

R. A.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MURPHY EXPLORATION AND)	DATE ISSUED: 09/26/2007
PRODUCTION COMPANY)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney’s Fees and the Amended Compensation Order-Denial of Attorney’s Fees of David A. Duhon, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Douglas P. Mathews (Frilot Partridge, L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney’s Fees and the Amended Compensation Order-Denial of Attorney’s Fees (Case No. 07-163557) of District Director David A. Duhon 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his left knee on May 14, 1999, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability from April 22, 2000, to December 12, 2001, when claimant's injury reached maximum medical improvement. Employer then initiated payment of compensation for permanent partial disability, based on a 26 percent permanent impairment of the left leg. 33 U.S.C. §908(c)(2). On November 18, 2002, claimant filed a claim alleging entitlement to compensation for permanent total disability due to his work injury. The district director held an informal conference on September 25, 2003, in which the claims examiner opined that employer had established the availability of suitable alternate employment and that employer did not owe further compensation. Employer accepted the recommendation. Claimant requested referral of the claim to the Office of Administrative Law Judges (OALJ).

In his decision, the administrative law judge found the parties agreed that claimant is unable to return to his usual employment as an offshore mechanic due to his work injury. The administrative law judge found that employer established the availability of suitable alternate employment based on a desk clerk position employer identified on February 17, 2003, and a desk clerk and gate guard position employer subsequently identified. Thus, claimant was awarded compensation for permanent total disability from December 13, 2001, to February 17, 2003, the date suitable alternate employment was established. Thereafter, claimant was limited to the scheduled award already paid.

Subsequently, claimant's counsel submitted a petition to the administrative law judge requesting an attorney's fee. The administrative law judge rejected employer's objections to its liability for any fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and awarded counsel a fee in the amount of \$21,475, plus expenses of \$10,901.49, and co-counsel a fee of \$723.45, payable by employer pursuant to Section 28(b).

Employer appealed the administrative law judge's fee award, contending that it is not liable for any attorney's fee under Section 28(a), (b) of the Act, 33 U.S.C. §928(a), (b). In its Decision and Order, the Board agreed with employer that it is not liable for a fee under Section 28(a) because employer was voluntarily paying claimant compensation for permanent partial disability when he filed his claim on November 18, 2002. Specifically, after claimant's injury reached maximum medical improvement, employer initiated weekly compensation payments for permanent partial disability, based on a 26 percent permanent impairment of the left leg, and these payments continued for six months after the claim was filed on November 18, 2002. *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 1, 2-3 (2007)(Hall, J., concurring and dissenting).

A majority of the panel also agreed with employer's contention that it is not liable for a fee under the plain language of Section 28(b), as it did not refuse the district director's recommendation after the informal conference that no further benefits were due claimant. The majority held that, while the Fifth Circuit, in whose jurisdiction this case arises, has not expressed a definitive opinion on the issue of fee liability when the recommendation is to pay nothing and claimant subsequently obtains an award greater than employer voluntarily paid, the court has strictly construed other portions of Section 28(b) concerning the convening of an informal conference. *Andrepoint*, 41 BRBS at 3-4. In this case, employer did not refuse the recommendation to pay nothing more than it had voluntarily paid. Accordingly, notwithstanding the administrative law judge's award of greater compensation than that recommended by the district director, the Board held that employer is not liable for claimant's attorney fee under Section 28(b) and the fee award therefore was reversed. The dissenting Board member would have affirmed the finding that employer is liable for claimant's fee pursuant to Section 28(b), based on the concerns expressed in *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006), and as the Fifth Circuit had declined to address the specific issue raised before the Board. *Andrepoint*, 41 BRBS at 4-6 (dissenting opinion of J. Hall).

Claimant filed a motion for reconsideration of the Board's decision contending that employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), as employer's payment of permanent partial disability benefits at the time the claim for permanent total disability was filed constituted its denial of the liability asserted by the claim. Alternatively, claimant requested that the Board remand the case to the administrative law judge for consideration of a fee award payable by claimant pursuant to Section 28(c). In its decision on reconsideration, the Board rejected claimant's contention that employer is liable for a fee pursuant to Section 28(a), holding that employer's payment of partial benefits after a claim is filed precludes fee liability pursuant to Section 28(a) notwithstanding claimant's eventual recovery of compensation greater than employer paid. *Andrepoint v. Murphy Exploration & Prod. Co.*, ___ BRBS ___, BRB No. 06-0393 (Jul. 13, 2007)(decision on recon.)(Hall, J., concurring). However, the Board remanded the case to the administrative law judge for consideration of claimant's liability for his attorney's fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c).

Claimant's counsel also filed a fee petition for work performed before the district director, requesting a fee in the amount of \$2,901.25, and a fee for co-counsel in the amount of \$420, plus expenses of \$85. The district director agreed with employer that its fee liability could not be predicated on Section 28(a) as employer voluntarily paid benefits, and that Section 28(b) is not applicable as employer did not object to the recommendation following the informal conference. Thus, the district director found that

employer is not liable for claimant's attorney's fee. Claimant appeals, and employer responds, urging affirmance.¹

On appeal, claimant contends that the district director erred in finding that Section 28(a) does not apply as employer denied the liability asserted by the claim, specifically permanent total disability, although it acknowledged liability for the permanent partial disability claim. Claimant also contends that the district director erred in finding that employer is not liable for a fee pursuant to Section 28(b) in a case in which the informal recommendation is adverse to the claimant but the claimant thereafter succeeds before the administrative law judge. Lastly, claimant contends that the district director erred in failing to consider the appropriateness of an attorney's fee payable by claimant pursuant to Section 28(c).

Section 28(a) provides for an employer-paid fee if employer refuses to pay any compensation within 30 days of the date it receives notice of the claim from the district director. *See Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *see generally W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). In this case, employer was voluntarily paying compensation for permanent partial disability when claimant filed a claim for permanent total disability. For the reasons stated in *Andrepoint*, slip op. at 4-6, (decision on recon.), we affirm the district director's finding that Section 28(a) does not apply in the instant case. In its decision on reconsideration, the Board held the text of Section 28(a) states that employer's liability is premised on its declining to pay *any* benefits, and the relevant cases hold that employer's payment of partial benefits after a claim is filed precludes fee liability pursuant to Section 28(a) notwithstanding claimant's eventual recovery of compensation greater than employer paid.

Claimant also contends that the district director erred in finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b) when, as here, the informal recommendation is adverse to the claimant but the claimant thereafter succeeds before the administrative law judge. For the reasons stated in *Andrepoint*, 41 BRBS at 3, we affirm the district director's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b).

¹In response, employer filed its brief in opposition to claimant's motion for reconsideration in *Andrepoint*, BRB No. 06-0393. As the contentions on reconsideration are the same as in the instant case, we will consider employer's arguments in favor of affirming the district director's denial of an attorney's fee payable by employer.

Lastly, claimant contends that the district director erred in failing to consider whether claimant's counsel is entitled to a fee payable by claimant pursuant to Section 28(c). If Section 28(a) or (b) does not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to Section 28(c). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132. As we have affirmed the district director's finding that employer is not liable for claimant's attorney's fee under either Section 28(a) or (b), counsel is entitled to consideration of the fee request by the district director pursuant to Section 28(c). Therefore, we remand the case to the district director for consideration of claimant's liability for his attorney's fee pursuant to Section 28(c). *Andreport*, slip op. at 7 (decision on recon.).

Accordingly, the district director's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(a) and (b) is affirmed. However, the case is remanded for consideration of counsel's entitlement to a fee payable by claimant pursuant to Section 28(c).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge