed the administrative law judge's fee award, as claimant did not successfully prosecute his claim for disability benefits, and employer had agreed to pay outstanding and future medical benefits. *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988).

Employer was held liable for a fee where it contested claimant's right to medical benefits and claimant prevailed on this issue. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Claimant's counsel is entitled to an attorney's fee for an appeal to the court only when the court addresses and resolves in claimant's favor a dispute over liability for compensation. As this appeal in a black lung case only addressed a question of procedure, *i.e.*, the deputy commissioner's authority to modify a decision of an administrative law judge, no contested claim for benefits was resolved. Thus, counsel was not entitled to a fee. *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989).

The Tenth Circuit reversed the Board's holding that claimant was entitled to attorney's fees under Section 28(a) because he reasonably believed he had a valid claim under Part C of the Black Lung Act, even though he entered into a stipulation after several administrative proceedings stating his intention not to pursue recovery of offset benefits, the apparent purpose for which he file his Part C claim in 1981 after having been awarded Part B disability and Part C medical benefits. The court held that attorney's fees may only be recovered if the claimant receives increased compensation or other benefits from the action, and since claimant received no benefits from pursuing his 1981 claim, he was not entitled to attorney's fees. *Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991).

Notwithstanding the amount of employer's credit under Section 33(f), claimant's attorney was entitled to a fee for work performed before the administrative law judge. Although claimant may never receive any actual benefits due to the large credit, claimant successfully established an inchoate right to compensation under the Act, and thus successfully prosecuted his claim. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

Employer was liable for an attorney's fee under Section 28(a), as the Board held it did not pay benefits until a year after it received notice of the claim. However, with regard to a fee for work at the administrative law judge level, the Board remanded the case, as the record was unclear as to

whether employer completed paying all benefits due before or after the case's referral to OALJ. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

The Board noted that an employer's liability for funeral expenses alone may make it liable for an attorney's fee. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

The Fifth Circuit held that as claimant succeeded in recovering an award of prejudgment interest, employer was liable for an attorney's fee as it had denied interest and claimant was successful on his claim. *Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *modifying on reh'g*, 912 F.2d 798, 24 BRBS 43(CRT), *cert. denied*, 500 U.S. 916 (1991).

The Board affirmed the administrative law judge's fee award against employer as employer controverted the claim, and claimant obtained benefits under Section 8(c)(13), the right to medical treatment from his own physician, an attorney's fee payable by employer, and, by virtue of the Board's decision, a Section 14(e) assessment. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds).

The Board held that claimant's counsel was entitled to an attorney's fee payable by employer pursuant to Section 28(a). Although by operation of the Section 3(e) credit, claimant did not realize any actual compensation benefits under the Act, claimant's counsel engaged in a "successful prosecution" by establishing employer's liability under the Act and thus receiving an inchoate right to various benefits under the Act. Moreover, claimant requested a formal hearing before filing her state claim and before she received any benefits pursuant to the state claim, and employer did not concede its liability for the longshore claim until the case was referred to a hearing. Finally, an attorney's fee should not be limited solely by the amount of compensation gained. Claimant's counsel represented claimant's best interests by simultaneously pursuing a state award and requesting a formal hearing under the Act after the deputy commissioner issued a recommendation for employer. *Murphy*, 20 BRBS 68, was distinguished. *Kinnes v. Gen. Dynamics Corp.*, 25 BRBS 311 (1992).

Where an administrative law judge determined that a claim was not barred, claimant was successful before the administrative law judge and was therefore entitled to a fee payable by employer. *Harms v. Stevedoring Services of Am.*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

Where claimant's appeal to the Board was dismissed and the case remanded for modification under Section 22 and claimant obtained an award of benefits on modification, the Board held that this success on modification accorded claimant's counsel the economic benefit requisite to establish a successful prosecution of the claim such that claimant was entitled to an attorney's fee for work before the Board. The Board reasoned that claimant's counsel could reasonably have regarded the work performed before the Board as necessary at the time the work was performed. *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993), *overruling Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

The court rejected employer's argument that since claimants had no measurable hearing impairments, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting that one doctor recommended annual evaluations and stated claimant was "a candidate for amplification" but another found that a hearing aid would not help him. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Where claimant prevailed on the issue of causation, entitling him to medical benefits, the Board held that there was a successful prosecution and claimant's counsel was entitled to an attorney's fee. The Board distinguished *Baker*, 991 F.2d 163, 27 BRBS 14(CRT), because in this case, unlike *Baker*, employer did not challenge claimant's entitlement to medical benefits if causation was established, and the only relevant medical opinion indicated that claimant should have yearly re-evaluations and was a candidate for amplification, and there were outstanding past medical benefits. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Employer's liability for the fee was governed by Section 28(a) where employer made no voluntary payments of compensation, and claimant prevailed on all contested issues. Employer's payment of compensation pursuant to an administrative law judge's award is not a voluntary payment of compensation affecting fee liability. *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993) (Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995).

In a black lung case, the Seventh Circuit stated that a victory on appeal that merely keeps the claim alive, but does not establish entitlement is not "successful prosecution" under Section 28(a). *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168(CRT) (7th Cir. 1993).

The Board held that the administrative law judge erred in denying claimant's counsel a fee based on his award of benefits to the Special Fund, as claimant's estate was entitled to the benefits due for the period prior to decedent's death. As employer did not voluntarily pay compensation, employer was liable for a fee to claimant's counsel under Section 28(a). The case was remanded for consideration of the fee petition. *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114 (1992), *rev'd mem. sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (5th Cir. March 10, 1993) (reversing hearing loss award under Section 8(c)(23) and remanding).

On remand, the Board reconsidered the claim and awarded benefits under Section 8(c)(13) to decedent's estate. Because claimant's counsel successfully prosecuted this case and established employer's liability for these benefits, the Board reaffirmed its conclusion that counsel was entitled to an attorney's fee payable by employer. Therefore, it reversed the administrative law judge's finding that claimant's counsel was not entitled to an attorney's fee and remanded the case for consideration of counsel's fee petition. *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (decision on remand).

Where claimant's counsel successfully prosecuted the case by establishing employer's liability for decedent's benefits, the Board held he was entitled to an attorney's fee payable by employer. Therefore, the Board vacated the administrative law judge's denial of a fee and remanded the case to the administrative law judge for consideration of the fee petition. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., concurring and dissenting).

Because the Act requires a showing of success on the merits before any attorney's fee becomes appropriate, the Board held that a claimant who successfully defended on appeal the approval of the withdrawal and voluntary dismissal of his claim had not yet established entitlement to benefits so as to entitle counsel to an award of attorney's fees. *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997) (Order).

In this black lung case, the court held that an attorney's fee may be recovered only if there has been a final decision awarding the claimant an economic benefit as a result of his claim. Thus, the application in this case was premature. *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997).

Although employer declined to pay benefits after its receipt of the claim, the court held it was not liable for an attorney's fee under Section 28(a) as claimant did not successfully prosecute his claim. Employer did pay some benefits, although not in time to avoid liability under Section 28(a). Although the findings established that claimant did not fabricate his back injury, he did not obtain any additional benefits for this injury. Although claimant need not obtain monetary benefits in order to be "successful," the court held that he must obtain "some actual relief that materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the claimant." *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

In a case where employer declined to pay benefits initially and controverted the claim, and claimant hired an attorney and obtained payment of the benefits sought pursuant to the recommendation of the claims examiner, the Board held claimant met the plain language requirements of Section 28(a), resulting in employer's liability for an attorney's fee. The Board rejected employer's argument that the Supreme Court's decision in *Buckhannon*, 532 U.S. 598, applies to preclude an attorney's fee in this case due to the absence of a "prevailing party." The Board held that *Buckhannon* does not apply to determine liability for a fee in cases arising under the Act, as the Act does not contain the "prevailing party" language and as liability must be ascertained from the directives of the specific applicable statute and within the procedures of the applicable forum. Moreover, the Board held that even if *Buckhannon* were to apply, its requirement for a "material change" in the relationship of the parties would be satisfied, as claimant obtained a sanctioned result when the claim was resolved via the Act's informal procedures. The Board thus affirmed the district director's award of an attorney's fee, relying on the plain language of Section 28(a) and on the Ninth Circuit's decision in *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). The Board held that claimant was successful in his claim because he actually obtained the benefits he sought. This tangible relief satisfies the Ninth Circuit's holding that "successful prosecution" under the Act requires a claimant to obtain something of substance and not just the possibility of future relief. *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

The Second Circuit held that Section 28(a), which allows for an award of an attorney's fee only if the employer "declines to pay any compensation," does not authorize an award of fees where the employer unsuccessfully contests a Section 14(f) assessment. The court held that an assessment pursuant to Section 14(f) is a "penalty" and not "compensation." Accordingly, the court denied the claimant's request for fees, costs and interest for defending the employer's appeal. *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Fourth Circuit held that a Section 14(f) late payment award constitutes the payment of additional compensation under the Act. Thus, the court held that claimant "successfully prosecuted" her claim and employer was liable for her attorney's fees under Section 28. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

The Ninth Circuit held that the Act authorizes attorney's fees for work an attorney performs to secure a late payment award under Section 14(f). The court, referring in part to the reasoning of the Fourth Circuit in *Brown*, 376 F.3d 245, 38 BRBS 37(CRT), held that the plain language of the Act, as well as its general compensation scheme and legislative history, supports the finding that a Section 14(f) late payment award is "compensation." *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Where employer paid claimant's medical benefits within 30 days of notice of the claim for compensation, but declined to pay any disability benefits, and claimant was awarded one week of disability benefits, the Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(a). Following a discussion of the meaning of the term "compensation," and acknowledging the purposes of Section 28(a) are to provide employers the incentive to pay benefits and avoid fee liability and to allow claimants to receive their full benefits without having to deduct legal fees, the Board adopted the interpretation espoused by the Director. Therefore, in order to give consistent meaning to the term each time it is used in Section 28(a) and to satisfy the purposes of the section, the Board held that "compensation" is to be read as "disability benefits and/or medical benefits" with the precise meaning in the phrase "declines to pay any compensation" dependent on what benefits the claimant claimed and what benefits the employer paid or declined to pay. Thus, whether a claimant files a claim for both disability and medical benefits or for just one type of benefit, fee liability under Section 28(a) depends on whether there is success in obtaining the claimed but denied benefit(s). As claimant here filed a claim for both disability and medical benefits, employer declined to pay any disability benefits, and claimant successfully obtained some disability benefits, employer is liable for claimant's attorney's fee. The Board remanded the case for consideration of the fee petition and objections. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017).

Wardell Orthopaedics provided medical care for claimants' work injuries. Wardell submitted invoices to employer, and employer disputed the amounts and made lesser payments. Wardell filed notices with the district director, seeking payment in full. Upon investigation, the district director calculated that, under the OWCP Medical Fee Schedule, employer owed additional amounts to Wardell. Employer disagreed and requested hearings. After the cases were referred to the OALJ, employer agreed to pay the additional amounts before any hearings were conducted. Thereafter, Wardell filed fee petitions with the administrative law judge. The administrative law

judge denied the fee requests under Section 28(a), finding that Wardell did not file "claims" as contemplated by that section and that employer did not "decline to pay any compensation" to claimants. Section 7(d)(3) requires the "party in interest" to file an "application" to be reimbursed the value of medical treatment. The Board held that Wardell's written "applications" to the district director constituted "claims for compensation" under Section 28(a). Moreover, the district director notified employer in writing of her calculations that it owed Wardell additional medical fees. Therefore, employer received written notices of Wardell's claims from the district director, and employer did not pay Wardell within the 30-day period following these notices. For the reasons in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017), the Board held that employer "declined to pay any compensation" to Wardell. As Wardell used the services of an attorney to obtain the unpaid medical fees after the case was referred to the OALJ, Wardell is entitled to have its attorney's fees paid by employer, as its interests were not represented by claimants. The Board reversed the denials of employer-paid fees and remanded the case to the administrative law judge for consideration of the fee petitions and objections. *Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23 (2017).

When Employer's Liability Commences

Section 28(a) states that, where the employer declines to pay any compensation on or after the thirtieth day after receiving notice of the claim 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," employer is liable for an attorney's fee in addition to the benefits awarded. (emphasis added).

The effect of the word "thereafter" in this provision has been subject to interpretation, with one reading being that it holds that employer is liable only for those services performed thirty days after it receives notice and declines to pay, while the opposing view asserts that once the pre-requisites in Section 28(a) are satisfied, employer is liable for all reasonable fees, including those for "pre-controversion" services. The Board has issued opinions stating the different positions, and the circuit courts are divided on the issue.

The Board initially held that employer is only liable for those fees incurred after 30 days from the date it receives notice of the claim or from the date employer declines to pay benefits, whichever is sooner. *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980); *Jones v. The Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979), *aff'd in relevant part sub nom. The Chesapeake & Potomac Tel. Co. v. Director, OWCP*, 615 F.2d 1368 (D.C. Cir. 1980) (table). Where the record was unclear as to when employer received notice of the claim, the Board remanded the case for more evidence on the issue. *Longergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979).

The Fourth Circuit affirmed this interpretation, finding that although the statute is ambiguous, the Board's interpretation was reasonable. *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir. 1986).

The Board then held specifically that employer was not liable for services performed before it received notice of the claim from the deputy commissioner, notwithstanding that employer was aware of the claim and controverted it at an earlier date. This decision was affirmed by the Fifth Circuit, albeit in an unpublished opinion. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table). The Fifth Circuit followed *Watkins* in a published case some years later, and specifically held that, once employer receives the requisite notice from the district director, employer is not liable for attorney fees for work incurred before it controverts the claim or before 30 days after receiving written notice of the claim, whichever event arises first. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

In the meantime, the Board overruled its prior cases and held that employer is liable under Section 28(a) for attorney's fees for pre-controversion legal work, reasoning that the language of Section 28(a) provides only the conditions precedent to employer's liability for all reasonable and necessary fees. *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997) (en banc) (Smith & Dolder, JJ., dissenting). *Liggett* was controlling before the Board for a few years, but was in effect overruled in a black lung case which relied on *Weaver* and *Watkins* and adopted the Board's prior interpretation of Section 28(a). *See Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (en banc) (McGranery and Hall, JJ., dissenting).

The Sixth Circuit joined the Fourth and Fifth Circuits in holding that employer may not be held liable for pre-controversion fees under Section 28(a), interpreting the word "thereafter" in Section 28(a) as placing a temporal limitation on the fee-shifting mechanism. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008).

However, the Ninth Circuit declined to follow these rulings, and held that under Section 28(a), a successful claimant is entitled to both pre and post-controversion attorney's fees. The court reasoned that "thereafter" as used in Section 28(a) means only that the claimant must employ an attorney after the employer declines to pay any compensation, and when that condition is satisfied, a successful claimant is entitled to all reasonable attorney's fees. *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2009).

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The Fourth Circuit affirmed the Board's interpretation of Section 28(a), which held employer liable for attorney's fee incurred after employer receives notice of the claim and declines to pay benefits. The court stated that where the Board's construction is "sufficiently reasonable," it must be accepted, even if it is not the only reasonable construction or the construction this court would have reached if originally deciding the question. Although finding the statute ambiguous, the court stated that the Board's interpretation could be reconciled with the statute and legislative history and was consistent with congressional intent that disputes be resolved without legal assistance other than that provided by the Secretary. *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir. 1986).

The Board held that under Section 28(a), employer is not liable for services rendered prior to the date it received notice and declined to pay benefits. In this case, employer was deemed to have declined to pay on the date its notice of controversion was prepared and dated and not, as employer would suggest, the date the controversion was filed with the deputy commissioner. *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986).

The Board held that a "response" filed by employer did not affect its liability under Section 28(a); although employer purported to accept liability, employer did not pay or tender until almost a year after it filed the response, thus effectively declining to pay until that time. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Where claimant filed his claim on April 8, 1987 and employer filed a notice of controversion on April 20, 1987, but the district director did not formally notify employer of the claim until December 1, 1987, the Board affirmed the administrative law judge's finding that employer was not liable for an attorney's fee until after December 1, 1987. The Board rejected claimant's contention that written notice from claimant to employer should satisfy the provisions of Section 28(a) and held, in accordance with the plain language of Section 28(a), that employer is liable for an attorney's fee for those services rendered to claimant after 30 days from the date employer received written notice of the claim from the district director or, within the 30 day period, from the date it declined to pay, whichever comes first. The Board noted its holding is consistent with the legislative intent that employer is not liable for an attorney's fee at the early, informal stages of the proceedings. The Board also noted the district director's duties under Section 19(b) to notify

employer of the claim within 10 days but acknowledged there is no provision in the Act concerning the consequences in the event the district director delays performance of those duties. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table).

The Fifth Circuit held that employer was not liable for attorney fees under Section 28(a) for pre-controversion legal work. Specifically, the court held that it was bound by its unpublished decision holding that receipt of written notice of the compensation claim by employer is a prerequisite to the recovery of attorney fees from employer for fees incurred thereafter. *See Watkins*, 12 F.3d 209 (table). Moreover, the court interpreted Section 28(a) to hold that employer is not liable for attorney fees incurred before it controverts the claim or before 30 days after receiving written notice of the claim, whichever event arises first. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

The Board overruled prior precedent and held that employer was liable to claimant under Section 28(a) for attorney's fees for pre-controversion legal work. Reasoning that this result follows from interpretations of federal fee-shifting statutes by the Supreme Court, the Board held that in cases arising under the Longshore Act, Section 28(a), when read consistently with other fee-shifting provisions generally and Section 28 as a whole, provides for employer's liability for pre-controversion legal services, subject only to the determination that such fees are incurred for legal work that is both reasonable and necessary to the successful prosecution of the claim. The overarching purpose of the Act, to insure adequate compensation, is furthered by this interpretation and is consistent with Section 28(d) which provides that amounts awarded against an employer or carrier "shall not in any respect affect or diminish the compensation payable." The Board thus held that Section 28(a) provides only a condition precedent to employer's liability for all reasonable and necessary fees, and overruled prior Board decisions to the contrary. *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(en banc)(Smith & Dolder, JJ., dissenting); *but see Clinchfield Coal Co. v. Harris*, 149 F.3d 307 (4th Cir. 1998) (companion black lung case rejecting reasoning of *Liggett*; note that black lung regulation, 20 C.F.R. §725.367, was subsequently amended to include liability for all necessary work, including that performed prior to the development of an adversarial relationship).

The Board, in effect, overruled *Liggett*, 31 BRBS 135, holding in a black lung case that the plain language of Section 28(a), as interpreted by the Board and Fifth Circuit in *Watkins*, 12 F.3d 209, and *Weaver*, 282 F.3d 357, 36 BRBS 12(CRT), states that employer's fee liability accrues only after: (1) employer declines to pay any compensation on or before the 30th day after receiving notice of the claim from the district director; and (2) *thereafter*, the claimant utilizes the services of an attorney in the successful prosecution of the claim. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (en banc) (McGranery and Hall, JJ., dissenting).

The Sixth Circuit held that employer may be not be held liable for pre-controversion fees under Section 28(a). The court explained that the word "thereafter" in Section 28(a) places a temporal limitation on the fee-shifting mechanism, as, prior to controversion, the claimant does not require the services of an attorney in the pre-adjudication stages of the case. The court also rejected the contention that pre-controversion fees shift to employer after the claim is, in fact, controverted. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008).

The Ninth Circuit held that under Section 28(a), a successful claimant is entitled to both pre and post-controversion attorney's fees. In so holding, the court stated that "thereafter" in Section 28(a) means only that the claimant must employ an attorney after the employer declines to pay any compensation. Once that condition is satisfied, a successful claimant is entitled to all reasonable attorney's fees. The Ninth Circuit declined to follow the contrary interpretation of "thereafter" utilized by the Fourth (*Kemp*), Fifth (*Weaver, Watkins*) and Sixth (*Day*) Circuits in holding that employer cannot be held liable for pre-controversion attorney's fees. *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2009).

Under Section 28(a), the liability for an attorney's fee attaches to employer from the date employer *or* carrier declines to pay benefits, or after 30 days from the date employer *or* carrier declines to pay benefits. Thus, even though the carrier on the risk was not identified until a later date, employer was liable for claimant's attorney's fee on the date 30 days from the date that it received notice of the claim and failed to begin payment of benefits. This interpretation is bolstered by Sections 4 and 35 of the Act which make employers primarily liable and imputes knowledge to the carriers. The administrative law judge's finding that carrier was liable for the fee only from the date it was joined was therefore modified. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board affirmed the administrative law judge's application of the last employer rule to his determination regarding liability for an attorney's fee, and thus affirmed his finding that SSA was liable for all attorney's fees, including those incurred prior to its controversion of the claim, so long as the services were necessary to claimant's successful prosecution of the case. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010).

Consistent with the Board's decision in *Lopez*, 39 BRBS 85, as well as the Ninth Circuit's decision in *Dyer*, 563 F.3d 1044, 43 BRBS 32(CRT), the Board affirmed the administrative law judge's application of the last employer rule to his determination regarding liability for an attorney's fee. In *Dyer*, the court held that once fee liability under Section 28(a) is established, employer is liable for a reasonable fee for both pre- and post-controversion services. The administrative law judge found that the requirements of Section 28(a) were met as to the responsible employer in this case. The Board thus affirmed his conclusion that employer is liable for all attorney's fees, including those incurred prior to its notice and controversion of the claim, as he found the services reasonable and necessary to claimant's successful prosecution of the case. *S.T. [Towne] v. California United Terminals*, 43 BRBS 82 (2009), *aff'd*, 414 F. App'x 941 (9th Cir. 2011).

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Decline to Pay

Section 28(a) applies where employer "declines to pay *any* compensation" within the 30-day period after notice of the claim. Section 28(a) is not applicable where employer pays at least partial compensation without an award in a timely manner. *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982). *See Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986) (Section 28(a) not applicable where employer voluntarily paid temporary total disability benefits at all times prior to hearing and conceded entitlement to permanent partial).

If employer pays some compensation after the injury, but terminates payments and a claim is filed thereafter, and employer pays no benefits after receiving notice of the claim, employer is liable under Section 28(a). *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). *Accord Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980), claimant was injured in 1973, and employer paid temporary total disability compensation until October 1974. Claimant filed a claim for permanent partial disability with the deputy commissioner in December 1974, and employer refused to pay claimant anything for his claim until the claims examiner recommended that it do so almost three years later. The Board concluded that Section 28(a) applied because, despite its payments of some temporary total disability compensation, it did not pay "any compensation" after receiving written notice of a claim.

Where employer does not pay benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for the entire claim is governed by Section 28(a). *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *A.M. [Mangiantine] v. Elec. Boat Corp.*, 42 BRBS 30 (2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). This result applies even if employer voluntarily pays some benefits at a later date; once the 30-day period lapses without the payment of any benefits, employer is liable under Section 28(a). *Id.*

The Fifth Circuit held that where employer paid claimant compensation but declined to pay claimant's medical expenses, claimant's attorney was entitled to a fee under Section 28(a), reasoning that Congress intended to allow claimant an employer-paid fee where the dispute involved only obtaining medical benefits. *Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), *aff'g Hansen, v. Oilfield Safety, Inc.*, 8 BRBS 835 (1978).

If employer pays compensation under a state workers' compensation law, but refuses to pay compensation for the federa1 claim, Section 28(a) is applicable. *Butler v. Lemont Shipbuilding & Repair Co.*, 3 BRBS 429 (1976); *Fairman v. J. A. McCarthy, Inc.*, 3 BRBS 239 (1976), *aff'd mem.* 547 F.2d 1161 (3d Cir. 1977).

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The Board held that a "response" filed by employer did not affect its liability under Section 28(a); although employer purported to accept liability, employer did not pay or tender until almost a year

after it filed the response, thus effectively declining to pay until that time. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Employer voluntarily paid temporary total disability compensation subsequent to the claimant's injury, and continued to make such payments after the claimant reached maximum medical improvement until the parties reached a settlement regarding the amount of weekly compensation. After the district director approved the parties' settlement pursuant to Section 8(i), the district director awarded claimant's counsel an attorney's fee. The Fifth Circuit held that claimant's counsel was not entitled to an attorney's fee under Section 28(a), as the employer did not refuse to pay permanent disability, but in effect, made such payments by virtue of its temporary total disability compensation payments. The court further held that an attorney's fee under Section 28(b) was inappropriate, as the parties settled their dispute as to the amount of compensation prior to imposition of the Department of Labor's informal dispute resolution mechanism. Thus, the Fifth Circuit reversed the district director's award of an attorney's fee. *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

The Board held that employer cannot be liable under Section 28(a) for the attorney's fee awarded in this case, as employer did not decline to pay compensation within 30 days of receipt of claimant's claim for compensation. Employer was voluntarily paying benefits when it received claimant's claim. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The Fifth Circuit held employer liable under Section 28(a) where it initially voluntarily paid disability benefits before any claim was filed, but ceased making all such payments, disclaiming further liability. Moreover, employer declined to pay any further benefits within thirty days after receiving written notice of the claim and thus was liable for an attorney's fee pursuant to Section 28(a) of the Act, as claimant obtained an award of benefits. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Ninth Circuit, following the Fifth Circuit's decision in *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), held that employer's voluntary payment of compensation before claimant filed a claim does not preclude employer's liability under Section 28(a) if it "declines to pay" after claimant files a claim. If employer takes no action within the 30-day period, it has "declined to pay." *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The Board held that a "claim for compensation" need not include any competent evidence of disability in support of the claim in order to be "valid;" a claim need only be a writing evincing an intent to seek compensation. Thus, a claim for hearing loss benefits need not be accompanied by an audiogram or other evidence demonstrating a loss of hearing. Moreover, in two of the three cases involved here, the claimants provided uninterpreted audiograms with their claim forms. Pursuant to Section 28(a), employer must pay benefits or decline to pay benefits within 30 days of its receipt of notice of the claim from the district director. This 30-day period provides employer sufficient time to have an audiogram interpreted or to have the degree of claimant's impairment evaluated prior to employer's deciding to pay or to decline to pay. As the employer did not pay benefits to any of the three claimants within 30 days of its receipt of the claim from the district director, the Board held that employer was properly held liable for claimants' attorney's fees from the date the district director served the claim until employer paid benefits. *Craig, et al. v. Avondale*

Indus., Inc., 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Fifth Circuit rejected employer's argument that a valid claim for hearing loss benefits for purposes of triggering employer's liability for attorney fees under Section 28(a) has not been made until the claimant has provided an audiogram and interpretive report that qualify as presumptive evidence of the amount of hearing loss under Section 8(c)(13)(C). The court further rejected employer's argument that it did not decline to pay compensation, holding that, pursuant to *Weaver*, 282 F.3d 357, 36 BRBS 12(CRT), the fact that employer filed its notices of controversion before receiving formal notice of the claims from the district director was irrelevant. *Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Fourth Circuit held that claimant was not entitled to an attorney's fee paid by employer pursuant to Section 28(a), as employer voluntarily paid compensation within 30 days of its receipt of the claim. That claimant later sent a letter requesting additional compensation did not trigger a new obligation to pay under Section 28(a), as a "claim" refers only to a formal action initiating the proceedings. Moreover, such an interpretation would nullify Section 28(b), which applies where employer pays compensation voluntarily and claimant thereafter seeks additional compensation. The court therefore reversed the Board's holding that employer was liable for claimant's fee under Section 28(a). *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

When the employer initially pays compensation voluntarily after the filing of a claim, but then refuses a later request for additional benefits on the same claim, employer is not liable for an attorney's fee pursuant to Section 28(a) for claimant's obtaining additional benefits, as employer did not decline to pay *any* compensation within 30 days of receipt of the claim. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

Employer was not liable for a fee under Section 28(a) inasmuch as it was voluntarily paying claimant compensation of permanent partial disability when he filed his claim for permanent total disability compensation. *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, 556 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

On reconsideration, the Board rejected claimant's contention that he was entitled to an employer-paid fee under Section 28(a) since employer did not timely pay the exact benefits claimed by claimant. Employer was voluntarily paying claimant compensation for scheduled permanent partial disability when he filed his claim for permanent total disability compensation. Claimant's contention is not consistent with the plain language of Section 28(a), which states that employer will be liable for claimant's attorney's fee if it "it declines to pay *any* compensation" within 30 days of its receipt of the claim from the district director. *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 556 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

The Fifth Circuit affirmed the Board's decision that employer was not liable for claimant's attorney's fee as employer was paying partial disability compensation when the claim for permanent total disability benefits was filed. If employer pays any compensation within the thirty days after the filing of the written claim, it cannot be held liable for an attorney's fee pursuant to Section 28(a). *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

Pursuant to the plain language of Section 28(a), the Board held that as employer did not pay benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for the entire claim is governed by Section 28(a). Claimant's subsequent request for additional benefits, although timely paid after the informal conference, does not result in the application of Section 28(b). The Board therefore reversed the district director's finding under Section 28(b) that employer was not liable for a fee for work regarding the additional benefits and held employer liable under Section 28(a). *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

The Sixth Circuit held that when an employer does not pay any benefits to claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for work involving all benefits due on the claim must be determined pursuant to Section 28(a). Employer is not relieved of fee liability by voluntarily paying some benefits before the claim was filed or after it filed a notice of controversion if it declined to pay benefits within the 30 days after it received written notice of the claim. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008).

As employer declined to pay any benefits within 30 days of its receipt of the claim, and claimant thereafter successfully obtained additional benefits, albeit at different periods, the Board held, based on the plain language of the statute, that employer is liable for counsel's fee pursuant to Section 28(a). The Board discussed its prior decision in *W.G.*, 41 BRBS 13, as well as the Sixth Circuit's decision in *Day*, 518 F.3d 411, 42 BRBS 15(CRT), supporting this result. The Board stated that employer's prompt payment of additional disability and medical benefits when the need for claimant's surgery arose in 2007 did not alter the fact that it initially declined to pay benefits within 30 days of its receipt of the claim in 2002, which subjected it to potential attorney's fees under Section 28(a). The Board declined to address the issue reserved by the First Circuit in *Barker*, 138 F.3d 431, 32 BRBS 171(CRT), as to whether medical benefits are "compensation," since employer's liability for a fee in this case does not turn on its payment of medical benefits alone. *A.M. [Mangiantine] v. Elec. Boat Corp.*, 42 BRBS 30 (2008).

In considering the applicability of Section 28(a), the Board affirmed the administrative law judge's finding that employer's payment of $1 after the claim was filed was merely an attempt to avoid fee liability rather than the payment of compensation for claimant's injury. Thus, as employer did not pay claimant any compensation within the meaning of Section 28(a) of the Act, and in fact controverted the claim prior to receiving notice of the claim, the Board affirmed the administrative law judge's finding that employer was liable for claimant's attorney's fee pursuant to Section 28(a). *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011) (merits).

The Fourth Circuit affirmed the finding that employer is not liable for claimant's attorney's fee under Section 28(a). After the district director served notice of claimant's claim for a hearing loss on employer, employer paid, within 30 days, benefits of over $1,250, amounting to one week of compensation for a .5% binaural loss. In rejecting claimant's contentions of error, the court held that employer's refusal to pay compensation in the 30-day period must be absolute for it to face possible fee liability under Section 28(a). The court stated that if employer pays "any" compensation to the claimant and contests only the total amount of benefits, it is sheltered from fee liability under Section 28(a). The plain language of Section 28(a) requires fee-shifting only when an employer has paid no compensation within 30 days of receiving the official claim. The court stated that *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011), wherein the employer paid $1, is distinguishable as, in this case, employer did not pay a nominal amount of compensation but paid one week of benefits at the maximum compensation rate. The court further held that employer's filing of a notice of controversion prior to its payment is not relevant to its fee liability as Section 28(a) does not incorporate Section 14(d). *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014), *cert. denied*, 574 U.S. 932 (2014).

The Board rejected employer's assertion that Section 28(b) was applicable to this case. Although employer/ACE voluntarily paid benefits for claimant's initial injury, claimant suffered an aggravation and filed a claim. Employer/ICoSp did not pay any compensation within 30 days of receiving notice of the claim for aggravation. Consequently, Section 28(a) is the applicable fee liability provision. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Where employer paid claimant's medical benefits within 30 days of notice of the claim for compensation, but declined to pay any disability benefits, and claimant was awarded one week of disability benefits, the Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(a). Following a discussion of the meaning of the term "compensation," and acknowledging the purposes of Section 28(a) are to provide employers the incentive to pay benefits and avoid fee liability and to allow claimants to receive their full benefits without having to deduct legal fees, the Board adopted the interpretation espoused by the Director. Therefore, in order to give consistent meaning to the term each time it is used in Section 28(a) and to satisfy the purposes of the section, the Board held that "compensation" is to be read as "disability benefits and/or medical benefits" with the precise meaning in the phrase "declines to pay any compensation" dependent on what benefits the claimant claimed and what benefits the employer paid or declined to pay. Thus, whether a claimant files a claim for both disability and medical benefits or for just one type of benefit, fee liability under Section 28(a) depends on whether there is success in obtaining the claimed but denied benefit(s). As claimant here filed a claim for both disability and medical benefits, employer declined to pay any disability benefits, and claimant successfully obtained some disability benefits, employer is liable for claimant's attorney's fee. The Board remanded the case for consideration of the fee petition and objections. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017).

Wardell Orthopaedics provided medical care for claimants' work injuries. Wardell submitted invoices to employer, and employer disputed the amounts and made lesser payments. Wardell filed notices with the district director, seeking payment in full. Upon investigation, the district director calculated that, under the OWCP Medical Fee Schedule, employer owed additional

amounts to Wardell. Employer disagreed and requested hearings. After the cases were referred to the OALJ, employer agreed to pay the additional amounts before any hearings were conducted. Thereafter, Wardell filed fee petitions with the administrative law judge. The administrative law judge denied the fee requests under Section 28(a), finding that Wardell did not file "claims" as contemplated by that section and that employer did not "decline to pay any compensation" to claimants. Section 7(d)(3) requires the "party in interest" to file an "application" to be reimbursed the value of medical treatment. The Board held that Wardell's written "applications" to the district director constituted "claims for compensation" under Section 28(a). Moreover, the district director notified employer in writing of her calculations that it owed Wardell additional medical fees. Therefore, employer received written notices of Wardell's claims from the district director, and employer did not pay Wardell within the 30-day period following these notices. For the reasons in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017), the Board held that employer "declined to pay any compensation" to Wardell. As Wardell used the services of an attorney to obtain the unpaid medical fees after the 8ase was referred to the OALJ, Wardell is entitled to have its attorney's fees paid by employer, as its interests were not represented by claimants. The Board reversed the denials of employer-paid fees and remanded the case to the administrative law judge for consideration of the fee petitions and objections. *Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23 (2017).

Assuming, arguendo, that Section 28(a) is applicable, the First Circuit held that employer did not decline to pay any compensation. Employer voluntarily paid claimant medical benefits for his back injury and there is no evidence that employer refused to cover the cost of surgery in Puerto Rico, where claimant resides. Employer's refusal to cover the cost of surgery in New York does not amount to a refusal to pay "any compensation." *Peña-Garcia v. Director, OWCP*, 917 F.3d 61, 53 BRBS 13(CRT) (1st Cir. 2019).

Employer's Liability—Section 28(b)

Introduction

Section 28(b) applies where the employer has paid or tendered compensation pursuant to Section 914(a), (b), and a controversy develops over the amount of additional compensation due. *See* 20 C.F.R. §702.134(b). *See generally Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980).

As with Section 28(a), this provision for employer liability was added in the 1972 Amendments. Thus, the Board held that where all of the attorney's work was performed after the 1972 Amendments, Section 28(b) requires the attorney's fee to be assessed wholly against the employer, *i.e.*, no amount can be made a lien on claimant's compensation. *Stevens v. Jones Oregon Stevedoring Co.*, 2 BRBS 76 (1975). *See also Director, OWCP v. Airport Transp., Inc.*, 1 BRBS 94 (1974).

The statute provides that once the controversy arises, the deputy commissioner or Board must conduct an informal conference and make a written recommendation regarding the disposition of the controversy. If the employer does not accept the written recommendation, the employer must pay or tender within 14 days the amount of additional compensation it believes is due to the employee. If the employee refuses the payment or tender and utilizes the services of an attorney to gain compensation greater than the amount paid or tendered, the employer is responsible for a reasonable attorney fee based solely upon the difference between the amount awarded and the amount tendered or paid. *Wilson v. Old Dominion Stevedoring Corp.*, 3 BRBS 224 (1976).

The Fourth, Fifth and Sixth Circuits have held that the following are prerequisites to employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *See, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). *See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007) (letters between the parties and the district director serve as the "functional equivalent of an informal conference").

Although the Board in earlier cases adopted the reasoning of the Ninth Circuit that a recommendation by the deputy commissioner was not required, *see Nat'l Steel &*

Shipbuilding Co. v. U. S. Dep't of Labor, 606 F. 2d 875, 11 BRBS 68 (9th Cir. 1979), *Caine v. Washington Metro. Area Transit Auth.*, 19 BRBS 180 (1986), the Board now follows the rulings of the Fourth, Fifth and Sixth Circuits except in cases arising in the Ninth Circuit. *See, e.g., Davis v. Eller & Co.*, 41 BRBS 58 (2007), and cases cited, *infra.*

Where employer voluntarily pays benefits for temporary total disability at all times prior to the administrative law judge's decision and claimant obtains an award of permanent partial disability benefits, claimant is not entitled to a fee under this section on the basis he obtained an enforceable award. *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986).

Section 28(b) also provides that attorneys' fees may be avoided if the controversy which develops relates to the degree or length of claimant's disability, and the employer offers to submit the case to a physician for an independent medical examination and also offers, before the examination occurs, to pay whatever compensation is indicated by the independent examination.

Section 28(b) also authorizes a fee award for claimant's counsel assessed against employer where claimant is successful in review proceedings before the Board or court.

The section concludes by stating that in all other cases, any claim for legal services shall not be assessed against the employer.

Tender of Compensation

Section 28(b) states that it applies where employer "pays or tenders payment of compensation" and thereafter a controversy arises over the amount of compensation due. The Board initially held that a tender of compensation by employer means the actual proffer of compensation, not merely a statement to claimant that employer will tender compensation. *Granstrom v. Portland Stevedore Co.*, 6 BRBS 745 (1977) (S. Smith, dissenting). The Board held that an offer to pay compensation based on the deputy commissioner's written recommendation coupled with the condition that claimant waive his future rights under the Act was not a "tender" under Section 28(b), stating that the employer's obligation to "pay or tender" is not satisfied by a mere offer to settle the case, but must be an unrestricted admission of a limited liability. *Hadel v. I .T.O. Corp. of Baltimore*, 6 BRBS 519 (1977).

The Board subsequently changed this interpretation, holding that under Section 28(b), a tender of compensation without an award does not require an actual proffer of funds. Rather, a tender of voluntary payments means a readiness, willingness and ability on the part of employer or carrier expressed in writing to make such payment to claimant. To the extent the Board's prior decisions in *Granstrom*, 6 BRBS 745, and *Hadel*, 6 BRBS 519, were inconsistent, they were overruled. *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986).

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An "offer to stipulate" may constitute a "tender" under the Act sufficient to relieve employer of subsequent liability for claimant's fee. However, Section 28(b) requires that employer either pay or "tender to the employee is writing" the additional compensation it believes the employee is entitled to receive. In the case, employer's offer to stipulate was not contained in a "writing" sufficient to satisfy the "tender" requirement under the Act. *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990).

The Board rejected employer's argument that the administrative law judge erred in holding it liable for claimant's attorney's fees because claimant refused a settlement offer and was ultimately awarded less than the tendered amount. The Board found that as the two letters which employer had submitted in support of its asserted tender offer indicated only that employer's counsel was willing to recommend a settlement of $1,500 plus medicals to her client, and not that she was authorized to agree to a settlement, they did not establish a readiness, willingness, and ability on employer's part to make payment to claimant. The Board accordingly affirmed the administrative law judge's finding that employer had not made a valid tender of compensation and that inasmuch as claimant was successful in establishing his right to medicals, employer was liable for claimant's attorney's fees under Section 28(b). *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Payment of compensation pursuant to a settlement agreement does not constitute a voluntary payment of benefits under Section 28(b). *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

Employer voluntarily paid temporary total disability compensation subsequent to the claimant's injury, and continued to make such payments after the claimant reached maximum medical improvement until the parties reached a settlement regarding the amount of weekly compensation. After the district director approved the parties' settlement pursuant to Section 8(i), the district director awarded claimant's counsel an attorney's fee. The Fifth Circuit held that claimant's counsel was not entitled to an attorney's fee under Section 28(a), as the employer did not refuse to pay permanent disability, but in effect, made such payments by virtue of its temporary total disability compensation payments. The court further held that an attorney's fee under Section 28(b) was inappropriate, as the parties settled their dispute as to the amount of compensation prior to imposition of the Department of Labor's informal dispute resolution mechanism. Thus, the Fifth Circuit reversed the district director's award of an attorney's fee. *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

The Board held that this case was governed by Section 28(b) because when employer took the matter of increased compensation payments to a claims examiner, it was effectively controverting claimant's entitlement to any dependency benefits on behalf of her son after he reached the age of eighteen, and in fact, ceased paying such benefits. Thereafter, claimant was forced to utilize the services of an attorney in order to recover her asserted full compensation, and successfully asserted her entitlement to dependency benefits for the time her son attended a vocational school. As counsel's services resulted in claimant's partially successful defense of her death benefits, the Board held that employer was liable for claimant's attorney's fee under Section 28(b), and affirmed the administrative law judge's attorney's fee award. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

The Board held that employer could not be liable for an attorney's fee under Section 28(b) on the facts of this case as it paid benefits voluntarily without resort to informal or formal proceedings, and as claimant did not pursue or obtain additional benefits thereafter. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The court rejected claimant's argument that employer's $5,000 settlement offer was not a tender under section 28(b) because it was contingent on his agreeing to drop his back claim. The court stated that the condition of dropping a claim is implicit in all tenders because they are made to satisfy a debt or obligation; a tender is called an "unconditional" offer under the Act only because there are no *additional* contingencies. *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

In two consolidated cases, the Board held that in order to constitute a "tender" of compensation under Section 28(b), employer's offer must be a written, *unconditional* offer

to pay compensation. In these cases, employer offered to pay compensation if claimants would agree to certain stipulations. Claimants rejected the stipulations and the administrative law judge looked to whether claimants provided a valid reason for doing so to determine if the tenders were valid. The Board held since a tender must be "unconditional" it cannot be dependent on the validity of claimant's reasons for rejecting a condition, and it stated that the administrative law judge's approach shifted to claimants the burden to justify their refusals to accept the stipulations instead of placing the burden on employer to establish it "tendered" compensation under the Act. As the offers to pay were conditioned on claimants' accepting the stipulations, the Board held that they were not "tenders" under Section 28(b) and that employer therefore was liable for claimants' attorneys' fees because claimants obtained greater compensation than employer paid or tendered. *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004); *see also Hitt v. Newport News Shipbuilding & Dry Dock Co.,* 38 BRBS 47 (2004).

The Fourth Circuit held that where employer conditioned its offer to pay claimant by requiring him to sign a stipulation, employer's offer was not a valid tender because it was not "unconditional." The stipulation stated, "That the parties are aware of no other outstanding compensation issues as of the date of execution of these Stipulations." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

Controversy

Section 28(b) applies where employer timely pays or tenders compensation under Section 14, and "thereafter a controversy arises over the amount of additional compensation" due. The Board has held that employer is not responsible for any attorney's fees incurred prior to the date a controversy develops over the amount of additional compensation to which claimant is entitled. *Trachsel v. Brady-Hamilton Stevedore, Co.*, 15 BRBS 469 (1983). There is no requirement that the dispute over the additional compensation actually be litigated at a formal hearing in order for an attorney's fee to be assessed against the employer. *Brown v. Rothschild-Washington Stevedore Co.*, 8 BRBS 539 (1978) (parties reached agreement on the eve of hearing).

The Board has held that no controversy exists under Section 28(b), and thus employer could not be held liable for the fee, where employer voluntarily made temporary total disability payments for five years and, after terminating them, reinstated benefits at permanent total disability levels with full retroactive payments. The fact payments were made "under protest" was irrelevant. *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982). *See also Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986) (Section 28(b) does not apply where employer voluntarily pays temporary total at all times prior to hearing and concedes entitlement to permanent partial).

Although Section 28(b) contains the requirement that following a controversy, the claimant refuse to accept compensation from the employer, the Fifth Circuit has held that the employer is liable under Section 28(b) if claimant accepts partial compensation from the employer but also requests additional compensation. *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Furthermore, the court rejected the argument that since the additional compensation was to be paid out of the Special Fund, employer was not liable under Section 28(b). The court stated that in that case employer disputed the existence and extent of disability, claimant was forced to retain counsel to pursue his claim, he obtained additional compensation and employer was liable for the fee.

Thus, in Section 8(f) cases, the Board has held employer liable if it has a real interest in the outcome of and is an active litigant in the proceedings. *See Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 43 (1985); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981); *Floyd v. Savannah Mach. & Shipyard Co.*, 11 BRBS 465 (1979); *Brown*, 8 BRBS 539; *Baird v. W. J. Jones & Son, Inc.*, 6 BRBS 727 (1977). *Cf. Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) (where employer did not participate before the Board or court, employer could not be liable for the fee); *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on*

recon., 36 BRBS 133 (2002) (McGranery, J., concurring) (same); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987) (same).

Even if the parties agree to the additional compensation before the hearing in front of the administrative law judge, the employer is still liable for any attorney's fee incurred before the agreement is reached. *Kleiner*, 16 BRBS 297; *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981); *Brown*, 8 BRBS 539.

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The Board held that employer's liability for an attorneys' fee pursuant to Section 28(b) commenced at the time a controversy arises between the parties, *i.e.*, at the time employer stopped making voluntary payments. *Caine v. Washington Metro. Area Transit Auth.*, 19 BRBS 180 (1986) (note that the Board's rejection of employer's contention that the language of Section 28(b) requires the holding of an informal conference, and employer's rejection of the deputy commissioner's recommendation after the conference, before fee liability commences is no longer good law, *infra*).

The Board held that employer was liable for claimant's counsel's attorney fees from the time it stopped making voluntary payments of compensation, as that is the date a controversy arose under Section 28(b), and all services were performed after that date. Since the nature and extent of claimant's disability were at issue at the informal conference, employer was on notice of a claim for permanent partial disability. *Ping v. Brady-Hamilton Stevedore Co.*, 21 BRBS 223 (1988).

Employer was liable for claimant's attorney's fee under Section 28(b) after the date of controversion because employer voluntarily paid compensation without an award, and thereafter terminated these payments upon a belief that the Special Fund should be liable for continuing payments. That employer was discharged of its liability for some compensation due to the operation of Section 8(f) did not affect its obligation under Section 28(b). Moreover, employer could not escape liability on the ground that it stipulated to claimant's entitlement at the hearing, as a controversy remained until that time. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

The Fifth Circuit affirmed the Board's holding that employer was liable for counsel's fee under Section 28(b) as it discontinued payment of benefits, and contested the compensability of the claim at the hearing, despite contending it was entitled to Section 8(f) relief. That employer was discharged from liability pursuant to Section 8(f) did not affect its obligation for an attorney's fee. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995).

Informal Conference, Recommendation and Acceptance

Section 28(b) states that once a controversy arises over the additional compensation, if any, to which claimant 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 refuses to accept this recommendation within fourteen days of its receipt by them, they must pay or tender to the employee the additional compensation, if any, which they believe claimant is entitled to receive. If claimant refuses to accept this amount and utilizes the services of an attorney to obtain additional compensation, then employer is liable for a reasonable attorney's fee.

Although Section 28(b) specifically refers to informal conferences before the "deputy commissioner or Board" and recommendations by these authorities, the Board does not hold informal conferences or issue recommendations. *J.R. [Robinson] v. NGSS/Ingalls Operations*, 43 BRBS 86 (2009).

Although Section 28(b) specifically states the deputy commissioner shall make a written recommendation regarding the disposition of the controversy, the Board and the Ninth Circuit held that the failure of the deputy commissioner to make a written recommendation does not preclude the assessment of an attorney's fee against the employer. *Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F. 2d 875, 11 BRBS 68 (9th Cir 1979), *aff'g in part, rev'g in part Holston v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 794 (1977); *Director, OWCP v. Jacksonville Shipyards, Inc.*, 1 BRBS 26 (1974). In *Nat'l Steel*, the court rejected the argument that a written recommendation by the deputy commissioner is a precondition to employer's liability for claimant's attorney's fees, stating that congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, regardless of whether the employer had rejected an administrative recommendation. The court further stated that even if it viewed a written recommendation as a precondition to fee liability it would not reach a different result, as the recommendation following the informal conference here was for the matter to "be referred to the Office of Administrative Law Judges for formal hearing at the request of both parties." The court stated that it was evident that the parties did not reach agreement at the conference and that any explicit recommendation would have been rejected by one of the parties. The court also agreed with the administrative law judge that employer's failure to raise this issue with the administrative law judge until it filed a motion for reconsideration of the fee order "thwarted any possibility of achieving a timely compliance with the statute" and thus was not grounds for setting aside the fee award.

For almost 20 years, no other circuit court addressed these requirements, and during this time, the Board followed the liberal interpretation of the Ninth Circuit. Relying on *Nat'l Steel*, the Board rejected employer's contention that the language of Section 28(b) requires the holding of an informal conference and employer's rejection of the deputy

commissioner's recommendation after the conference before fee liability commences. *Caine v. Washington Metro. Area Transit Auth.*, 19 BRBS 180 (1986). The Board reasoned that the Act does not require the deputy commissioner to hold an informal conference, as the holding of an informal conference is a discretionary act by the deputy commissioner, *citing Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). Thus, in *Caine*, the Board concluded that references in Section 28(b) to informal conferences and other procedures must be regarded as suggested guidelines rather than prerequisites.

Moreover, the Board held that even if the employer accepted the deputy commissioner's recommendation but claimant did not and requested a hearing, employer was liable for the attorney's fee if any additional compensation was eventually awarded. *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981)**;** *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd on other grounds sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Butler v. LeMont Shipbuilding & Repair Co.*, 3 BRBS 429 (1976). If the deputy commissioner failed to make a recommendation regarding the issue of disability but claimant was later awarded additional compensation, the Board held employer responsible for the attorney's fee. *See Alston v. United Brands Co.*, 5 BRBS 600 (1977). Where claimant received an unfavorable recommendation from the deputy commissioner, claimant was still found entitled to an employer-paid fee if ultimately successful in obtaining benefits. *Hogan v. Int'l Terminal Operating Co., Inc.*, 13 BRBS 734 (1981).

These holdings are no longer good law. Initially, in *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997) the Fifth Circuit reversed an administrative law judge's award of attorney's fees under Section 28(b) on the basis that employer paid total disability benefits at all times and the case settled without resort to the Labor Department's informal dispute resolution procedure. *Accord Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991) (employer paid benefits voluntarily and no dispute other than attorney's fee remained after informal conference). In reaching this result in *Perez*, 128 F.3d at 910, 31 BRBS at 164(CRT), the court stated that "an award of attorney's fees under section 928(b) is appropriate only if the dispute has been the subject of an informal conference with the Department of Labor." Subsequently in *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000), the court stated that the plain language of Section 928(b) permits claimants to obtain attorney's fees only where: (1) an informal conference on the disputed issue has been held; (2) a written recommendation on that issue is made; and (3) the employer refuses to accept the recommendation. The court initially concluded that as claimant did not raise an average weekly wage dispute at the informal conference and thus did not obtain a recommendation on this issue, fee liability was precluded. However, upon rehearing, the court determined that the recommendation encompassed payment at a certain compensation rate, which employer rejected by later raising a lower average weekly wage as an issue for the first time. Claimant was thus entitled to payment of his fee under Section 28(b).

The Fifth Circuit followed *Staftex* with *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), in which it held that as no informal conference was held, liability under Section 28(b) was precluded. The Fourth Circuit followed suit, holding liability under Section 28(b) precluded by the absence of an informal conference and written recommendation by the district director, which it stated are mandatory statutory pre-conditions to fee liability. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005). In *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007), the Sixth Circuit agreed with the strict interpretation of the requirements of Section 28(b), holding that under its plain language, the district director must issue a written recommendation containing a suggested disposition of the same controversy that claimant successfully prosecutes before the administrative law judge. *Cf. Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (while employer did not reject a recommendation, issues remained in dispute following the informal conference on which claimant prevailed, and employer was thus held liable).

In *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), the Board was faced with the issue of whether employer can be liable when the district director recommends that no further benefits are due claimant, employer accepts that recommendation and claimant successfully obtains an award of additional benefits from the administrative law judge. The Board held that under the requirements for liability set forth by the courts, employer must reject the recommendation and as it had not done so here, liability under Section 28(b) was precluded. The Fifth Circuit affirmed this result, noting that it seems at odds with the purpose of the statute, in that in a case such as this claimant either must accept the district director's recommendation, or pursue additional compensation and pay the attorney's fee himself. Nonetheless, the court stated that only Congress can remedy this anomaly.

In view of the holdings of the Fourth, Fifth and Sixth Circuits, the Board adopted the strict interpretation of Section 28(b) in those circuits as well as all others which have not addressed the issue. *Davis v. Eller & Co.*, 41 BRBS 58 (2007). *See R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). The practical effect of these holdings is to overrule *Caine*, 19 BRBS 180, and the other cases cited above. *See also Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989), *infra*.

Correspondence between the parties may be the functional equivalent of an informal conference. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006). *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007) (informal conference by telephone).

While the plain language of Section 28(b) states that "the deputy commissioner *or Board* shall set the matter for an informal conference," the Board has declined claimant's request that it hold an informal conference pursuant to Section 28(b), citing its statutory authority under Section 21 of the Act. *J.R. [Robinson] v. NGSS/Ingalls Operations*, 43 BRBS 86 (2009).

Although under 20 C.F.R. §702.317(c), any recommendations by the deputy commissioner may not be transmitted to the administrative law judge when the pre-hearing statements and evidence are transmitted, *see Wilson v. Old Dominion Stevedoring Corp.*, 3 BRBS 224 (1976), the recommendations are relevant under Section 28(b). The Board has held that claimant's counsel's reference to the deputy commissioner's recommendation in a letter accompanying his fee application was not improper given the requirement of Section 28(b) that an attorney's fee award be based upon the difference between the amount of compensation tendered or paid after the employer has refused to accept the deputy commissioner's recommendation and the amount ultimately awarded. *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977). In the wake of the court decisions making the recommendation a key to liability under Section 28(b), it is clear that conference recommendations may be placed in the record for this purpose.

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The Board affirmed the administrative law judge's determination that claimant was entitled to an attorney's fee paid by employer even though employer paid compensation pursuant to the deputy commissioner's recommendation, since claimant obtained additional compensation in proceedings before the administrative law judge. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). *Cf. Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), *infra*.

The Ninth Circuit held that employer was not liable for claimant's attorney's fee under Section 28(b) as there was no dispute after the informal conference concerning the amount of compensation to be awarded. Employer voluntarily paid benefits after it controverted the claim and at the conference employer agreed claimant was entitled to permanent total disability benefits. No dispute remained other than the amount of the fee. Section 28(b) authorizes a fee only if employer refuses to accept the recommendation of the deputy commissioner and claimant thereafter obtains greater compensation. The case was remanded for consideration of employer's liability for a fee under Section 28(a). *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991).

The Ninth Circuit reversed the administrative law judge's denial of an attorney's fee and held that employer was liable for an attorney's fee under Section 28(b) even though employer did not reject the district director's recommendation, as claimant prevailed on

issues that remained in dispute following the informal conference (average weekly wage calculation and amount of disability compensation) and obtained a greater award on appeal. The court distinguished *Watts*, 950 F.2d 607, 25 BRBS 65(CRT), in that in *Watts* at the informal conference employer agreed to pay all benefits sought and thereafter there was no issue in dispute other than claimant's entitlement to an attorney's fee. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

The Fifth Circuit initially reversed the Board's affirmance of the administrative law judge's award of an attorney's fee, finding that the issue on which claimant was successful, average weekly wage, was not the subject of a recommendation which employer rejected. The court stated that the plain language of Section 28(b) permits claimants to obtain attorney's fees only where: (1) an informal conference on the disputed issue has been held; (2) a written recommendation on that issue is made; and (3) the employer refuses to accept the recommendation. The court concluded that as claimant did not submit the average weekly wage dispute at the informal conference and thus did not obtain a recommendation on this issue, fee liability was precluded. However, upon rehearing, the court determined that the recommendation of the claim's examiner, which called for payments to continue at the referenced compensation rate, was rejected by employer when it later raised a lower average weekly wage as an issue for the first time. Thus, employer did not accept the recommendation, and claimant's use of an attorney to resolve the controversy and obtain greater benefits entitled him to an attorney's fee under Section 28(b). *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g* 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000).

The Fifth Circuit rejected employer's argument that it was not liable for a fee under Section 28(b) where employer acknowledged that there was a recommendation issued after the informal conference, but asserted that it complied with the district director's recommendation to reinstate temporary total disability compensation. The court noted that employer did reinstate these benefits several months after the informal conference. However, the court found that employer offered no evidence of the exact nature of the recommendations and the record reflected that several other disputed issues remained and claimant obtained greater compensation by virtue of proceedings before the administrative law judge. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Board, following a discussion of the Fifth Circuit's decisions in *Staftex*, 237 F.3d 409, 34 BRBS 105(CRT), and *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT), affirmed the administrative law judge's finding that the requirements of Section 28(b) were met and thus affirmed the award of an attorney's fee payable by employer. Specifically, the Board held that the record established that following an informal conference, claimant used the services of an attorney to successfully recover an award of additional compensation. As in *Gallagher*, employer here offered no evidence concerning the substance of the district director's recommendations. *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

No informal conference took place in this case, and under the law of the Fifth Circuit, that fact poses an absolute bar to an award of attorney's fees under Section 28(b). The court did not address the contentions that the prior law of the Fifth Circuit is contrary to this holding, as the court held that an attorney's fee award was properly awarded under Section 28(a). *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Fourth Circuit held that claimant was not entitled to an attorney's fee payable by employer pursuant to Section 28(b) because of the absence of an informal conference and written recommendation by the district director, which are mandatory statutory pre-conditions to fee liability. That convening an informal conference is within the discretion of the district director does not nullify the statutory requirements. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005).

In a Fourth Circuit case, the Board stated it was compelled to follow *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), and affirm the administrative law judge's finding that employer was not liable for an attorney's fee under Section 28(b). Although an informal conference was held and the district director issued a recommendation, the recommendation was that claimant was entitled to no further benefits, a finding which employer accepted. Although claimant was successful before the administrative law judge, *Edwards* requires that employer refuse to adopt the district director's recommendation, and this requirement was not met. The Board affirmed the administrative law judge's finding that in absence of employer's refusal to adopt the district director's recommendation employer cannot be held liable for a fee but discussed the problem arising from the *Edwards* holding in cases such as this where claimant is the party refusing to accept the recommendation and is successful before the administrative law judge. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

The Board held that the administrative law judge erred in finding that employer was not liable for claimant's attorney fee pursuant to Section 28(b). Pursuant to *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), an informal conference was held via written correspondence between the parties and the district director, 20 C.F.R. §702.311, the district director issued a written "supplemental recommendation," employer refused to adopt the recommendation, and claimant succeeded on the issue before the administrative law judge. The Board rejected the administrative law judge's finding that the issues before the district director and administrative law judge were different, as a claim for total disability benefits includes a claim for any lesser disability. The Board noted that it need not reach the legal issue of whether the issues before the district director and the administrative law judge *must* be the same. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

The Sixth Circuit held that under the plain language of Section 28(b), in order for fees to be assessed against employer the district director must issue a written recommendation containing a suggested disposition of the same controversy that claimant successfully

prosecutes before the administrative law judge. At the informal conference, claimant asserted a claim for permanent total disability. The district director issued a "recommendation" stating he was not recommending anything because the parties were pursuing a settlement. The administrative law judge awarded claimant permanent total disability benefits. The court held that employer was not liable for claimant's fee because there was no written recommendation on the controversy at the district director level. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Employer was held liable for an attorney's fee under Section 28(b) as the district director held an informal conference and issued a recommendation which employer did not accept. Employer refused to pay the recommended medical bills on the ground of no causation. Claimant obtained a favorable award from the administrative law judge. Nonetheless, the court agreed with the Board that the fee is not payable until claimant undergoes the proposed surgery and suffers a period of disability, citing *Adkins*, 109 F.3d 307. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

Employer refused the district director's written recommendation that employer should begin payments for a 19 percent impairment and that claimant was not required to sign the disputed stipulation as a condition to receive the compensation. The court noted that employer never changed its initial offer to pay conditioned on the challenged stipulation. Citing 20 C.F.R. §702.311, the court also held that the letters between the parties and the district director serve as the "functional equivalent of an informal conference." Thus, employer was held liable for an attorney's fee when claimant obtained benefits without having to agree to the stipulation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

The Board held that the administrative law judge erred by holding employer liable for a fee under Section 28(b). After the informal conference, the district director recommended that no further benefits were due claimant. Employer accepted this recommendation and paid or tendered no further benefits. Thus, notwithstanding that the district director's recommendation was legally incorrect and the administrative law judge awarded additional compensation, employer was not liable for claimant's attorney fee pursuant to Section 28(b). The Board noted that it was following the lead of the Fifth Circuit in strictly interpreting Section 28(b). *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

The Fifth Circuit affirmed the Board's decision that employer cannot be held liable for attorney's fees under Section 28(b) if it accepts the district director's written recommendation, as this interpretation is compelled by the plain language of the statute. In this case, employer accepted the district director's recommendation that no

compensation was due. The court noted that this result seems at odds with the purpose of the statute, in that in a case such as this claimant either must accept the district director's recommendation of no additional benefits, or pursue additional compensation and pay the attorney's fee himself. Nonetheless, the court held that only Congress can remedy this anomaly. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

Given the recent trend in the case law, *i.e.*, *Edwards, Pittsburgh & Conneaut,* and *Pool Co. v. Cooper*, the Board adopted a strict construction of Section 28(b) and held it would apply this construction in all circuits that have not addressed the issue. In this case, claimant requested an informal conference, but, following a conversation with employer, instead requested that the case be transferred to an administrative law judge. The parties subsequently stipulated that no informal conference was held. Pursuant to the plain language of Section 28(b), the absence of an informal conference precludes employer's liability for claimant's attorney's fee. The administrative law judge's assessment of fee liability on employer therefore was reversed. *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

Employer voluntarily paid benefits from the date of the injury. An informal telephone conference was conducted at the conclusion of which the district director gave the parties additional time to discuss a settlement and did not write a recommendation. Claimant's counsel notified the district director that the parties were unable to reach agreement and requested the case be transferred to the OALJ. The district director complied and did not write a recommendation. Pursuant to *Davis*, 41 BRBS 58, which follows the Fourth, Fifth and Sixth Circuits on the analysis of Section 28(b), the Board held, in this Third Circuit case, that employer cannot be held liable for an attorney's fee due to the absence of a written recommendation, and it reversed the administrative law judge's fee award payable by employer. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In this case arising in the Fourth Circuit, the Board held that employer was not liable for claimant's fee pursuant to Section 28(b) because the district director did not issue a recommendation on the issue favorably decided by the administrative law judge. The district director recommended that employer pay scheduled benefits for a 52 percent impairment, which employer ultimately accepted. This issue was not adjudicated before the administrative law judge. The administrative law judge adjudicated the compensability of claimant's back impairment, finding for claimant, but the district director never addressed any issues concerning claimant's back injury. Thus, the Board reversed the administrative law judge's finding that employer was liable for claimant's attorney's fee. *R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

The Board declined claimant's request that the Board convene an informal conference pursuant to Section 28(b). Although Section 28(b) states that, after a controversy arises, "the deputy commissioner or Board shall set the matter for an informal conference," such an action is not within the Board's statutory grant of authority in Section 21 of the Act. It

is clear that, pursuant to Section 21, the Board's authority does not extent to holding informal conferences, but is restricted to its review function. The Board noted that claimant faces a predicament should the district director's memorandum of informal conference be accepted by employer, but stated that this concern can be addressed only by Congress. *J.R. [Robinson] v. NGSS/Ingalls Operations*, 43 BRBS 86 (2009).

After an informal conference on January 30, 2008, a May 20, 2008 letter from the district director resolved the conference issues in claimant's favor; however, the letter stated that claimant's compensation rate could not be determined due to insufficient evidence of claimant's post-injury wages. Because this letter specifically stated that a compensation rate could not be calculated, the Board held that the letter does not constitute a written recommendation to pay compensation for purposes of conferring on employer liability for claimant's attorney's fee pursuant to Section 28(b). The Board noted that claimant no longer worked for employer and that his post-injury wages were not provided to the district director. *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010).

A recommendation by the district director for permanent total disability benefits incorporates the recommendation that claimant "shall be" thereafter entitled to annual cost-of-living adjustments pursuant to Section 10(f) until such time that claimant is no longer permanently totally disabled. The Board thus held that the administrative law judge erred in concluding that Section 10(f) was not addressed in the written recommendation. The Board further reversed the administrative law judge's finding that employer did not refuse to accept the written recommendation of the district director. Employer did not pay the recommended Section 10(f) adjustment, and it opposed claimant's entitlement to permanent total disability benefits, with the corresponding cost-of-living adjustments. Moreover, the administrative law judge awarded claimant permanent total disability benefits, rather than the permanent partial urged by employer. Claimant's entitlement to cost-of-living adjustments pursuant to Section 10(f) constitutes additional compensation within the meaning of Section 28(b). The Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(b). The case was remanded for the administrative law judge to determine the amount of the fee to which counsel is entitled. *Wilson v. Serv. Employees Int'l, Inc.*, 44 BRBS 81 (2010), *aff'd on recon.*, 45 BRBS 1 (2011).

In denying employer's motion for reconsideration, the Board first distinguished this case from *Perez*, 128 F.3d 908, 31 BRBS 162(CRT), where the parties settled their dispute at the district director level before an informal conference was held, on the ground that this case required action by the district director. The Board rejected the contention that no informal conference had taken place, as the correspondence between the parties, culminating in the district director's written recommendation that employer pay permanent total disability benefits, constituted an informal conference pursuant to 20 C.F.R. §702.311. The Board also rejected employer's contention that, as in *Thompson*, 44 BRBS 71, it did not reject the recommendation because no compensation rate was specified. Unlike

Thompson, which involved a recommendation for partial disability benefits based on claimant's wage-earning capacity with another employer, this case involved total disability benefits based on claimant's wages with employer and which employer had been paying. The Board reiterated that as employer did not pay the Section 10(f) adjustments which became due on October 1, 2008, and claimant obtained an award before the administrative law judge, employer is liable for claimant's fee under Section 28(b), citing *Carey*, 627 F.3d 979 (5th Cir. 2010). *Wilson v. Serv. Employees Int'l, Inc.*, 45 BRBS 1 (2011), *aff'g on recon.* 44 BRBS 81 (2010).

The Fifth Circuit rejected employer's argument that its voluntary payment of benefits after the informal conference at the recommended rate was not a refusal to adopt the district director's written recommendation that the proper average weekly wage calculation includes claimant's premium pay. The court held that irrespective of its voluntary continuation of payment, employer sought a hearing on the issue of whether claimant's premium pay should be included in his average weekly wage calculation and, thus, sought to overturn the district director's recommendation through litigation. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010).

In this DBA case which arises in the jurisdiction of the Ninth Circuit, employer's liability for a fee is not dependent upon any written recommendation by the district director but is dependent on claimant obtaining additional compensation. The Board rejected employer's assertion that claimant did not obtain any additional compensation as he obtained additional medical and disability benefits for his work-related psychological disability, as well as medical benefits for his lung condition, regardless of employer's voluntary payment of disability benefits at a higher compensation rate than that which the administrative law judge awarded. The Board rejected employer's assertion that medical benefits cannot constitute "additional compensation" under Section 28(b), as it was unwilling to depart from long-held precedent based on cases employer cited that did not address the issue directly. *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

In this hearing loss case, on August 24, 2016, the district director issued a recommendation, which Employer received on August 29, 2016. However, prior to the 14-day deadline for Employer to accept that recommendation, on September 7, 2016, the district director issued another recommendation. Employer accepted the September 7 recommendation and, within 14 days of receiving it, on September 16, paid Claimant the recommended benefits. In awarding counsel a fee pursuant to Section 28(b), the district director found Employer's September 16 payment of benefits was not within 14 days of receiving the August 24 recommendation. The Board reversed, holding the September 7 recommendation, issued within the original 14-day period, superseded the August 24 recommendation. As Employer accepted that recommendation and paid within 14 days of its receipt, one of the criteria for fee liability under Section 28(b) had not been satisfied. In a split decision, the Fifth Circuit reversed the Board's decision and held the Section 28(b) criteria were met when the district director issued a recommendation on August 24, 2016, and Employer

rejected that recommendation by not paying benefits within 14 days. The court disagreed with Employer, and the Board, that the September 7 recommendation rendered the August 24th one moot. *Rivera v. Director, OWCP*, 22 F.4th 460, 55 BRBS 59 (5th Cir. 2021).

Additional Compensation

After an informal conference is held and a recommendation is issued which employer refuses to accept, Section 28(b) applies to shift liability if claimant utilizes the services of an attorney to obtain compensation greater than that paid or tendered by the employer.

Where employer voluntarily pays benefits for temporary total disability at all times prior to the administrative law judge's decision and claimant obtains an award of permanent partial disability benefits, the Board has rejected the argument that claimant is entitled to a fee under this section on the basis he obtained an enforceable award. *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986).

Additional compensation within the meaning of Section 28(b) has been obtained where employer pays claimant's medical bills either by order of the administrative law judge after a hearing, *Morgan v. Gen. Dynamics Corp*. 16 BRBS 336 (1984); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 13 BRBS 147 (1980); *Simeone v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 249 (1976), or by agreement before the hearing. *Revoir v. Gen. Dynamics Corp.*, 12 BRBS 524 (1980); and where a Section 14(e) additional assessment of compensation is awarded against employer, *Smelcer v. Nat'l Steel & Shipbuilding Co.*, 16 BRBS 117 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978).

Where employer agreed to pay additional compensation for claimant's hearing loss prior to the hearing, employer was liable under Section 28(b). *Brown v. Gen. Dynamics Corp.*, 12 BRBS 528 (1980). Claimant obtained additional compensation where the deputy commissioner recommended a higher average weekly wage and claimant and employer stipulated to this increase before the hearing, which employer did not pay until embodied in the administrative law judge's award, and claimant received four additional weeks of compensation for temporary total disability, *Vanison v. Greyhound Cines, Inc.*, 17 BRBS 179 (1985), as well as where the Board increased the administrative law judge's determination of claimant's average weekly wage, *Bacon v. Gen. Dynamics Corp.*, 14 BRBS 408 (1981).

The Board has found employer liable under Section 28(b) where claimant successfully prosecuted a permanent partial disability claim under Section 8(c)(21)**,** receiving an ongoing award, even though due to employer's overpayment of temporary total benefits claimant would not realize the award for many years. The Board noted employer actively disputed the claim. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). *Accord E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Geisler v. Cont'l Grain Co.*, 20 BRBS 35 (1987). *C.f. Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992) (establishing right to benefits did not establish right to additional compensation due to employer's credit and the employee's death, which extinguished his right to benefits); *Scott v. C & C Lumber Co., Inc.*, 9 BRBS 815 (1978) (no additional

compensation obtained where employer overpaid temporary total benefits and claimant obtained a scheduled permanent partial award).

Claimant has not established a right to additional compensation when the Board modifies the administrative law judge's decision to find claimant's average weekly wage under Section 10(c) rather than Section 10(b), but does not change the amount of benefits claimant received, *Orkney v. Gen. Dynamics Corp.*, 8 BRBS 543 (1978); when the administrative law judge finds the date of claimant's permanent disability started later than when claimant argued and than when employer began voluntarily paying permanent disability benefits, *Wilhelm v. Seattle Stevedore Co.*, 15 BRBS 432 (1983); when employer reinstates voluntary benefits in the full amount due prior to claimant's retention of counsel, *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982); and where employer voluntarily pays temporary total at all times and concedes entitlement to permanent partial benefits which were ultimately awarded. *Flowers*, 19 BRBS 162.

In *Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the court found that although the effect of its decision was to diminish the amount claimant was entitled to recover in the form of a 10 percent assessment on his compensation, since claimant was for the most part successful, claimant was entitled to an attorney's fee award under Section 28(b).

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Counsel was entitled to an attorney's fee paid by employer where the Board modified the compensation award, resulting in additional compensation above the amount voluntarily paid by employer. As employer did not challenge the amount of the administrative law judge's fee award, it was affirmed. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1982), *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The Board held that, under Section 28(b), claimant's counsel is entitled to payment of his attorney's fee by employer where he establishes claimant's right to payment of past medical benefits and the right to additional future medical benefits inasmuch as he has established claimant's right to additional compensation within the meaning of the Act. Previous cases reached this result under Section 28(a). Employer is liable even though due to its large overpayment, claimant may not realize the award for many years. *Geisler v. Cont'l Grain Co.*, 20 BRBS 35 (1987).

Even though employer did not contest claimant's modification request for permanent total disability benefits, presumably because it assumed that any additional amount awarded claimant on modification would be paid by the Special Fund due to a prior award of Section 8(f) relief, where employer actively participated in the proceedings, the Board affirmed the administrative law judge's determination that employer was liable for a fee for claimant's

attorney's work during the modification proceedings. The Board reasoned that since claimant obtained additional compensation as a result of the modification proceedings and had been required to be represented by an attorney throughout the proceedings due in part to employer's failure to concede liability for the additional amount requested, the administrative law judge properly held employer liable for the fee. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The Board concluded that the administrative law judge did not err in holding employer liable for the attorney's fee incurred with claimant's motion for modification where claimant by virtue of the modification proceedings obtained an inchoate right to additional compensation equivalent to the amount of the Section 3(e) credit awarded to employer in the original Decision and Order. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Ninth Circuit rejected employer's argument that claimant was not entitled to an attorney's fee under Section 28(b) because only the source of his benefits was at issue, not the amount of compensation. The court affirmed the Board's holding that claimant was entitled to an attorney's fee because, by virtue of the modification proceedings, claimant successfully secured an inchoate right to additional compensation equivalent to the amount of Section 3(e) credit awarded to employer. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board rejected employer's argument that it could not be liable under Section 28(b) as it voluntarily paid both temporary and permanent total disability benefits. Claimant had previously been awarded benefits by an administrative law judge, with employer being awarded Section 8(f) relief. When claimant sought additional benefits, employer filed for modification to a lower award, and thereafter, it refused to enter into any stipulations at the hearing, actively litigated all of the issues in the claim, and argued that it had an economic interest in the outcome of the case. Claimant's successful prosecution of the claim thus satisfied the requirements of Section 28(b) and supported the administrative law judge's award of attorney's fees. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

In a hearing loss claim decided during the period when the application of the 1984 Amendments to such claims was uncertain, the Board stated that it need not decide if claimant ultimately would receive more money under Section 8(c)(13), which paid a lump sum, or Section 8(c)(23), under which employer was paying $10.09 weekly and continuing, as it upheld the award under Section 8(c)(13). The Board held that the value of receiving a large lump sum under Section 8(c)(13) was sufficient to establish that claimant obtained "greater compensation" under Section 28(b). *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *rev'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Fifth Circuit reversed the attorney's fee award based on its holding that claimant was entitled to benefits under Section 8(c)(23). The court remanded the case for consideration of whether counsel was entitled to a fee on grounds other than those initially relied upon. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

Although claimant's award was modified from Section 8(c)(13) to Section 8(c)(23), the Board held that as employer remained liable for a Section 14(e) penalty, this liability would support an award of an attorney's fee payable by employer, even though the penalty may be subsumed by employer's overpayment of benefits, as employer's credit may one day run out and it again would be liable for weekly payments to claimant. As the Section 14(e) penalty resulted in the accrual of a benefit to claimant greater than that voluntarily paid by employer, employer was liable for an attorney's fee. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand) (note that following the Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), hearing loss awards were made under Section 8(c)(13), although potentially at a lower average weekly wage).

The Board rejected employer's argument that if successful on appeal it was not liable for a fee, since the Board affirmed the findings on causation and claimant's inability to perform his usual work. Although the Board remanded for reconsideration of suitable alternate employment and average weekly wage, the Board affirmed the fee awards, because, at a minimum, claimant established entitlement to medical benefits which employer controverted, and employer did not challenge the amount of the fees awarded.. *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991).

Under the facts of this case, claimant's counsel was not entitled to a fee for services rendered in connection with decedent's *inter vivos* claim. Claimant's right to decedent's disability compensation and unpaid medical benefits was extinguished by employer's Sections 33(f) and 3(e) credits. Accordingly, counsel's efforts did not ultimately result in claimant's receiving additional benefits. Counsel's entitlement to a fee in connection with the claim for death benefits was contingent on the resolution of the Section 33(g) issue on remand. *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992).

In a hearing loss case, employer initially controverted the claim but then began making voluntary payments of compensation to claimant based on the rate to which he was ultimately found entitled. Where claimant's counsel was unsuccessful in gaining claimant any additional benefits beyond that which employer voluntarily paid before the case came before the administrative law judge and Board, the Fifth Circuit denied counsel's request for an attorney's fee pursuant to Section 28(b). *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

The First Circuit held that the applicability of Section 28(b) turns on whether the claimant succeeds in securing additional compensation. The court rejected claimant's contention that he was entitled to a fee because, overall, his claim was compensable, even though he did not succeed in obtaining greater compensation than employer paid. Moreover, the court declined to answer the question of whether medical benefits are (or are not) subsumed within the phrase "additional compensation" for purposes of awarding attorney fees under Section 28(b), as the record was bereft of any credible evidence indicating that claimant's petition brought about a payment of medical bills that would not have otherwise occurred. *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

The First Circuit held that claimant was not awarded compensation greater than tendered by employer because there is no evidence that employer refused to pay the cost of surgery in Puerto Rico, where claimant resides, regardless of where he ultimately chose to undergo surgery. Moreover, confirmation by the administrative law judge of claimant's entitlement to medical benefits for his back injury does not equate to securing "additional compensation" within the plain meaning of Section 28(b). *Pena-Garcia v. Director, OWCP*, 917 F.3d 61, 53 BRBS 13(CRT) (1st Cir. 2019).

The Fifth Circuit rejected employer's argument that it was not liable for a fee under Section 28(b) because it complied with the recommendation to reinstate temporary total disability compensation following the informal conference as the record reflected that several other disputed issues remained and claimant obtained greater compensation by virtue of proceedings before the administrative law judge. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Fifth Circuit initially reversed the Board's affirmance of the administrative law judge's award of an attorney's fee, concluding that the issue on which claimant was successful, an increased average weekly wage, was not the subject of a recommendation after an informal conference. However, upon rehearing, the court determined that the recommendation of the claim's examiner, which called for payments to continue at the referenced compensation rate, was rejected by employer when it later raised a lower average weekly wage as an issue for the first time. Thus, employer did not accept the recommendation, and claimant's use of an attorney to resolve the controversy and obtain greater benefits entitled him to an attorney's fee under Section 28(b). *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g* 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000).

The Board, following a discussion of the Fifth Circuit's decisions in *Staftex*, 237 F.3d 409, 34 BRBS 105(CRT), and *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT), affirmed the administrative law judge's finding that the requirements of Section 28(b) were met and thus affirmed the award of an attorney's fee payable by employer. Specifically, the Board held that the record established that following an informal conference, claimant used the services of an attorney to successfully recover an award of additional compensation. As in

Gallagher, employer herein offered no evidence concerning the substance of the district director's recommendations. *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

The Ninth Circuit denied claimant an attorney's fee under Section 28(b), as he did not establish that the compensation awarded was greater than the amount tendered by employer. Claimant was awarded $932 as compensation for his knee injury, after rejecting employer's $5,000 offer to settle both the knee and back injury claims. The court rejected claimant's argument that the Board erred in comparing his $932 recovery with the $5,000 employer offered to settle both claims. The court stated that it was claimant's burden to establish how much of the lump-sum offer was for each claim. As claimant did not establish how the offer could be allocated separately as to the knee and back claims nor did the record contain such evidence, he was not entitled to an employer-paid attorney's fee. *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The Fourth Circuit rejected employer's contention that claimant was not entitled to an employer-paid attorney's fee award under Section 28(b). Employer argued that claimant failed to obtain greater compensation by litigating the case, because employer tendered payment of compensation for a 19 percent impairment after ceasing voluntary payments and claimant ultimately was awarded compensation based on that rating. Nonetheless, the court held, although claimant did not receive a higher dollar award in benefits from the administrative law judge, Section 28(b) applies because employer refused to accept the district director's written recommendation after an informal conference and continued to condition its tender offer of payment on claimant's signing a stipulation. Thus, the court concluded that claimant received an award "greater than the amount paid or tendered" by employer because he received an award of benefits without having to sign the stipulation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

A recommendation by the district director for permanent total disability benefits incorporates the recommendation that claimant "shall be" thereafter entitled to annual cost-of-living adjustments pursuant to Section 10(f) until such time that claimant is no longer permanently totally disabled. The Board thus held that the administrative law judge erred in concluding that Section 10(f) was not addressed in the written recommendation. The Board further reversed the administrative law judge's finding that employer did not refuse to accept the written recommendation of the district director. Employer did not pay the recommended Section 10(f) adjustment, and it opposed claimant's entitlement to permanent total disability benefits, with the corresponding cost-of-living adjustments. Moreover, the administrative law judge awarded claimant permanent total disability benefits, rather than the permanent partial urged by employer. Claimant's entitlement to cost-of-living adjustments pursuant to Section 10(f) constitutes additional compensation within the meaning of Section 28(b). The Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(b). The case was remanded for the administrative law judge to determine the amount of the fee to which counsel is entitled.

Wilson v. Serv. Employees Int'l, Inc., 44 BRBS 81 (2010), *aff'd on recon.*, 45 BRBS 1 (2011).

In denying employer's motion for reconsideration, the Board first distinguished this case from *Perez*, 128 F.3d 908, 31 BRBS 162(CRT), where the parties settled their dispute at the district director level before an informal conference was held, on the ground that this case required action by the district director. The Board rejected the contention that no informal conference had taken place, as the correspondence between the parties, culminating in the district director's written recommendation that employer pay permanent total disability benefits, constituted an informal conference pursuant to 20 C.F.R. §702.311. The Board also rejected employer's contention that, as in *Thompson*, 44 BRBS 71, it did not reject the recommendation because no compensation rate was specified. Unlike *Thompson*, which involved a recommendation for partial disability benefits based on claimant's wage-earning capacity with another employer, this case involved total disability benefits based on claimant's wages with employer and which employer had been paying. The Board reiterated that as employer did not pay the Section 10(f) adjustments which became due on October 1, 2008, and claimant obtained an award before the administrative law judge, employer is liable for claimant's fee under Section 28(b), citing *Carey*, 627 F.3d 979 (5th Cir. 2010). *Wilson v. Serv. Employees Int'l, Inc.*, 45 BRBS 1 (2011), *aff'g on recon.* 44 BRBS 81 (2010).

The Fifth Circuit held that the administrative law judge and the Board erred in concluding that employer was not liable for claimant's attorney's fee under Section 28(b). In this case, employer argued that claimant's benefits should be based on a certain average weekly wage but continued to pay benefits based on the higher average weekly wage recommended by the district director pending a decision by the administrative law judge on the issue of the correct average weekly wage. The administrative law judge awarded benefits based on an average weekly wage greater than the amount employer believed was correct but lower than the average weekly wage recommended by the district director. Consistent with its decision in *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981), the court held that employer is liable under Section 28(b) where claimant utilized the services of an attorney to obtain an award "greater than the amount" to which employer believed he was entitled. The court rejected employer's argument that *Savannah Mach.* is no longer controlling precedent in light of the Fifth Circuit's subsequent decision in *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). The court stated that the plain language of Section 28(b) makes it clear that the phrase "the amount paid or tendered by the employer" means "the amount of additional compensation, if any, to which they [the employer] believe the employee is entitled." *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010).

In this DBA case which arises in the jurisdiction of the Ninth Circuit, employer's liability for a fee is not dependent upon any written recommendation by the district director but is dependent on claimant obtaining additional compensation. The Board rejected employer's

assertion that claimant did not obtain any additional compensation as he obtained additional medical and disability benefits for his work-related psychological disability, as well as medical benefits for his lung condition, regardless of employer's voluntary payment of disability benefits at a higher compensation rate than that which the administrative law judge awarded. The Board rejected employer's assertion that medical benefits cannot constitute "additional compensation" under Section 28(b), as it was unwilling to depart from long-held precedent based on cases employer cited that did not address the issue directly. *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

Amount of the Award

Section 28(b) further provides that, where the above requirements are met, a "reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation."

The Board has consistently held that this provision is a basis for holding an employer liable, and it does not limit the amount of the attorney's fee award to an amount equal to or less than the compensation awarded, where all of the circumstances of the case indicate that a larger fee is reasonable. *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd on other grounds sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Kelley v. Handcor, Inc.*, 1 BRBS 319 (1975). In *Barber*, the Board stated that Section 702.132 of the regulations requires that the administrative law judge consider several other factors in addition to the amount of benefits involved. *See* Amount of Benefits, Relevant Factors, *supra*.

In *Brown v. Lykes Bros. Steamship Co., Inc.*, 6 BRBS 244 (1977), the Board further stated that the phrase "based solely upon" in Section 28(b) means that the fee must have some reasonable relationship to the compensation awarded over that tendered or paid by the employer. Furthermore, limiting an attorney's fee to an amount equal to or less than the compensation awarded would drive competent counsel from the field and therefore is contrary to the spirit of the Act. *Piecoro v. Pittston Stevedoring Corp.*, 8 BRBS 360 (1978). In *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.), the Board further stated that under this section, employer's liability for a fee is predicated on the fact that claimant obtained more than employer voluntarily paid or tendered, and the fee is to be solely for the *work* done to increase compensation. Thereafter, in determining the reasonableness of the fee for which employer is liable, the regulation at 20 C.F.R. §702.132 provides the criteria for determining the reasonableness of the *amount* of the fee.

The Board therefore rejected employer's argument that a fee award should be reversed because it was not based solely on the difference between the two percent permanent partial disability employer paid and the four percent the administrative law judge awarded, as employer did not show that the fee award was unreasonable or that the administrative law judge abused his discretion. *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981). *See also Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979) (rejecting argument $1,200 fee was unreasonable where the additional compensation was only $2,156.69).

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The Board held that the administrative law judge erred by relying on language in Section 28(b) to summarily limit the attorney's fee award to the amount of additional compensation

obtained on appeal. *Jarrell v. Newport News Shipbuilding & Dry Dock Co*, 19 BRBS 216 (1987).

The amount of the fee is not limited to the amount of additional compensation gained; an administrative law judge must consider factors in addition to the amount of benefits and award a fee which is reasonable considering the facts of the particular case. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

In rejecting employer's motion for reconsideration of the Board's affirmance of the administrative law judge's fee award, the Board rejected employer's contention that the fee should be limited by the amount of compensation gained, and that claimant had only limited success in the case on the merits. The Board stated that Section 28(b) provides one means for establishing employer's liability for claimant's attorney's fee in cases in which there is a dispute as to claimant's entitlement to benefits. Under this section, employer's liability for a fee is predicated on the fact that claimant obtained more than employer voluntarily paid or tendered, and the fee is to be solely for the *work* done to increase compensation. Thereafter, in determining the reasonableness of the fee for which employer is liable, the regulation at 20 C.F.R. §702.132 provides the criteria for determining the reasonableness of the *amount* of the fee. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.).

The Board rejected employer's arguments that counsel's fee should be limited to the difference between the amount voluntarily paid and the amount awarded by the administrative law judge, that counsel's efforts resulted in only a nominal award, and that claimant was only partially successful because employer did not raise these issues before the administrative law judge and cannot raise them for the first time on appeal. Moreover, the Board noted that it has consistently rejected the argument that fee awards must be limited to the difference between the amount of benefits awarded and the amount paid or tendered. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

The Fifth Circuit held that in conjunction with *Hensley v. Eckerhart*, 461 U.S. 421 (1983), Section 28(b) specifically requires that an attorney's fee award be based "solely upon the difference between the amount awarded and the amount tendered or paid." In view of this language, the court observed that the fee award of $15,500 may be excessive in light of the fact that claimant's recovery of benefits beyond those tendered by employer was limited to future medical costs for psychiatric care, plus $736.50 in penalties and interest. In particular, the court held the administrative law judge erred in not attempting to quantify the award of future medical benefits when determining the amount of the attorney's fee award. The court therefore vacated the Board's affirmance of the administrative law judge's fee award and remanded for further consideration. *Avondale Indus., Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003).

Avoidance of Fee Liability under Section 28(b)

Section 28(b) also provides that an employer can avoid liability for an attorney's fee under Section 28(b) if: 1) the controversy which develops relates to the degree or length of claimant's disability; and 2) the employer offers to submit the case to a physician for an independent medical examination under Section 7(e) and also offers, before the examination occurs, to pay whatever compensation is indicated by the independent examination. *Hadel v. I.T.O. Corp. of Baltimore*, 6 BRBS 519 (1977).

If employer does not agree in advance to accept the findings of the impartial examiner, employer is liable for the attorney's fee, *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F. 2d 608, 9 BRBS 326 (3d Cir. 1978), *aff'g in pert. part* 7 BRBS 802 (1978); *Thompson v, McDonnell Douglas Corp.*, 17 BRBS 6 (1984), as is employer if it submits no evidence that it agreed to accept the findings in advance of the exam, *Caraballo v. Ne. Marine Terminal Co., Inc.*, 11 BRBS 514 (1979); *Barranca v. Universal Mar. Services Corp.*, 6 BRBS 781 (1977); *Holmes v. Universal Mar. Serv. Corp.*, 5 BRBS 488 (1977), or employer agrees to pay compensation after the examination. *Baird v. W. Jones & Son, Inc.*, 6 BRBS 727 (1977); *Hadel*, 6 BRBS 519.

In *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979), the Board further held that whether employer was responsible for an attorney fee under this part of Section 28(b) depends on whether the physician used to rate claimant's disability was an "independent medical examiner" consistent with the requirements of Section 7(i), which provides that, unless the parties agree, a physician cannot be selected for purposes of Section 7(e) if he has been employed by or received a fee from any insurer on a worker's compensation claim in the two years prior to his selection. The case was remanded for the administrative law judge to make the findings necessitated by this section.

Claimant's Liability—Section 28(c)

An attorney's fee can only be levied against an employer if the requirements of Section 28(a) or (b) are met. If the employer is not liable for an attorney's fee under these subsections, Section 28(c) provides that the attorney's fee may be assessed against claimant and may be made a lien on claimant's compensation. *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), *rev'g Loiselle v. Portland Stevedoring Co.*, 2 BRBS 214 (1975).

Where the administrative law judge denies the claim for compensation in full, claimant's counsel not only cannot receive a fee from employer, but claimant cannot be held liable. *Karacostas v. Port Stevedoring Co., Inc.*, 1 BRBS 128 (1974); *Director, OWCP v. Hemingway Transp., Inc.*, 1 BRBS 73 (1974). Where there is no compensation award upon which to place a lien, no fee can be awarded. However, claimant's counsel is entitled to a lien on claimant's compensation where employer cannot be held liable and counsel has obtained some benefits for claimant; "success" with regard to claimant's liability is not measured against what employer voluntarily paid, but is based on claimant's receiving any benefits as a result of counsel's efforts.

Claimant may be liable for fees incurred prior to employer's notification and refusal to pay under Section 28(a), *see Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Jones v. The Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979), *aff'd in relevant part sub nom. The Chesapeake & Potomac Tel. Co. v. Director, OWCP*, 615 F.2d 1368 (D.C. Cir. 1980) (table), and prior to a controversy arising under Section 28(b), *see Trachsel v. Brady-Hamilton Stevedore, Co.*, 15 BRBS 469 (1983).

Moreover, as the Special Fund can never be held liable for an attorney's fee under Section 28, *see, e.g., Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), on some facts the result of this holding is that claimant is liable for the fee. In *Holliday*, the court held that the fee for work before the Board and court could not be assessed against employer as it did not participate at those levels. Moreover, although due to the operation of Section 8(f), the Special Fund was liable for the benefits awarded, it could not be liable for the fee. The court noted that the Act specifically provides for claimant's liability in some instances. *See Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987).

Where claimant is represented by a lay representative who is not working under the guidance of an attorney, the lay representative is not entitled to an employer-paid fee under Section 28(a) or (b) but may be compensated by claimant at a lower rate. *Todd Shipyards Corp. v. Director, OWCP*, 545 F. 2d 1176, 5 BRBS 23 (9th Cir. 1976), *rev'g Hilton v. Todd Shipyards Corp.*, 1 BRBS 159 (1974). *See Luce v. Bath Iron Works*, 12 BRBS 162 (1979).

In *Todd Shipyards*, the court distinguished between paralegals and other staff in an attorney's office hired to assist him and lay representatives hired by claimant in lieu of an attorney. Although the regulations allow claimant to be represented by an attorney or "other" person, Section 28(a) and (b) specifically provides for fees assessed against employer only where claimant utilizes the services of an attorney at law. Lay representatives do not fit within this definition. Thus, a paralegal or other support staff working under the direction of counsel and compensated at a lower rate can reasonably be counted as part of the "attorney's fee" under Section 28(b) or (b), for which employer is liable. Employer is not liable for services performed by a lay representative who is independent and not assisting counsel, and claimant is liable for such services.

The Board has affirmed an administrative law judge's rejection of an agreement that claimant would pay employer's fees in consideration of employer's stipulations as to its liability. *Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd on other grounds sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988).

The Board affirmed the administrative law judge's denial of a fee to counsel in *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986), where employer voluntarily paid temporary total benefits and conceded entitlement to permanent partial benefits, which claimant was awarded. The Board found employer was not liable and declined to award a fee assessed against claimant as employer was willing to pay the benefits awarded and counsel's failure to obtain his claimant's cooperation prolonged the litigation unnecessarily. *Flowers* must be viewed on its specific facts, as in general, since claimant did obtain entitlement to benefits in that case, counsel would be entitled to a fee as a lien on compensation had his actions not been found to have prolonged the litigation..

The regulations at Sections 702.132 and 802.203 provide that, in addition to the other factors, where the fee is assessed against claimant, claimant's ability to pay must be considered. *See Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

Section 28(c) also provides that the Board or reviewing court may approve an attorney's fee for the work done before it by claimant's attorney. *See Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977). This is consistent with the language in Section 28(a) that an attorney's fee may be awarded against the employer or carrier "by the deputy commissioner, Board, or court, as the case may be." 33 U.S.C. §928(a). *See* Authority to Award, *supra*.

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Where Section 8(f) relief was awarded, employer did not respond to claimant's appeal or contest his assertion of an earlier onset date of disability consistent with the parties' stipulation (which the administrative law judge ignored), and claimant was successful on appeal, the Board held claimant's counsel entitled to a reasonable attorney's fee assessed against claimant. *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987).

The Board rejected claimant's argument that he should not be responsible for payment of his attorney's fee. Claimant contended that he detrimentally relied on the administrative law judge's order awarding an attorney's fee payable by employer. The Board held that the amount of the attorney's fee awarded against claimant was not unduly burdensome, and that claimant had no basis for relying on the administrative law judge's Order, as all possibilities for review were not exhausted. *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989).

In a case where the Board held that employer could not be held liable for claimant's fee because it had voluntarily made payments and had not controverted any aspect of the claim, the Board held that claimant is liable for the fee as a lien on his compensation, given that the Special Fund also cannot be held liable for the fee. *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990), *overruled in part Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991) (attorney's fee may not be assessed against Special Fund under Section 26).

The Board reversed the district director's award of an attorney's fee assessed against employer and remanded for consideration as to whether counsel is entitled to a fee assessed against claimant as a lien on the compensation pursuant to Section 28(c) of the Act since claimant did obtain some compensation in this case. The Board also noted that Section 702.132 requires that the financial circumstances of claimant be taken into account when the fee is to be assessed against claimant. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The Board held that the district director erred in denying counsel a fee payable by claimant due to counsel's failure to establish: there had been a successful prosecution; claimant's understanding of representation including necessity and reasonableness of work; and claimant's ability to pay the fee. Counsel submitted a fee petition conforming to the regulations at 20 C.F.R. §702.132, and he responded to the district director's information requests in multiple correspondences addressing raised issues. Moreover, applicable regulations provide for the compilation of an administrative file which would give the requisite information needed for consideration of the fee petition. *See* 20 C.F.R. §§702.203 *et seq.*,702.234-236. The case was remanded for reconsideration of claimant's liability for a fee under Section 28(c) and 20 C.F.R. §702.132. *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

The Board held that employer could not be liable for claimant's attorney's fee for work performed before the Board, as it did not participate in the case before the administrative law judge or the Board. Claimant was liable for the fee as a lien on his compensation pursuant to Section 28(c), as well as for the requested costs. *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring).

The district director erred in assessing an attorney's fee against claimant pursuant to Section 28(c). The district director did not find that employer was not liable for the fee under Section 28(a) or (b), but rather found that LIGA could not be liable for the fee due to Louisiana law. The Board held that this finding was not a proper basis for imposing the fee on claimant as a lien against compensation, as employer is primarily liable for all awards. The Board thus remanded for further findings regarding counsel's entitlement to a fee for reasonable and necessary work and employer's liability for that fee. The Board noted that employer's insolvency did not affect its liability for a fee, but could present an enforcement issue. *Marks v. Trinity Marine Grp.*, 37 BRBS 117 (2003).

The Board granted reconsideration in part and remanded the case to the administrative law judge for consideration of a fee payable by claimant pursuant to Section 28(c) in view of the holding that neither Section 28(a) nor Section 28(b) applied. *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

As the Board held that employer could not be held liable for claimant's attorney's fee, the case was remanded for the administrative law judge to address claimant's liability for the fee pursuant to Section 28(c), consistent with 20 C.F.R. §702.132. *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010).

Where claimant's attorney was awarded an attorney's fee as a lien on claimant's compensation pursuant to Section 28(c) by both the district director and the administrative law judge, but claimant died before counsel received any amount, the Board affirmed the administrative law judge's determination that employer is not personally liable for the payment of the awarded fees. It is claimant's counsel's responsibility to have the district director and the administrative law judge "fix in the award approving the fee, such lien and manner of payment," in accordance with the requirements of Section 28(c). In this case, the district director's and administrative law judge's fee orders did not specify the "manner of payment," and, thus, employer cannot be viewed as having failed to secure counsel's attorney's fee liens. *Simmons v. Huntington Ingalls, Inc.*, 48 BRBS 45 (2014), *aff'd sub nom. Albe v. Director, OWCP*, 600 F. App'x 252 (5th Cir. 2015).

Liability of the Special Fund

The Board initially held that the Special Fund may be liable for an attorney's fee in some cases arising under Section 8(f), 33 U.S.C. §908(f), and Section 10(h), 33 U.S.C. §910(h). The determination of whether the Special Fund or the employer was liable for claimant's attorney's fee depended on the level of employer's interest and involvement in the proceedings for which the fees were awarded. *See Galen v. Bath Iron Works*, 13 BRSS 95 (1981); *Sites v. The Braedon Co.*, 13 BRBS 87 (1981); *Buteaux v. Alumaship Corp.*, 12 BRBS 675 (1980); *Lawson v. Atl. & Gulf Stevedores*, 9 BRBS 855 (1979).

However, decisions of the Fifth, Ninth and Eleventh Circuits, established that the Special Fund can never be held liable for claimant's attorney's fee under Section 28. *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982), *rev'g Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 12 BRBS 582 (1980); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980); *Still v. Todd Pac. Shipyards*, 14 BRBS 890 (1982).

The Fund also cannot be held liable for employer's attorney's fee. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). *See Baker v. Todd Shipyards, Corp.*, 12 BR6S 309 (1980) (Board denied employer's request for fees assessed against Director to compensate for alleged unjust expenses incurred as a result of motions filed by Director).

The ruling against Fund liability has sometimes led to holding claimant liable since employer did not participate in claimant's appeal, *see Holliday*, 654 F.2d 415, 13 BRBS 741, or no attorney's fee being awarded where employer was properly liable but had been dismissed from the case, *see Still*, 14 BRBS 890. In other cases, employer has been held liable for the fee based on its participation, even though the Fund was liable for benefits. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988); *Waganer v. Alabama Dry Dock & Shipbuilding*, 17 BRBS 43 (1985); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

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The case was remanded to the administrative law judge to determine whether fees could be assessed against the Special Fund as costs under Section 26 where the Director's non-participation caused unnecessary litigation. Such a result should be limited to cases where no issues were ever contested between claimant and employer, all payments were voluntarily made by employer, and all of the administrative law judge's findings were supported by the uncontradicted evidence of record. In any event, attorney's fees can never be assessed against the Special Fund under Section 28, and they could not be assessed against employer, under the circumstances of this case. *Medrano v. Bethlehem Steel Corp.*, 18 BRBS 229 (1986), *decision after remand*, 23 BRBS 223 (1990), *overruled in part*

Toscano v. Sun Ship, Inc., 24 BRBS 207 (1991) (attorney's fee may not be assessed against Special Fund under Section 26). *See also Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994).

The Board agreed with the Director that the administrative law judge erred in assessing claimant's counsel's fee against the Special Fund. The Special Fund cannot be held liable for attorney's fees under Section 28. Inasmuch as employer contested liability and was an active litigant in the proceedings, Board held employer rather than Director liable for claimant's attorney's fee. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

As attorney's fees are not "compensation" within the meaning of the Act, an employer is not relieved of liability for the payment of an attorney's fees merely because it has previously discharged its responsibility for the payment of 104 weeks of "compensation" pursuant to Section 8(f). *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

The Special Fund cannot be held liable for claimant's fee under Section 28. In this case, employer was held liable for claimant's fee under Section 28(b) after the Board reversed the administrative law judge's finding that the Fund was liable for the fee under Section 26. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). On appeal, the Fifth Circuit agreed that the Special Fund could not be held liable under Section 26, the Federal Rules of Civil Procedures, the Equal Access to Justice Act or any other provision.

The Board held that the administrative law judge acted outside his authority in finding the Director liable for an attorney's fee pursuant to Section 26. It is well-established that the Special Fund cannot be held liable for an attorney's fee under Section 28, and neither the Board nor an administrative law judge has the authority to award fees and costs pursuant to Section 26. *Terrell v. Washington Metro. Area Transit Auth.*, 34 BRBS 1 (2000).

Costs - Section 28(d)

Introduction

Section 28(d) provides that the costs, fees, and mileage for necessary witnesses can be assessed against employer when an attorney's fee is awarded against employer. *Love v. Potomac Iron Works*, 16 BRBS 249 (1984); *Tugwell v. Texas Stevedores, Inc.,* 12 BRBS 522 (1980). Furthermore, costs, fees, and mileage of witnesses are only allowed if they are reasonable and necessary. *Bradshaw v. J. A. McCarthy Inc.*, 3 BRBS 195 (1976), *pet. for review denied*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 433 U.S. 905 (1977), *pet. for review denied*, 564 F.2d 89 (3d Cir. 1977). *See also* 33 U.S.C. §925 (witnesses summoned to a proceeding or whose depositions are taken are entitled to the same fees and mileage as in U.S. courts).

The necessity of the witnesses and the reasonableness of the costs must be approved by the hearing officer, the Board, or the court. 20 C.F.R. §702.135. *See Piecoro v. Pittston Stevedoring Corp.*, 8 BRBS 360 (1978); *Robinson v. Bethlehem Steel Corp.*, 6 BRBS 723 (1977). The administrative law judge must rule with specificity as to the cost items allowed or disallowed in claimant's application. *Morris v. California Stevedore & Ballast Co.*, 8 BRBS 674 (1978).

The amount awarded as attorney's fees, costs, and mileage for witnesses shall not in any way diminish the compensation payable under the Act. 33 U.S.C. §928(d); 20 C.F.R. §702.135.

Necessary and reasonable costs incurred by claimant do not include the costs of an economic projection of claimant's loss of wages prepared by an economic consulting firm, *Smelcer v. Nat'l Steel & Shipbuilding Co.*, 6 BRBS 215 (1977), or having claimant accompanied to a medical examination, *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981).

Costs for photocopying expenses may be considered necessary and reasonable. *Cahill***,** 14 BRBS 483.

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It is within the discretion of the deputy commissioner or administrative law judge to determine, in any given case based upon the record, whether photocopying expenses were part of the attorney's overhead or that such expenses were unnecessary or unreasonable. The Board's decision in *Cahill*, 14 BRBS at 483, holding photocopying expenses compensable, is inconsistent with *Pritt*, 9 BLR at 1-159, affirming the deputy commissioner's denial of photocopying expenses as overhead, only to the extent that *Cahill* suggests such expenses must be awarded. The Board clarified that such a determination is

within the discretion of the office awarding the fee. *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order).

As the request for costs was not itemized, the Board held it could not review the request and counsel must supplement the fee petition if the Board was to consider the request for costs. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

In light of the lack of specificity exhibited by the fee petition concerning the costs requested by claimant's counsel, and the administrative law judge's cursory consideration of this issue, the Board vacated the administrative law judge's award of costs and remanded for further consideration of this aspect of counsel's fee petition. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

The Board affirmed the administrative law judge's award of costs for witness fees, hearing and deposition transcripts, medical reports and travel expenses. In so holding, the Board rejected employer's argument that a *Hensley* analysis should have been applied to the award of costs. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board rejected employer's contention that a number of the expenses should be disallowed because evidence was not used at the hearing as the test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court holds status and situs elements not met).

The Ninth Circuit held that where claimant is not entitled to recover attorney's fees from employer under 28(a) or 28(b), he also is not entitled to costs under Section 28(d). *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

The Seventh Circuit affirmed, as reasonable, the administrative law's acceptance of counsel's assertion that the postage and photocopying costs were necessary to successfully prosecute this case as the physicians needed a complete copy of the record to provide a written report on claimant's behalf. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

The Act allows, in limited circumstances, an award of interest on costs to account for delay in payment of those costs. *Hobbs*, 820 F.2d 1528 (9th Cir. 1987), deals with post-judgment interest, which is not at issue here. The Ninth Circuit remanded for consideration of whether an award of interest on the costs is appropriate because of the "exceptionally protracted" period this case has been pending. The claim was filed in 2005 and costs were incurred between 2007 and 2016, a period of five to fourteen years ago. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

Witness Fees

Section 28(d) specifically provides for an award of witness fees but only if an attorney's fee is assessed against the employer. *See Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). If the attorney's fee award is reversed, claimant will not receive payment for the fee charged by any witness. *Wilhelm v. Seattle Stevedore Co.*, 15 BRBS 432 (1983). The standard is whether the costs are necessary, *i.e.*, whether claimant's attorney thought the witness was necessary so as to adequately protect claimant's interests, and whether the fees are reasonable. *Hardrick v. Campbell Indus., Inc.*, 12 BRBS 265 (1980).

With regard to the necessity of a witness, the Board has specifically held that an administrative law judge may not deny the costs and fees of a particular witness merely because the claimant was not successful on the specific issue for which the witness's evidence was offered. *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981); *Cutaia v. Ne. Stevedoring Co., Inc.*, 12 BRBS 942 (1980); *Lorenz v. FMC Corp.*, 12 BRBS 592 (1980). Additionally, a fee for an interpreter has been considered a necessary cost under Section 28(d). *Suarez v. Sea-Land Serv., Inc.*, 3 BRBS 17 (1975), *rev'd on other grounds sub nom. Sea-Land Serv. v. Director, OWCP*, 552 F.2d 985, 5 BRBS 632 (3d Cir. 1977).

The administrative law judge has broad discretion in awarding a reasonable fee for witnesses, and the Board will reverse the award only if the appealing party shows the award was arbitrary, capricious or an abuse of discretion. *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983) (employer's allegation that witness fee is excessive does not establish fee was unreasonable); *Sawyer v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 270 (1982) (it is not unreasonable for an expert witness to charge a higher fee for his deposition testimony than what witness normally earns per hour); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979) (employer's attack on $25 in deposition costs does not establish witness's fee was unreasonable). *See also Piecoro v. Pittston Stevedoring Corp.*, 8 BRBS 360 (1978); *Robinson v. Bethlehem Steel Corp.*, 6 BRBS 723 (1977).

However, the Board has held that an administrative law judge may not establish a fee for a witness who had testified in two claims, one successful and one not, by merely dividing the fee request in half. Instead, the Board remanded for the administrative law judge to determine what portion of the witness fee represented services on the successful claim. *Byrum*, 14 BRBS 833. And, like an attorney's fee award, the administrative law judge may not substantially reduce a witness fee without adequately explaining the reduction. *Palmore v. Washington Metro. Area Transit Auth.*, 14 BRBS 401 (1981); *Cutaia*, 12 BRBS 942; *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979).

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The administrative law judge exceeded his authority in awarding claimant one day's lost wages for attending a pre-hearing deposition requested by employer, as there is no authority under the Act, applicable regulations, or case law, to support such an award. Section 28(d), the only statutory provision authorizing the administrative law judge to assess litigation costs, provides for an assessment against employer, where an attorney's fee is awarded, for necessary witnesses attending the hearing at the instance of claimant, whereas here, the award of lost wages was not part of attorney's fee award and costs were incurred by claimant's attendance at employer's instance. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

Where a doctor was awarded $450 per hour for deposition, the Board held the administrative law judge acted within his discretion in denying request for an increase to $600 per hour. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999)

Medical Reports and Testimony

The cost of a physician's testimony is recoverable if the administrative law judge finds the physician is a necessary witness under Section 28(d). *See Hernandez v. Nat'l Steel & Shipbuilding Co.*, 13 BRBS 147 (1980); *see also Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999) (cost for doctor's time at his deposition). If the physician also prepares a medical report, the cost of the medical report is recoverable if it was written for the physician's testimony at the hearing. *See Townsend v. Potomac Elec. Power Co.*, 13 BRBS 127 (1981); *Himelright v. Blake Constr. Co.*, 7 BRBS 399 (1978). If the physician does not testify but claimant submits the physician's medical report, the Board has held that the cost of the medical report is recoverable under Section 28(d). *Del Vacchio v. Sun Shipbuilding& Dry Dock Co.*, 16 BRBS 190 (1984); *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981)**;** *Hardrick v. Campbell Indus., Inc.*, 12 BRBS 265 (1980). *See DeFelice v. Pittston Stevedoring Corp.*, 5 BRBS 660 (1977) (Board vacated and remanded decision denying the costs of a doctor's report which was placed into evidence in lieu of his testimony by agreement of both parties).

Claimant's attorney cannot, however, receive payment for the cost of claimant's physical examination since this would, in effect, be a request for medical benefits. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

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Employer was held liable for costs incurred prior to the date that employer declined to pay benefits. Costs may be awarded under Section 28(d) for a physician's report submitted in support of claimant's case where benefits are awarded. The prohibition on pre-controversion fees under Section 28(a) is not applicable to costs under Section 28(d). *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986).

In a black lung case, the Board affirmed the administrative law judge's requiring employer to reimburse claimant for the costs of obtaining a physician's deposition, as the Act provides for the taking of depositions in lieu of hearing testimony. Moreover, the administrative law judge properly held employer liable for mileage costs claimant's counsel incurred when attending two depositions as he found the travel expenses necessary in establishing claimant's case. *Branham v. E. Associated Coal Corp.*, 19 BLR 1-1 (1994).

The administrative law judge erred in awarding claimant a day's lost wages for attending a deposition at employer's request. Under Section 25 and the regulation at 20 C.F.R. §702.342, witnesses whose depositions are taken are limited to an attendance fee of $40 per day. There is no federal case authority to support an award of lost wages to a witness. Moreover, the general rule is that a party is not entitled to witness fees and *per diem*

expenses related to taking his own testimony. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Seventh Circuit held that Section 28(d) provides for employer's liability for the fees of medical experts who submit medical reports in lieu of providing live testimony at the hearing. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

In his decision, the administrative law judge found that Dr. Meyers, claimant's medical provider, was entitled to be paid by employer the sum of $1,575 for his appearance at his deposition. As the 1994 Order of the initial administrative law judge stated that Dr. Meyers should be paid $300 per hour, "provided that such testimony is limited to Dr. Meyers' knowledge as a non-party percipient witness to Claimant's medical condition," this sum represented an increase in Dr. Meyers' payment from $300 per hour to $450 per hour. The Board held that the administrative law judge acted within his discretion in denying any additional payment to Dr. Meyers for his appearance at the deposition, as the questions Dr. Meyers was asked did not go beyond the scope of the 1994 Order. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Hearing Transcript

Section 28(d) only explicitly refers to the reasonable and necessary costs of witnesses and thus, the cost of a hearing transcript is not technically covered by this Section. *Hillare v. I.T.O. Corp.*, 3 BRBS 409 (1976), *aff'd mem.*, 551 F.2d 306 (4th Cir. 1977) (table); *Bradshaw v. J. A. McCarthy Inc.*, 3 BRBS 195 (1976), *pet. for review denied*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 433 U.S. 905 (1977), *pet. for review denied*, 564 F.2d 89 (3d Cir. 1977). However, the Board has held that, in cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred by a claimant during the course of a proceeding may also be assessed against the employer. *Bradshaw*, 3 BRBS 195. Although the Board previously found that a hearing transcript was necessary if it was required for the preparation of claimant's post-hearing brief, *Ascione v. Universal Terminal & Stevedoring Corp.*, 4 BRBS 44 (1976); *McIntosh v. Parkhill-Goodloe Co.*, 4 BRBS 3 (1976), *aff'd*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *Tortorici v. Hellenic Lines, Ltd.*, 3 BRBS 210 (1976), the Board has since held that the cost of a hearing transcript, as well as a transcript of a physician's deposition, are reasonable and necessary expenses as a matter of law. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981); *Luce v. Bath Iron Works Corp.*, 12 BRBS 162 (1979); *Collins v. Todd Shipyards Corp.*, 11 BRBS 232 (1979).

Travel Expenses

Section 28(d) does not specifically allow travel expenses for an attorney, but since the Board has held that reasonable and necessary costs and expenses incurred by a claimant during the course of a proceeding are reasonable, *Bradshaw v. J. A. McCarthy Inc.*, 3 BRBS 195 (1976), *pet. for review denied*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 433 U.S. 905 (1977), *pet. for review denied*, 564 F.2d 89 (3d Cir. 1977), where claimant's attorney has incurred reasonable and necessary travel expenses in excess of what is normally considered overhead, such expenses may be considered by the administrative law judge in assessing an attorney's fee against the employer under Section 28. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981) (1 1/2 hours between attorney's office and place of hearing is too lengthy to be considered incidental overhead expense); *Stillwell v. The Home Indem. Co.*, 5 BRBS 436 (1977), *pet. for review dismissed*, 597 F.2d 87 (6th Cir. 1979), *cert. denied*, 444 U.S. 869 (1979); *Bradshaw*, 3 BRBS 195. *See also Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979) (court allowed as costs to the prevailing claimant's attorney an amount for travel to the appellate hearing for oral argument). Both travel time and costs may be awarded. The standard is whether the travel time or costs are reasonable and necessary. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979). *See* Travel Time, *supra*.

The Act and regulations do not provide for payment of travel expenses incurred by claimant. *Love v. Potomac Iron Works*, 16 BRBS 249 (1984). Moreover, as Section 28(d) provides for an award of costs only where attorney's fees are awarded, and no fee was awarded here, claimant's costs of $144 to attend an informal conference were not reimbursable. *Id.*

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The Board affirmed the administrative law judge's holding that claimant was not entitled to reimbursement of his air fare for travel expenses to hearing. The Board noted that 20 C.F.R. §702.337(a) gives claimant option of having a hearing within 75 miles of home. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

The Board held that counsel was not entitled to bill for travel time to and from a "nearby" Hampton courthouse (from Newport News) because fees from travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. The administrative law judge acted within his discretion in finding that counsel's travel from Norfolk, Virginia, to the

hearing in Hampton, Virginia, was local in nature, and not in excess of that normally considered overhead for the Tidewater region. *Ferguson v. S. States Coop.*, 27 BRBS 16 (1993).

The Board affirmed, as within his discretion, the administrative law judge's denial of travel expenses for a trip between Norfolk and Hampton, Virginia. The administrative law judge found that this 20 mile trip is part of normal office overhead and not separately compensable because it is routine and not out of the ordinary, not unique to this case, and was made by claimant's counsel on innumerable occasions over the past ten years. *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995).

In a black lung case, the Board held that the administrative law judge properly held employer liable for mileage costs claimant's counsel incurred when attending two depositions as he found the travel expenses necessary in establishing claimant's case. *Branham v. E. Associated Coal Corp.*, 19 BLR 1-1 (1994).

The Board affirmed the award of costs associated with travel between claimant's home in New Mexico and the hearing site in Dallas, as they are reasonable, necessary and in excess of that normally considered to be part of overhead. *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds).

The Board held that although the administrative law judge had the discretion to raise *sua sponte* the issue of the compensability of a fee and costs for counsel's travel time and expenses, he erroneously failed to provide the parties with reasonable notice of this issue and to afford claimant the opportunity to present evidence relevant to the compensability of the travel charges. The Board also held that there must be a factual foundation supporting an administrative law judge's disallowance of counsel's travel time and expenses on the basis that claimant retained counsel from outside his locality despite the availability of competent counsel within his locality. In this case where there was no evidence that claimant could have retained local counsel, the Board reversed the administrative law judge's disallowance of counsel's travel time and expenses, and remanded for a determination of the reasonableness and necessity of the specific charges. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

The administrative law judge and district director reduced the time claimed for attorney travel between Louisiana and claimant's home in Mississippi. The Board vacated the implicit findings of the administrative law judge and district director that competent, experienced local counsel was available to claimant because they were unsupported by any factual foundation. The Board noted that neither the administrative law judge nor the district director took judicial notice of any information relevant to this issue, made findings regarding the explicit geographic area constituting claimant's locality, or cited any information regarding attorneys available in that area; in this regard, Hurricane Katrina may have affected availability of counsel. The Board thus held that as there was no

evidence that claimant could have retained local counsel, claimant's decision to retain counsel from Louisiana was not unreasonable and counsel was therefore entitled to reimbursement of her reasonable travel time and expenses. The Board instructed the administrative law judge and district director to determine, on remand, the reasonableness and necessity of claimant's counsel's specific travel charges. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

Section 28(e)

Section 28(e) provides for a fine and/or imprisonment of a person who is convicted of receiving a fee or other consideration for services rendered as a representative of a claimant without approval by the deputy commissioner, Board, or court. 33 U.S.C. §928(e); 20 C.F.R. §702.133.

Attorney's Fees and Settlements

The parties may agree to an attorney's fee as part of a Section 8(i) settlement. Two regulations promulgated after the 1984 Amendments address the approval of an attorney's fee as part of a settlement agreement. Section 702.132(c) states,

> Where fees are included in a settlement agreement submitted under §702.241, *et seq.* approval of that agreement shall be deemed approval of attorney fees for purposes of this subsection for work performed before the Administrative Law Judge or district director approving the settlement.

20 C.F.R. §702.132(c). Section 702.241(e) addresses attorney's fees that are part of an automatically approved settlement. This section states,

> A fee for representation which is included in an agreement that is approved in the manner described in paragraph (d) of this section, shall also be considered approved within the meaning of section 28(e) of the Act, 33 U.S.C. 928(e).

20 C.F.R. §702.241(e).

In view of the former regulation, the Board has held that, where the administrative law judge approved the parties' settlement as adequate and not procured by duress, he cannot amend the attorney fee portion of the agreement, as the parties had not agreed it was severable. The amount agreed to as an attorney's fee was separate from the amount claimant was to receive as compensation. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Cases discussed below pre-dating the promulgation of these regulations may be of limited precedential value.

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The Board has affirmed an administrative law judge's rejection of an agreement that claimant was to be liable for his fee in consideration of employer's stipulations where no other consideration was provided by employer, the evidence overwhelmingly supported liability and the administrative law judge stated he would not automatically accept stipulations. *Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd on other grounds sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988).

The Board rejected claimant's assertion that he was entitled to the fee awarded by the Board in a 1997 order, rather than only the fee provided for in the subsequent settlement

agreement. The Board's fee award was not enforceable, and as the issue of an attorney's fee to be paid by employer to claimant's counsel for the work performed in this case at all levels was listed as a contested issue in the settlement, the district director rationally construed the settlement as completely resolving the fee issue for all levels of adjudication. Claimant did not put forth any argument or evidence that the attorney's fee agreed to was inadequate or that the settlement was procured by duress. *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002).

Where self-insured employer and claimant entered into a settlement agreement which was approved by the administrative law judge, it was erroneous for the administrative law judge to alter the attorney's fee provision of the agreement. Section 702.132(c) of the regulations provides that an attorney's fee included in a settlement agreement is deemed approved upon approval of the settlement agreement. As the parties did not indicate that any part of the settlement could be severed, the administrative law judge was not permitted to reduce the hourly rate to reflect a rate he had approved in a prior case. The Board modified the administrative law judge's Order to reflect that counsel is entitled to the fee negotiated by the parties, despite counsel's waiver of this issue on appeal. *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Pre-1984 Amendments Decisions

The Act does not prohibit the parties to a claim from agreeing on an appropriate attorney's fee. The private agreement concerning claimant's attorney's fee, however, can not be determinative of a fee award without official approval. *Eaddy v. R. C. Herd & Co.*, 13 BRBS 455 (1981).

The Board has held that, although the agreement in and of itself is not sufficient to mandate an award of the agreed upon fee, an element of reasonableness should be inferred from such an agreement as long as the parties have engaged in arm's length negotiations. *Ballard v. Gen. Dynamics Corp.*, 12 BRBS 966 (1980). In the absence of evidence of collusion, the fee should be approved unless it is clearly excessive. *Id.*

The Act also does not prohibit an employer and claimant from agreeing to a settlement which discharges both the claimant's attorney's fee and compensation due from employer even though the agreement does not specify the exact amount of the attorney's fee. *Carswell v. Wills Trucking*, 13 BRBS 340 (1981). However, because the amount of claimant's compensation is then dependent upon and interrelated with the amount for claimant's attorney's fee, the Board has required in such cases: 1) that the administrative law judge specifically determine that the amount of compensation after the attorney's fee is deducted is in the best interests of the claimant (the "best interest" standard is that of the 1972 Act; the 1984 Amendments require that the amount be adequate); and 2) at the time claimant signs the agreement, he is cognizant of the amount, or the minimum amount, he is to receive from the total settlement proceeds. *Id.* These requirements also apply when the parties agree to a settlement amount but it is unclear whether the parties understand that the settlement encompasses only compensation or both compensation and the attorney's fee. *Aquilino v. ITT Cont'l Baking Co.*, 13 BRBS 576 (1981); *Enright v. St. Louis Ship*, 13 BRBS 573 (1981).

The requirement that claimant be cognizant of the amount he will receive from the total settlement proceeds is not met if it is unclear whether the claimant understands that he is responsible for paying the attorney's fee from the settlement proceeds, which would thereby reduce the amount of compensation he would receive. *Gjertson v. Pac. Architects & Eng'rs, Inc.*, 14 BRBS 885 (1981); *Jankowski v. United Terminals, Inc.*, 13 BRBS 727 (1981); *Enright*, 13 BRBS 573. However, if the minimum amount of compensation claimant would actually receive can be determined by calculation from the figures given in the agreement, the second *Carswell* requirement is met. *Rohm v. Republican Nat'l Comm.*, 14 BRBS 266 (1981); *Barber v. FMC Marine & Rail Equip. Div.*, 13 BRBS 1081 (1981) (Board nonetheless remanded for ''best interests'' determination).

Although the parties may sign an agreement regarding the attorney's fee, claimant's attorney must still file a proper fee application in compliance with 20 C.F.R. §702.132. *Ballard*, 12 BRBS 966. The presiding officer must decide whether the attorney's fee

derived under such an agreement is reasonable, *Jankowski*, 13 BRBS 727, and if she or he substantially reduces the amount of the attorney's fee requested, a sufficient explanation for the reduction must be provided. *Enright*, 13 BRBS 573.

If the parties dispute what services the attorney's fee encompasses, *i.e.*, before the administrative law judge alone or before both the Board and below, the Board has remanded for a factual determination. *See Carpenter v. Lockheed Shipbuilding & Constr. Co.*, 14 BRBS 382 (1981); *Ware v. Int'l Great Lakes Shipping Co.*, 13 BRBS 535 (1981). Additionally, although the settlement attorney's fee may encompass services rendered at different levels, the deputy commissioner still has the authority to review and approve the attorney's fee with the settlement. *Gjertson*, 14 BRBS 885.

Interest

Interest is not assessed on attorney's fee awards. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987); *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984); *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982).

While the Board has continued to hold that interest is not due on fee awards as it is on awards of compensation under the Act, *infra,* it has held that enhancement for delay in payment is part of a reasonable attorney's fee in appropriate cases. *See Missouri v. Jenkins*, 491 U.S. 274 (1989); *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995). *See also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999)*; Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). The Board has approved the augmentation of counsel's hourly rate from historic to current levels where there is an extraordinary delay between the time services were performed and the fee award became final. *E.g., Nelson,* 29 BRBS 90. *See* Factors Considered in an Award and Hourly Rate, *supra,* for additional discussion.

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There is no statutory authorization for the assessment of prospective post-judgment interest on attorney's fee awards. Section 1961, 28 U.S.C. §1961, allows assessment of interest on money judgments in a civil case recovered in a district court. Section 1961 does not however, apply to agency awards. *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987), *aff'g Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986).

Interest is not awarded on an outstanding attorney's fee. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

Since an attorney's fee is not "compensation" under the Act, interest is not awarded on fee awards. *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988).

In an appeal of a district court's ruling allowing employer to offset an overpayment of compensation against the attorney's fee award, the Fifth Circuit reversed the offset, and held that employer is liable for pre- and post-judgment interest on the fee, as it provides an incentive for attorneys to represent claimants. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

The Board rejected claimant's contention that employer was liable for interest on an attorney's fee award under *Guidry*, 901 F.2d 485, 23 BRBS 82(CRT), stating *Guidry* was distinguishable. In the instant case, the attorney's fee award was not final and enforceable, and employer was not yet required to pay the fee. Moreover, the *Guidry* court did not note

contrary precedent, *i.e.*, *Hobbs*, 820 F.2d 1528. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand); *see also Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

The Fifth Circuit followed *Hobbs* and held that there is no indication in the statute or in case law that interest is available on an attorney's fee award. *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

The Act allows, in limited circumstances, an award of interest on costs to account for delay in payment of those costs. *Hobbs*, 820 F.2d 1528 (9th Cir. 1987), deals with post-judgment interest, which is not at issue here. The Ninth Circuit remanded for reconsideration of whether an award of interest is appropriate because of the "exceptionally protracted" period this case has been pending. The claim was filed in 2005 and costs were incurred between 2007 and 2016, a period of five to fourteen years ago. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).