

CECIL D. COLSON)	BRB No. 10-0457
)	
Claimant-Respondent)	
)	
v.)	
)	
TRADESMAN INTERNATIONAL,)	
INCORPORATED)	
)	
and)	
)	
NEW HAMPSHIRE INSURANCE)	DATE ISSUED: 04/21/2011
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	
)	
CECIL D. COLSON)	BRB No.10-0500
)	
Claimant-Petitioner)	
)	
v.)	
)	
TRADESMAN INTERNATIONAL,)	
INCORPORATED)	
)	
and)	
)	
NEW HAMPSHIRE INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	

Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Respondent)
) DECISION and ORDER

Appeals of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, and the Supplemental Decision and Order Denying Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor, and the United States Department of Labor.

Virginia L. LoCoco (LoCoco & LoCoco, P.A.), D'Iberville, Mississippi, for claimant.

Collins C. Rossi (Collins C. Rossi, P.L.C.), Metairie, Louisiana, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel For Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 07-179602) of District Director David A. Duhon, BRB No. 10-0500, and claimant appeals the Supplemental Decision and Order Denying Attorney's Fee (2008-LHC-01423) of Administrative Law Judge Lee J. Romero, Jr., BRB No. 10-0457, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related back injury on January 25, 2007. Employer filed a notice of controversion on January 29, 2007, and did not pay claimant benefits. Claimant hired counsel and filed a formal claim for benefits on May 28, 2007. Following an informal conference on August 21, 2007, the district director recommended that employer pay claimant temporary total disability benefits from January 25 through May 8, 2007, as well as related medical benefits. Employer paid claimant benefits in accordance with the district director's August 21, 2007, recommendation.

On January 27, 2008, claimant alleged that he suffered an exacerbation of his 2007 back injury, and he requested reinstatement of his temporary total disability benefits and authorization for medical treatment. Employer refused to pay claimant any additional benefits averring that claimant's current back problem was unrelated to his 2007 work injury. Consequently, the district director held an informal conference on March 3, 2008, to consider whether claimant was entitled to any additional benefits for his back condition. After this informal conference, the district director recommended that claimant was not entitled to reinstatement of temporary total disability benefits.

The case was transferred to the Offices of Administrative Law Judges (OALJ) on May 16, 2008. In a Decision and Order dated December 1, 2009, the administrative law judge found that claimant's residual back condition was work-related and awarded claimant ongoing temporary total disability benefits from May 9, 2007, as well as medical care from January 25, 2007. Employer did not appeal the administrative law judge's award of additional benefits.

Claimant's counsel filed a fee petition with the district director and the administrative law judge. Employer objected to the fee petitions, contending that the hourly rate is excessive, that the district director may not award a fee for services performed after May 16, 2008, when the case was transferred to the OALJ, and the administrative law judge may not award a fee for services performed before that date, and that it is not liable for a fee under either Section 28(a) or 28(b) of the Act, 33 U.S.C. §928(a), (b). Employer also objected to various itemized entries and the amount requested for costs. After considering employer's objections, because employer refused to pay benefits until after claimant hired an attorney, the district director found Section 28(a) applicable and awarded counsel a total fee of \$9,124.59, representing 29.92 hours of services at an hourly rate of \$200, and \$3,140.59 in costs, payable by employer. The administrative law judge denied claimant's counsel a fee altogether, finding that Section 28(a) is inapplicable because there was only one claim filed and employer paid benefits on that claim without an award. The administrative law judge found that the district director issued an unfavorable recommendation on claimant's request for additional benefits, a recommendation with which employer complied, and denied an attorney fee

pursuant to Section 28(b), citing *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). Supplemental Decision and Order at 4.

Employer appeals the district director's award of an attorney's fee, contending it is not liable for a fee as it paid benefits without an award. Alternatively, employer asserts that the hourly rate is excessive and that the district director erroneously awarded costs for expenses incurred before the administrative law judge. Claimant and the Director, Office of Workers' Compensation Programs (the Director) respond, urging affirmance of the district director's fee award, though claimant concedes error in the award of costs incurred before the administrative law judge. BRB No. 10-0457. Claimant appeals the administrative law judge's denial of an employer-paid attorney's fee. The Director responds in support of claimant's position that the administrative law judge erred in denying an attorney's fee under Section 28(a). BRB No. 10-0500. Employer did not respond to claimant's appeal.

Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay *any* compensation. 33 U.S.C. §928(a);¹ *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Section 28(b) applies where an employer pays or tenders payment of compensation without an award and thereafter a controversy arises over additional compensation. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit enumerated the following criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; (3) the employer's refusal of the recommendation; and (4) claimant's obtaining greater

¹Section 28(a) provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, 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 in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

compensation than that paid or tendered by the employer. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000).

Employer asserts that it voluntarily paid benefits without an award from January 28, 2007 through May 8, 2008, pursuant to the district director's recommendation, thereby precluding liability pursuant to Section 28(a). We reject this contention. The district director properly awarded claimant an employer-paid fee under Section 28(a) because employer had not paid benefits to claimant within 30 days of its receipt of the claim from the district director. Claimant filed a formal claim for benefits on May 28, 2007. On June 28, 2007, the district director notified employer that the claim had been filed; however, employer did not pay claimant any benefits until after the district director's August 21, 2007, recommendation. Claimant's subsequent pursuit of additional temporary total disability benefits for the same work-related back injury did not involve a new claim. *See Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). Moreover, claimant successfully prosecuted his claim before the administrative law judge. As claimant's pursuit of additional benefits after his initial claim was filed did not involve a "new claim," employer's liability for a fee is governed by its actions regarding the actual claim filed. *Id.* As employer did not pay claimant benefits within 30 days after its receipt of notice of the claim, employer is liable for an attorney's fee on the entire claim under Section 28(a). Consequently, we affirm the district director's imposition of an employer-paid attorney's fee pursuant to Section 28(a) as it is in accordance with law.² *See W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *see also Pool Co.*, 274 F.3d at 186-187, 35 BRBS at 118-119(CRT); *A.M. [Mangiantine] v. Electric Boat Corp.*, 42 BRBS 30 (2008).

As we have affirmed the district director's award of an employer-paid fee, we now address employer's remaining arguments on appeal. Employer avers that the district director erred in awarding costs incurred while this case was before the OALJ. Claimant concedes this point. Therefore, we modify the district director's award of costs to reflect employer's liability for \$39.41 for expenses incurred while this case was before the district director. 33 U.S.C. §928(d); 20 C.F.R. §702.135; *see generally Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Additionally, we reject employer's assertion that the hourly rate should be reduced to \$185. The district director found \$200 per hour is reasonable in this case, and employer has not shown there was an abuse of discretion in

²In light of our affirmance of the district director's award of an attorney's fee under Section 28(a), we reject as irrelevant employer's contentions regarding Section 28(b).

this regard. *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); 20 C.F.R. §702.132. Therefore, we affirm the district director's attorney's fee award.

We turn next to claimant's appeal of the administrative law judge's denial of an employer-paid fee. For the reasons stated above, the administrative law judge erred in finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(a). Employer declined to pay any compensation within 30 days of its receipt of the notice of the claim and claimant successfully prosecuted his claim before the administrative law judge. *Gordon*, 41 BRBS 13; *see also Pool Co.*, 274 F.3d at 186-187, 35 BRBS at 118-119(CRT); *Mangiantine*, 42 BRBS 30. Under these circumstances, Section 28(b) is not applicable. Therefore, we reverse the administrative law judge's denial of an employer-paid attorney's fee. We remand this case to the administrative law judge for consideration of counsel's petition for an attorney's fee and costs, including those improperly awarded by the district director, and employer's objections thereto.

Accordingly, we affirm the district director's attorney's fee award of \$5,980. We modify the award of costs to reflect employer's liability for \$39.41 for the costs incurred while the case was before the district director. BRB No. 10-0457. We reverse the administrative law judge's denial of an employer-paid fee, and we remand the case to the administrative law judge for consideration of counsel's fee petition for services performed and costs incurred while the case was before him, as well as employer's objections thereto. BRB No. 10-0500.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge