

MICHAEL PRUDHOMME)
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 Claimant-Petitioner)
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 v.)
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 LEEVAC INDUSTRIES, LLC) DATE ISSUED: 09/25/2013
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 and)
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 AMERICAN SPECIALTY LINES)
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jere Jay Bice (Veron, Bice, Palermo & Wilson, LLC), Lake Charles, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (2012-LHC-00021) of Administrative Law Judge Patrick M. Rosenow 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his left knee at work on October 20, 2003, and has not returned to work. Employer voluntarily paid claimant temporary total disability benefits from December 9, 2003 to June 16, 2009, and, thereafter, permanent partial disability benefits under the schedule for 77.76 weeks for a 27 percent impairment to his lower extremity. 33 U.S.C. §908(c)(2), (19). Employer terminated benefits on December 2, 2010, based upon its determination that claimant was limited to the award under the schedule as his condition had reached maximum medical improvement and suitable alternate employment was available. Claimant disputed that determination and, on December 8, 2010, filed a claim for additional compensation.

Following an informal conference, the district director issued a recommendation in which he stated that employer had established suitable alternate employment but that claimant “may not have made a diligent search for employment. . . . It is recommended that the parties attempt an amicable resolution of this claim.” *See* Memorandum of Informal Conference (July 8, 2011). Employer filed a response to the recommendation stating that it understood the recommendation to state that claimant was permanently partially disabled due to his scheduled injury; employer had fully compensated claimant for this disability and, thus, was in full compliance with the recommendation. The case was referred to the Office of Administrative Law Judges. The administrative law judge found that employer did not establish the availability of suitable alternate employment and that claimant thus remained totally disabled.¹ Accordingly, the administrative law judge awarded claimant additional compensation benefits.

Claimant’s counsel subsequently filed with the administrative law judge a petition for \$16,413.87 in attorney’s fees and expenses. The administrative law judge denied the petition under Section 28(b), 33 U.S.C. §928(b), and did not consider the applicability of Section 28(a), 33 U.S.C. §928(a). Claimant appeals the denial of his fee petition, asserting the administrative law judge erred in failing to award counsel an employer-paid fee under Section 28(a) and in denying the fee request under Section 28(b). Claimant also asserts, in the alternative, that his counsel is entitled to a fee pursuant to Section 28(c) payable by claimant. Employer responds, urging affirmance of the administrative law judge’s decision. Claimant has filed a reply brief.

Section 28 of the Act provides the authority for awarding attorney’s fees under the Act. Section 28(a) applies when an employer declines to pay *any* compensation within 30 days of its receipt of a claim from the district director’s office, if claimant successfully prosecutes his claim. 33 U.S.C. §928(a). Section 28(b) applies when the employer begins paying benefits voluntarily, a controversy arises regarding the claimant’s

¹The parties stipulated that claimant was injured on October 20, 2003, and was totally disabled through October 14, 2005, when he reached maximum medical improvement.

entitlement to additional benefits, an informal conference is held, and claimant obtains a greater award after employer refuses to comply with the district director's written recommendation. 33 U.S.C. §928(b). See *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). In this case, the administrative law judge found counsel is not entitled to an employer-paid attorney's fee because the criteria of Section 28(b) had not been met. The administrative law judge did not address the applicability of Section 28(a). For the reasons that follow, we agree with claimant that employer is liable for counsel's fee pursuant to Section 28(a).

In this case, employer voluntarily paid claimant benefits prior to the filing of his claim. Employer made its last payment on December 2, 2010, for a period of disability ending on December 12, 2010. Employer concedes that notice of claimant's claim for compensation was served on it on December 8, 2010, and received on December 10, 2010. Employer's payment of benefits prior to its receipt of claimant's claim is irrelevant to employer's liability for an attorney's fee pursuant to Section 28(a). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that, regardless of whether any benefits were paid prior to the filing of the claim, fee liability shifts to the employer pursuant to Section 28(a) once the 30-day period following employer's receipt of the claim has expired without the payment of any benefits to the claimant. *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT). Thus, employer's voluntary payment of benefits to claimant for his work injury prior to the filing of his claim is irrelevant for purposes of determining its liability for an attorney's fee under Section 28(a). *Id.* Moreover, we cannot accept employer's assertion that Section 28(a) is not applicable because its payment on December 2, 2010 included a period of disability after the claim was filed. Employer did not pay those benefits in response to claimant's claim. In *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), the Fifth Circuit held that if employer admits liability by paying any benefits in response to the claim, employer cannot be held liable for a fee pursuant to Section 28(a).² In this case, employer did not pay any benefits in the 30 days after its receipt of the claim in response thereto, and in fact, controverted the claim on December 16, 2010.³ CX 4.

²“[I]f the employer pays some partial compensation during those thirty days, thereby admitting to liability for the injury, section 928(a) does not apply.” *Andrepoint*, 566 F.3d at 419, 43 BRBS at 29(CRT).

³Employer did not pay any compensation after receiving notice of claimant's claim until after August 9, 2012, the date of the administrative law judge's Decision and Order awarding additional benefits. *Prudhomme v. LeeVac Industries, LLC*, Case No. 2012-LHC-00021 (Aug. 9, 2012).

Therefore, as employer received notice of claimant's claim from the district director on December 10, 2010, and did not pay claimant any benefits within 30 days of this date, and as claimant successfully prosecuted his claim before the administrative law judge, we hold that employer is liable for claimant's attorney's fee pursuant to Section 28(a).⁴ *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT). Consequently, we reverse the administrative law judge's finding that claimant is not entitled to an employer-paid attorney's fee, and we remand this case for the administrative law judge to address counsel's fee petition and any objections thereto.⁵ 20 C.F.R. §702.132.

Accordingly, we reverse the administrative law judge's Supplemental Decision and Order Denying Attorney Fee and we hold that employer is liable for counsel's attorney's fee pursuant to Section 28(a). We remand the case to the administrative law judge for consideration of counsel's fee petition.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴We note that the district director reached this correct result in awarding counsel an employer-paid attorney's fee for work performed before his office.

⁵In light of our holding herein, we need not address counsel's alternative contentions regarding Section 28(b), (c).