BRB No. 90-1922

FRANKLIN LADNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ATLANTIC & GULF STEVEDORES	)	DATE ISSUED:
	)	
Employer	)	
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY, by and through the MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Carrier-Petitioner	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees of N. Sandra Kitchin, District Director, United States Department of Labor.

Alben N. Hopkins (Hopkins, Dodson, Wyatt & Crawley), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier Midland Insurance Company, by and through the Mississippi Insurance Guaranty Association.

William D. Blakeslee (Bryant, Colingo, Williams & Clark), Gulfport, Mississippi, for carrier National Union Fire Insurance Company of Pittsburgh, PA.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Carrier Midland Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association (MIGA) appeals the Compensation Order-Award of Attorney's Fees (6-83519) of District Director[1] N. Sandra Kitchin 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a crane operator for employer, injured his back on August 23, 1984, while he was attempting to open a rusty and jammed door of a container that was being moved. After receiving conservative treatment for this injury, claimant returned to work in mid-September 1984. Claimant continued to work until May 31, 1985, when he allegedly was unable to continue because of unrelenting back pain. On July 19, 1985, claimant filed a claim for compensation under the Act. Employer was provided with formal notice of this claim by the district director on September 18, 1985.

The matter was referred to the Office of Administrative Law Judges for a hearing. On October 29, 1986, however, Administrative Law Judge Dolan remanded the case because claimant's counsel informed him that based on Dr. Danielson's deposition, claimant wanted to amend his pleadings to reflect that his work-related condition had been aggravated through his continued employment with employer from September 1984 until May 31, 1985. Counsel for National Union Fire Insurance Company (National Union) agreed that if claimant was contemplating amending the claim to raise an aggravation theory, the case should be remanded so that the carrier on the risk at the time when claimant left work on May 31, 1985, could be joined. National Union provided workers' compensation coverage for employer through February 24, 1985, when Midland Insurance Company (Midland) became the compensation carrier. Midland provided insurance coverage for employer from February 24, 1985 through February 25, 1986, and is now in receivership.

[1]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" in the statute.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

On February 23, 1987, claimant amended the original claim to reflect that he sustained an aggravation of his initial August 23, 1984, work injury when he returned to work for employer from September 16, 1984, until May 31, 1985. Employer received formal notice of the amended claim from the district director on March 19, 1987, and controverted this claim on April 3, 1987.[2]

In his Decision and Order, Administrative Law Judge Avery found that claimant sustained a work-related injury to his back on August 23, 1984, which aggravated a pre-existing arthritic condition. The administrative law judge further determined that when claimant returned to work from September 16, 1984 through May 31, 1985, he again aggravated his condition, and that this aggravation constituted a second accidental injury within the meaning of the Act. The administrative law judge found that National Union was the insurance carrier liable for any compensation due claimant for the first injury, from the date of his August 1984 accident until his return to work in September 1984, and that Midland was responsible for all compensation owed claimant for his second injury.

Claimant's attorney thereafter filed attorney's fee petitions with both the administrative law judge[3] and the district director. In the petition for work filed with the district director, claimant's counsel requested a fee of $9,800.30 representing 98.50 hours of services rendered at $90 per hour, plus $935.30 in expenses. On July 3, 1990, District Director Sandra Kitchin issued an Order directing employer to pay the sum of $8,514.80 as an attorney's fee for services rendered to claimant at the district director level.

On appeal, MIGA contends that the district director erred in holding it liable for those attorney's fees incurred prior to April 4, 1987. MIGA asserts that pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), it cannot be held liable for any fees incurred prior to April 3, 1987, the date employer declined to pay the benefits sought by controverting the claim[4] after having received

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[2]Although claimant apparently sought permanent total disability compensation initially, prior to the hearing before the administrative law judge the parties agreed that claimant had not reached maximum medical improvement.

[3]The administrative law judge issued a Supplemental Order dated February 6, 1989 awarding claimant's counsel fees in the amount of $8,390 along with expenses of $322 representing time incurred subsequent to the date of referral to the Office of Administrative Law Judges on September 18, 1987. The administrative law judge found that the two carriers were jointly and severally liable for the awarded attorney's fee. National Union appealed this decision on May 9, 1989. In an unpublished decision, the Board held that no attorney's fee was owed by National Union in this instance inasmuch as National Union fully compensated claimant for all monies owed for the initial injury before the case was referred to the administrative law judge. *Ladner v. Atlantic & Gulf Stevedores*, BRB No. 89-1529 (June 27, 1991)(unpublished). Therefore, the Board held there had been no successful prosecution within the meaning of Section 28(b) with regard to National Union, and Midland was wholly liable for the fee award. *Id.*, slip op. at 3.

[4]MIGA mistakenly refers to the date of controversion as April 4, 1987, in some portions of its

notice of the amended claim on March 19, 1987. MIGA asserts that all but 9.75 of the total 98.5 hours claimed involved work performed prior to April 4, 1987, and are thus chargeable against claimant as a lien upon his compensation, 33 U.S.C. §928(c). Moreover, MIGA contends that inasmuch as 97.5 hours of the total time claimed involved work performed in connection with claimant's unsuccessful prosecution of the first claim, no fee is owed for these services. In the alternative, MIGA contends that if a fee is owed in connection with the original claim, that fee should be assessed against National Union, the carrier on the risk at the time of the first claim.[5] National Union responds, contending that it cannot be held liable for claimant's attorney's fee inasmuch as it voluntarily paid the compensation due claimant for his 1984 injury, and claimant received no additional compensation for that injury. Claimant also responds that because he was ultimately successful in obtaining greater compensation benefits than that voluntarily paid or tendered by employer, the district director properly determined that employer is liable for claimant's attorney's fees and that it is of no importance to him how liability for the fee is apportioned between carriers.

Initially, we reject MIGA's assertion that it cannot be held liable for fees incurred prior to April 4, 1987, when employer received notice of the amended claim and declined to pay it by controverting the claim. Pursuant to Section 28(a) of the Act, if either employer *or* carrier declines to pay any compensation within 30 days of receiving written notice of a claim by the district director, and claimant's counsel's efforts ultimately result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993). The language of Section 28(a) indicates that liability for an attorney's fee attaches to employer from the date employer *or* carrier receives formal notice of the claim. Similarly, under Section 28(b), if employer *or* carrier pays some compensation without an award and thereafter a controversy arises over additional benefits, if employer or carrier declines to pay the additional amount and claimant is successful in obtaining additional benefits, employer is liable for the fee.

In the present case, employer received formal notice of its potential compensation liability when it received notice of the original July 19, 1985, claim on September 18, 1985. Employer's potential fee liability under Section 28(a) commenced on that date. Although claimant subsequently amended his claim on February 23, 1987, to raise an aggravation theory of recovery and Midland was not joined as a carrier until that time, carrier liability is contingent upon employer liability. *See* 33 U.S.C. §§904, 935; *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24 (CRT) (1st Cir. 1989). Thus, as carrier's liability is dependent on employer's liability, the responsible carrier is liable from the date employer would be liable regardless of whether it had been formally joined as a party

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brief.

[5]MIGA also asserts that in any event any fee owed should be substantially less than that awarded in light of the limited success which claimant ultimately obtained consistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We decline to address this argument which MIGA has raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

at that time. *See Martin v. Kaiser Company, Inc.*, 24 BRBS 112, 126 (1990).

The district director erred, however, in holding employer liable from September 1985 when it received notice of the claim under Section 28(a). The record indicates that employer, through its carrier National Union, voluntarily paid claimant temporary total disability compensation from August 28, 1984, through September 13, 1984, and from June 1, 1985 to February 7, 1986, at the same compensation rate ultimately deemed applicable by the administrative law judge. Since employer was paying full benefits during this period, employer is not liable for a fee for work performed prior to February 7, 1986. On that date, however, employer terminated payments. Under Section 28(b), when an employer or carrier voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer or carrier will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer or carrier. 33 U.S.C. §928(b); 20 C.F.R. §702.134(b); *see generally Rihner v. Boland and Manufacturing Co.*, 24 BRBS 84 (1990). A controversy thus arose between the parties as of February 7, 1986, when employer through its carrier suspended its voluntary payments of compensation. Inasmuch as claimant was ultimately successful in establishing his right to continuing temporary total disability compensation beyond that date, as well future medical benefits, this additional compensation supports an award of attorney's fee payable by employer under Section 28(b). *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Accordingly, we modify the district director's attorney's fee award to reflect that employer is liable for a fee of $7,065, representing the 78.5 hours of legal services performed after February 7, 1986 at a rate of $90 per hour. Inasmuch as Midland was deemed to be the carrier responsible for claimant's temporary total disability compensation after he ceased working on May 31, 1985, Midland is liable for the fee in question.

With regard to the fee for services performed prior to the time that employer ceased its voluntary payments of compensation, claimant may be liable pursuant to Section 28(c), 33 U.S.C. §928(c). In the present case, the district director properly determined that claimant was liable for those fees incurred prior to September 13, 1985, when employer received formal notice of the claim. *See Watkins*, 26 BRBS at 181. The case, however, must be remanded for the district director to consider whether the fees incurred between September 13, 1985, and February 7, 1986, which cannot be properly assessed against employer pursuant to Section 28(a) or (b), should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c). Under such circumstances, the district director must take into account claimant's financial circumstances. *See* 20 C.F.R. §702.105. *See generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. February 26, 1980), *amended*, (D.C. Cir. March 31, 1980).

Accordingly, the district director's Compensation Order-Award of Attorney's Fee is modified to provide that employer and Midland are liable for a fee of $7,065, representing the 78.50 hours of legal services performed after February 7, 1986 at a rate of $90 per hour. The case is remanded for the district director to consider whether additional fees, which cannot be properly assessed against employer, should be assessed against claimant pursuant to Section 28(c) consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge