BRB No. 99-921

CLAUDE O. WEAVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER *EN BANC*

Appeal of the Compensation Order - Denial of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Traci Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

NELSON, Acting Administrative Appeals Judge:

Claimant appeals the Compensation Order - Denial of Attorney's Fees (6-143287) of District Director Jeana F. Jackson 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 the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This case is on appeal to the Board for the second time. On February 4, 1992, claimant filed a claim under the Act for occupational hearing loss benefits. Employer filed a notice of controversion on February 11, 1992. On February 12, 1992, employer received formal notice of the claim from the district director. On September 3, 1992, employer

voluntarily paid $154.11 in back compensation and initiated biweekly permanent partial disability compensation payments under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). By letter dated October 6, 1992, employer offered claimant $1,200 to settle all issues, including medical benefits, plus $250 for an attorney's fee. Claimant refused the offer. On October 29, 1992, employer notified claimant's attorney that the claim had been accepted as compensable based on a two percent impairment of the whole man, that claimant would continue to receive $9.34 bi-weekly pursuant to Section 8(c)(23), and that employer would pay all of claimant's medical expenses related to the hearing loss.

On March 17, 1993, the case was referred to the Office of Administrative Law Judges for a formal hearing. On November 17, 1993, the administrative law judge issued a decision awarding claimant permanent partial disability compensation for a 5.01 percent binaural hearing impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), plus interest.[1]

Subsequent to the issuance of the administrative law judge's decision, claimant's attorney submitted a fee petition for services rendered between March 31, 1992 and March 22, 1993, at the district director level, requesting $1,140, representing 6.5 hours at $150 per hour, plus 1.5 hours at a rate of $110 per hour. In her Compensation Order, the district director denied the fee application in its entirety, finding that no basis existed for imposing fee liability on employer because employer had tendered a settlement offer of $1,200 which claimant had refused and claimant was ultimately successful only in obtaining an award of $396.10, which the employer had previously paid on August 13, 1993. Claimant appealed the district director's denial of an attorney's fee to the Board.

The Board held that the district director erred in not holding employer liable for a portion of claimant's attorney's fee, as it is undisputed that employer did not voluntarily pay any benefits to claimant prior to September 3, 1992, more than 30 days after employer received formal notice of the claim from the district director. Inasmuch as claimant's counsel was successful in establishing employer's liability for disability and medical benefits which employer had initially refused to pay, the Board held that employer is liable for a reasonable attorney's fee for those services performed before the district director prior to September 2, 1992, pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). *Weaver v. Ingalls Shipbuilding, Inc.,* BRB No. 97-710 (Feb. 13, 1998)(unpublished). The Board held that as

[1]Claimant appealed this decision. BRB No. 94-0468. September 12, 1996, this case was administratively affirmed by the Board as it had been pending for more than one year on that date. Pub. L. No. 104-134.

employer initiated voluntary payments of compensation as of September 3, 1992, the issue of employer's liability for the remainder of the claimed fee was governed by Section 28(b) of the Act, 33 U.S.C. §928(b), and that because claimant received less compensation than if employer had continued its voluntary payments under Section 8(c)(23), employer was not liable for a fee under Section 28(b) for work performed after September 3, 1992. Accordingly, the Board vacated the district director's Compensation Order insofar as it concerned work performed prior to September 3, 1992, and remanded the case for the district director to enter a reasonable fee for this work.

Before the district director issued her decision on remand, claimant's counsel filed an amended fee application on March 5, 1998, stating that in view of the Board's holding in *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), he was amending the fee application of December 3, 1993, which formed the basis for the first appeal, to include services performed before employer controverted the claim.[2] Claimant's attorney submitted a fee petition for additional services rendered at the district director level beginning on February 4, 1992, the date the claim was filed, requesting an additional $770, representing 4.4 hours at $175 per hour. Employer filed objections and claimant filed a response to employer's objections. In her Compensation Order, the district director reduced the hourly rate requested to $100, and awarded a fee of $440, of which $150 was to be paid by employer, and $290, representing 2.9 hours at $100 per hour, by claimant. The fees payable by claimant were those incurred prior to March 12, 1992, the 30th day after the district director gave employer formal notice of the claim. In holding claimant liable for these services, the district director relied on the Board's decision in *Jones v. Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980).

In the case presently before the Board, claimant appeals the district director's Compensation Order after remand. On appeal, claimant argues that, based on *Liggett*, employer, not claimant, is liable for the entire fee awarded. Employer responds, urging affirmance of the fee award. Employer concedes that *Liggett* would appear to support claimant's position and require a reversal of the district director's fee assessment against claimant, but it contends that the basis for the Board's holding was rejected by the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998), *aff'g on other reasoning Jackson v. Jewell Ridge Coal*

[2]Claimant's counsel also amended the fee application to reflect 1/10th of an hour instead of 1/4 of an hour billing increments, and to reflect current hourly rates.

Corp., 21 BLR 1-27 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting).

> Section 28 of the Act states:
>
> > 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 Act, 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) (emphasis added). Prior to the decision in *Jackson*, 21 BLR at 1-27, the Board had interpreted Section 28(a) as providing that employer is liable for claimant's reasonable attorney's fee only for services rendered to claimant after 30 days from the date employer received written notice of the claim from the district director or, within the 30-day period, from the date it declined to pay benefits, whichever came first. Claimant was liable for a reasonable fee for services performed prior to employer's controversion of the claim, or before the 30th day after the employer received written notice of the claim from the district director. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table); *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980)(Miller, J., concurring in part and dissenting in part)*; Jones v. Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980). This holding was premised on the interpretation of the word "thereafter" in Section 28(a).

Upon reconsideration of the Board's prior decisions on this issue, a majority of the Board held in *Jackson* that employers in cases arising under the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Black Lung Act), are to be held liable pursuant to Section 28(a) for a fee for work performed prior to employer's controversion of the claim once the conditions for shifting the fee to employer are met, *i.e.*, once employer has controverted the claim. The Board held that this result follows from the decisions of the United States Supreme Court regarding the award of a reasonable fee under federal fee-shifting statutes in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), noting the applicability of these cases to the awards of an attorney's fee under Section 28 of the Act. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Ingalls Shipbuilding, Inc. v.*

Director, OWCP [Baker], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). The Board thus held that:

> the provisions about notice of a claim and declination to pay, plus the utilizing *thereafter* of an attorney, plus a successful prosecution of the claim simply trigger the liability of the employer for a reasonable fee for *all* services rendered in the successful prosecution of the claim, not only for the services rendered after the date of notice of the claim and declination to pay.

Jackson, 21 BLR at 1-32 (emphasis in original). In *Liggett*, a majority of the Board held that this rationale is equally applicable to cases arising under the Longshore Act. 31 BRBS at 137-138.

In its decision in *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998),[3] the United States Court of Appeals for the Fourth Circuit affirmed the result of the Board's decision in *Jackson*, but not its rationale. The Fourth Circuit held that the Board's reliance on the Supreme Court's decisions in *Hensley* and *Dague* was misplaced, as those cases are inapposite to the issue of the statutory interpretation of the word "thereafter" in Section 28(a), but instead interpret the word "reasonable" in federal fee-shifting statutes. The court held that pursuant to the regulation at 20 C.F.R. §725.367, an employer is liable for pre-controversion attorney's fees only in those cases in which the Office of Workers' Compensation Programs (OWCP) makes an initial determination that a claimant's claim for black lung benefits is denied.

In my opinion, there is a compelling equitable argument for holding employers liable for all legal services, including pre-controversion services, when it refuses to pay benefits and the claimant ultimately is successful in obtaining benefits. However, for approximately 20 years prior to the Board's decisions in *Jackson* and *Liggett*, the Board's interpretation of Section 28(a) was that employers are liable for claimant's reasonable attorney's fees only for services rendered to claimant after 30 days from the date employer received notice of the claim from the district director, or within the 30-day period, from the date it declined to pay benefits, whichever came first. Claimants were liable for a reasonable fee for those services rendered prior to employer's controversion of the claim, or before the 30th day after the employer received written notice of the claim from the district director. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table); *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986); *Baker v.*

[3]The decision was rendered upon three consolidated black lung cases.

Todd Shipyards Corp., 12 BRBS 309 (1980)(Miller, J., concurring in part and dissenting in part)*; Jones v. Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979)(Miller, J., dissenting in part), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. March 31, 1980). I do not preclude the possibility that there may come a time when it is necessary to revisit the statutory interpretation of the word "thereafter" in Section 28(a). However, in light of the Fourth Circuit's decision in *Harris*, I do not believe that the decisions in *Hensley* and *Dague* compel that revisit, nor do they compel a reversal of the district director's apportionment of the attorney's fee award in the instant case. Therefore I would affirm the district director's fee award.

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring:

I concur in the decision to affirm the district director's fee award in this case, although I do so on differing grounds. In my opinion, the holding in *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), that an employer is properly held liable for reasonable pre-controversion attorney's fees once it is determined that liability shifts to the employer, remains a sound proposition as demonstrated by the holding of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998). Nonetheless, as this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit which has addressed this issue, albeit in an unpublished decision, I believe the Board is compelled to follow the law of that circuit.

In *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (table), No. 93-4367 (5th Cir. 1993), the Board held that, pursuant to Section 28(a) of the Act, only written notice of the claim from the district director, pursuant to 33 U.S.C. §919(b), triggers employer's liability for an attorney's fee, even when employer had actual notice of the claim from the claimant. The Board thus rejected the claimant's contention that employer could be liable for claimant's attorney's fees for services performed prior to the employer's receipt of the claim from the district director. In affirming the Board's decision, the Fifth Circuit, in an unpublished decision, rejected the claimant's argument that, pursuant to the strict interpretation of Section 28(a) rendered by the Board in that case, it would be unfair to

hold him responsible for the payment of pre-controversion legal fees where employer had not been notified of the claim by the district director for nearly eight months. The court stated that claimant's contention had "no legal foundation" and that the "statute preclude[d]" an award of attorney's fees against the employer which were incurred by claimant prior to employer's receipt of written notice of the claim. *Watkin*s, No. 93-4367, slip op. at 2. The Fifth Circuit's rule regarding the precedential value of its unpublished decision is that "Unpublished opinions issued before January 1, 1996 are precedent." 5th Cir. Local R. 47.5.3.[4] Thus, as *Watkins* precludes employer's liability for pre-controversion attorney's fees, and as this decision is the controlling precedent in this case, I would affirm the district director's fee award on this basis.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring:

I concur in my colleagues' decision to affirm the district director's determination that claimant is responsible for the payment of attorney's fees for legal services rendered prior to

[4]The Fifth Circuit itself recently noted this rule with regard to the precedential value of its fee orders in *Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished). *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 689 n.2, 33 BRBS 187, 190 n.2 (CRT) (5th Cir. 1999).

the 30-day period following notification to employer that a claim was filed. For the reasons stated generally in my dissent in *Liggett v. Crescent City Marine Ways & Drydock Co.,* 31 BRBS 135, 140 (1997) (Smith and Dolder, JJ., dissenting), I would continue to hold that an employer cannot be held liable for pre-controversion attorney's fees based on the long-held interpretation that in order to give full effect to the word "thereafter" in Section 28(a) of the Act, employer's liability under Section 28(a) cannot commence until 30 days after employer receives written notice of the claim from the district director, or within the 30-day period, from the date it declines to pay, whichever comes first. *Id.* at 140-141.

Moreover, the decision of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Harris,* 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998), provides additional reasoning for overturning *Liggett.* In that case, the court affirmed the Board's holding in *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), that employers were liable for pre-controversion attorney's fees, but not on the rationale upon which the Board based its holding. The Fourth Circuit adopted the position of the Director, OWCP, and held that pre-controversion fees should be payable by an employer only in those cases in which the OWCP makes an initial determination that a claimant be denied black lung benefits. *Harris*, 149 F.3d at 311, 21 BLR at 2-488. The court held that the Supreme Court cases upon which the Board's majority relied, *Hensley* and *Dague*, flesh out the word "reasonable" in federal fee-shifting statutes, and are inapposite to the determination of whether the Section 28(a) allows the award of pre-controversion fees to be shifted to an employer. The Fourth Circuit adopted what it termed the Director's "reasonable and common sense" interpretation of an "ambiguous fee-shifting scheme," which was not inconsistent with the Black Lung regulation at issue, 20 C.F.R. §725.367(a).

I note that the procedure adopted by the court for shifting pre-controversion fees to an employer is not applicable in cases arising under the Longshore Act, as the district director in a Longshore case does not enter either an initial finding of eligibility or ineligibility for benefits as occurs in a black lung case, *see* 20 C.F.R. §725.410, and which subsequently requires action on the part of an employer. *See* 20 C.F.R. §§725.412, 725.413. Rather, the proceedings before the district director in cases arising under the Longshore Act are aimed at resolving the case through informal means. *See* 20 C.F.R. §702.311. In the event that an informal conference held by a district director does not resolve the claim, his or her recommendation is not admissible in the formal proceedings. *See* 20 C.F.R. §§702.315, 702.316, 702.318. More importantly to the issue at hand, the employer is not required to take any action in response to a recommendation of the district director. Thus, the *Harris* decision does not support the conclusion that the Board's interpretation of Section 28(a) prior to *Liggett* was incorrect. I note, moreover, the *Harris* court's discomfort with its departure from its precedent in *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir.1986), which affirmed the Board's prior interpretation

of Section 28(a).[5] *See Harris*, 149 F.3d at 310-311, 21 BLR at 2-487.

[5]In *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4th Cir. 1986), the claimant challenged the Board's interpretation of Section 28(a) which held him responsible for the payment of attorney's fees for pre-controversion legal services, asserting that the Board's ruling "place[d] an onerous burden on a claimant [and] diminish[ed] the compensation payable . . . ." 805 F.2d at 1153, 19 BRBS at 52(CRT). The Fourth Circuit declared that "[the Board's construction of Section 28(a)] is consistent with congressional intent that disputes be resolved in the first instance without the necessity of relying on assistance other than that provided by the Secretary of Labor [under Section 39(c), 33 U.S.C. §939(c)]." *Kemp* is cited by the United States Court of Appeals for the Ninth Circuit in *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991). In that case, the Ninth Circuit reversed the Board's holding, *inter alia*, that employer was responsible for an attorney's fees pursuant to Section 28(b). The Ninth Circuit ruled that the employer was not liable for the claimant's attorney's fee under Section 28(b) in that case because there was no dispute after the informal conference at which employer agreed that the claimant is entitled to permanent total disability benefits. The case was remanded for consideration of employer's liability under Section 28(a). In citing *Kemp*, the Ninth Circuit noted by way of a parenthetical that the Fourth Circuit's decision indicates that "Congress intended that disputes first be resolved without the parties having to rely on assistance other than that provided by the Department of Labor." *Watts*,

950 F.2d at 611, 25 BRBS at 70(CRT).

In its decision in *Harris*, the Fourth Circuit stated that the interpretation the Director presented to the court was inconsistent with proposed changes in the regulation at Section 725.367(a) that would hold an employer liable only for post-controversion attorney's fees. Subsequent to the court's decision, the Director proposed a different regulation applicable to cases arising under the Black Lung Act that would hold the employer liable for claimant's pre-controversion attorney's fees where it "took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant." The regulation continues that such a relationship can be created, *inter alia*, when the employer responds to an initial finding of eligibility, or by failing to respond to an initial denial of eligibility. 64 Fed. Reg. 55035. My dissenting colleagues cite this proposed regulation as continued support for their adherence to *Liggett*, and suggest that this represents the Director's interpretation for attorney's fee awards under the Longshore Act. This position is untenable for several reasons. First, as stated above, the procedures in the proposed regulation for finding the creation of an adversarial relationship are not present in cases arising under the Longshore Act. Secondly, a proposed black lung regulation is entitled to no deference in a claim under the Longshore Act. The two programs are administered by the Director of OWCP, under separate program regulations. The interpretation of the Director for the black lung program is not necessarily the interpretation of the Director for the longshore program. Lastly, and critically, the Secretary is free to alter the provisions of the Longshore Act by promulgating regulations applicable under the Black Lung Act. *See* 30 U.S.C. §§932, 957; *see also West v. Director, OWCP*, 896 F.2d 308 (8th Cir. 1990). Accordingly it simply does not follow that the Longshore Act, as applied to longshore cases, should be reinterpreted every time the Director proposes new regulations for the Black Lung Program.

Furthermore, even if the Director's interpretation of Section 28(a) by way of a proposed black lung regulation were entitled to deference in this case, his position could not overcome circuit precedent. The Board's former interpretation of Section 28(a) was accepted by the United States Courts of Appeals for the Fifth Circuit, whose law is controlling in the instant case. *See* 5th Cir. Local R. 47.5.3.[6] According to the Fifth Circuit,

[6]The opinion of my dissenting colleagues regarding the precedential value of *Watkins* cannot be accepted. While the Fifth Circuit's rule concerning the precedential value of unpublished decisions is prefaced with the word "normally," this certainly does not preclude unpublished decisions from being cited in other instances. Moreover, the Fifth Circuit has previously chided the Board for not following unpublished circuit precedent. In *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995)(unpubl.), the court stated that the Board may not "contravene circuit precedent" in declining to follow *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpubl.) regarding the court's ruling on the quarter-hour minimum billing method. In *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 689 n. 2, 33 BRBS 187, 190 n.2 (CRT)(5th Cir. 1999), the court cited both decisions in noting that they

> [the Board] . . . properly applied the law *as it is written* in denying compensation for attorneys' fees that were incurred before the formal notice of claim was filed upon the employer by the district director. Like the BRB, this court has no power to rewrite the statute.

Watkins v. Ingalls Shipbuilding, Inc., No. 93-4367, slip op. at 2 (emphasis added). Critically, the court concluded that, despite the "equitable" appeal of claimant's argument, his "position has no legal foundation." *Id*.

Thus, I would continue to hold, consistent with the pre-*Liggett* line of cases cited in my dissent in *Liggett*, that employer's liability under Section 28(a) cannot commence until it controverts the claim within 30 days of receiving notice of the claim from the district director, or following the expiration of 30 days, whichever occurs first. Under Section 28(a) employer "thereafter" is liable for claimant's reasonable attorney's fee. For these reasons, I believe *Liggett* should be overruled, and I join in affirming the conclusion that the district director properly found that claimant bears responsibility for the payment of the pre-controversion attorney's fees in this case.

ROY P. SMITH
Administrative Appeals Judge

BROWN and McGRANERY, Administrative Appeals Judges, dissenting:

We respectfully dissent. We would apply the majority's holding in *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), which is consistent with the Director's interpretation of the statute as reflected in the proposed regulation. As a result, we would vacate the district director's order that claimant is liable for the pre-controversion attorney's fees and hold that employer is liable for the entire attorney's fee award, because after employer controverted the claim it became liable for a reasonable attorney's fee for all necessary work performed.

Our colleagues have made much of the fact that in *Liggett* the Board abandoned an

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had been followed by the Board.

interpretation of 33 U.S.C. §928(a), which it had applied for many years. The Board did not do so lightly. Further reflection on the attorney's fee provision in the Longshore Act compelled a majority of the Board to hold that an employer who is liable for an attorney's fee is liable for a reasonable fee for all necessary work performed. As we pointed out in *Liggett,* Section 28(a) limits the amount of the fee by the term "reasonable" and not by the date on which the services are rendered. *Liggett,* 31 BRBS at 138. From the Supreme Court's teaching in *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), we know that an attorney's fee is payable when the plaintiff is successful on the central issue, and that a reasonable fee compensates for all the necessary work performed to achieve that success. Obviously, the legal assistance provided in connection with filing the claim would be compensated in a reasonable attorney's fee, but employer and the majority insist that because that work was performed pre-controversion, claimant must bear that burden. This determination is, as we explained in *Liggett,* in direct conflict with Section 28(d) of the Act which makes plain that claimant's compensation should not be reduced by payment of an attorney fee or related expenses incurred to establish his claim. 33 U.S.C. §928(d) provides in pertinent part:

> The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses *shall not in any respect affect or diminish the compensation payable under this chapter.*

(emphasis added). *See Liggett* 31 BRBS at 138. As the United States Court of Appeals for the Third Circuit observed in *Bethenergy Mines, Inc. v. Director, OWCP,* 854 F.2d 632, 636 (3d Cir. 1988), the attorney's fee provision of the Longshore Act seems to have been designed to prevent placement of the burden for any attorney's fee on claimant. Because our prior construction of Section 28 was in conflict with both the terms and spirit of the statute, we overruled it.

We believe that the majority's decision to return to the Board's prior holding and to impose liability on longshore claimants for attorney's fee work performed prior to controversion is misguided. The majority has discussed the decision of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Harris,* 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998), in which the court relied upon the deference owed the Director's reasonable interpretation of the statute and regulation, to affirm the Board's decision in *Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), and by extension, *Liggett.* The court and Board held that pre-controversion fees are properly the liability of the employer once an "adversarial relationship" arises.[7] In the

[7]Although the court spoke in terms of the Director's reasonable interpretation of the regulation at 20 C.F.R. §725.367, this regulation is virtually identical to Section 28(a) of the Act.

cases before it, which were black lung cases, the court held that such an adversarial relationship was created once OWCP made an initial determination of ineligibility, prior to the time that employer controverted the claim because employer would inevitably concur in that denial and its controversion is essentially a ratification of the Director's denial. The court thus affirmed the Board's holding in those cases, that the employers were properly liable for the pre-controversion attorney's fees, but the court rejected the Board's rationale after observing that the Director's interpretation was entitled to "substantial deference" and the Board's interpretation was not entitled to special deference. *Harris*, 149 F.3d at 307, 21 BLR at 2-483, citing *PEPCO v. Director, OWCP*, 449 U.S. 268, 278 n. 18 (1980).

Since longshore cases do not follow a procedure comparable to the initial decision by the district director in black lung cases, an adversarial relationship between a longshore claimant and employer cannot arise until employer either controverts the claim or fails to take any action on the claim within thirty days after the district director notifies it of the claim. 33 U.S.C. §928(a). *See Harris*, 149 F.3d at 310, 21 BLR at 2-486. In the case at bar, employer controverted the claim, thus, at that time the adversarial relationship was created. The majority's holding that employer is not liable for an attorney's fee for work performed prior to controversion is consistent with the interpretation which the Director argued to the Fourth Circuit two years ago.

Since then, however, the Director has again reconsidered his interpretation of the attorney's fee provision of the Longshore Act and now proffers an interpretation identical to the Board's in *Liggett.* Under the Director's new interpretation, the creation of an adversarial relationship and claimant's successful prosecution of the claim are prerequisites for establishing employer's liability for an attorney's fee, but, "the date on which the adversarial relationship commenced will no longer serve as the starting point for such liability." Summary of Noteworthy Proposed Regulations. 64 Fed. Reg. 54987 (1999). The Director now asserts that successful attorneys should obtain reasonable fees for all of the necessary work they perform. *Id.* The Director has rewritten his attorney fee regulation, 20 C.F.R. §725.367, to reflect his new interpretation of the statute: "the fees payable under this section shall include fees for reasonable and necessary services performed prior to the creation of the adversarial relationship." 64 Fed. Reg. 55035 (1999)(proposed October 8, 1999).

In light of the Supreme Court's teaching in *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny, that deference is owed to the Director in his interpretation of the Act which he administers, the Director's interpretation is controlling unless employer can demonstrate that it is "plainly erroneous." *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159-160 (1987); *Harris,* 149 F.3d at 310, 21 BLR at 2-488. It is noteworthy that the Fourth Circuit adopted the Director's interpretation in *Harris,*

even though that interpretation conflicted with a prior published decision of that court.[8] The court did so because, as in the instant case, the Director had changed his interpretation since the prior decision. The court observed that "an agency is allowed to change its interpretation as long as its position is reasonable and does not conflict with Congressional intent." *Harris*, 149 F.2d at 310, 21 BLR at 2-487, quoting *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir.

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[8]We believe our colleagues' reliance on *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993) (table), is misplaced and their citation of *Watkins* is inappropriate in view of Rule 47.5.3 of the United States Court of Appeals for the Fifth Circuit. Rule 47.5.3 provides in relevant part:

> Unpublished opinions issued before January 1, 1996 are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

It is clear both that the *Watkins* panel did not consider the decision's holding had precedential value and that the case does not fall within any of the exceptions for citation of unpublished decisions provided in the rule. Thus, consideration of *Watkins* is not relevant to the decision in the case at bar. In any event, the Director has developed a new interpretation of the statute since the court issued *Watkins.*

1993). Hence, having considered the terms and spirit of the attorney's fee provision of the Longshore Act, 33 U.S.C. §928, as well as the Director's interpretation reflected in the proposed regulation, we would hold that employer is liable for

a reasonable attorney's fee for work performed prior to controversion. Accordingly, we would vacate the administrative law judge's denial of a fee for work before controversion and remand the case for the district director to order the full fee requested, payable by employer.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge