

ROBERT ANDREPONT)	
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Claimant-Respondent)	
)	
v.)	
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MURPHY EXPLORATION & PRODUCTION COMPANY)	DATE ISSUED: 07/13/2007
)	
and)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER on RECONSIDERATION

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and the Order on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Douglas P. Matthews (Frilot Partridge, L.C.), New Orleans, Louisiana, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J.,

dissenting).¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has filed a response brief urging rejection of claimant's motion to which claimant has replied.

To briefly recapitulate, claimant injured his left knee on May 14, 1999, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability from April 22, 2000, to December 12, 2001, when claimant's injury reached maximum medical improvement. Employer then initiated payment of compensation for permanent partial disability, based on a 26 percent permanent impairment of the left leg. 33 U.S.C. §908(c)(2). On November 18, 2002, claimant filed a claim alleging entitlement to compensation for permanent total disability due to his work injury. The district director held an informal conference on September 25, 2003, in which the claims examiner recommended that employer had established the availability of suitable alternate employment and that employer did not owe further compensation. Employer accepted this recommendation and did not pay claimant any additional compensation. Claimant requested referral of the claim to the Office of Administrative Law Judges.

In his decision, the administrative law judge found that the parties agreed that claimant's work injury prevents his return to his usual employment as an offshore mechanic. The administrative law judge found that employer established the availability of suitable alternate employment based on a desk clerk position employer identified on February 17, 2003, and desk clerk and gate guard positions employer subsequently identified. Thus, claimant was awarded compensation for permanent total disability from December 13, 2001, to February 17, 2003, the date suitable alternate employment was established. Thereafter, claimant was limited to the scheduled award already paid.

Claimant's counsel, Ed Barton, submitted a petition to the administrative law judge requesting an attorney's fee of \$40,817.74. Claimant's co-counsel, Randall Hart, submitted a separate fee petition requesting a fee of \$1,342.25. In his Supplemental Decision and Order, the administrative law judge addressed and rejected employer's objections to its liability for any fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), on the ground that, following the informal conference, claimant obtained greater compensation than employer had voluntarily paid without an award. The administrative law judge awarded Mr. Barton a fee of \$21,475, plus expenses of \$10,901.49, and Mr. Hart a fee of \$723.45, payable by employer pursuant to Section 28(b).

Employer appealed the administrative law judge's fee award, contending that it is not liable for any attorney's fee under Section 28(a), (b) of the Act, 33 U.S.C. §928(a), (b). In its Decision and Order, the Board agreed with employer that it is not liable for a fee under Section 28(a) because employer was voluntarily paying claimant compensation for permanent partial disability when he filed his claim on November 18, 2002.

¹ We deny claimant's motion to consolidate his motion for reconsideration with his pending appeal in BRB No. 07-0416. Claimant's appeal of the district director's fee order will be addressed in turn. 20 C.F.R. §802.104.

Specifically, after claimant's injury reached maximum medical improvement, employer initiated weekly compensation payments for permanent partial disability, based on a 26 percent permanent impairment of the left leg, and these payments continued for six months after the claim was filed on November 18, 2002. *Andrepoint*, 41 BRBS at 2-3.

A majority of the panel also agreed with employer's contention that it is not liable for a fee under the plain language of Section 28(b), as it did not refuse the district director's recommendation after the informal conference that no further benefits were due claimant. The majority held that, while the Fifth Circuit, in whose jurisdiction this case arises, has not expressed a definitive opinion on the issue of fee liability when the recommendation is to pay nothing and claimant subsequently obtains an award greater than employer voluntarily paid,² the court has strictly construed other portions of Section 28(b) concerning the convening of an informal conference. *Andrepoint*, 41 BRBS at 3-4. In this case, employer did not refuse the recommendation to pay nothing more than it had voluntarily paid. Accordingly, notwithstanding the administrative law judge's award of greater compensation than that recommended by the district director, the majority held that employer is not liable for claimant's attorney fee under Section 28(b) and the fee award therefore was reversed. The dissenting Board member would have affirmed the finding that employer is liable for claimant's fee pursuant to Section 28(b), based on the concerns expressed in *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006), and as the Fifth Circuit had declined to address the specific issue raised before the Board. *Andrepoint*, 41 BRBS at 4-6.

In his motion for reconsideration, claimant argues that employer's payment of permanent partial disability benefits at the time he filed his claim for permanent total disability benefits constituted its denial of the liability asserted by the claim. Claimant contends that he subsequently established employer's liability for a period of permanent total disability, and that employer therefore is liable for claimant's attorney's fee pursuant to Section 28(a). Alternatively, claimant moves that the Board remand the case to the administrative law judge for consideration of a fee award payable by claimant pursuant to Section 28(c).³

Section 28(a) provides for an employer-paid fee if employer refuses to pay any compensation within 30 days of the date it receives notice of the claim from the district director.⁴ See *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th

² The Board noted that the Fifth Circuit expressly declined to address this issue in *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 425 n.18, 34 BRBS 35, 42 n.18(CRT) (5th Cir. 2000).

³ Claimant notes his disagreement with the Board's denial of a fee pursuant to Section 28(b) in order preserve his right to appeal this issue, but he makes no new argument in this regard.

⁴ Section 28(a) states, in relevant part:

Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *see generally* *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). In this case, employer was voluntarily paying compensation for permanent partial disability when claimant filed a claim for permanent total disability. In its decision, the Board agreed with employer that Section 28(a) does not apply because employer was paying benefits for permanent partial disability when the permanent total disability claim was filed. *Andrepoint*, 41 BRBS at 2-3.

Claimant contends that in order to avoid fee liability pursuant to Section 28(a), employer has to timely pay the exact benefits claimed by claimant. Claimant thus contends that as he claimed permanent total disability benefits and employer was paying only permanent partial disability benefits, employer is liable for his attorney's fee pursuant to Section 28(a).

We reject claimant's contention, as it is not supported by the language of the statute or the cases he cites in support of his motion. Section 28(a) states that employer will be liable for claimant's attorney's fee if "it declines to pay *any* compensation" within 30 days of its receipt of the claim from the district director. This language suggests that the payment of lesser compensation than that claimed will preclude the applicability of Section 28(a), because employer's liability is predicated on its failure to pay *any* compensation. *See also* discussion, *infra*. In this regard, we first reject claimant's contention that the Fifth Circuit's decision in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) supports his contention that employer's permanent partial disability payments do not preclude its liability for a fee pursuant to Section 28(a). Claimant contends that this case supports the construction of the phrase in Section 28(a) "no liability for compensation" as referencing liability only for the same type of compensation asserted by the claim. In *Pool Co.*, the employer voluntarily paid benefits for temporary total disability and permanent partial disability. After the payments stopped, claimant filed a claim for additional compensation, which employer

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a).

controverted. The court held that, “[P]ool disclaimed further liability and declined to pay any further benefits within thirty days after receiving written notice of Cooper’s claim, and is thus liable for attorney fees under the plain language of [Section 28(a)].”⁵ *Pool Co.*, 274 F.3d at 186-187, 35 BRBS at 119(CRT). Contrary to claimant’s assertion, the court did not specifically construe the phrase “no liability for compensation” in Section 28(a). The court held only that employer’s voluntary payments prior to its receiving written notice of the claim are irrelevant to the question of a fee award under Section 28(a) if employer “declines to pay any further benefits” after the claim is filed.⁶ *Id.*; see also *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

Moreover, other cases arising in the Fifth Circuit are consistent with the Board’s holding in this case that employer is not liable for an attorney’s fee pursuant to Section 28(a). In *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997), the employer voluntarily paid benefits for temporary total disability. These payments continued after claimant filed a claim for permanent disability. The Fifth Circuit rejected claimant’s contention that Section 28(a) applied because employer declined to pay compensation for permanent disability. The court held that employer’s temporary total disability payments were consistent with those due for permanent total disability, and that employer, in effect, made permanent total disability payments through the date the claim settled. In *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981), employer timely paid compensation for temporary total disability before and after the claim was filed. Employer continued paying benefits after it requested a hearing to challenge causation and permanent disability. The administrative law judge awarded claimant permanent total disability benefits. The court held that Section 28(a) was inapplicable because employer paid partial compensation. In these cases, like the Board’s decision in this case, Section 28(a) was held inapplicable since employer timely paid some compensation after receiving notice of the claim, even though the payments were not of the kind claimed. See also *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982).

The Fourth Circuit’s decision in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Moody)*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006) also is pertinent to the issue raised by claimant. In *Moody*, the employer paid compensation for temporary total disability within thirty days of its receiving notice of the claim. Claimant returned to work. He subsequently was found entitled to additional surgery, which would encompass a further period of temporary total disability. The court held that employer

⁵ The court held that employer could not be held liable for an attorney’s fee under Section 28(b) as no informal conference was held. *Pool Co.*, 274 F.3d at 186, 35 BRBS at 119(CRT).

⁶ Indeed, one could argue that the court’s use of the phrase “any further benefits” supports the result reached by the Board in this case.

was not liable for claimant's attorney's fee pursuant to Section 28(a), as employer did not decline to pay *any* compensation within thirty days after the claim was filed, as employer initially paid temporary total disability benefits. *Moody*, 474 F.3d at 113, 40 BRBS at 71(CRT) (additionally holding employer liable for an attorney's fee under Section 28(b) when claimant has the surgery).

In sum, neither the language of the statute nor the cases cited by claimant support the interpretation of Section 28(a) urged by claimant. Indeed, the text of Section 28(a) states that employer's liability is premised on its declining to pay *any* benefits, and the cases hold that employer's payment of partial benefits after a claim is filed precludes fee liability pursuant to Section 28(a) notwithstanding claimant's eventual recovery of compensation greater than employer paid. *Savannah Machine & Shipyard Co.*, 642 F.2d 887, 13 BRBS 294; *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 126 S.Ct. 478 (2005); *Henley*, 14 BRBS 970. Therefore, claimant's motion for reconsideration of the Board's holding that employer is not liable for an attorney's fee pursuant to Section 28(a) is denied.⁷

However, we grant claimant's motion in the alternative that the Board remand this case to the administrative law judge for consideration of claimant's liability for his attorney's fee pursuant to Section 28(c), 33 U.S.C. §928(c). If Section 28(a) or (b) does not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to Section 28(c). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132. As the Board has held that employer is not liable for claimant's attorney's fee under either Section 28(a) or (b), counsel is entitled to consideration of the fee request by the administrative law judge pursuant to Section 28(c).

Accordingly, claimant's motion for reconsideration of the Board's holding that employer is not liable for an attorney's fee pursuant to Section 28(a) is denied. Claimant's motion is granted insofar as counsel is entitled to consideration of the fee

⁷ We reject claimant's reliance on the construction of Section 28(a) offered by the Director, Office of Workers' Compensation Programs, in a brief in support of the claimant's petition for rehearing *en banc* in *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007), *reh'g and reh'g en banc denied*, (June 7, 2007). In *Pittsburgh & Conneaut*, the Sixth Circuit rejected claimant's contention that employer was liable for a fee pursuant to Section 28(a). The court held that employer paid temporary total disability benefits within 30 days of receipt of the claim, despite its later controversion of a claim for permanent disability benefits. *Id.*, 473 F.3d at 264, 40 BRBS at 80(CRT). In denying claimant's motion for rehearing, the court did not issue an opinion and thus did not address the Director's position. Moreover, the Director has not filed a brief in the case presently before the Board. Therefore, there is no basis for the Board to defer to the construction of Section 28(a) offered by the Director. *See generally Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995).

request by the administrative law judge pursuant to Section 28(c), and the case is remanded for further proceedings in accordance with this opinion. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring:

I concur fully in the decision of my colleagues to reject claimant's contention that employer is liable for an attorney's fee pursuant to Section 28(a) and to remand the case for consideration of claimant's liability for an attorney's fee pursuant to Section 28(c). However, for the reasons expressed in my dissenting opinion in *Andrepoint*, 41 BRBS at 4-6, I remain of the opinion that the administrative law judge properly held employer liable for claimant's attorney's fee pursuant to Section 28(b).

BETTY JEAN HALL
Administrative Appeals Judge