

LARRY D. DAY )  
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 Claimant-Respondent )  
 v. )  
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 JAMES MARINE, INCORPORATED ) DATE ISSUED: 12/20/2005  
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 Employer-Petitioner ) DECISION and ORDER

Appeal of the Award of Attorney’s Fees Pursuant to Section 28 of the Act and Decision on Motion for Reconsideration of Award of Attorney’s Fees Under Section 28 of the Act of Chris John Gleasman, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and Steven C. Schletker, Covington, Kentucky, for claimant.

Robert Nienhuis (Goldstein and Price, L.C.), St. Louis, Missouri, for employer.

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

PER CURIAM:

Employer appeals the Award of Attorney’s Fees Pursuant to Section 28 of the Act and Decision on Motion for Reconsideration of Award of Attorney’s Fees Under Section 28 of the Act (Case No. 06-185905) of District Director Chris John Gleasman 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., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related neck injuries on July 10, 1996 and August 31, 2000. In the present proceeding, claimant sought benefits for the second injury. The administrative law judge awarded claimant ongoing permanent total disability benefits commencing July 28, 2003. Employer was awarded relief from continuing compensation liability pursuant to

Section 8(f), 33 U.S.C. §908(f). The administrative law judge also held employer liable for the payment of an attorney's fee in the amount of \$27,779.38 pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See* Decision and Order—Awarding Benefits. Employer did not appeal the administrative law judge's awards of disability benefits or an attorney's fee.

Subsequently, claimant's counsel submitted a fee petition to the district director, asserting that he is entitled to a fee payable by employer pursuant to Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Claimant's counsel requested an attorney's fee of \$14,105.40, representing 79.3 hours of attorney services at \$175 per hour and \$227.90 in costs. Employer objected to its liability for any fee, and asserted that its liability, if any, was limited to services rendered from July 16, 2003, the date it rejected the district director's written recommendation, to September 16, 2003, the date the district director referred the case to the Office of Administrative Law Judges (OALJ). The district director held employer liable for the entire fee requested pursuant to Section 28(b). *See* Award of Attorney's Fees Pursuant to Section 28 of the Act and Decision on Motion for Reconsideration of Award of Attorney's Fees Under Section 28 of the Act.

On appeal, employer contends that the district director erred in holding it liable under Section 28(b) for fees for services rendered before July 16, 2003, when it rejected the district director's written recommendation. Claimant responds that the district director properly awarded fees under Section 28(a) from either July 2001, when claimant first hired his attorney, or from October 2001 when the district director provided written notice of the claim to employer, to early 2002, when employer made payments pursuant to the district director's December 2001 written recommendations. Claimant also responds that the district director properly awarded fees under Section 28(b) from July 2003, when employer refused to pay benefits pursuant to the district director's July 2003 written recommendations. Employer replies that the applicability of Section 28(a) should not be addressed because the district director held employer liable under Section 28(b) and claimant did not file a cross-appeal. If claimant's contention is addressed, employer contends that the district director's fee award cannot be upheld pursuant to Section 28(a).

We first address the facts relevant to employer's liability for an attorney's fee. Employer voluntarily paid benefits from October 6, 2000 to May 15, 2001. Claimant hired his attorney on July 17, 2001, and filed his claim on July 31, 2001. Claimant's Motion for Employer-Paid Attorney Fees, Ex. A at 1, Exs. 4; 12 at 2; Jt. Ex. 1 at 2; CX DD. Employer was not paying benefits at the time claimant filed his claim, as he was receiving his pre-injury wages from employer by using his vacation days throughout July, August, and September 2001. Tr. at 28, 30-31; CX Y at 12-19; Ex. 1 at 6-7. Claimant stopped working on September 24, 2001. Tr. at 31; Ex. 1 at 7. Employer filed its first notice of controversion on September 25, 2001. Exs. 6; 12 at 2; Jt. Ex. 1 at 2; CX EE. The district director gave employer notice of the filing of the claim on October 24, 2001. It cannot be ascertained from

the record before the Board when employer *received* the notice of the claim from the district director.

Upon claimant's counsel's requests in November 2001 for an informal conference to obtain temporary total disability benefits and medical benefits for surgery, CX HH, KK, an informal conference was held on December 17, 2001. Ex. 8; CX NN. On December 18, 2001, the district director recommended that employer/carrier pay claimant ongoing temporary total disability benefits from September 24, 2001. *Id.* The carrier purported to accept the district director's recommendation in early January 2002. Ex. 9. However, employer suspended compensation on January 14, 2002, and the district director noticed on January 15, 2002, that another informal conference would be held on January 22, 2002. CX OO. This informal conference was not held, as employer subsequently paid claimant the recommended benefits. Claimant reached maximum medical improvement on June 28, 2002. Exs. 1 at 8; 12 at 3; Jt. Ex. 1 at 3; CX B at 13-14. Employer paid claimant permanent total disability benefits from June 29, 2002, to July 28, 2003, Ex. 12 at 2; Jt. Ex. 1 at 2, but filed a second notice of controversion on October 4, 2002. Ex. 11. In July 2003, employer's carrier became insolvent. CX SS.

A second informal conference was held on July 11, 2003, and the district director recommended on July 16, 2003, that employer pay claimant ongoing permanent total disability benefits and all outstanding and future medical benefits. Ex. 1 at 10; CX SS, Z at 1. Employer terminated the payment of permanent total disability benefits on July 28, 2003. Ex. 1 at 10; Tr. at 37. On September 16, 2003, the case was referred to the OALJ. Ex. 14; ALJ 4.

Employer's liability for an attorney's fee is governed by Section 28(a) and (b) of the Act which states:

- (a) 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 . . . .
- (b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district

director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, 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. . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(a), (b). In this case, the district director found employer liable for the entire fee requested, regardless of when the services were incurred, pursuant to Section 28(b), on the basis that employer rejected the district director's July 2003 written recommendations.

We cannot affirm the district director's award of the entire attorney's fee under Section 28(b) without regard to when the services were performed. Moreover, that the administrative law judge awarded a fee pursuant to Section 28(b) does not dictate the conclusion that employer's liability for a fee during the entire time the case was at the district director level also is governed by this subsection. Rather, it is appropriate in this case to first address employer's liability for the fee pursuant to Section 28(a), as claimant contends.<sup>1</sup> *Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 118 (CRT) (5<sup>th</sup> Cir. 2001). If employer declines to pay any compensation on or before the thirtieth day after it receives written notice of the claim from the district director, employer is liable for an attorney's fee if claimant successfully prosecutes his claim. 33 U.S.C. §928(a); *see Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5<sup>th</sup> Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5<sup>th</sup> Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5<sup>th</sup> Cir. 1993). That employer paid benefits before claimant filed his claim does not preclude the applicability of Section 28(a), if it

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<sup>1</sup> Claimant raises the applicability of Section 28(a) in his response brief and his contention supports the district director's fee award. Moreover, fee liability in general is at issue. Therefore, we reject employer's contention that we are precluded from addressing the applicability of Section 28(a). *See generally Reed v. Bath Iron Works Corp.*, 38 BRBS 1, 2 (2004); *see also Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 118(CRT) (5<sup>th</sup> Cir. 2001).

declines to pay compensation after it receives written notice of the claim. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 118(CRT) (5<sup>th</sup> Cir. 2001). Claimant asserts in his response brief that the date the district director provided notice of the claim to employer was October 24, 2001. Cl. Resp. Br. at 10. However, the date employer *received* written notice of the claim from the district director is not contained in the record. As employer filed a notice of controversion before it received the claim, and did not pay any benefits after its receipt of the claim until January 2002, the date employer received the claim is the date employer's liability for an attorney's fee under Section 28(a) begins.<sup>2</sup> *Alario*, 355 F.3d at 853, 37 BRBS at 119(CRT). We remand this case to the district director to determine the date employer received notice of the claim. *See Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979).

Employer's liability for an attorney's fee under Section 28(a) ceases on the date employer pays benefits pursuant to the district director's written recommendations, and any fee liability on the part of employer thereafter is governed by Section 28(b). On December 18, 2001, the district director recommended that employer pay claimant ongoing temporary total disability benefits from September 24, 2001. Ex. 8; CX NN. The date employer

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<sup>2</sup> We reject claimant's contention in response that employer is liable for pre-controversion fees pursuant to *Liggett v. Crescent City Marine Ways & Dry Dock Co.*, 31 BRBS 135 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). The holding in *Liggett* was essentially overruled by the Board's decision in *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002)(*en banc*)(McGranery and Hall, JJ., dissenting), as being inconsistent with the plain language of Section 28(a). *See Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5<sup>th</sup> Cir. 2002). *See also Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-481 (4<sup>th</sup> Cir. 1998)(court holds pre-controversion fees awardable only if OWCP makes an initial determination that claimant is ineligible for black lung benefits).

actually paid claimant pursuant to the district director's December 2001 written recommendations is not reflected in the record. Consequently, on remand the district director must determine this date as well.<sup>3</sup>

Thereafter, employer's liability under Section 28(b) again commenced at the time a controversy arose between the parties, *i.e.*, at the time employer stopped making payments pursuant to the district director's December 2001 recommendation. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). Employer ceased making its voluntary payments on July 28, 2003, after the district director had held a second informal conference on July 11, 2003, and recommended on July 16, 2003, that employer pay claimant ongoing permanent total disability benefits and all outstanding and future medical benefits. Ex. 1 at 10; CX SS, Z at 1; Tr. at 37. Employer did not comply with this recommendation. Subsequently, the case was referred to the OALJ on September 16, 2003, and the administrative law judge awarded claimant ongoing permanent total disability benefits from July 28, 2003. *See* Decision and Order-Awarding Benefits; Ex. 14; ALJ 4. Thus, as employer refused to accept the district director's recommendation and claimant obtained additional compensation before the administrative law judge, employer is liable under Section 28(b) for claimant's attorney's fee from July 28, 2003, the date it ceased making payments, to September 16, 2003, when the case was referred to the OALJ. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9<sup>th</sup> Cir. 1998); *Caine*, 19 BRBS 180; *Trachsel*, 15 BRBS 469.

In sum, we vacate the district director's fee award pursuant to Section 28(b) and remand this case to the district director for reconsideration. We hold that employer is liable for an attorney's fee under Section 28(a) from the date it received written notice of the claim from the district director to the date it paid benefits pursuant to the district director's December 2001 recommendations. Since these dates are not contained in the record, on remand the district director should determine these dates and award a fee under Section 28(a) payable by employer for necessary services rendered during this time. 20 C.F.R. §702.132. Additionally, we hold that employer is liable for an attorney's fee pursuant to Section 28(b) from July 28, 2003, when it suspended its voluntary payments and declined the district director's recommendation, to September 16, 2003, when the case was referred to the OALJ. Employer is not liable for an attorney's fee under either Section 28(a) or (b) prior to the date

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<sup>3</sup> Certain documents submitted by employer indicate that payments were made on January 4 or 11, 2002. Ex. 9. However, a letter dated January 15, 2002, from the district director to the parties indicates that employer was still not making payments because he scheduled a telephonic informal conference for January 22, 2002. CX OO. Apparently, employer paid the recommended benefits since the scheduled telephonic informal conference never took place.

it received written notice of the claim from the district director in 2001 and during the time it made payments to claimant from January 2002 through July 27, 2003, pursuant to the district director's December 2001 written recommendations. *See generally Trachsel*, 15 BRBS at 471; *see also Ping v. Brady-Hamilton Stevedore Co.*, 21 BRBS 223 (1988). As claimant obtained an award of ongoing permanent total disability benefits, counsel may be entitled to a fee assessed against claimant as a lien on his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c), for the periods during which employer is not liable for the fee.<sup>4</sup> 33 U.S.C. §928(c); 20 C.F.R. §702.132; *see Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). Consequently, on remand the district director should address claimant's liability for an attorney's fee award pursuant to Section 28(c) for the periods during which Sections 28(a) and (b) are not applicable.

Accordingly, the district director's Award of Attorney's Fees Pursuant to Section 28 of the Act and Decision on Motion for Reconsideration of Award of Attorney's Fees Under Section 28 of the Act are vacated, and the case is remanded to the district director for reconsideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>4</sup> The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant.