RUSSELL JENSEN	)	BRB Nos. 02-0333 and 02-0545)
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED: Jan 15, 2003
	)	
RUSSELL JENSEN	)	BRB No. 02-0575
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Third Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor, the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor, and the Compensation Order Awarding Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Third Decision and Order on Remand (1995-LHC-0217) of Administrative Law Judge Ralph A. Romano, and employer appeals the Decision and Order (2001-LHC-2946) of Administrative Law Judge Paul H. Teitler awarding claimant a Section 14(f) penalty, 33 U.S.C. ' 914(f), and the Compensation Order Awarding Attorney's Fees (Case No. 02-106128) of District Director Richard V. Robilotti, 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). This case is before the Board for a fifth time.

To recapitulate, on July 22, 1991, claimant sustained work-related injuries to his left foot, left hip and right knee for which employer voluntarily paid compensation for temporary total disability and medical benefits from July 23, 1991, through June 22, 1994, as well as for a four percent permanent partial impairment to claimant's right leg. Thereafter, claimant, who has not returned to his pre-injury or any other employment, filed a claim seeking a continuation of temporary total disability compensation from June 22, 1994, and additional medical benefits due to the work-related injury to his right knee as well as an alleged lower back injury which had subsequently developed as a result of the right knee injury.

In a Decision and Order dated March 25, 1996, Administrative Law Judge Nicodemo DeGregorio awarded claimant temporary total disability benefits from June 22, 1994, to August 22, 1994, and continuing permanent total disability benefits from August 23, 1994, as well as all related medical care and treatment, due to his work-related right knee injury. Employer's subsequent appeal of Judge DeGregorio's decision was dismissed by the Board in light of its filing of a petition for modification under 33 U.S.C. §922. On modification, the case was reassigned to Administrative Law Judge Ralph A. Romano. In his Order dated

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[1]Judge DeGregorio denied the claim related to claimant's alleged back injury, finding that claimant did not establish that he sustained any work-related injury to his back. In addition, he determined that claimant had reached maximum medical improvement with regard to his right knee injury as of August 22, 1994.

June 5, 1998, Judge Romano denied employer's request for modification, finding that employer did not establish the availability of suitable alternate employment and hence the requisite change in condition. Employer's appeal of Judge Romano's Order of Denial of Request for Modification and the fee award was consolidated with employer's reinstated appeal of Judge DeGregorio's award of total disability benefits.

In its decision, the Board affirmed Judge DeGregorio's award of total disability benefits. *Jensen v. Weeks Marine, Inc.* [*Jensen I*], 33 BRBS 97 (1999). The Board, however, vacated Judge Romano's denial of employer's petition for modification, holding that the evidence employer submitted on modification is sufficient to bring the claim within the scope of Section 22 as it could support a finding of a change in claimant's physical and economic condition since the time of Judge DeGregorio's award. Therefore, the case was remanded for further consideration. Additionally, the Board vacated Judge Romano's award of an attorney's fee and remanded for a more detailed discussion of employer's objections to the attorney's fee petition. *Id.*

In his Decision and Order on Remand, Judge Romano stated that he felt constrained to find, as a result of the Board's decision in *Jensen I*, 33 BRBS 97, that suitable alternate employment was established. He further found that claimant did not diligently seek alternate work and therefore is limited to an award of permanent partial disability benefits. Thus, he granted employer's petition for modification and awarded claimant permanent partial disability benefits as of March 2, 1998, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a weekly loss in wage-earning capacity of $127.50.

Employer appealed and claimant cross-appealed Judge Romano's Decision and Order on Remand. Specifically, employer challenged Judge Romano's award of permanent partial disability benefits pursuant to Section 8(c)(21), contending that claimant is limited to an award under the schedule, 33 U.S.C. §908(c)(2), for the permanent partial disability to his knee. In his cross-appeal, claimant challenged the denial of total disability benefits.

In *Jensen v. Weeks Marine, Inc.* [*Jensen II*], 34 BRBS 147 (2000), the Board clarified its decision in *Jensen I,* 33 BRBS 97, to hold merely that employer produced sufficient evidence to bring the claim within the scope of Section 22, and thus again remanded the case to the administrative law judge to determine

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[2]Judge Romano also issued a Supplemental Decision and Order Awarding Attorney Fees, in which he awarded claimant's counsel an attorney's fee totaling $13,350 representing 53.4 hours at the requested hourly rate of $250, and $2,100.45 in costs.

whether claimant's award of total disability benefits should be modified. The Board explicitly instructed the administrative law judge that he "is required to evaluate the medical and vocational evidence submitted by both parties, and to determine the weight it should be accorded, applying the same standards of proof that are required in an initial adjudication in determining if there has been a change in claimant's physical or economic condition." *Jensen II,* 34 BRBS at 151. The Board also held that pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), any permanent partial disability award must be made under the schedule, *i.e.*, 33 U.S.C. §908(c)(2), (19); *Jensen II*, 34 BRBS at 152. Accordingly, Judge Romano's award of continuing permanent partial disability benefits from March 2, 1998, was vacated, and the case was remanded for further findings.

In his Second Decision and Order on Remand, Judge Romano determined that employer did not establish a change in claimant's economic condition. Specifically, Judge Romano found that employer did not present sufficient evidence of suitable alternate employment to warrant modification of the award of total disability. In addition, Judge Romano declined to address whether claimant's physical condition had changed/improved as employer conceded that claimant cannot return to his previous work, and there is insufficient evidence of suitable alternate employment to alter claimant's totally disabling condition. Employer's request for modification was therefore denied. Employer appealed this decision.

In *Jensen v. Weeks Marine, Inc.* [*Jensen III*], 35 BRBS 174 (2000), the Board again vacated Judge Romano's finding that employer is not entitled to modification and instructed the administrative law judge on remand to specifically consider positions identified in employer's labor market survey which had been approved by Dr. Greifinger, to determine whether those positions are sufficient to meet employer's burden to establish the availability of suitable alternate employment. In particular, the Board observed that the security guard jobs identified by employer on modification were "different in kind from those previously submitted by employer." *Jensen III*, 35 BRBS at 178. In addition, the Board again instructed the administrative law judge that he "must also fully consider the effect of claimant's subsequent cooperation with employer's vocational experts, and may, if necessary, elect to reopen the record for submission of additionally relevant evidence, previously excluded, on this issue." *Jensen III*, 35 BRBS at 179. Lastly, the administrative law judge was instructed that if he determined that suitable alternate employment has been established then claimant would be limited to a scheduled award of permanent partial disability benefits based on the degree of permanent physical impairment to his right leg.

In his Third Decision and Order on Remand, Judge Romano concluded that the security jobs identified by employer constitute sufficient evidence of the

availability of suitable alternate employment in order to establish a change in condition under Section 22, and also to meet employer's burden on the merits. Consequently, he found that claimant is no longer entitled to ongoing total disability benefits as of March 2, 1998, but rather is limited to the already paid scheduled award for permanent partial disability benefits for his right knee injury.

Meanwhile, following Judge Romano's Second Decision and Order on Remand, filed by the district director on March 6, 2001, employer drafted and sent a compensation check to claimant in the sum of $29,267.91. This check was delivered on or after March 21, 2001. As payment was made more than 10 days after the filing of Judge Romano's decision, claimant petitioned the district director for additional compensation in accordance with Section 14(f) of the Act. 33 U.S.C. §914(f). On June 7, 2001, and again on June 26, 2001, the district director requested that employer furnish proof of payment of the 20 percent additional compensation dictated by Section 14(f) of the Act. On July 23, 2001, employer advised claimant and the district director that all compensation due had been paid. Claimant thereafter advised the district director of his disagreement with employer and inquired as to the correct remedy for pursuit of his claim for additional compensation allegedly owed under Section 14(f). The district director advised claimant that "upon receipt of [claimant's] LS-18, [the] case would be referred to the Office of Administrative Law Judges [OALJ]," and on August 8, 2001, claimant's LS-18, listing Section 14(f) compliance and interest as unresolved issues, was forwarded to the Office of Administrative Law Judges. The case was then assigned to Administrative Law Judge Paul H. Teitler.

In his Decision and Order, Judge Teitler determined that as employer did not claim that payment was being stayed pursuant to Section 21 of the Act, 33 U.S.C. §921(a), (b)(3), and as there was no allegation by employer that it exercised good faith in attempting to deliver the check in a timely fashion, employer was in violation of Section 14(f). Accordingly, he ordered employer to pay claimant a 20 percent assessment pursuant to that provision.

Claimant's counsel also submitted before the district director a petition for an attorney's fee totaling $2,822.50, for work performed from March 10, 2001, until March 22, 2002. Employer filed objections to the fee petition. After consideration of employer's objections, the district director awarded an attorney's fee for the total amount requested.

On appeal, claimant challenges Judge Romano's termination of the award of total disability benefits, BRB No. 02-0575. Employer responds, urging affirmance of

[3] Claimant's counsel specifically sought an attorney's fee for 11.2 hours of work at an hourly rate of $250, plus $22.50 in expenses.

Judge Romano's decision. In its appeals, employer challenges Judge Teitler's consideration of claimant's Section 14(f) claim citing a lack of jurisdiction, BRB No. 02-0333, as well as the district director's award of an attorney's fee, BRB No. 02-0545. Claimant responds, urging affirmance of these decisions.

Appeal of Judge Romano's Decision

Claimant first argues that the findings applied by the Board in support of its underlying remand order in *Jensen III* were not those of Judge Romano but rather were independently reached by the Board based upon an improper *de novo* review of the record in this case. Claimant specifically asserts that the Board's reliance on the opinion of Dr. Greifinger to find that employer established a physical change in condition of claimant's right knee falls directly contrary to Judge Romano's finding, in his Order of Denial of Request for Modification and subsequent Order on Remand, that "Dr. Greifinger's resultant opinion of increased walking capacity [does not] establish such medical improvement particularly in light of Dr. Post's essentially unrefuted opinion of a worsened medical condition." Order of Denial of Request for Modification at 2, n. 4; *see also* Order on Remand at 1. Claimant therefore maintains that the Board exceeded the scope of its authority by making new findings exactly opposite to those of the trier-of-fact.

In *Jensen II*, the Board addressed both Judge Romano's finding regarding the value of Dr. Greifinger's opinion and claimant's assertion that the Board, in addressing the issue of modification, conducted an improper re-weighing of the evidence of record. Specifically, the Board considered but rejected claimant's contention "that the Board, in remanding the case for the administrative law judge to address employer's evidence on modification, erred by engaging in a *de novo* review of the record." *Jensen II*, 34 BRBS at 149. In its discussion of claimant's contention, the Board initially acknowledged that "[i]n a footnote, [Judge Romano] suggested that Dr. Greifinger's opinion that claimant has an increased walking capacity does not establish an improvement in claimant's physical condition." 34 BRBS at 149. The Board clarified its holding in *Jensen I* regarding Judge Romano's denial of employer's request for modification to hold that employer produced sufficient evidence to bring the claim within the scope of Section 22, but that the administrative law judge was required to fully weigh all relevant evidence to determine whether modification was in fact warranted. *Jensen II* 34 BRBS 147; *see also Jensen III,* 35 BRBS at 176. In *Jensen III*, the Board focused on Judge Romano's denial of employer's request for modification based on a change in economic, rather than physical, condition, specifically instructing him, on remand, to "consider Mr. Steckler's labor market survey, and in particular, the seven security guard positions found appropriate by Dr. Greifinger, to determine whether these positions are sufficient to meet employer's burden of establishing suitable alternate employment." *Jensen III*, 35 BRBS at 179. Each of these decisions to remand this

case rests on the administrative law judge's duty to weigh the relevant evidence. Consequently, to the extent that the Board, in *Jensen II* and *III,* addressed and rejected claimant's contention that the Board impermissibly re-weighed the evidence in the appeal previous to the one before the Board, these decisions constitute the law of the case. *See e.g., Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995). We further reject claimant's contention that the Board re-weighed the evidence in *Jensen III.* The Board, as it was in its prior decisions, addressed errors in the administrative law judge's weighing of the evidence and remanded the case to the administrative law judge to weigh the evidence pursuant to relevant law.

Claimant next argues that the evidence "relied upon" by the Board in repeatedly remanding this case, *i.e*., the labor market survey of Mr. Steckler and opinion of Dr. Greifinger, is not credible. Specifically, claimant asserts that Mr. Steckler's conclusions are suspect since his premises are based entirely on Dr. Seslowe's "stale" 1994 report and not on more recent medical evidence of record, which shows that the condition of claimant's right knee is deteriorating. Similarly, claimant avers that Dr. Greifinger's opinion lacks credibility as he failed to explain his findings of physical improvement in light of the contrary evidence he had before him, *i.e.*, that claimant's right knee has buckled on at least two occasions and visual evidence of claimant's significant limp. Moreover, claimant asserts that Mr. Steckler and Dr. Greifinger are biased against him since employer hired them both to bolster its case.

Mr. Steckler's labor market survey is not, as claimant suggests, based solely on Dr. Seslowe's 1994 opinion. Mr. Steckler testified that he relied on the opinions of Drs. Seslowe and Greifinger in conducting his labor market survey. Hearing Transcript on Modification (HTM) at 52-3, 65. In addition, as the Board has repeatedly observed, "Mr. Steckler took into account the most recent medical opinions of Dr. Greifinger [dated June 23, 1997, and December 2, 1997], who opined that claimant's ability to walk had increased from three hours to five or six hours a day, and that Dr. Greifinger, did, in fact, opine [in his deposition dated May 15, 1998] that claimant should be able to perform a number of the jobs listed in Mr. Steckler's labor market survey." *Jensen III*, 35 BRBS at 178; *see also Jensen I*, 33 BRBS at 100; HTM at 51; Employer's Exhibit on Modification (EXM) 13 at 40-45. With regard to claimant's arguments concerning Dr. Greifinger's credibility, the record indicates that he explicitly stated at deposition that, while claimant provided him with a "history of buckling" of the right knee, he found no objective evidence of instability, nor any orthopedic explanation for this buckling. EXM 13 at 34-36, 90. Additionally, Dr. Greifinger testified he had no recollection, based on his viewing of the videotapes, that claimant was walking with a limp. EXM 13 at 78. Dr. Greifinger, however, clarified his position on this topic by stating that he could not specifically recollect whether claimant had a limp but that if he did, at some point, it was not a major

issue. EXM 13 at 78-79. Moreover, although during cross-examination, Dr. Greifinger stated that claimant's arthritic right knee condition could get worse over time, he steadfastly maintained that this possibility did nothing to change his opinion that claimant was capable of performing sedentary work, and, in particular, a number of the jobs identified in Mr. Steckler's labor market survey. EXM 13 at 94-97. Thus, claimant's contentions regarding the credibility of employer's evidence are rejected.

Furthermore, there is no evidence that Mr. Steckler and/or Dr. Greifinger exhibited any bias against claimant in rendering their opinions regarding claimant's ability to perform sedentary work in this case.

Claimant further contends that employer did not establish suitable alternate employment since it never asked the alleged future employers if they would hire a man like claimant given his overall circumstances, *e.g*., his age, experience, and severe physical limitations. Employer bears the burden of establishing the availability of suitable alternate employment by identifying jobs which claimant is capable of performing given his age, education, vocational background and physical restrictions. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991). An employer cannot meet its burden of establishing suitable alternate employment merely by illustrating claimant is able to perform particular physical tasks; employer, while not an employment agency for claimant, must demonstrate the availability of jobs for which claimant can realistically compete. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). Moreover, where a vocational expert testifies that specific jobs are available which are suitable given claimant's age, education, history and restrictions, it is implicit in such evidence that he considered the entirety of claimant's circumstances and found these jobs reasonably available to claimant. *Fox v. West State, Inc*., 31 BRBS 118 (1997). If employer meets this burden, claimant may retain his entitlement to total disability benefits by demonstrating he diligently, yet unsuccessfully, tried to obtain alternate work of the type shown by employer to be suitable and available. *Palombo,* 937 F.2d 70, 25 BRBS 1(CRT). If, in fact, employers will not hire applicants with claimant's circumstances, it will be apparent when claimant demonstrates that his diligent job search was unsuccessful. *Fox*, 31 BRBS 118. Thus, contrary to claimant's assertion, there was no requirement for Mr. Steckler, or his associate, Ms. Marracco-Morris, to specifically inquire of the employers identified in the labor

[4] As employer notes, even claimant's consultant, Dr. Post, conceded that claimant is physically capable of performing sedentary or light work. Hearing Transcript at 98; see also HTM at 272-73, 275.

market survey as to whether they would actually hire claimant.

Pietrunti, 119 F.3d 1035, 31 BRBS 84(CRT); *Fox*, 31 BRBS 118.

In his Third Decision and Order on Remand, Judge Romano determined that the medical evidence overwhelmingly supports the proposition that claimant is capable of performing the security guard positions identified by Mr. Steckler. He therefore found that employer presented sufficient evidence as to the availability of suitable alternate employment, and thus granted employer's petition for modification and terminated the award of total disability benefits. As claimant has raised no reversible error in the administrative law judge's conclusion, and as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's entitlement to total disability benefits ceased as of March 2, 1998. *Spitalieri v. Universal Maritime Services,* 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001).

Appeal of Judge Teitler's Decision

Employer argues that Judge Teitler lacked the authority to hear and/or resolve the dispute regarding claimant's entitlement to a Section 14(f) assessment, as the proper jurisdiction for this issue lies only with the district director and not with an administrative law judge. Employer further argues, based on the decision of the United States Court of Appeals for the Second Circuit in *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied,* 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998), that the penalty sought by claimant herein is not "compensation" as that term is defined by the Act and that therefore the Section 18 default process, 33 U.S.C. §918, pursued by claimant in this case is not appropriate.

Section 14(f) mandates that if an employer does not pay compensation within 10 days after it becomes due, then the employer is liable for an additional amount of compensation equal to 20 percent of the unpaid compensation, which

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[5] In any event, Mr. Steckler testified that, although he did not call the employers listed in the labor market survey, his colleague, Ms. Marracco-Morris, did, in fact, make these calls. HTM at 72. Ms. Marracco-Morris testified that she made calls to all of the specific identified employers to inquire whether claimant, in his condition, would be able to do the jobs. HTM at 128, 140-142.

[6] Claimant does not argue, nor is there any evidence in the record, that he undertook a diligent job search in an effort to secure suitable alternate employment.

shall be paid at the same time as the compensation. 33 U.S.C. §914(f); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985). Section 18(a), 33 U.S.C. §918(a), provides that where an employer defaults in payment of compensation for 30 days after it is due and payable, a claimant may apply to the district director for a supplemental order declaring default, and he may then take a certified copy of that order to federal district court for enforcement thereof. Under Section 18(a), the district director is charged with investigating the application and in providing notice and a hearing to the appropriate parties prior to the issuance of a supplementary order declaring the amount of the default. Claimant may then file in federal district court for enforcement of the supplementary order. The district court then determines whether the default order is in accordance with law and enters judgment on the matter. 33 U.S.C. §918(a); *Hanson v. Marine Terminals Corp.,* 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002).

Initially, we reject employer's contention, based on the holding in Burgo, that claimant cannot use the Section 18(a) default process to compel the payment of a Section 14(f) assessment. Although the Second Circuit, in Burgo, held, in the context of an attorney's fee petition for work defending claimant's entitlement to a Section 14(f) assessment, that the language of Section 14 supports the conclusion that payments under this section are properly characterized as penalties, and are distinguishable from compensation, the court nevertheless affirmed the district director's supplemental compensation order awarding a Section 14(f) assessment, which was written in compliance with the procedures outlined in Section 18(a) of the Act. Specifically, the Second Circuit observed, "Section 14(f) cannot reasonably be characterized as an enforcement proceeding," and thus inferred that the Section 14(f) assessment is a substantive penalty enforced through the procedures governed by Section 18(a) of the Act. See Burgo, 122 F.3d at 144, 31 BRBS at 99(CRT). Additionally, the courts have held that a Section 14(f) assessment is a supplementary order declaring the amount of the default within the meaning of Section 18(a) of the Act. Sea-Land Service, Inc. v. Barry, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), aff'g 27 BRBS 260 (1993); *Quave v. Progress Marine,* 912 F.2d 798, 800 (5th Cir. 1990), *cert. denied,* 500 U.S. 916 (1991); *Lauzon Co.,* 782 F.2d at 1219; *see also*

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[7]The applicable regulations similarly provide that in such an instance, claimant may apply to the district director for a supplementary compensation order declaring the amount of the default, and that the district director shall, upon receipt of the application, institute proceedings as if such application were an original claim for compensation. 20 C.F.R. §§702.372(a), 702.315, 702.316; *but see Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000)(limiting the right to a hearing on Section 14(f) penalty claims).

Hanson v. Marine Terminals Corp., 34 BRBS 136 (2000). Thus, the Section 18(a) default process is the appropriate vehicle for claimant's pursuit of a Section 14(f) assessment. *Id.*

With regard to the process itself, the courts of appeals have uniformly held that enforcement issues are presented when the district director has issued an order of default and the employer has not paid the amount in default. In such cases, the administrative law judge under Section 19, and Board under Section 21 have no jurisdiction, as the proceedings are limited to district courts as governed by Section 18(a). *See Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Schmit v. ITT Federal Electric Int'l*, 986 F.2d 1103, 26 BRBS 166(CRT) (7th Cir. 1993); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983); *Hanson*, 34 BRBS 136. The Board and courts however have recognized that jurisdiction will lie under Section 21 in cases involving Section 14(f) under certain circumstances as when the district director declines to issue a default order or where the employer has paid the Section 14(f) assessment. *Barry*, 41 F.3d 903, 29 BRBS 1(CRT); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting); *Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995); *McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989); *Lynn v. Comet Const. Co.*, 20 BRBS 72 (1986); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). In those instances, as there is no default order to enforce, employer has no remedy in district court under Section 18(a) and may proceed under Section 21. *Id.*

The present case fits precisely within these parameters as the record establishes that the district director has not issued a default order and employer has, in fact, paid the penalty in question. In *Hanson*, the Board held:

> [T]he administrative law judge has jurisdiction to hear the case [pertaining to a Section 14(f) assessment] where a factual matter is raised with regard to the compensation due which must be resolved before the district director is able to issue the default order. Specifically, where a question arises as to the interpretation or clarification of findings made in a final compensation order, the case must go to an administrative law judge for proceedings before a district director can assess additional compensation or determine if the employer is in default.

Hanson, 34 BRBS at 138 [case citations omitted]. The record supports a finding that the district director had reason to believe that there was a factual dispute between the parties at the time he forwarded the case. This is evidenced by the

fact that, on two occasions, the district director requested employer to submit proof of timely payment, to which employer ultimately responded on July 26, 2001, stating that all compensation due had been paid. Thereafter, claimant advised the district director of his disagreement with employer on this point and the case was forwarded to the Office of Administrative Law Judges on August 8, 2001, for resolution of this factual dispute. All of this occurred prior to employer's payment in full of the outstanding compensation and the Section 14(f) assessment in March 2002. Moreover, the record establishes that employer remitted payment of the 20 percent penalty to claimant via check dated March 19, 2002. Consequently, as there was a factual dispute regarding the amount of compensation owed claimant at the time the case was forwarded to the Office of Administrative Law Judges and since employer has, in fact, paid the assessment, we hold, based upon the specific facts of this case, that the administrative law judge had jurisdiction to resolve the issues presented to him regarding the Section 14(f) assessment. Barry, 41 F.3d 903, 29 BRBS 1(CRT); Hanson, 34 BRBS at 138; Brown, 30 BRBS 29; Irwin, 29 BRBS 77 (1995); McCrady., 23 BRBS 106. Any error on the part of Judge Teitler in not remanding the case to the district director for issuance of a supplemental compensation order is harmless, as employer has raised no error in the determination of the amount of compensation owed claimant or as to its liability for the Section 14(f) assessment. Accordingly, the Section 14(f) assessment is affirmed.

Appeal of the District Director's Attorney Fee Award

Employer asserts that the district director's award of an attorney's fee must be vacated. In his attorney's fee petition, claimant's counsel states that his fee is for services rendered to claimant to recover $13,824.78 in back compensation owed by employer. These services occurred between March 10, 2001, and March 22, 2002, and were apparently prompted by the issuance of Judge Romano's Second Decision and Order on Remand, which was filed in the district director's office on March 6, 2001. Specifically, claimant sought $6,786 in additional compensation for the period between November 27, 2001, and March 18, 2002, plus $7,040.78 pursuant to Section 14(f). Thus, counsel's services pertain to the reinstatement of benefits and to recovery of the Section 14(f) assessment. The district director awarded the fee in its entirety, i.e., 11.2 hours of work at an hourly rate of $250, plus $22.50 in expenses, for a total attorney's fee of $2,822.50.

Employer asserts that claimant's counsel is not entitled to any hours spent in pursuit of a penalty for unpaid compensation in this case as the Second Circuit has held, in *Burgo*, that penalties are not considered compensation for purposes of obtaining an attorney's fee under Section 28 of the Act. *Burgo*, 122 F.3d 140, 31 BRBS 97(CRT). Employer's contention has merit.

The Second Circuit, in *Burgo*, explicitly held that Section 28(a) does not authorize an award of fees payable by employer where the employer contests a Section 14(f) assessment, since Section 28(a) applies only to the successful prosecution of a claim for "compensation," and not for the collection of penalties, and payments under Section 14(f) are properly characterized as penalties, and thus are distinguishable from compensation. *Burgo,* 122 F.3d 140, 31 BRBS 97(CRT). Section 28(b), which applies to the case at hand, is similar to Section 28(a) as it likewise only allows for an attorney's fee when claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Applying Burgo, we hold, in cases such as this one which arise within the jurisdiction of the Second Circuit, that employer is not liable for an attorney's fee under Section 28 for work performed by claimant's counsel in obtaining a Section 14(f) penalty. *Burgo,* 122 F.3d 140, 31 BRBS 97(CRT). Accordingly, claimant's counsel is not entitled to an attorney's fee payable by employer for any work performed in obtaining the Section 14(f) assessment. In addition, the record in this case does not support an award of an attorney's fee for work performed regarding the reinstatement of claimant's benefits. In his Third Decision and Order on Remand, which is affirmed herein, Judge Romano determined that claimant's entitlement to permanent total disability benefits ceased as of March 2, 1998. The benefits which counsel sought to recover for claimant, and which serve as the basis for counsel's attorney's fee petition in this case, covered periods of time subsequent to March 2, 1998. Claimant, therefore, was ultimately not entitled to the benefits sought. Consequently, we hold that employer cannot be liable for an attorney's fee representing time spent in an effort to obtain compensation to which claimant is not ultimately entitled. 33 U.S.C. §928(b); *see generally Barker v. U.S. Department of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *see also Warren v. Ingalls Shipbuilding, Inc*., 31 BRBS 1 (1997)(Order). In this instance, claimant was ultimately adjudged to have no entitlement to total disability benefits after March 2, 1998. *Id*. We must therefore

[8] The limitation to cases arising within the Second Circuit is due, in part, to the contrary decision by the United States Court of Appeals for the Federal Circuit in *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997).

reverse the district director's award of an attorney's fee.

Attorney Fee Petition for Work Before the Board

Counsel for claimant has submitted a petition for an attorney's fee seeking $2,030.54, representing 8.1 hours of services performed at an hourly rate of $250, plus $5.54 in costs, for services rendered in claimant's defense of Judge Teitler's Decision and Order, BRB No. 02-0333. The Board has not received any objections to the attorney's fee petition. Based on the unique facts of this case, we must hold that claimant's counsel is not entitled to any attorney's fee for work performed before the Board in this case. First, claimant has not been successful in obtaining additional benefits or in defending his claim to entitlement as evidenced by our affirmance of Judge Romano's Third Decision and Order on Remand, wherein claimant's entitlement to total disability benefits was terminated as of March 2, 1998. Thus, claimant's only success on appeal relates to the award of the Section 14(f) assessment. However, as observed above, the Second Circuit, within whose jurisdiction the instant case arises, has held that Section 28 does not authorize an award of fees payable by employer where employer contests a Section 14(f) assessment. *Burgo*, 122 F.3d 140, 31 BRBS 97(CRT). Consequently, claimant's counsel's request for an attorney's fee is denied.

Accordingly, Judge Romano's Third Decision and Order on Remand terminating the award of permanent total disability benefits as of March 2, 1998, and Judge Teitler's Decision and Order are affirmed. The district director's award of an attorney's fee is reversed. Claimant's counsel's request for an attorney's fee for work performed before the Board is denied.

[9] In light of our reversal of the district director's award of an attorney's fee in this case, we need not consider the other contentions raised by employer in its appeal of this award, *i.e.*, that its compliance with Section 28(b) precludes any award of an attorney's fee and also that the district director's award of an hourly rate of $250 is inappropriate.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge