TOPIC 28 ATTORNEY'S FEES

28.1 GENERALLY

28.1.1 Introduction

Section 28 of the LHWCA provides the only authority for an award of an attorney's fee to a claimant's attorney. Generally, Section 28(a) applies when an employer denies a claimant's entitlement to any compensation or continued compensation or when there is a controversy as to the nature and extent of the claimant's disability. Baker v. Todd Shipyards Corp., 12 BRBS 309 (1980) (Once the employer receives written notice of a claim, (and the claimant is ultimately successful) the employer is liable for the claimant's attorney's fee.)

The regulations generally applicable to attorney's fee recovery for work done before the district director, administrative law judge, or court, on claims under the LHWCA, are contained at 20 C.F.R. § 702.131. The regulations generally applicable for attorney's fee recovery for work performed before the Board are contained at 20 C.F.R. § 802.202.

In enacting the LHWCA, Congress sought not only to provide an incentive for employers to pay valid claims rather than contest them, but to ensure that the value of an employee's statutory benefits could not be diminished by the costs of legal services. Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc., 625 F.2d 1248, 1257 (**5th Cir.** 1980). Consequently, except as outlined in Section 28.3, infra, an award of attorney's fees will not work to offset a claimant's compensation award.

[ED. NOTE: *For a discussion on burdens of proof, in relation to attorney fees, see infra, Topic 28.10.1 Standard of Review–Burdens.]*

Section 28(a) provides:

> **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 grounds 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 this 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 in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the**

claimant in a lump sum after the compensation order becomes final.

33 U.S.C. § 928(a).

Section 28(a) of the LHWCA provides that, in addition to the compensation award, the employer is responsible for a reasonable attorney's fee when it denies claimant's entitlement to any compensation and, thereafter, claimant utilizes the services of an attorney who engages in a successful prosecution of his claim. Director, OWCP v. Baca, 927 F.2d 1122 (**10th Cir.** 1991); American Stevedores v. Salzano, 538 F.2d 933 (**2d Cir.** 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Murphy v. Honeywell, Inc. 20 BRBS 68 (1986); see 20 C.F.R. § 702.134(a).

28.1.2 Successful Prosecution

In order for a fee to be awarded pursuant to Section 28(a), the claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (**9th Cir.** 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (**5th Cir.** 1980); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (**2d Cir.** 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Harms v. Stevedoring Servs. of America, 25 BRBS 375 (1992); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992).

The courts have held **"successful prosecution"** to mean:

a) establishing jurisdiction under the LHWCA, Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992); Parrott v. Seattle Joint Port Labor Relations Comm. of the Pac. Maritime Ass'n, 22 BRBS 434 (1989) (prevailing on the issue of status); Brattoli v. International Terminal Operating Co., 2 BRBS 57 (1975);

b) establishing the claimant's right to past, present, or future medical benefits, Ingalls Shipbuilding, Inc. v. Director, OWCP, 991 F.2d 163 (**5th Cir.** 1993); Bethlehem Steel Corp. v. Mobley, 920 F.2d 558 (**9th Cir.** 1990); Ahmed v. Washington Metro. Area Transit Auth., 27 BRBS 24 (1993); Maguire v. Todd Pac. Shipyards Corp., 25 BRBS 299 (1992); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140 (1991); Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61 (1991);

c) successfully establishing a permanent disability, Landrum v. Air America, Inc., 534 F.2d 67 (**5th Cir.** 1976); Canty v. S.E.L. Maduro, 26 BRBS 147 (1992); Hamilton v. Ingalls Shipbuilding, Inc., 26 BRBS 114 (1992);

d) a successful appeal by the claimant, Ford Aerospace & Communications Corp. v. Boling, 684 F.2d 640 (**9th Cir.** 1982); Hole v. Miami Shipyards Corp., 640 F.2d 769 (**5th Cir.** 1981) (if claimant is successful at a higher adjudicatory level, counsel is entitled to fees for all services rendered at each level of adjudication, even

if claimant was unsuccessful at a particular level); White v. Newport News Shipbuilding & Dry Dock Co., 633 F.2d 1070 (**4th Cir.** 1980); Overseas African Constr. Corp. v. McMullen, 500 F.2d 1291 (**2d Cir.** 1974); Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989);

e) successfully defending an appeal, Hensley v. Washington Metro. Area Transit Auth., 690 F.2d 1054 (**D.C. Cir.** 1982); National Steel & Shipbuilding Co. v. Director, OWCP, 616 F.2d 420 (**9th Cir.** 1980); Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306 (**5th Cir.** 1979); Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (**4th Cir.** 1978), cert. denied, 439 **U.S.** 979 (1979); Lebel v. Bath Iron Works Corp., 544 F.2d 1112 (**1st Cir.** 1976); Atlantic & Gulf Stevedores v. Director, OWCP, 542 F.2d 602 (**3d Cir.** 1976); American Stevedores v. Salzano, 538 F.2d 933 (**2d Cir.** 1976); Mikell v. Savannah Shipyard Co., 26 BRBS 32 (1992);

f) succeeding in obtaining benefits in a controverted claim subsequent to an informal hearing before the district director, even though the administrative law judge ultimately denies the claim for permanent total disability benefits, Wells v. International Great Lakes Shipping Co., 14 BRBS 868 (1982);

g) successfully prosecuting claim for penalties and interest, Quave v. Progress Marine, 912 F.2d 798, on reh'g, 918 F.2d 33 (**5th Cir.** 1990), cert. denied, 500 **U.S.** 916 (1991); Canty v. S.E.L. Maduro, 26 BRBS 147 (1992); Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61 (1991) (even where 10% may be subsumed by virtue of employer's overpayment of the lump sum section 8(c)(13) award); Kaczmarek v. I.T.O. Corp. of Baltimore, 23 BRBS 376 (1990);

h) establishing entitlement to benefits even though due to the employer's large credit for overpayment, the claimant may not realize the award for many years, Geisler v. Continental Grain Co., 20 BRBS 35 (1987); Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985);

i) establishing entitlement to benefits even though the claimant does not realize benefits because of operation of Section 3(e). Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992);

j) establishing right to benefits even though the original claimant is deceased and the substituted claimant was not a statutory survivor and thus was not entitled to benefits, Hamilton v. Ingalls Shipbuilding, Inc., 26 BRBS 114 (1992);

k) never actually receiving any benefits from the employer due to the § 33(f) credit, Cretan v. Bethlehem Steel Corp., 24 BRBS 35 (1990);

l) producing additional benefits at a modification proceeding, Arrar v. St. Louis Shipbuilding Co., 837 F.2d 334 (**8th Cir.** 1988); McDougall v. E.P. Paup Co., 21 BRBS 204 (1988); Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988); Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987);

m) establishing that the claimant is entitled to have container royalty payments included in the average weekly wage calculation, even though no additional benefits, Richmond v. Smith & Sons, BRB 87-2542 (August 8, 1991) (unpublished);

n) where the claimant did not receive additional compensation because employer voluntarily paid benefits but employer refused to enter stipulations at the hearing, actively litigated all issues and argued that it had economic interest in the outcome, the Board found successful prosecution, Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989);

o) succeeding in receiving large lump sum rather than small continuing award sufficient to establish that the claimant has obtained greater compensation under §28(a), Fairley v. Ingalls Shipbuilding, 22 BRBS 184 (1989);

p) successfully establishing employer liability by virtue of which the claimant obtains an inchoate right to additional compensation equivalent to the amount of the Section 903(e) credit awarded to the employer, E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341 (**9th Cir.** 1993);

q) successfully prosecuting a claim, receiving medical and monetary benefits for a period of five years, regardless of whether the law changes while the case is waiting on appeal and the claimant is no longer eligible for benefits under 33(g), Clark v. National Steel & Shipbuilding, Co., 29 BRBS 816 (ALJ) (1995);

r) successfully establishing a right to medical benefits, even if the claimant was unable to establish a compensable injury existed, Biggs v. Ingalls Shipbuilding, Inc., 27 BRBS 237 (1993); Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163 (**5th Cir.** 1993);

s) successfully establishing the right's of an estate to decedent's benefits (medical expenses and compensation payments), Krohn v. Ingalls Shipbuilding, Inc., 29 BRBS 72 (1994);

t) successfully enlarging the claimant's benefits, under Section 28(b), above what the employer was voluntarily paying, Boland Marine & Manufacturing v. Rihner, 41 F.3d 997 (**5th Cir.** 1995); and

u) successfully pursing the claimant's right to interest, physician of claimant's choosing, and a Section 14(e) penalty even though the employer had voluntarily paid benefits prior to trial. Hoda v. Ingalls Shipbuilding, Inc., 28 BRBS 197 (1994).

v) Recovery of some benefits for a child when the employer only originally paid widow's benefits is a successful prosecution. Mary J. Hawkins (Widow of Gilbert W. Hawkins) v. Harbert International, Inc. and Ins. Co. of N. A., 33 BRBS 198 (1999).

Additionally, the Board has found that a claimant's attorney successfully prosecuted the claim before the district director where the claimant filed a claim for permanent total disability benefits which employer controverted, and, after an informal conference was held, employer paid compensation benefits, even though the claim for permanent total disability benefits was ultimately denied by a judge. Wells v. International Great Lakes Shipping Co., 14 BRBS 868 (1982).

A claimant has **not successfully prosecuted** the claim and thus no attorney's fee is awarded when:

a) the Board affirms the denial of the claim, Darling v. Northwest Marine Iron Works, 15 BRBS 486 (1983); Fortier v. Bath Iron Works Corp., 15 BRBS 261 (1982);

b) the Board finds for the employer on appeal, Bluhm v. Cooper Stevedoring Co., Inc., 13 BRBS 427 (1981);

c) the Board finds the claim barred by Section 13, Keatts v. Horne Bros., Inc., 14 BRBS 605 (1982);

d) the Board reverses the award of disability benefits and vacates the award of medical benefits, Redick v. Bethlehem Steel Corp., 16 BRBS 155 (1984);

e) the judge finds the claim is timely filed, but the claimant has suffered no loss in wage-earning capacity, Jenkins v. Federal Marine Terminal, 15 BRBS 157 (1982);

f) the claimant's success involves only the form of compensation, i.e., defense of a lump sum contribution, and does not establish liability, Portland Stevedoring Co. v. Director, OWCP, 552 F.2d 293 (**9th Cir.** 1977);

h) the judge denies the claim for compensation, Karacostas v. Port Stevedoring Co., 1 BRBS 128 (1974); Director, OWCP v. Hemingway Transp., Inc., 1 BRBS 73 (1974);

i) the claimant does not receive any additional benefits following remand but felt "bound to follow through" with his case, and the attorney argues that the employer's appellate issue regarding a credit could have been decided in the first instance which would have resulted in the claimant's attorney fee being awarded, Murphy v. Honeywell, Inc., 20 BRBS 68 (1986);

j) the claimant's cross-appeal is unsuccessful even if he was successful before the judge, Brown v. Bethlehem Steel Corp., 20 BRBS 26 (1987), rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759 (**5th Cir.** 1989);

k) the claimant requests that the case be withdrawn without prejudice prior to reaching the ALJ's office and the lawyer wins the appeal of the motion denying withdraw. Tactical benefit is not sufficient, there must be economic gain, Crandle v. Ingalls Shipbuilding, Inc., BRB No. 93-1540 (Dec. 4, 1996) (unpublished);

l) the awarding of Section 28(b) fees is not appropriate if there has not been an informal conference with the Department of Labor. FMC Corporation v. Perez, 128 F.3d 908 (**5th Cir.** 1997); Accord Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607 (**9th Cir.** 1991); Staftex Staffing v. Director, OWCP, 217 F.3d 365 (**5th Cir.** July 18, 2000); re-issued at 237 F.3d 409 (**5th Cir.** July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.); but see, Mary J. Hawkins (Widow of Gilbert W. Hawkins) v. Harbert International, Inc. and Insurance Company of North America, 33 BRBS 198 (1999) (Although technically no informal conference had been held, the review of the claim by two claims examiners satisfied the informal process requirements of the LHWCA.); Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (**5th Cir.** 2000). The Board found Bolton v. Halter Marine, Inc., (BRB No. 01-0182) (Oct. 2, 2001) (Unreported), to be analogous to Flanagan. In Bolton the employer had not offered any record evidence supporting its allegation regarding the substance of the recommendation. [Employer alleged there was never any recommendation made by the district director disposing of the disputed issues, and that even if there was, there was no evidence to show that the employer did not comply with the recommendation.] Thus the Board found that the instant case did not turn on the issue of whether there was a written recommendation or not, but rather, whether the claimant obtained greater compensation following a formal hearing than that paid or tendered by the employer.

[ED. NOTE:** For more on the need for informal conferences in order to receive attorney fees, see the Staftex discussion infra at Topic 28.2 Employer Liability**]

Moreover, where the claimant successfully seeks modification before the administrative law judge while an appeal of claimant's claim is pending before the Board, the time spent before the

Board is considered unnecessary and accordingly no fees for time before the Board are awarded. Clark v. Director, OWCP, 19 BRBS 185 (1986).

28.1.3 When Employer's Liability Accrues

Under Section 28(a), the employer may not be liable for all the claimant's attorney's fees. The employer is only liable for fees incurred after 30 days from the date the employer received notice of the claim or from the date the employer declined to pay benefits, whichever occurs sooner. Kemp v. Newport News Shipbuilding & Dry Dock Co., 805 F.2d 1152 (**4th Cir.** 1986); Director, OWCP v. Jones, 615 F.2d 1368 (**D.C. Cir.** 1980) (Table); Martin v. Kaiser Co., Inc., 24 BRBS 112 (1990); Luter v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 103 (1986). If the record is unclear as to when the employer received notice of the claim, the Board will remand the case for more evidence on the issue. Lonergan v. Ira S. Bushey & Sons, Inc., 11 BRBS 345 (1979).

The Board has held that notice must come in writing from the district director in order to comply with Section 28(a). Notice from the claimant, even in writing, will not "trigger" the employer's liability for attorney's fees. Watkins v. Ingalls Shipbuilding, 26 BRBS 179 (1993).

Hearing loss claims are not to be treated any differently than other claims with respect to the information necessary for the claimant to file a “valid” claim or the applicability of the attorney’s fee provisions of Section 28 of the LHWCA.. In Craig v. Avondale Industries, Inc., ___ BRBS ___, (BRB No. 00-05690 (Oct. 5, 2001) (*en banc*) the Board held that the initial claim form, standing alone, triggered the 30-day time period following notice of the claim from the district director. Previously in Craig, before the *en banc* consolidated reconsideration, the Board had held that where a claim form states only that the claimant alleged he suffered a “hearing loss” due to “exposure to injurious noise” with no degree of impairment alleged on the form, and no hearing test attached to the form, the claim was akin to an anticipatory filing inasmuch as it did not identify a specific degree of hearing impairment. Previously, the Board also had gone further to hold that under such circumstances, the employer could not be held for an attorney’s fee under Section 28(a), nor was the employer liable under Section 28(b) as the employer had paid all benefits within the 30 days after a claim containing all pertinent information was filed. In its *en banc* holding, the Board now explained that the claim forms specifically evince an intent to seek benefits for a work-related hearing loss and that there was no evidence of any intent by Congress to treat hearing loss claims differently with respect to the information necessary for the claimant to file a “valid” claim or the applicability of the attorney’s fee provisions of Section 28 of the LHWCA.

Employer may be liable, in an award by an ALJ, for pre-controversy costs incurred by the claimant, even if notice does not trigger normal liability for attorney’s fees. The prohibition, in Jones v. Chesapeake and Potomac Telephone Company, 11 BRBS 7 (1979), aff’d per curiam, 615 F.2d 1369 (**D.C. Cir.** 1980), amended per curiam (**D.C. Cir.** 1980), relates to costs incurred under 28(a) but not to doctors bills incurred under 28(d). Magee v. Ingalls Shipbuilding, Inc., BRB No. 96-0746 (Jan 23, 1997) (unpublished); Luter v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 103 (1986); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190 (1984).

The claim need not go to a formal hearing in order to entitle the claimant's attorney to a fee award, Thornton v. Beltway Carpet Service, Inc., 16 BRBS 29 (1983), and the employer is still liable for the attorney's fee even though the claims examiner issued a memorandum rather than a compensation order which contained the parties' agreement and the examiner's recommendations. Baker v. Todd Shipyards Corp., 12 BRBS 309 (1980).

[ED. NOTE:** In the non-longshore case of Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 121 S.Ct. 1835, 532 **U.S.** 598 (2001), an attorney fee request was at issue in this matter involving the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disability Act of 1990 (ADA), based on the **"catalyst theory."** The catalyst theory posits that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. The **Supreme Court** held that the catalyst theory is not a permissible basis for the award of attorneys fees under the FHAA and ADA since it allows an award where there is no judicially sanctioned change in the parties legal relationship. The **Court** found that while a defendant's voluntary change in conduct may accomplish what a plaintiff sought to achieve by suit, it lacks the necessary judicial imprimatur on the change.**]

Furthermore, a judge can properly find two employers jointly and severally responsible for the attorney's fee where each denied its status as an employer and failed to voluntarily render medical payments to claimant. Hansen v. Oilfield Safety, Inc., 8 BRBS 835, reaff'd on recons., 9 BRBS 490 (1978), aff'd sub nom. Oilfield Safety & Mach. Specialties, Inc. v. Harmen Unlimited, Inc., 625 F.2d 1248 (**5th Cir.** 1980).

***[ED. NOTE:** In Liggett v. Crescent City Marine Ways & Drydock Co., Inc., 31 BRBS 135 (1997), the Board formally overturned jurisprudence which declined to award attorney's fees for services rendered prior to a claim being controverted. Following the holding in the Black Lung Act case of Jackson v. Jewell Ridge Coal Corp., 21 BLR 1-27 (1997)(en banc)(JJ. Smith and Dolder, dissenting); the Board ruled that the employer was liable for the pre-controversion fees. The rational for the new holding is that Hensley v. Eckerhart, 461 U.S. 424 (1983), mandates the use of a two step procedure for the determination of what are reasonable fees. The Board is using the open definition of "reasonable attorney's fees" to allow the **district directors** to award fees for work preformed prior to the running of the **statutorily** mandated bar in Section 28(a). This bar prevented the assessing of liability for attorney's fees until: (a) 30 days after the employer receives notice of the claim; or (b) at the point of controversion.*

***The new Liggett holding is limited in its application as the Fourth and Fifth Circuit's have rulings on point holding that pre-controversion fees are not awardable in these situations**. See Kemp v. Newport New Shipbuilding & Dry Dock Co., 805 F.2d 1152, 19 BRBS 50 (CRT)**(4th Cir.** 1986); Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179, 185 (1993), aff'd mem., 12 F.3d 209 (**5th Cir.** 1993). The Liggett holding may be limited in the **Ninth Circuit** depending on whether future jurisprudence follows the holding in **Anderson** or by Todd Shipyards Corp. v. Director, OWCP [Watts], 950 F.2d 607, 25 BRBS 65 (CRT) (**9th Cir.** 1991).*

In any event, Liggett only applies to discretionary awards of the district director, which are directly appealable to the Board. *The holding in Liggett should not effect the awarding of attorney's fees under an Order issued though the Office of Administrative Law Judges.**]***

28.1.4 Decline to Pay

An employer is considered to have declined to pay compensation if it disputes or simply refuses to pay the compensation requested in the claim. Tait v. Ingalls Shipbuilding, Inc., 24 BRBS 59 (1990); Baker, 12 BRBS 309. If the employer does not decline to pay the compensation requested, but does decline to pay the claimant's medical expenses, the claimant's attorney is still entitled to a fee award. Oilfield Safety & Mach. Specialties, Inc. v. Harmen Unlimited, Inc., 625 F.2d 1248 (**5th Cir.** 1980). If employer pays compensation under the state law but refuses to pay on the federal claim, Section 28(a) is applicable. Butler v. Lemont Shipbuilding & Repair Co., 3 BRBS 429 (1976); Fairman v. J.A. McCarthy, Inc., 3 BRBS 239 (1976), aff'd mem., 547 F.2d 1161 (**3d Cir.** 1977).

Section 28(a) is not applicable, however, either if the employer pays at least partial compensation without an award, Henley v. Lear Siegler, Inc., 14 BRBS 970 (1982); or if a district director's computation order does not establish the existence or extent of disability, but only deals with the form of compensation. Portland Stevedoring Co. v. Director, OWCP, 552 F.2d 293 (**9th Cir.** 1977). See also Flowers v. Marine Concrete Structures, Inc., 19 BRBS 162 (1986) (Section 28(a) did not apply when the employer voluntarily paid temporary total disability benefits during the entire time prior to hearing and conceded entitlement to permanent partial).

28.2 EMPLOYER'S LIABILITY

Section 28(b) of the LHWCA provides:

> **If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 14(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in Section 7(e) and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.**

33 U.S.C. § 928(b).

Section 28(b) applies when a controversy develops over additional compensation where the employer has tendered compensation or is voluntarily paying compensation pursuant to Sections 914(a) and (b). See 20 C.F.R. § 702.134(b). Section 28(b) provides when the employer voluntarily tenders payment without an award and thereafter a conflict arises over additional compensation, the

employer will be liable for attorney's fees if the claimant is successful in obtaining greater compensation than that originally agreed upon by the employer. Universal Maritime Serv. Corp. v. Parker, 587 F.2d 608 (**3d Cir.** 1978); Bjazevich v. Marine Terminals Corp., 25 BRBS 240 (1991); Rihner v. Boland Marine & Mfg. Co., 24 BRBS 84 (1990); Tait v. Ingalls Shipbuilding, Inc., 24 BRBS 59 (1990); Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

The statute provides that when the controversy arises, the district director *may* conduct an informal conference and make a written recommendation regarding the disposition of the controversy. If the employer does not accept the district director's recommendation, the employer must pay or tender within 14 days the amount of additional compensation it believes is due to the employee. If the employee refuses the payment or tender and utilizes the services of an attorney to gain compensation greater than the amount paid or tendered, the employer is responsible for a reasonable attorney's fee based solely on the difference between the amount awarded and the amount tendered or paid. Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989) (en banc); Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988); Caine v. Washington Metro Area Transit Auth., 19 BRBS 180 (1986).

Section 28(b) does not authorize the payment of attorney's fees for services performed by a claimant's attorney unless the record shows that the employer refused to accept the written recommendation of the claims examiner following an informal conference. Todd Shipyards v. Director, OWCP, 950 F.2d 607 (**9th Cir.** 1991) (where only unresolved issue after informal conference was attorney's fees).

In its original Staftex decision, Staftex Staffing v. Director, OWCP, 217 F.3d 365 (**5th Cir.** July 18, 2000); re-issued at 237 F.3d 409 (**5th Cir.** July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.), the **Fifth Circuit** held that the plain wording of Section 28(b) permits claimants to obtain attorney's fees only where there has been an informal conference and a written recommendation on the disputed issue(s), and the employer refuses to accept the recommendation. Originally the appellant court had denied the fee request because an informal conference had not been held on an average weekly wage issue, though on other issues one had.

Subsequently the first version was withdrawn and on reconsideration, a panel of the **Fifth Circuit** held that the ALJ in Staftex correctly granted attorney fees. The circuit court then held that when there is an informal conference and recommendation, and the rate of compensation is to "continue" as an essential part of the recommendation, and the recommendation specifically referenced both the average weekly wage and comp rate, then, if the employer raises the rate of the average weekly wage at the time of the formal hearing, a successful claimant's attorney will be entitled to a fee award.

Ultimately, a third version of Staftex was issued. In this latest version, the **Fifth Circuit** noted that the employer had voluntarily paid compensation based on a certain average weekly wage and that the claimant, satisfied with his compensation rate, had no reason to raise it at the informal

conference. The claims examiner, following the informal conference, recommended that the parties agree to an order awarding permanent and total disability benefits with the rate of compensation continuing. The employer did not timely accept the recommendation of the claims examiner, agreed with the claimant's statement of the issues to be resolved at the formal hearing and raised no new issues until shortly before the formal hearing was scheduled. At that time, the employer agreed to pay total permanent disability but contended that the average weekly wage should be much lower than it had been paying. The **Fifth Circuit** found that the rate of compensation which was to "continue" is an essential part of the recommendation and the recommendation specifically referenced both the higher average weekly wage and its accompanying compensation rate. Therefore, the **Fifth Circuit** found that the claimant's counsel did successfully prosecute the case and is entitled to an attorney fee.

In Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (**5th Cir.** 2000), the **Fifth Circuit** upheld an attorney fee where there had not been an informal conference on all issues. After an informal conference and a recommendation, the claimant in Flanagan, used the services of an attorney to successfully recover an award of additional compensation. On appeal, the employer conceded that there was an informal conference, but contended that the conference was not held with respect to the issues that were ultimately tried before the ALJ. In upholding the attorney fee award, the **Fifth Circuit** stated that, "The employer's unsupported assertion does not overcome the force of the joint stipulation with its implicit yet obvious implication that the formal conference involved one or more of the disputed issues before the ALJ."

When the claimant in Staftex had originally requested rehearing to reconcile Staftex with Flanagan, the **Fifth Circuit** responded that Flanagan was "decided under a unique set of facts that we do not find helpful in this case."

[ED. NOTE: *There are several perplexing aspects to the Staftex litigation. First, the terminology used by the court is often confusing. For instance, the decision at one point dwells on archaic LHWCA language which speaks in terms of the Board holding informal conferences. Likewise, the decisions that it cites for support, FMC Corp. v. Perez, 128 F.3d 908 (**5th Cir**. 1997) and Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607 (**9th Cir.** 1991), are equally poorly worded and at one point it becomes apparent that there is some confusion as to the Director's function, with there being an implication that the Director is head of the Board.*

The withdrawal of the original opinion and replacement with a fact specific opinion, followed by the second re-issuance, may leave the longshore bar wondering how the court will hold when faced with the situation where there has not been an informal conference at all. One must realize that the statute states that the district director may hold an informal conference. In the normal course of events, there are many cases that are referred up without an informal conference. This may be because of scheduling problems, or simply because all parties agree that nothing is going to be solved without a full fledged hearing. Does Staftex now mean that there must be an informal conference, with very, very limited exceptions? And if a case has been referred up and a new issue arises, must the claimant's attorney now ask that it be remanded for there to be an

informal conference [even though all know there will not be a resolution of this matter] so as to protect his attorney fee rights. And what if the claimant is not in pay status during this lengthy process ?]

Citing to Staftex and Flanagan, in Pool Co. v. Cooper, ___ F.3d ___ (Nos. 99-60615, 00-60093) (**5th Cir.** Nov. 20, 2001), the **Fifth Circuit** again found that an attorney fee could not be awarded where no informal conference with OWCP had taken place: "Under the law of our Circuit, that fact poses an absolute bar to an award of attorney's fees under § 28(b)."

The Board found Bolton v. Halter Marine, Inc., ___ BRBS ___, (BRB No. 01-0182) (Oct. 2, 2001) to be analogous to Flanagan. In Bolton the employer had not offered any record evidence supporting its allegation regarding the substance of the recommendation. [Employer alleged there was never any recommendation made by the district director disposing of the disputed issues, and that even if there was, there was no evidence to show that the employer did not comply with the recommendation.] Thus the Board found that the instant case did not turn on the issue of whether there was a written recommendation or not, but rather, whether the claimant obtained greater compensation following a formal hearing than that paid or tendered by the employer.

Section 28(b) also provides that attorney's fees may be avoided if the controversy which develops relates to degree or length of claimant's disability and the employer offers to submit the case to a physician for an independent medical examination and also offers, before the examination, to pay whatever compensation is indicated by the independent examination.

28.2.1 Controversy

Under Section 28(b), the employer is not responsible for any attorney's fee incurred prior to the date a controversy develops over the amount of additional compensation to which claimant seeks entitlement. Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988); Trachsel v. Brady-Hamilton Stevedore Co., 15 BRBS 469 (1983). There is no requirement that the dispute over the additional compensation actually be litigated at a formal hearing in order for an attorney's fee to be assessed against the employer. Brown v. Rothschild-Washington Stevedore Co., 8 BRBS 539 (1978); Thorton v. Beltway Carpet Service, Inc, 16 BRBS 29 (1983).

The employer is responsible for attorney's fees where it rejects the recommendation of the district director and the claimant succeeds in obtaining a greater award. Director, OWCP v. Rasmussen, 567 F.2d 1385 (**9th Cir.** 1978), aff'd, 440 **U.S.** 29 (1979); Henley v. Lear Siegler, Inc., 14 BRBS 970 (1982); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982).

The employer need only controvert some aspect of the claimant's claim to be liable for attorney's fees. Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). Filing an LS-207 Form can create a controversy necessitating claimant's need for an attorney. However, an employer who pays all that is owed, reserving the right to contest, does not create a controversy by filing an LS-207

Form such that attorney's fees are recoverable. Kemp v. Newport News Shipbuilding & Dry Dock Co., 805 F.2d 1152 (**4th Cir.** 1986); Henley v Lear Siegler, Inc., 14 BRBS 970 (1982).

The Board has held that no controversy exists under Section 28(b) and thus employer was not liable for the fee where employer voluntarily made temporary total disability payments for five years and, after terminating them, reinstated benefits at permanent total disability levels with full retroactive payments. The fact payments were made "under protest" was irrelevant. Henley, 14 BRBS 970.

Section 28(b) does not apply where the employer voluntarily pays temporary total at all times prior to hearing and concedes entitlement to permanent partial. FMC Corporation v. Perez, 128 F.3d 908 (**5th Cir.** 1997). In Flowers v. Marine Concrete Structures, Inc., 19 BRBS 162 (1986), where the claimant did not submit to vocational testing, the administrative law judge determined that litigation at the OALJ level resulted from the claimant's intransigence rather than a controversion by the employer. In light of the purpose of the LHWCA to facilitate informal resolution of claims where participation is voluntary, complete and forthright, the intransigence of the claimant was assessed against the claimant's counsel so as not to diminish the claimant's award. The Board reasoned that the counsel's failure to secure the claimant's participation protracted the litigation.

The **Fifth Circuit** has held that if the claimant refuses to accept compensation from the employer and utilizes the services of an attorney to obtain a greater award, the employer is still liable under Section 28(b) if the claimant accepts partial compensation from the employer but also requests additional compensation. Savannah Mach. & Shipyard Co. v. Director, OWCP, 642 F.2d 887 (**5th Cir.** 1981). Furthermore, where the additional compensation is to be paid out of the Special Fund, the employer is still liable under Section 28(b) if the employer has a real interest in the outcome of, and is an active litigant in, the proceedings. See Waganer v. Alabama Dry Dock & Shipbuilding Co., 17 BRBS 43 (1985); Kleiner v. Todd Shipyards Corp., 16 BRBS 297 (1984); Floyd v. Savannah Mach. & Shipyard Co., 11 BRBS 465 (1979). Finally, even if the parties agree to the additional compensation before the hearing in the presence of the administrative law judge, the employer is still liable for any attorney's fee incurred before the agreement. Kleiner, 16 BRBS 297; Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982); Brown, 8 BRBS 539.

28.2.2 Tender of Compensation

A "tender" of compensation by the employer does not mean an actual "proffer of goods," as such is contrary to the entire system of settlement offers, which by its nature, requires that offers and counter-offers take place until an agreement is reached. Actual payment is not contemplated until approval of the settlement offer by the ALJ or district director. "Tender," in light of the purpose of Section 28 to encourage voluntary payments, means a readiness, willingness, and ability on the part of the employer, **expressed in writing**, to make such a payment to the claimant. Ahmed v. Washington Metro. Area Transit Auth., 27 BRBS 24 (1993) (no offer made where employer's counsel had no authority to settle for indicated amount); Kaczmarek v. I.T.O. Corp. of Baltimore,

23 BRBS 376 (1990) (no tender where employer's offer not made in writing); Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986) (en banc).

In Ingalls v. Director, OWCP, 865 F.2d 1263 (**5th Cir.** 1989) (Table), Ingalls tendered payment of any medical bills incurred by the claimant as a result of his occupational disease. The claimant refused the tender. When his claim was finally resolved by the Board, he was awarded only medical benefits. Since this award was no greater than Ingalls' original offer of payment, the award of attorney's fees was found by the **Fifth Circuit** to be inappropriate.

[ED. NOTE: *According to* ***Fifth Circuit*** *Local Rule 47.5.3 "[u]npublished opinions issued before January 1, 1996 are precedent."****]***

28.2.3 District Director's Recommendation

Although Section 28(b) specifically states that the district director shall make a written recommendation requiring the disposition of the controversy, the Board and the courts have held that failure of the district director to make a written recommendation will not preclude the assessment of an attorney's fee against the employer. National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, 606 F.2d 875 (**9th Cir.** 1979); Director, OWCP v. Jacksonville Shipyards, 1 BRBS 26 (1974). Furthermore, even if the employer follows the district director's recommendation but the employee does not and requests a hearing, the employer is liable for fees if any additional compensation is eventually awarded. Collington v. Ira S. Bushey & Sons, 13 BRBS 768 (1981); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (**7th Cir.** 1979); Butler v. Lemont Shipbuilding & Repair Co., 3 BRBS 429 (1976).

Moreover, if the district director fails to make a recommendation regarding the issue of disability but the claimant is later awarded additional compensation, the employer is still responsible for the attorney's fee. See Alston v. United Brands Co., 5 BRBS 600 (1977). Although the claimant receives an unfavorable recommendation from the district director, the claimant's attorney is still entitled to attorney's fees for services performed at that level if the claimant is ultimately successful in obtaining benefits. Hogan v. Int'l Terminal Operating Co., Inc., 13 BRBS 734 (1981).

Although under 20 C.F.R. § 702.317(c) the judge may not receive into evidence any recommendations by the district director, Wilson v. Old Dominion Stevedoring Corp., 3 BRBS 224 (1976), these recommendations may be relevant under Section 28(b). The Board has held that a claimant's counsel's reference to the district director's recommendation in a letter accompanying his fee application was not improper given the requirement of Section 28(b) that an attorney's fee award be based upon the difference between the amount of compensation tendered or paid after the employer has refused to accept the district director's recommendation and the amount ultimately awarded. McCray v. Ceco Steel Co., 5 BRBS 537 (1977).

28.2.4 Additional Compensation

Additional compensation within the meaning of Section 28(b) has been obtained where the employer pays the claimant's **medical bills** either by order of the judge after a hearing, Morgan v. General Dynamics Corp., 16 BRBS 336 (1984); Hernandez v. National Steel & Shipbuilding Co., 13 BRBS 147 (1980); Simeone v. Universal Terminal & Stevedoring Corp., 5 BRBS 249 (1976), or by agreement before the hearing, Revoir v. General Dynamics Corp., 12 BRBS 524 (1980), and where a **Section 14(e) penalty is assessed** against employer, Smelcer v. National Steel & Shipbuilding Co., 16 BRBS 117 (1984); MacDonald v. Sun Shipbuilding & Dry Dock Co., 10 BRBS 734 (1978).

Where the employer agrees to pay additional compensation for the claimant's hearing loss prior to the hearing, the employer is liable under Section 28(b). Brown v. General Dynamics Corp./Elec. Boat Div., 12 BRBS 528 (1980). A claimant has also obtained "additional compensation" when the claimant and the employer have stipulated to the claimant's average weekly wage before the hearing and the claimant receives four **additional weeks of compensation** for temporary total disability, even though the employer never contested the award at the hearing. Vanison v. Greyhound Lines, Inc., 17 BRBS 179 (1985). The claimant has also obtained "additional compensation" where the Board **increases** the administrative law judge's determination of the claimant's **average weekly wage**. Bacon v. General Dynamics Corp., 14 BRBS 408 (1981).

The Board has found an employer liable under Section 28(b) where the claimant successfully prosecuted a permanent partial disability claim under Section 8(c)(21), even though due to the employer's overpayment of temporary total benefits claimant **will not realize the award for many years**. The Board noted that the employer actively disputed the claim. Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985). Cf. Scott v. C & C Lumber Co., Inc., 9 BRBS 815 (1978) (no additional compensation obtained where the employer overpaid temporary total benefits and the claimant obtained a scheduled permanent partial award).

Additional compensation does not include:

(1) when the Board modifies the judge's decision to find a claimant's average weekly wage under Section 10(c) rather than Section 10(b), but does not change the amount of benefits the claimant received, Orkney v. General Dynamics Corp., 8 BRBS 543 (1978);

(2) when the judge finds the dates of the claimant's permanent disability started later than the claimant argued (and later than when the employer began paying permanent disability benefits), Wilhelm v. Seattle Stevedore Co., 15 BRBS 432 (1983);

(3) when the employer reinstates voluntary benefits in the full amount due prior to the claimant's retention of counsel, Henley v. Lear Siegler, Inc., 14 BRBS 970 (1982); and

(4) where the employer voluntarily pays temporary total and concedes entitlement to permanent partial benefits which were ultimately awarded. Flowers, 19 BRBS 162.

In National Steel & Shipbuilding Co. v. U.S. Department of Labor, 606 F.2d 875, 11 BRBS 68 (**9th Cir.** 1979), the court found that although the effect of its decision was to diminish the amount the claimant was entitled to recover in the form of a 10 percent assessment on his compensation, since the claimant was for the most part successful, the claimant was entitled to an attorney's fee award under Section 28(b).

28.2.5 Amount of Award (See also Topic 28.5, 28.6, infra.)

Section 28(b) provides that an attorney's fee awarded under this subsection is to be based solely on the difference between the amount awarded and the amount tendered or paid. The Board has held, however, that "there is no requirement that the amount of the attorney's fee award be commensurate with claimant's award of benefits." Strachan Shipping Co. v. Nash, 782 F.2d 513 (**5th Cir.** 1986); Barbera v. Director, OWCP, 245 F.3d 282 (**3rd Cir.** 2001), 35 BRBS 27 (CRT) (2001) (Where attorney secured future medicals and de minimis award, circuit court affirmed ALJ's fee award without limited success reduction); Clophus v. Amoco Prod. Co. 21 BRBS 261 (1988).

The Board has applied the holding in Kelley v. Handcor, Inc., 1 BRBS 319 (1975), to Section 28(b), finding that it is not proper to limit the award of the attorney's fee to an amount equal to or less than the compensation awarded, where all the circumstances of the case indicate that a larger fee is reasonable. Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (**7th Cir.** 1979). In Brown v. Lykes Bros. Steamship Co., Inc., 6 BRBS 244 (1977), the Board further stated that the language in Section 28(b) ("**based solely upon**") means only that the fee must have some reasonable relationship to the compensation awarded over that tendered or paid by the employer.

Furthermore, limiting the fee to an amount equal to or less than the compensation award would drive competent counsel from the field and, therefore, would run contrary to the spirit of the LHWCA. Piecoro v. Pittston Stevedoring Corp., 8 BRBS 360 (1978). The Board therefore refused to reverse an attorney's fee award not based solely on the difference between the amount awarded and the amount paid when the employer failed to show that the fee award was unreasonable. Collington v. Ira S. Bushey & Sons, 13 BRBS 768 (1981). See also National Steel & Shipbuilding Co. v. U.S. Dep't of Labor,, 606 F.2d 875 (**9th Cir.** 1979).

28.2.6 Avoidance of Attorney's Fees Under Section 28(b)

An employer can avoid liability for attorney's fees under Section 28(b) if:

(1) the controversy which develops relates to the degree or length of the claimant's disability, and

(2) the employer offers to submit the case to a physician for an independent medical examination and pay whatever compensation is indicated by the independent examiner. Hadel v. I.T.O. Corp. of Baltimore, 6 BRBS 519 (1977).

The employer **does not** avoid attorney's fees under Section 28(b) by the use of an independent medical examiner where:

(1) the employer does not agree prior to the examination to accept the findings of the impartial examiner, Universal Terminal & Stevedoring Corp. v. Parker, 587 F.2d 608 (**3d Cir.** 1978); Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984);

(2) there is no evidence that the employer accepted the findings in advance, Caraballo v. Northeast Marine Terminal Co., 11 BRBS 514 (1979); Barranca v. United Marine Serv. Corp., 6 BRBS 781 (1977); Holmes v. Universal Maritime Serv. Corp., 5 BRBS 488 (1977); or

(3) the employer agrees to pay compensation after the examination. Baird v. W.J. Jones & Son, Inc., 6 BRBS 727 (1977); Hadel, 6 BRBS 519.

In Jones v. I.T.O. Corp. of Baltimore, 9 BRBS 583 (1979), the Board held that whether the employer was responsible for an attorney fee under Section 28(b) depended on whether the physician used to rate the claimant's disability was an "independent medical examiner," which had to be determined on remand.

28.3 CLAIMANT'S LIABILITY

Section 28(c) of the LHWCA provides:

> **In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.**

33 U.S.C. § 928(c).

The appropriate regulations governing this section are contained at 20 C.F.R. § 702.132(a) and 20 C.F.R. § 802.203(e).

An attorney's fee can only be levied against an employer if the conditions of Section 28(a) or 28(b) are met. If the employer is found not to be liable for a fee under Section 28(a) or 28(b), the fee may be assessed against the claimant and may be made a lien on the claimant's compensation pursuant to Section 28(c). Kemp v. Newport News Shipbuilding & Dry Dock Co., 805 F.2d 1152 (**4th Cir.** 1986); Portland Stevedoring Co. v. Director, OWCP, 552 F.2d 293 (**9th Cir.** 1977).

The claimant may also be liable for fees incurred:

(1) prior to the employer's notification and refusal to pay, see Director, OWCP v. Jones, 615 F.2d 1368 (**D.C. Cir.** 1980); 33 U.S.C. §928(a); and

(2) prior to a controversy arising, see Jones, 615 F.2d 1368; Trachsel, 15 BRBS 469; 33 U.S.C. § 928(b).

[ED. NOTE: *In Liggett v. Crescent City Marine Ways & Drydock Co., Inc., 31 BRBS 135 (1997), the Board formally overturned the jurisprudence denying attorney's fees for services rendered prior to the claim being controverted. Following the holding in the Black Lung Case of Jackson v. Jewell Ridge Coal Corp., 21 BLR 1-27 (1997)(en banc)(JJ. Smith and Dolder, disenting); the Board ruled that the Employer was liable for the pre-controversion fees. The rational for the Liggett holding is that Hensley v. Eckerhart, 461* ***U.S.*** *424 (1983) mandates the use of a two step procedure for the determination of what are reasonable fees. The Board is using an open definition of "reasonable attorney's fees" to allow the* ***district directors*** *to award fees for work preformed prior to the running of the* ***statutorily*** *mandated bar in Section 28(a). This bar prevents the assessing of liability for*

attorney's fees until: (a) 30 days after the employer receives notice of the claim; or (b) at the point of controversion.

The new holding is limited in its application as the Fourth and Fifth Circuit's have rulings on point holding that pre-controversion fees are not awardable in these situations*.* *See Kemp v. Newport New Shipbuilding & Dry Dock Co., 805 F.2d 1152, 19 BRBS 50 (CRT)(**4th Cir.** 1986); Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179, 185 (1993), aff'd mem., 12 F.3d 209 (**5th Cir.** 1993). The holding may be limited in the **Ninth Circuit** depending on whether the future jurisprudence follows the holding in Anderson or by Todd Shipyards Corp. v. Director, OWCP [Watts], 950 F.2d 607, 25 BRBS 65 (CRT)(**9th Cir.** 1991).*

In any even, Liggett only applies to discretionary awards of the district director, which are directly appealable to the Board. *The holding in Liggett should not change the normal criteria for the awarding of attorney's fees under an Order issued though the Office of Administrative Law Judges.**]***

In Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179 (1993), the claimant was held liable for fees prior to the district director's notice to the employer even though the claimant had provided the employer with written notice eight months previously and the employer had controverted.

The Board has affirmed an ALJ's rejection of an agreement that a claimant would pay his own fees in consideration of the employer's stipulation as to its liability. Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986).

The Board affirmed the judge's denial of a fee to counsel in Flowers v. Marine Concrete Structures, Inc., 19 BRBS 162 (1986), where the employer voluntarily paid temporary total benefits and conceded entitlement to permanent partial benefits which the claimant was awarded. The Board found that the employer was not liable and declined to award a fee assessed against the claimant as the employer was willing to pay the benefits awarded and counsel's failure to obtain his client's cooperation **prolonged the litigation unnecessarily**.

Section 28(c) also provides that the Board or reviewing court may approve an attorney's fee for the work done before it by the claimant's attorney. See Ayers Steamship Co. v. Bryant, 544 F.2d 812 (**5th Cir.** 1977). This provision is consistent with the language in Section 28(a) which provides that fees may be awarded against the employer or carrier "by the deputy commissioner, Board, or court, as the case may be." 33 U.S.C. §928(a). See also Topic 28.7, supra.

28.3.1 Liability of Special Fund (See also Topic 26, supra.)

Although the Board has held the Special Fund liable for attorney's fees, decisions from the **Fifth**, **Ninth**, and **Eleventh Circuits** have confirmed that the Board lacks the specific statutory authority to assess attorney's fees against the Special Fund pursuant to Section 28. Director, OWCP

v. Alabama Dry Dock & Shipbuilding Co., 672 F.2d 847 (**11th Cir.** 1982); Holliday v. Todd Shipyards Corp., 654 F.2d 415 (**5th Cir.** 1981), overruled on other grounds by Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (**5th Cir.** 1990) (en banc); Director, OWCP v. Robertson, 625 F.2d 873 (**9th Cir.** 1980).

Although these circuit court cases seem to close the question of whether attorney's fees may be assessed against the Special Fund pursuant to Section 28, the Board continues to struggle with the question of whether Section 26 may provide an avenue for recovery. For example, the Board recently addressed the argument that attorney's fees may be assessed against the Special Fund as costs under Section 26. In Medrano v. Bethlehem Steel Corp (Medrano I), 18 BRBS 229 (1986), the Board held that attorney's fees could potentially be assessed against the Special Fund pursuant to Section 26. The Board limited this result to cases in which the claimant and the employer did not contest any issues, all payments had been voluntarily made, and all of the judge's findings were supported by uncontroverted record evidence.

Subsequently, in Medrano v. Bethlehem Steel Corp.(Medrano II), 23 BRBS 223 (1990), the Board concluded that attorney's fees could not be awarded against the Special Fund as Section 26 "costs" since the employer had requested the formal hearing and refused to stipulate to the claimant's entitlement to benefits. Thus, the district director's actions were not arbitrary and did not protract the litigation.

The Board next addressed the issue of Special Fund liability in Rihner v. Boland Marine & Mfg. Co., 24 BRBS 84 (1990) and Toscano v. Sun Ship, Inc., 24 BRBS 207 (1991). In finding that the Special Fund was not liable for attorney's fees, the Board in Toscano stated decisively, "we hold that attorney's fees may not be considered costs within the meaning of Section 26." 24 BRBS at 213.

At least two OALJ decisions have held that attorney's fees may be assessed as "costs" pursuant to Section 26 where the **district director's conduct has been oppressive or vexatious**. Bordelon v. Republic Bulk Stevedores, 24 BRBS 648 (ALJ) (1991), subsequently over-ruled at 27 BRBS 280 (1994); Hebert v. TTT Stevedores of Texas, 91-LHC-2107 (1993) (unpublished).

The conduct of the Director must be such that fraud has been practiced on the court, or "that the very temple of justice has been defiled." Chambers v. NASCO, Inc., 501 **U.S.** 32,46 (1991); Boland Marine & Manufacturing Co. v. Rihner, 41 F.3d 997,1003, 29 BRBS 43,46 (CRT) (**5th Cir.** 1995); Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 27 BRBS 132 (CRT) (**9th Cir.** 1993). Following this line of thinking, the OALJ decision of Hebert v. TTT Stevedores of Texas, BRB No. 92-1239 (Jan. 27, 1996) (unpublished), held that there was no way that attorney's fees could be paid out of the Special Fund either as an exception to the "American rule" under Section 28 or as a cost under Section 26. The Board had adopted this same position in Bordelon v. Republic Bulk Stevedores, 27 BRBS 280 (1994).

28.4 APPLICATION PROCESS

An attorney's fee award cannot be made without the filing of a fee application/petition. 20 C.F.R. § 702.132 and 20 C.F.R. § 802.203 provide similar requirements for fee applications to the judge or district director and the Board.

28.4.1 Content Requirements

An attorney's fee application must be **in writing**. See Vaden v. Maude-James, Inc., 8 BRBS 760 (1978) (although the Board found that a former regulation allowed verbal fee requests where the requirements of 20 C.F.R. §702.132 are met).

The regulations require that a fee **application must be supported by**:

(1) a **complete statement of the extent and character** of the necessary work performed;

(2) an **hourly breakdown** of the time spent in the particular activity;

(3) a **description of the professional status** of each person performing the work, e.g., attorney, paralegal, law clerk, or other legal assistant as opposed to their actual given name; and

(4) the **normal billing rate** for such person, and the **hours devoted** by each such person to each category of work.

See Nacirema Operating Co. v. Lynn, 577 F.2d 852 (**3d Cir.** 1978), cert. denied, 439 **U.S.** 1069 (1979); Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (**4th Cir.** 1976), cert. denied, 439 **U.S.** 979 (1978); Ayers Steamship Co. v. Bryant, 544 F.2d 812 (**5th Cir.** 1977); Matthews v. Walter, 512 F.2d 941 (**D.C. Cir.** 1975); Forlong v. American Sec. & Trust Co., 21 BRBS 155 (1988).

"Unit" or "increment" billing does not satisfy the provisions of 20 C.F.R. § 802.203(d)(1)-(3), the Board's regulation dealing with what a complete fee application must contain. Pullin v. Ingalls Shipbuilding, Inc., 27 BRBS 218, 219 (1993). Unit or increment billing is not related to actual work done on a particular date or to the performance or talents of a specified person. In Pullin, the Board held that the regulation was unambiguous as to the requirements of a complete fee petition, and that the use of the quarter-hour increment billing method alone cannot support approval of items charged using the "unit" billing practice. The billing must be for hours performed by a specific person, not by a team effort of the lawyers, paralegals, and support staff. Each person's

hours need to be listed separately so that the trier of fact can determine what work was necessary and what was traditional clerical work which is not compensable. Pullin, 27 BRBS at 219, 220.

[ED. NOTE:** The **Board's** regulations specify that the number of hours should be in quarter-hour increments. **However**, following the holding in Ingalls Shipbuilding, Inc. v. Director, OWCP (Fairley), 904 F.2d 705 (**5th Cir.** 1990) (Table), a claimant's attorney cannot charge more than 1/8 of an hour to review a single page letter and 1/4 of an hour to draft a single page letter. Bullock v. Ingalls Shipbuilding, Inc., 29 BRBS 131 (1995). It should be noted that under **Fifth Circuit** Local Rule 47.5.3, unpublished opinions issued before January 1, 1996 are precedent.**]

In Biggs v. Ingalls Shipbuilding, Inc., 27 BRBS 237 (1993), the Board held that the administrative law judge did not err in awarding a fee based on a fee petition that billed in quarter-hour increments. See Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991). See also Jarrell v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 883 (1982). In Biggs, the Board rejected the argument that the fee order of the **Fifth Circuit** in Ingalls Shipbuilding, Inc. v. Director, OWCP, 904 F.2d 705 (**5th Cir.** 1990), mandates a different result in this case. In that fee order, the **Fifth Circuit** declined to award fees for work before it based on a quarter-hour minimum billing method. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. Biggs, 27 BRBS at 243, citing 20 C.F.R. § 702.132. See also Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173 (1993).

The Board has held that in determining whether or not certain expenses are disallowed as not being necessary (or utilized) at the hearing, the **test for compensability is whether the claimant's attorney, at the time the work was performed, could reasonably regard it as necessary**. Bazor v. Boomtown Bell Casino, ___BRBS ___, (BRB No. 00-0928B)(July 11 2001); Kelly v. Department of Army, 34 BRBS 39 (2000).

Although the fee request need not be sworn to, McCloud v. George Hyman Construction Co., 11 BRBS 194 (1979), the Board has held that a fee request in the form of an affidavit is sound evidence and the **affidavit must be given considerable weight** in determining the fee. Cuevas v. Ingalls Shipbuilding Corp., 5 BRBS 739 (1977).

The usual remedy for a fee request that is incomplete, lacks specificity, or fails in any other way to meet the standards of the regulations is to withhold the fee award until a complete statement is provided. National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, 606 F.2d 875 (**9th Cir.** 1979); Ayers Steamship Co. v. Bryant, 544 F.2d 812 (**5th Cir.** 1977); O'Keefe v. Morris Boney, Inc., 2 BRBS 363 (1975), rev'd on other grounds sub nom. Director, OWCP v. O'Keefe, 545 F.2d 337 (**3d Cir.** 1976).

When a fee has been awarded and on appeal the Board has found itself unable to review the award due to an inadequate petition, the Board has vacated the fee award and remanded for counsel to submit a proper statement. Smith v. Aerojet Gen. Shipyards, 16 BRBS 49 (1983); Carter v. General Elevator Co., 14 BRBS 90 (1981); McCloud v. George Hyman Constr. Co., 11 BRBS 194

(1979). Where costs were not awarded because the petition lacked specificity regarding costs, the judge's decision was affirmed with an instruction that claimant's attorney could file a supplemental petition. Mikell v. Savannah Shipyard Co., 24 BRBS 100 (1990).

Even though the parties may agree on an appropriate attorney's fee in a **settlement** or otherwise, the Board still requires the attorney to submit an **itemized fee application**. Rohm v. Republican Nat'l Comm., 14 BRBS 266 (1981); Ballard v. General Dynamics Corp., 12 BRBS 966 (1980).

28.4.2 Time Requirements

The LHWCA and regulations do not specify the time period for filing a fee petition. In Baker v. New Orleans Stevedoring Co., 1 BRBS 134 (1974), the Board held that an application for approval and award of an attorney's fee pursuant to Section 28 of the LHWCA has no time limitation, thus a fee application may be made subsequent to the filing of a decision. 20 C.F.R. § 702.132 provides, however, that the petition shall be filed within the time limit specified by the district director, judge, Board, or court.

Additional Cases:

(1) In a black lung case involving a similar regulation, the Board affirmed a denial of an award by the district director where the attorney failed to file within the time specified. Bankes v. Director, OWCP, 765 F.2d 81 (**6th Cir.** 1985).

(2) In some cases, the Board has required that a fee request for services rendered before the Board be received within 30 days from receipt of the Board's decision and order to promote administrative efficiency. The employer had 10 days from receipt of the claimant's fee request in which to respond. See Smith v. Ceres Terminal, 9 BRBS 121 (1978).

(3) In a black lung case for survivor’s rights, the **Sixth Circuit** held that no attorney’s fees will be awarded for cases that have been closed due to inactivity within a given time period (i.e., abandonment of the claim). Jordan v. Director, OWCP, 892 F.2d 482,487 (**6th Cir.** 1989).

28.4.3 Due Process Hearing Requirements

When the fee request is submitted, a failure to hold a formal hearing on the matter is not a violation of due process when the fee request was presented to the judicial administrative body before whom the work was performed. Hullinghorst Indus. v. Carroll, 650 F.2d 750 (**5th Cir.** 1981), cert. denied, 454 **U.S.** 1163 (1982); Dupre v. Cape Romain Contractors, 23 BRBS 86 (1989); Luker v. Ingalls Shipbuilding, Inc., 3 BRBS 321 (1976).

If the employer challenges the fee request for work performed at the district director level, an evidentiary hearing (to determine usual and customary fees, etc.) is only necessary if the employer raises a bona fide factual issue in challenging the fee request. A bald challenge to an item in a fee application or a mere assertion that the fee is excessive is insufficient. See McCloud v. George Hyman Constr. Co., 11 BRBS 194 (1979); Monahan v. Portland Stevedoring Co., 8 BRBS 653 (1978).

Due process requires only that the fee request be served on the employer and that the employer be given a reasonable time to respond. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176 (**9th Cir.** 1976); Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989); Ortega v. Bethlehem Steel Corp., 7 BRBS 639 (1978); Green v. Atlantic Container Lines, Ltd., 2 BRBS 385 (1975) (Board implies notice requirement in regulations).

Additional Cases:

(1) In Divine v. Atlantic Container Line, G.I.E., 25 BRBS 15 (1990), the Board held that granting employer five days to respond to a fee petition was not reasonable.

(2) When the fee request is made to the employer, but the employer never receives it, the Board has remanded for reconsideration of the fee issue. Lumsdon v. Portland Stevedoring Co., 4 BRBS 397 (1976).

(3) In a similar case, a remand by the Board was unnecessary where the administrative law judge heard the employer's objections after he awarded the fee, but stood by his original fee award. Glover v. C & P Tel. Co., 4 BRBS 23 (1976), rev'd on other grounds sub nom. C & P Tel. Co. v. Director, OWCP, 564 F.2d 503 (**D.C. Cir.** 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (**9th Cir.** 1983).

In Luna v. Todd Shipyards Corp., 12 BRBS 70 (1980), the Board did not find a denial of due process in the judge's issuance of a contemporaneous compensation award and attorney's fee award. The Board stated that there is no procedural requirement in the statute or the regulations that a judge must issue either separate decisions or a combined decision. See 33 U.S.C. § 928; 20 C.F.R. §§ 702.134, 702.348. In response to the employer's argument that it is not able to make timely objection to the requested attorney's fee until after it is apprized of the amount of compensation awarded, the Board stated that if an employer has adequate notice of a fee request and is given a reasonable time to respond, due process is satisfied. See Green, 2 BRBS 385.

The Board in Luna further found that the employer had an adequate basis on which to object to the requested fee, since the "amount of benefits awarded" factor is only one of the factors listed under 20 C.F.R. § 702.132 to be considered by the adjuster when awarding a fee. Finally, the Board found that any practice of issuing fee awards subsequent to the issuance of the administrative law

judge's decision would result in unnecessary delay and could deter counsel from representing the claimant under the LHWCA. Luna, 12 BRBS at 74-75.

28.5 AMOUNT OF AWARD

28.5.1 Sufficient Explanation

[ED. NOTE:** Occasionally there are times when a fee will not be reduced even though, at first glance, the fee seems out of proportion to the award the claimant receives. For example, in Barbera v. Director, OWCP, 245 F.3d 282 (3rd **Cir.** 2001), 35 BRBS 27 (CRT) (2001), the **Third Circuit** affirmed the attorney fee award, including hourly rates awarded and the full fee awarded without making a limited success reduction. In Barbera, the claimant was awarded a de minimis award and future medicals. The court held that the ALJ's determination that the claimant established the significant possibility of future economic harm was supported by substantial evidence. The court found that the full fee–with no "limited success" reduction–was supported by substantial evidence and, moreover, was in accordance with the **Supreme Court's** holding in Hensley v. Eckerhart, 461 **U.S.** 424 (1983). In Barbera, the court noted that the claimant prevailed against his employer's strong contestation of jurisdiction, the extent of disability, and entitlement to future medical benefits. Additionally, the court noted that the ALJ expressly noted counsel's decades-long experience in maritime litigation, high standing, and "success in this matter despite the employer's tenacious defense by experienced counsel." These factors, in part, constitute substantial evidence in determining the appropriateness of counsel's rates.**]

When an administrative law judge reduces the fee awarded from the amount requested, the judge is required to provide sufficient explanation of the reasons for the reduction. Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15 (1990); Stowars v. Bethlehem Steel Corp., 19 BRBS 134 (1986); Speedy v. General Dynamics Corp., 15 BRBS 448 (1983). This requirement applies regardless of which party appeals, Cabral v. General Dynamics Corp., 13 BRBS 97 (1981), and also applies to reductions by the district director. Mazzella v. United Terminals, Inc., 9 BRBS 191 (1978); Campbell v. Blake Constr. Co., 8 BRBS 667 (1978).

On remand, the administrative law judge must specify the hourly rate awarded for the specific services allowed and provide reasons for any disallowances. Jarrell v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 216 (1987) ("we note that regarding the requested 'enhancement' an attorney fee should normally be based on the product of the reasonable hourly rate times the number of compensable hours"). The judge must provide an adequate justification for any additional amount. Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986); Memmer v. I.T.T./Sheraton Washington, 18 BRBS 123 (1986).

Although the explanation for the reduction should be set out in the hearing officer's order and not in a subsequent brief, the Board has occasionally reviewed the rationale in the brief in the interest of judicial economy. Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989); Williams v. Halter Marine Serv., Inc., 19 BRBS 248 (1987); Keith v. General Dynamics Corp./Quincy Div., 13 BRBS 404 (1981); Cabral v. General Dynamics Corp., 13 BRBS 97 (1981). In Keith and Cabral, however, the Board found the explanation insufficient even as supplemented by the brief.

The district director or judge must discuss how the regulatory criteria in 20 C.F.R. § 702.132 apply to a reduction; mere reference to one factor has been held insufficient. Speedy v. General Dynamics Corp., 15 BRBS 448 (1983); Fitzgerald v. RCA Int'l Serv. Corp., 15 BRBS 345 (1983); Huf v. Northwestern Constr., Inc., 13 BRBS 730 (1981); Palmore v. Washington Metro. Area Transit Auth., 9 BRBS 388.22 (1978). Merely adopting the employer's objections is insufficient, Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982), as is a statement that time spent was excessive. Collins v. General Dynamics Corp., 14 BRBS 458 (1981); Eaddy v. R.C. Herd & Co., 13 BRBS 455 (1981); Ballard v. General Dynamics Corp., 12 BRBS 966 (1980).

The Board will affirm reductions which are fully explained and reasonable. See Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); Jensen v. Maryland Shipbuilding & Dry Dock Co., 15 BRBS 400 (1983); Waters v. Farmers Export Co., 14 BRBS 102 (1981); Doty v. Farmers Export Co., 12 BRBS 785 (1980).

An attorney's fee award is unreasonable if the hearing officer fails to provide sufficient explanation to support the reduction of the fee. Bell v. Volpe/Head Constr. Co., 11 BRBS 377 (1979), 13 BRBS 41 (1980), or an increase in the fee, Muscella v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 830 (1978). In a Black Lung Act decision, the Board approved of a judge taking judicial notice of Altman & Weil Survey of Law Firm Economics when determining the correctness of a hourly rate on a fee petition so long as the judge clearly states what section is being utilized and includes a copy. Mullins v. Betty B. Coal Co., BRB No. 95-1149, Case No. 90-BLA-2597 (Mar. 14, 1996) (unpublished); Fitzgerald v. R.C.A. International Serv. Corp., 15 BRBS 345 (1983); Schneider v. Director, OWCP, 12 BRBS 482 (1979) (Black Lung Act decision).

28.6 FACTORS CONSIDERED IN AWARD
(See also Topic 28.6.4, infra.)

Section 702.132 of the regulations provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account:

(1) the **quality** of representation;

(2) the **complexity** of the legal issues involved; and

(3) the **amount** of benefits awarded.

20 C.F.R. § 702.132. See also Brown v. Marine Terminals Corp., 30 BRBS 29 (1996) (en banc); Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (**4th Cir.**), cert. denied, 439 **U.S.** 979 (1978); Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179 (1993) (amount of benefits only one factor considered); Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991) aff'd on recon., 25 BRBS 346 (1992) ("requested fee reasonably commensurate with necessary work done"); Mikell v. Savannah Shipyard Co., 24 BRBS 100 (1990); Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988).

(4) the **delay** in the payment of the attorney's fee award

Anderson v. Director, OWCP, 91 F.3d 1322 (**9th Cir. 1996**); Nelson v. Stevedoring Services of America, 29 BRBS 90 (1995), following the holding in Missouri v. Jenkins, 491 **U.S.** 274 (1989) (school desegregation case) the Board found that "it is clear that enhancement for delay is appropriate in fee awards under section 28 of the Act." 29 BRBS at 97; see also Allen v. Bludworth Bond Shipyard, 31 BRBS 95 (1997); Tarabocchia v. International Terminal Operating Company, Inc., BRB No, 92-0436 (Jan. 22, 1996) (unpublished) (Board upheld a bonus of $4,812.50 above the sum of the hours (32.25) multiplied by the hourly rate ($250) for a lawyer who settled a complex case unusually quickly and successfully then had to wait 13 years to be paid). In Jenkins, the **United States Supreme Court** considered the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C §1988, finding that "enhancement for delay in payment is, where appropriate, part of a 'reasonable attorney's fee.'" 491 **U.S.** at 282.

[ED. NOTE: *To the extent that prior Board holdings in Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988) and Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988) are inconsistent with the holding in Jenkens, they are overruled. Nelson, 29 BRBS 112 (1996).****]***

The **Ninth Circuit** has held that either the **historic or the current rate** may be used to determine the fee award. D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379 (**9th Cir.** 1990). If there is an unreasonable delay in the satisfaction of the award then the court can use the current rate to increase the value of the award to reflect the value of the delay. The **Ninth Circuit** used the current rate in the case of a three year delay in payment, especially when it found that the

firm could have taken other work that would have paid promptly, had they not taken the case of Gates. Gates v. Dueukemjian, 977 F.2d 1300 (**9th Cir.** 1992).

The quarter hour billing method is reasonable and complies with 20 C.F.R. § 702.132. Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 346 (1992); Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

[ED. NOTE: *In Ingalls Shipbuilding v. Director,OWCP (Fairley), 904 F.2d 705 (1990) (Table), counsel disclosed that they automatically charge one-quarter hour for reviewing a single-page letter and one-half hour for preparation of a single-page letter. As to this "minimum billing method" to prepare an attorney fee request, the* ***Fifth Circuit*** *stated, "We are unwilling to accept this billing method for calculation of attorney's fees for purposes of determining the amount the employer is to be required to pay. We conclude that on the average, no more than one-eighth of an hour should be required for reading a one-page letter and no more than one-quarter hour for writing a routine one-page letter." As previously noted, under* ***Fifth Circuit*** *Local Rule 47.5.3, unpublished opinions issued before January 1, 1996 are precedent.]*

Other Factors for Consideration:

(1) The judge may consider his experience and personal knowledge of the facts and the practice of law when he makes a determination of the reasonableness of an attorney's fee. Morris v. California Stevedore & Ballast Co., 10 BRBS 375 (1979).

(2) When fees are settled, due consideration must be given to the fact that the amount of the attorney's fee was agreed to by the parties in the course of an arm's length negotiation. Ballard v. General Dynamics Corp., 12 BRBS 966 (1980).

(3) The size of a claimant's compensation award is one factor to be considered by the judge, although the fee award is not limited to the amount of compensation awarded.

(4) If the fee is to be assessed against the claimant, the regulations provide that the award should also take into account the financial circumstances of the claimant. Thornton v. Beltway Carpet Serv., Inc., 16 BRBS 29 (1983); Hildebrand v. Bergstrom Fiscal Control Office, 9 BRBS 176 (1978).

There is no requirement that the amount of the fee award be commensurate with the claimant's award of benefits. Strachan Shipping Co. v. Nash, 782 F.2d 513 (**5th Cir.** 1986). The Board has held that the amount of a fee may not be limited by the amount of compensation gained since to do so would drive competent counsel from the field. Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (**7th Cir.** 1979); Kelley v. Handcor, Inc., 1 BRBS 319 (1975), aff'd on other grounds sub nom. Handcor, Inc. v. Director, OWCP, 568 F.2d 143 (**9th Cir.** 1978).

Similarly, where an attorney's fee is awarded for work on appeal involving a fee award made below, the amount of the fee for appellate work should not be limited based on the amount of the attorney's fee ultimately awarded below. Jarrell v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 883 (1982).

Although the fee is not limited by the award, the amount of benefits awarded is a valid consideration in awarding a fee, see Muscella, 12 BRBS 272; White, 4 BRBS 279, including the amount of future benefits. Roach v. New York Protective Covering Co., 16 BRBS 114 (1984). Thus, where a disability award is reversed on appeal, the Board held that the district director may not consider such action on remand in his determination of the attorney's fee as only the award of medical benefits remained. Speedy v. General Dynamics Corp., 15 BRBS 448 (1983).

The ALJ does not commit reversible error, however, if the amount of benefits involved are not considered as long as the employer has not shown that the attorney's fee actually awarded was not reasonably commensurate with the necessary work performed or that the fee was an unreasonable breach of discretion. Ross v. Ingalls Shipbuilding, Inc., 29 BRBS 42 (1995); Lebel v. Bath Iron Works Corp., 544 F.2d 1112 (**1st Cir.** 1976). But the ALJ does err when the judge denies a fee request based on the judge's comparison of the amount of the settlement offer and the ultimate award of benefits. Stokes v. George Hyman Constr. Co., 14 BRBS 698 (1981). Further, the award cannot be contingent or based on a fixed percentage of the compensation award. City of Burlington v. Dague, 505 **U.S.** 557 (1992); Lebel, 544 F.2d 1112; Enright v. St. Louis Ship, 13 BRBS 573 (1981); Ashton v. Diener's, Inc., 9 BRBS 539 (1978).

Since the amount of benefits is important in awarding an attorney's fee, the Board has remanded for reconsideration of a fee award when it acts in such a way as to effect the amount of benefits awarded. See Rodriguez v. California Stevedore & Ballast Co., 16 BRBS 371 (1984) (Board reverses the award of benefits; the judge based the fee award on the amount of benefits); Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982); Phillips v. California Stevedore & Ballast Co., 14 BRBS 498 (1981); Bell v. Volpe/Heed Constr. Co., 13 BRBS 41 (1980) (Board finds the judge's determination of the amount of benefits is or might be erroneous); Mitchell v. Bath Iron Works Corp., 11 BRBS 770 (1980) (Board remands for further proceedings to determine the extent of partial disability). Additionally, if the Board remands the case for a redetermination of the issues which would effect the amount of benefits, the Board may not consider the fee application for work performed before the Board until the amount of benefits is decided. Perkins v. Marine Terminals Corp., 16 BRBS 84 (1984).

The administrative law judge has wide discretion in awarding an attorney's fee and may award a fee higher than that calculated by multiplying the hourly billing rate by the number of compensable hours if the award is based on other factors set forth in Section 702.132. Jensen v. Maryland Shipbuilding & Dry Dock Co., 15 BRBS 400 (1983); Laplante v. General Dynamics Corp./Elec. Boat Div., 15 BRBS 83 (1982); White v. Old Dominion Marine Ry., 4 BRBS 279 (1976). The ALJ may also award a fee not based solely on the attorney's usual billing rate where the judge relies on other factors set forth in Section 702.132. Muscella, 12 BRBS 272. Cf. Memmer

v. ITT/Sheraton Washington, 18 BRBS 123 (1986) (Board reversed $3,000 bonus as an abuse of discretion under facts of the case).

The Board has affirmed an awarded attorney fee which took into consideration the complexity of the case and the level of services provided. Powell v. Nacirema Operating Co., 19 BRBS 124 (1986). Additional factors to be considered are the difficulties presented by the case both as to the demands and limitations imposed on the attorney by time, novelty, and complexity of the questions presented. See Presley v. Tinsley Maintenance Serv., 529 F.2d 433 (**5th Cir.** 1976). The ALJ may also award a higher fee than that which was requested, if the judge finds that a higher award is justified, Lilly v. Moon Engineering Co., Inc., 5 BRBS 132 (1976), and the ALJ provides sufficient explanation for the higher fee award. See Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986).

In a Black Lung Act decision, the Board, as of March 14, 1996, approved a judge taking judicial notice of Altman & Weil Survey of Law Firm Economics when determining the correctness of a hourly rate on a fee petition so long as the judge clearly stated what was being used and included a copy. Mullins v. Betty B. Coal Co., BRB No. 95-1149, Case No. 90-BLA-2597 (Mar. 14, 1996) (unpublished); Fitzgerald v. R.C.A. International Serv. Corp., 15 BRBS 345 (1983); Schneider v. Director, OWCP, 12 BRBS 482 (1979) (Black Lung Act decision).

Improper Considerations

The claimant's financial circumstances are irrelevant if the employer is responsible for the fees. Thornton v. Beltway Carpet Serv., Inc., 16 BRBS 29 (1983); Hildebrand v. Bergstrom Fiscal Control Office, 9 BRBS 176 (1978).

The judge may not reduce the claimant's counsel's fee award in order to compensate employer for time spent objecting to the fee as this constitutes an attorney's fee award to employer which is not allowed. Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982).

In Taylor v. Marine Insulation Corporation, BRB No. 97-0108 (Oct. 1, 1997) (unpublished), the issue was raised as to the ability of parties in a 33(g) settlement to include a settlement of the attorney's fees to the exclusion of Section 28. The Board remanded the case to the ALJ to determine if: (1) the claimant had made an informed waiver of his rights to attorney's fees in exchange for the third-party insurer's approval of the settlement; (2) the settlement, signed only by the claimant's attorney, was enforceable against the claimant; (3) a clarification of the whether the employer was defunct, bankrupt, or insolvent; (4) whether Section 15 prohibits either the assignment of attorney's fees liability to the claimant or the agreement not to pursue further benefits from the employer.

[ED. NOTE:** The Board's remand order leaves a strong suggestion that such settlement is permitted under the LHWCA. This case should be contradicted with regulations and case law noted above.**]

The plain language of 20 C.F.R. § 702.132(a) is: "No contract pertaining to the amount of a fee shall be recognized." In Taylor, the agreement to pay the attorney's fees by the claimant in exchange for the approval of the settlement by the 3d party represents a contract. **Whether or not the settlement provision is in conflict with the regulation, was not addressed by the Board.**

The Board cited one case in the entire opinion as authority for the position that it took. However, Mason v. Baltimore Stevedoring Co., 22 BRBS 413 (1989), held that if a claimant's attorney secures increased benefits (above those given in an accepted settlement), then the attorney is entitled to an award of fees which can be increased above the simple compensation of the hours times the rate, if the ALJ feels it is necessary to accurately compensate the quality of the representation or the difficulty of the issue.

Cases **not** mentioned by the Board are City of Burlington v. Dague, 505 **U.S.** 557 (1992) (sets out rational for why fee-shifting statutes, and not contingency or percentage fees should be used to determine attorney's fees under the Clean Water Act. The two acts, CWA and LHWCA, have the same provisions for attorney's fees); Pennsylvania v. Delaware Valley Citizens for Clean Air [Delaware Valley I], 478 **U.S.** 546, 565 (1986) (cited by City of Burlington, supra, for the proposition that "These statutes were not designed as a form of economic relief to improve the financial lot of lawyers."); Enright v. St. Louis Ship, 13 BRBS 573, 574 (1981) ("A contingent fee arrangement is in violation of the act and any private agreements concerning claimant's attorney's fees, without official approval, cannot be determinative of a fee award").

[ED. NOTE: *Administrative law judges confronted with a Taylor-like situation should address 20 C.F.R. §702.132(a) in their analysis of the situation. In doing so, the ALJ may distinguish the instant case from the Board's problematic holding in Taylor.**]***

28.6.1 Hourly Rate

When the administrative law judge or district director reduces the requested hourly rate, the judge must specify the rate awarded and provide an adequate rationale. Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984), modified in part, Brady v. J. Young & Co., 18 BRBS 167 (1985). The rationale should indicate that the judge has considered the regulations. See 20 C.F.R. § 702.132. In a Black Lung Act decision, the Board, as of March 14, 1996, approved a judge's taking judicial notice of Altman & Weil Survey of Law Firm Economics when determining the correctness of a hourly rate on a fee petition so long as the administrative law judge clearly states which section is being using and therein includes a copy. Mullins v. Betty B. Coal Co., BRB No. 95-1149, Case No. 90-BLA-2597 (Mar. 14, 1996) (unpublished); Fitzgerald v. R.C.A. International Serv. Corp., 15 BRBS 345 (1983); Schneider v. Director, OWCP, 12 BRBS 482 (BLA) (1979).

In Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), the Board affirmed the administrative law judge's decision to lower the hourly rate from $150 to $125 based on the judge's finding that $125 was the usual billing rate allowed by judges in that area and nothing in the record warranted a higher hourly rate.

In Welch v. Pennzoil Co., 23 BRBS 395 (1990), the Board affirmed a judge's finding reducing the hourly rate in view of the judge's detailed rationale for doing so.

In Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986), the Board found no error in the administrative law judge's refusal to credit a survey of rates in the state. Miller v. Prolerized New England Co., 14 BRBS 811 (1981), aff'd on other grounds, 691 F.2d 45 (**1st Cir.** 1982); Luce v. Bath Iron Works Corp., 12 BRBS 162 (1979) (reduction held reasonable where ALJ found the charged rate excessive and a lower rate more consistent with attorney's skill and experience).

The Board will not, however, affirm a rate so low as to be manifestly inadequate. Quintana v. Crescent Wharf & Whse. Co., 18 BRBS 254 (1986) ($35.00 per hour is inadequate); Palmore v. Washington Metro. Area Transit Auth., 14 BRBS 401 (1981) (reduction from $60.00 to $50.00 was unreasonable where attorney was an expert in the field and had not requested an unreasonable rate).

The hourly rate should be based upon the rate in effect at the time the services were performed. Hobbs v. Director, OWCP, 820 F.2d 1528 (**9th Cir.** 1987); Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988); Phillips v. California Stevedore & Ballast Co., 14 BRBS 498 (1981).

Although the **Seventh Circuit** allowed the **delay in payment** of attorney's fees as a consideration in setting the fees, Wells v. International Great Lakes Shipping Co., 693 F.2d 663 (**7th Cir.** 1982), the Board in Hobbs, supra, stated that it disapproved of the practice of increasing fees to reflect the risk of loss due to delay in longshore cases. Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988); Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

In Blake, supra, the Board stated that augmentation of the hourly rate to reflect delay constitutes an abuse of discretion under the LHWCA because factors such as risk of loss and delay of payment generally occur in longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. Further, the Board held that since attorney's fees are not compensation under the LHWCA, there is no legal authority under the LHWCA for awarding interest. Blake, 21 BRBS at 55.

The Board has, however, affirmed an administrative law judge's award at an hourly rate greater than that in effect at the time the claimant's attorney rendered services. Noting that the judge had found that "the **unusually protracted course of the litigation** (over 6 years) in the ... case far exceeded what would normally be expected or foreseeable in an administrative forum." The Board distinguished this case from Hobbs, 280 F.2d 1528. Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991).

As previously noted, any attorney fee approved shall be reasonably commensurate with the necessary work done and shall, among other factors, take into account the delay in the payment of the attorney's fee award. 20 C.F.R. §702.132; Anderson v. Director, OWCP, 91 F.3d 1322 (**9th Cir. 1996**); Nelson v. Stevedoring Services of America, 29 BRBS 90 (1995), following the holding in Missouri v. Jenkins, 491 **U.S.** 274 (1989) the Board found that "it is clear that enhancement for

delay is appropriate in fee awards under section 28 of the Act." 29 BRBS at 97; See also Allen v. Bludworth Bond Shipyard, 31 BRBS 95 (1997); Tarabocchia v. Int'l Terminal Operating Company, Inc., BRB No, 92-0436 (Jan. 22, 1996) (unpublished) (Board upheld a bonus of $4,812.50 above the sum of the hours-32.25- multiplied by the hourly rate-$250- for a lawyer who settled a complex case unusually quickly and successfully then had to wait 13 years to be paid). In Jenkins, the **United States Supreme Court** considered the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C §1988, finding that "enhancement for delay in payment is, where appropriate, part of a 'reasonable attorney's fee.'" 491 **U.S.** at 282. **To the extent that Fisher and Blake are inconsistent with the holding in Jenkins, they are overturned.** 29 BRBS 112.

The **Ninth Circuit** has held that either the **historic or the current** rate may be used to determine the fee award. D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379 (**9th Cir.** 1990). If there is an unreasonable delay in the satisfaction of the award then the court can use the current rate to increase the value of the award to reflect the value of the delay. The **Ninth Circuit** used the current rate in the case of a three year delay in payment, especially when it found that the firm could have taken other work that would have paid promptly, had they not taken the case of Gates. Gates v. Duekmejian, 977 F.2d 1300 (**9th Cir.** 1992).

An attorney need not bill the time spent performing administrative work at a lower hourly rate. Holmes v. Tampa Ship Repair & Dry Dock Co., 8 BRBS 455 (1978). Similarly, an administrative law judge cannot reduce the attorney's hourly rate for office time as opposed to hearing or trial time. Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989); Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989). An attorney can, however, request two separate rates in the fee application. Hilyer v. Morrison-Knudsen Constr. Co., 670 F.2d 208 (**D.C. Cir.** 1981), rev'd on other grounds sub nom. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 **U.S.** 624 (1983).

[ED. NOTE: *In a non-LHWCA, age discrimination claim, Real v. The Continental Group, Inc., 116 F.R.D. 211 (**N.D. Cal.** 1986) the district court judge held that the defense counsel's hours and hourly rates were at least minimally relevant to the employee's fee application and that the defense counsel's hours and hourly rates were not information protected either by work-product doctrine or attorney-client privilege but the defense counsel's statement of fees and billing printouts were not discoverable by the employer as these documents would necessarily reveal the nature of legal services provided. The judge relied on Rule 401 of the Federal Rules of Evidence, which defines "relevant evidence," and on Rule 26(b)(1) of the Federal Rules of Civil Procedure dealing with "privilege." No presidential cases specifically dealing with this issue under the LHWCA have been reported.]*

28.6.2 Compensable Services

An attorney is entitled to compensation for all necessary work performed. The proper **test** for determining if the attorney's work is necessary is whether **at the time the attorney performs the work** in question the attorney could **reasonably regard the work as necessary to establish entitlement**. Cabral v. General Dynamics Corp., 13 BRBS 97 (1981); Cherry v. Newport News

Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978). See Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984) (unsuccessful settlement negotiations held compensable under this standard); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984) (time spent reading a memorandum compensable even though it ultimately had no bearing on the outcome); Marcum v. Director, OWCP, 12 BRBS 355 (1980) (same standard in black lung case).

The Board has disallowed fees for entries which are unnecessary, excessive, or duplicative. Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991) (the Board reduced the number of hours for telephone calls as they constituted over one-half of all hours billed); Gardner v. Railco Multi Constr. Co., 19 BRBS 238 (1987); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984).

The Board has disallowed an amount claimed by counsel under New Mexico's gross receipts tax. Brinkley v. Department of the Army/NAF, 35 BRBS 60 (2001). In New Mexico, amounts received as attorney fees are subject to this tax. The Board found that the tax is a part of counsel's overhead suggesting that the billing rate claimed could have been adjusted upward to permit him to pay the tax without diluting his fee. Also in Brinkley, the Board disallowed 10 hours claimed by counsel for familiarizing himself with general provisions of the LHWCA.

Time spent preparing the motion for attorney's fees is not compensable as either billable hours or as expenses relating to the case. In Sproull v. Stevedoring Services of America, 28 BRBS 271 (1994) (Decision on Recon.) (en banc), the Board, sitting en banc, held that this was an activity that was not reasonably necessary to protect claimant's interests. See also 20 C.F.R. §725.366(b); Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984). The Board felt that each attorney should keep a running, accurate, total of the hours expended on the case so that the preparation of the fee request "should be, for the most part, a clerical function included in overhead expenses." Sproull, 28 BRBS 271, 277; Morris v. California Stevedore & Ballast Co., 10 BRBS 375, 383 (1979).

The Board distinguished its position from that taken in Hensley v. Eckerhart, 461 **U.S**. 424 (1988); Rose Pass Mines, Inc. v.Howard, 615 F.2d 1088 (**5th Cir**. 1980). Hensley, a civil rights case, involved significantly more hours and people that needed to be accounted for in the fee motion than in most LHWCA claims. Rose Pass Mines, Inc. was a bankruptcy proceeding which, by statute, demands exhaustive detail in the fee petition.

[Editor's Note: See Section 28.6.3, infra, for more on Fee Petitions.]

The claimant's attorney is entitled to a fee award for services rendered either reading the decision and calculating the benefits awarded to the client or successfully defending the appeal of the fee award and establishing employer's liability for the fee. Nelson v. Stevedoring Services of America, 29 BRBS 90 (1995); Jarrell v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 883 (1982); Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982).

Additionally, if claimant’s counsel is ultimately successful in procuring compensation benefits under the LHWCA, counsel is entitled to fees for all services rendered the claimant at each level of the adjudication process, even if claimant’s counsel is unsuccessful at a particular level. Hole v. Miami Shipyards Corp., 640 F.2d 769 (**5th Cir.** 1981). See also Davis v. U.S. Dep't of Labor, 646 F.2d 609 (**D.C. Cir.** 1980). Attorney's fees, however, are only to be awarded for time spent and services rendered which are reasonably necessary to protect a claimant's interest. Bakke v. Duncanson-Harrelson Co., 13 BRBS 276 (1980). See also Marcum, 12 BRBS 355.

Attorney’s fees are not allowed for time spent obtaining a lien for medical services rendered by a **third party** *that has not filed a claim for reimbursement on its own behalf*, obtaining medicare, or unsuccessfully attempting to obtain a Section 14(f) penalty. Quintana v. Crescent Wharf & Whse. Co., 18 BRBS 254 (1986). But see Hunt v. Director, OWCP, 999 F.2d 419 (**9th Cir.** 1993), where the claimant’s *physician intervened* seeking reimbursement for medical services rendered. The **Ninth Circuit** held that Section 7(d)(3) grants standing to the medical providers, where services have been rendered, to seek benefits on behalf of the claimant. Hunt, 999 F.2d at 424. This means that the provider becomes the “person seeking benefits” under 28(a), thus entitling the provider to recover interest and attorney's fees in connection with an award of medical fees under the LHWCA. Buchanan v. International Transportation Services, 33 BRBS 32 (1999); Pozos v. St. Mary’s Hosp. & Medical Center, 31 BRBS 173 (1997).

Where a motion for sanctions was disallowed, both fees and costs incurred in the preparation of the motion were disallowed. Brinkley v. Department of the Army/NAF, 35 BRBS 60 (2001).

Although a claimant's attorney may seek an enforcement order in federal district court pursuant to Section 21(d) and Section 21(b)(3) provides that "payment of the amounts required by an award shall not be stayed pending a final decision unless the Board orders a stay," that section does not override Section 28(a) which provides that an order for attorney's fees is not payable until the compensation order becomes final. Section 21(b)(3)applies to the payment of compensation to the injured longshoreman, not the longshoreman’s attorney. Wells v. International Great Lakes Shipping Co., 693 F.2d 663 (**7th Cir.** 1982).

The **District of Columbia Circuit** stated:

> The Act's use of the word "solely" does not preclude an issue-by-issue examination of success but, rather, suggests that once success on an issue is demonstrated, recovery is limited "solely" to work done to increase compensation on that particular issue.

963 F.2d 1532, 1537.

The **District of Columbia Circuit** went on to explain that this view of the LHWCA is confirmed by the legislative history. Id. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9, 20,

reprinted in 1972 U.S.C.C.A.N. 4698, 4706, 4717. As explained by a Report by the House Committee on Education and Labor (the "House Report"), the LHWCA's fee provision

> authorize[s] assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorneys fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation.

H.R. Rep. No. 14419, reprinted in 1972 U.S.C.C.A.N. 4706.

[ED. NOTE:** The law is well established that an award of attorney's fees and costs is not enforceable, and therefore not collectible, until all appeals are exhausted. Williams v. Halter Marine Service, Inc., 19 BRBS 248, 253 (1987). However, the ALJ can proceed in one of two ways. The judge can either postpone adjudicating all attorney fee related issues pending the outcome of the appeal of the case-in-chief, or the ALJ can proceed to adjudicate these issues but hold the awarding of an actual attorney fee in abeyance until the outcome of the appeal. The reader is cautioned that, no matter which method the ALJ chooses the party should not unilaterally ignore an attorney fee related order (i.e., order to file an attorney fee request or brief the fee request, or order to file an opposition to an attorney fee, or brief the opposition to the fee request) simply because the case-in-chief has been appealed. The party that does so, does so at his or her own peril.**]

28.6.3 Fee Petition

Time spent preparing the motion for attorney's fees is not compensable as either billable hours or as expenses relating to the case. In Sproull v. Stevedoring Services of America, 28 BRBS 271(1994) (Decision on Recon.) (en banc), the Board sitting en banc, held that this was an activity that was not reasonably necessary to protect claimant's interests. See also 20 C.F.R. §725.366(b). Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984). The Board felt that each attorney should keep a running, accurate, total of the hours expended on the case so that the preparation of the fee request "should be, for the most part, a clerical function included in overhead expenses." Sproull, 28 BRBS 271, 277; Morris v. California Stevedore & Ballast Co., 10 BRBS 375, 383 (1979).

The Board distinguished its position from that taken in Hensley v. Eckerhart, 461 **U.S**. 424 (1988); Rose Pass Mines, Inc. v.Howard, 615 F.2d 1088 (**5th Cir**. 1980). Hensley, a civil rights case, involved significantly more hours and people that needed to be accounted for in the fee motion than in most LHWCA claims. The Rose Pass Mines, Inc. was a bankruptcy proceeding which by statute demands exhaustive detail in the fee petition.

In the **Ninth Circuit** it **is acceptable to award fees for the time spent preparing the attorney's fee application**. Anderson v. Director, OWCP, 91F.3d 1322 (**9th Cir.** 1996). In re Nucorp Energy, Inc., 764 F.2d 655 (**9th Cir**. 1985), like the Rose Pass Mines, Inc., was a bankruptcy case and the court eventually followed the holding of the **Fifth Circuit** in awarding attorney's fees including the time it took to prepare the motion. However, before following the Rose Pass Mines, Inc. holding, In re Nucorp Energy, Inc. exhaustingly discussed how other statutory fee cases have dealt with the issue. In looking mainly to section 1988 civil rights cases, the **Ninth Circuit** finds the support for their position in bankruptcy proceedings.

Another application of the **Ninth Circuit's** rule, granting compensation for the time needed to prepare the fee application, is seen in Clark v. City of Los Angeles, 803 F.2d 987 (**9th Cir.** 1986). Clark is a civil rights case which follows the rational of In re Nucorp Energy, Inc without providing any expansion on the line of reasoning. Anderson, which applies the fee application rule to LHWCA cases, relies rigidly on the wording of 42 U.S.C. §1988.487 and Clark. Anderson v. Director, OWCP, 91 F.3d 1322,1325 (**9th Cir.** 1996). After citing these two items the Anderson court uses the holding in Dague, saying that "a reasonable fee applies uniformly to all federal fee-shifting statutes," to extend the civil rights holdings on the issue to LHWCA. Id. **Compare this rational to the holding in Sproull where the Board sitting en banc held that the "activity" was necessary to the protection of the claimant's entitlement, and hence it is a clerical function.** Sproull, 28 BRBS 271, 277 (en banc*)*. **The Anderson holding is also in conflict with 20 C.F.R. §725.366(b) which specifically prohibits the awarding of fees for the preparation of the fee application.**

In Wagner v. Department of the Army/NAF, BRB No. 96-1038 and 96-1038A (May 9, 1997) (unpublished), a three judge panel of the Board held that they were going to follow the holding in Anderson. However the absences of any language overruling or distinguishing Wagner from the en banc holding in Sproull, and the unpublished status of the holding, means that the general rule outside the **Ninth Circuit** should still be in conformance with Sproull.

[ED. NOTE: *There are five permanent members of the Board. The Board normally sits in three judges panels. A panel decision of the Board "shall stand unless vacated or modified by the concurring vote* ***of at least three permanent members*** *sitting en banc.." 20 C.F.R.§801.301 (c). "The Board may delegate any or all of its powers except en banc review to panels of three members." 20 C.F.R. §801.301 (b). Thus, only an en banc Board can overrule a three judge panel and it takes the* ***concurrence of three members of the en banc Board*** *to do so.]*

The claimant's attorney may be awarded fees, however, for time spent **defending** the **fee petition**. Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982); Jarrell v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 883 (1982); Morris v. California Stevedore & Ballast Co., 10 BRBS 375 (1979).

28.6.4 Losing on an Issue

Board Position

The Board has held that an ALJ may not refuse to award a fee for services rendered on issues upon which the claimant did not prevail. Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984); Bouchard v. General Dynamics Corp., 14 BRBS 839 (1982); Peterson v. Washington Metro. Area Transit Auth., 13 BRBS 891 (1981); Welding v. Bath Iron Works Corp. 13 BRBS 812 (1981); Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978). But cf. George Hyman Constr. Co. v. Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT) (**D.C. Cir.** 1992) (rejected Board's holding in Cherry) and General Dynamics Corp. v. Horrigan, 848 F.2d 321, 21 BRBS 73 (CRT) (**1st Cir.** 1988), cert. denied, 488 **U.S.** 92 (1988).

This rule was developed in part because in most cases the issues are too interrelated to permit allocation of the fee between successful and unsuccessful issues. Battle, 16 BRBS 329. Compare this rule with the situation where the ALJ bases an overall fee reduction primarily on the fact that a "[c]laimant was awarded only a minute fraction of the benefits he sought to recover." Stowars v. Bethlehem Steel Corp., 19 BRBS 134 (1986). In Stowars, the Board found this determination to be consistent with 20 C.F.R. § 702.132(a), which states that any fee approved shall take into account the amount of benefits awarded.

Similarly, the administrative law judge cannot reduce the time expended by the attorney on an issue on which the employer concedes liability if the employer does not make the concession until the time of the hearing. Cahill v. International Terminal Operating Co., 14 BRBS 483 (1981).

The Board has most recently addressed the issue of amount of attorney's fees when there is only partial success in Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993). In Rogers, the Board noted that it had addressed the issue on similar facts in Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ concurring and dissenting). In both cases, the Board cited the **Supreme Court** in Hensley v. Eckerhart, 461 **U.S.** 424 (1983), for defining the condition under which a claimant who achieves only limited success may recover attorney's fees.

[ED. NOTE:** It should be noted that the prevailing trend is to classify an attorney's fee award in terms of its "reasonableness" rather than whether it is the result of a fully, or partially, successful prosecution of the claimant's case.**]

Hensley and Its Aftermath

The Hensley court made its ruling pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. In Hensley, the **United States Supreme Court** noted that the degree of success attained is the most crucial factor to consider and that if a plaintiff achieves only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a

reasonable hourly rate may result in an excessive amount. 461 **U.S.** at 436, 440. The Hensley **Court** stated that one must consider "the relationship between the extent of success and the amount of the fee award." 461 **U.S.** at 439; Ingalls Shipbuilding, Inc. v. Director, OWCP, 46 F.3d 66 (**5th Cir.** 1995) (Table). The Court stated that there is no precise rule or formula, but that a fact finder may address such a situation by eliminating hours or simply reducing the award. 461 **U.S.** at 436-37.

The Hensley court established the following two part **test**:

1) did the claimant's unsuccessful claims relate to the claims on which the claimant was successful; and

2) did the claimant succeed at a level that makes the hours reasonably expended a satisfactory basis for fee award.

461 **U.S.** at 434.

In applying the test, the Hensley **Court** stated that when the different issues involve the same facts or are based on the same legal theories, the claimant's overall success based on the number of hours reasonably should be considered.

If the claimant achieves "excellent" results (substantial relief) then all of the fees should be awarded. Where the plaintiff has won substantial relief, the entire figure should be awarded, and no reductions should be made merely because the plaintiff has not prevailed on every contention raised. 461 **U.S.** at 437.

If the claimant is only partially successful (in light of the number of hours expended), however, then the fees should be reduced accordingly. The Hensley **Court** stated that the attorney's fee award could properly be reduced in a situation where "the relief however significant, is limited in comparison to the scope of the litigation as a whole." 461 **U.S.** at 441. In such a case of partial or limited success, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." 461 **U.S.** at 437.

***[ED. NOTE:** Other tests are making their way through general, non-LHWCA litigation. For example, In Barber v. Williamson, 254 F.3d 1223, (**10th Cir.** 2001), a race discrimination plaintiff who recovered only nominal damages of a dollar on his harassment claim nevertheless may be entitled to attorney's fees, provided he meets the criteria set out in Justice's O'Connor's concurrence in.Farrar v. Hobby, 506 **U.S.** 103 (1992). The **"O'Connor criteria"** for deciding whether a plaintiff who recovers only nominal damages nevertheless is eligible for attorneys' fees are: (1) the difference between the amount of damages recovered and the amount sought; (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of "some public purpose other than occupying the time and energy of counsel, court, and client." At least **five other federal circuits**, in addition to the **Tenth Circuit**, either*

explicitly or implicitly invoke the "O'Conner criteria" in deciding whether to award attorney's fees in nominal damages cases.]

The **District of Columbia Circuit** and the **First Circuit** have also utilized this Hensley test in the context of claims under the LHWCA. See George Hyman Constr. Co. v. Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT) (**D.C. Cir.** 1992) (Hensley analysis for attorney fee awards applied under LHWCA); General Dynamics Corp. v. Horrigan, 848 F.2d 321, 21 BRBS 73 (CRT) (**1st Cir.** 1988), cert. denied, 488 **U.S.** 992 (1988). The **Fifth Circuit** has clearly held that the fee award should be **"tailored to [claimant's] limited success."** Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT) (**5th Cir.** 1993).

The **Board** in Rogers stated that the Hensley Court did not define "success" in terms of the monetary amount awarded but rather in terms of how successful the plaintiff was in achieving the claims asserted. Further, although **"the amount of benefits awarded is a relevant factor in determining the amount of an attorney's fee awarded ... claimant's success must also be measured against the amount of benefits voluntarily paid by the employer."** Rogers, 28 BRBS 92 (1993) (citing Bullock). See also Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 178 (1993).

In Ahmed v. Washington Metropolitan Area Transit Authority, 27 BRBS 24 (1993), the claimant succeeded only on his medical benefits claim, which was unrelated to the unsuccessful attempt to recover additional disability benefits. The Board, citing Hyman, 963 F.2d 1532, vacated the fee award in as much as the judge did not specifically consider the claimant's limited success in making the fee award. (The fee awarded had been $3,000 and the claimant's medical expense recovery had been $611.50.) The **Fifth Circuit** took a similar position in Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163 (**5th Cir.** 1993), where it remanded for a finding of attorney's fees consistent with the holding in Farrar v. Hobby, 506 **U.S.** 103 (1992).

Ahmed should be compared with Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986). There, the Board affirmed a fee award noting that it was the Board's policy to allow an award of attorney's fees for work performed in unsuccessful pursuit of a Section 48(a) claim (discrimination claim) where the claimant prevailed in obtaining disability compensation. See Battle, 16 BRBS 329.

The **First Circuit**, however, in General Dynamics Corp. v. Horrigan, 848 F.2d 321 (**1st Cir.** 1988), affirmed a judge's award of attorney's fees where the judge found the consolidated claim was successful as to the disability claim and unsuccessful on the discrimination claim, and awarded partial attorney's fees. The **First Circuit** held that: 1) the claims were consolidated in the interests of expediency and the record manifested the separateness of the events and evidence at issue in the two claims; and 2) the discrimination claim did not increase the claimant's compensation.

The Board has held that any time spent by a claimant's attorney on the applicability of Section 8(f) is not necessary since the source of the claimant's compensation is irrelevant to the claimant, thus such time must be disallowed. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS

231 (1984); Avallone v. Todd Shipyards Corp., 13 BRBS 348 (1981); Lostaunau v. Campbell Indus., 13 BRBS 227 (1981), rev'd on other grounds, 678 F.2d 856 (**9th Cir.** 1982); Monaghan v. Portland Stevedoring Co., 11 BRBS 190 (1979); Johnson v. Bender Ship Repair, 8 BRBS 635 (1978). When the only issue before the Board is the applicability of Section 8(f), the claimant's counsel is not entitled to any fee for work performed before the Board. Shaw v. Todd Pac. Shipyards Corp., 23 BRBS 96 (1989); Phelps v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 325 (1984).

In Battle, 16 BRBS 329, the Board held that the claimant's counsel could be compensated for time spent on an unsuccessful Section 48(a) discrimination claim where disability benefits were obtained. The Board recognized the decision of the **District of Columbia Circuit** in Director, OWCP v. Brandt Airflex Corp., 645 F.2d 1053 (**D.C. Cir.** 1982). In that case, the **District of Columbia Circuit** rejected the Board's decision in Cherry, 8 BRBS 857, and found claimant's attorney entitled to a fee only on the issues on which claimant prevailed; however, the only issue on which the claimant lost in Brandt Airflex Corp. was the application of Section 8(f). Since the Board has consistently held that a claimant's attorneys are not entitled to a fee for work on Section 8(f), the Board held the decision in Brandt Airflex Corp. was not inconsistent with Board case law. Battle, 15 BRBS at 331 n. 2. Therefore, the **Board held it would continue to apply Cherry**.

In Brown v. Bethlehem Steel Corp., 20 BRBS 26 (1987), the Board reduced the award of attorney's fees for hours spent on the claimant's unsuccessful cross-appeal.

[ED. NOTE: *Interest is not assessed on attorney fee awards. For more on this, see Topic 28.9.1 Attorney Fees–Interest.****]***

28.6.5 Collateral Actions

Generally, an attorney is not entitled to compensation under the LHWCA for time spent preparing a state worker's compensation suit. Miller, 14 BRBS 811; Kimbel v. Rock Hall Marine Railway, Inc., 4 BRBS 389 (1976). An attorney is also not entitled to compensation for services performed in securing a third party recovery for the claimant. Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd sub nom. Kahny v. OWCP, 729 F.2d 777 (**5th Cir.** 1984), overruled by Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (**5th Cir.** 1991).

The judge may, however, award a fee for services performed in connection with collateral services if counsel shows that the same services and/or their products are necessary to, and are used in the prosecution of, the LHWCA claim. Roach v. New York Protective Covering Co., 16 BRBS 114 (1984); Eaddy v. R.C. Herd & Co., 13 BRBS 455 (1981); Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388 (1978); Johnson v. Treyja, Inc., 5 BRBS 464 (1977); Turner v. New Orleans (Gulfwide) Stevedores, 5 BRBS 418 (1977), rev'd on other grounds, 661 F.2d 1031 (**5th Cir.** 1981).

Further, the fact that an attorney is compensated by a claimant in the collateral action does not preclude the attorney from receiving a fee award under the LHWCA. If the work in the collateral

action, however, reduces the time the attorney would have had to spend on the longshore claim, this must be reflected in the award. Petro-Weld, Inc. v. Luke, 619 F.2d 418 (**5th Cir.** 1980). An attorney may not be paid twice for the same work. Roach, 16 BRBS 114. See Adams v. Parr Richmond Terminal Co., 2 BRBS 303 (1975). A charge incurred in filing and withdrawing a state claim is not recoverable under the LHWCA. Jenkins v. Maryland Shipbuilding & Dry Dock Co., 6 BRBS 550 (1977), rev'd on other grounds, 594 F.2d 404 (**4th Cir.** 1979).

28.6.5.1 No Attorney Fee Award Set-off

An employer can not offset the amount of overcompensation it has paid to an employee from the amount of attorney fees awarded. Guidry v. Booker Drilling Co., 901 F.2d 485 (**5th Cir.** 1990).

28.6.6 Clerical Work

The professional status of the person performing the work must be kept separate from the type of services performed. Time spent on traditional clerical duties by an attorney is not compensable and cannot be included as part of the attorney's reported number of hours. Staffile v. Int'l Terminal Operating Co., Inc., 12 BRBS 895 (1980) (incorporated guidelines set forth in Marcum v. Director, OWCP, 12 BRBS 355 (1980) (black lung case)).

Likewise, traditional clerical duties performed by a clerical employee are not compensable services for which separate billing is permissible, but rather must be included as part of the attorney's overhead in setting the hourly rate requested. See Morris v. California Stevedore & Ballast Co., 10 BRBS 375 (1979). Traditional clerical duties include organizing and copying exhibits, preparation and collection of medical bills. Quintana v. Crescent Wharf & Whse. Co., 18 BRBS 254 (1986).

Time spent by clerical employees is compensable, however, and separately billable when the clerical employee performs work which is usually performed by attorneys, law clerks, or paralegals. Quintana v. Crescent Wharf & Whse. Co., 18 BRBS 254 (1986); Staffile, 12 BRBS 895.

Work by a law clerk, paralegal, or lay person may be recoverable but only if performed "in aid of or in association with the supervising attorney on the claim". Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176 (**9th Cir.** 1976).

28.6.7 Claimant's Costs

Section 28(d) of the LHWCA provides:

> **In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of**

> **expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. 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 Act.**

33 U.S.C. § 928(d).

Section 28(d) provides that the costs, fees, and mileage for necessary witnesses can be assessed against the employer when an attorney's fee is awarded against the employer. Love v. Potomac Iron Works, 16 BRBS 250 (1984); Tugwell v. Texas Stevedores, Inc., 12 BRBS 522 (1980). Furthermore, costs, fees, and mileage of witnesses are only allowed if they are reasonable and necessary. Bradshaw v. J.A. McCarthy, Inc., 3 BRBS 195 (1976), petition for review denied, 564 F.2d 89 (**3d Cir.** 1977).

The necessity of the witnesses and the reasonableness of the fees must be approved by the judge, the Board, or the court. 20 C.F.R. § 702.135. See Piecoro v. Pittston Stevedoring Corp., 8 BRBS 360 (1978); Robinson v. Bethlehem Steel Corp, 6 BRBS 723 (1977). The ALJ must rule with specificity as to the cost items allowed or disallowed in claimant's application. Morris v. California Stevedore & Ballast Co., 8 BRBS 674 (1978). The amount awarded as attorney's fees, costs, and mileage for witnesses shall not in any way diminish the compensation payable under the LHWCA. 33 U.S.C. § 928(d); 20 C.F.R. § 702.135.

28.6.7.1 Witness Fees

Section 28(d) specifically provides for an award of witness fees, but only if an attorney's fee is assessed against the employer. See Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982). If the attorney's fee award is reversed, the claimant will not receive any witness fees. Wilhelm v. Seattle Stevedore Co., 15 BRBS 432 (1983). The standard is whether the costs are **necessary** (i.e., if claimant's attorney thought the witness was necessary to adequately protect claimant's interest) and whether the fees are **reasonable**. Hardrick v. Campbell Indus., Inc., 12 BRBS 265 (1980).

In regard to the necessity of a witness, the Board has specifically held that an ALJ may not deny the costs and fees of a particular witness merely because the claimant was not successful on the particular issue for which the witness' evidence was offered. Waters v. Farmers Export Co., 14 BRBS 102 (1981); Cutaia v. Northeast Stevedoring Co., Inc., 12 BRBS 942 (1980); Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592 (1980). Additionally, a fee for an **interpreter** has been considered a necessary cost under Section 28(d). Suarez v. Sea-Land Serv., Inc., 3 BRBS 17 (1975), rev'd on other grounds sub nom. Sea-Land Serv., Inc. v. Director, OWCP, 552 F.2d 985 (**3d Cir.** 1977).

The ALJ has broad discretion in awarding a reasonable fee for witnesses, and the Board will reverse the award only if the appealing party shows the award was arbitrary, capricious, or an abuse of discretion. Topping v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 40 (1983) (employer's allegations that witness fee is excessive do not establish fee was unreasonable); Sawyer v. Newport News Shipbuilding & Dry Dock Co., 15 BRBS 270 (1982) (it is not unreasonable for expert witnesses to charge higher fees for their deposition testimony than what the experts witnesses normally earn per hour); Pernell v. Capitol Hill Masonry, 11 BRBS 532 (1979) (employer's attack of $25.00 in deposition costs does not establish witness' fee was unreasonable). See also Piecoro v. Pittston Stevedoring Corp., 8 BRBS 360 (1978); Robinson v. Bethlehem Steel Corp., 6 BRBS 723 (1977).

The Board has found, however, an administrative law judge may not establish a fee for a witness who had testified in two claims, one successful and one not, by merely dividing the fee request in half. Instead, the Board remanded for the ALJ to determine what portion of the witness's services applied to the successful claim. Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982). Like an attorney's fee award, the ALJ may not substantially reduce a witness fee without adequately explaining the reduction. Palmore v. Washington Metro. Area Transit Auth., 14 BRBS 401 (1981); Cutaia v. Northeast Stevedoring Co., Inc., 12 BRBS 942 (1980); Lozupone v. Stephano Lozupone & Sons, 12 BRBS 148 (1979).

[ED. NOTE: *Clearly, the witness fees contemplated here are not the same as those the subject of Section 25 of the LHWCA. Section 25 states that "Witnesses summoned in a proceeding before a deputy commissioner or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States." 33 U.S.C. § 925.]*

28.6.7.2 Medical Reports and Testimony

The cost of a physician's testimony is recoverable if the judge finds the physician is a necessary witness under Section 28(d). See Hernandez v. National Steel & Shipbuilding Co., 13 BRBS 147 (1980). If the physician also prepares a medical report, the cost of the medical report is recoverable if it was written for the physician's testimony at the hearing. See Townsend v. Potomac Elec. Power Co., 13 BRBS 127 (1981); Himelright v. Blake Constr. Co., 7 BRBS 399 (1978).

If the physician does not testify, but claimant submits the physician's medical report, the Board has held that the cost of the medical report is recoverable under Section 28(d). Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190 (1984); Cahill v. International Terminal Operating Co., Inc., 14 BRBS 483 (1981); Hardrick v. Campbell Indus., Inc., 12 BRBS 265 (1980).

See also De Felice v. Pittston Stevedoring Corp., 5 BRBS 660 (1977), where the Board vacated and remanded the portion of the judge's decision denying costs of a doctor's report which was placed into evidence in lieu of his testimony by agreement of both parties. The claimant's attorney cannot, however, receive payment for the cost of the claimant's physical examination, since

this would in effect be a request for medical benefits. Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982).

***[ED. NOTE:** See also 28.1.3, supra .]*

28.6.7.3 Hearing Transcript

Section 28(d) only explicitly refers to the reasonable and necessary costs of witnesses and, thus, the cost of a hearing transcript is not technically covered by this section. Hillary v. I.T.O. Corp. of Baltimore, 3 BRBS 409 (1976), aff'd mem., 551 F.2d 306 (**4th Cir.** 1977); Bradshaw, 3 BRBS 195.

The Board has held, however, that in cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred by a claimant during the course of a proceeding may also be assessed against the employer. Bradshaw, 3 BRBS 195. The Board previously found that a hearing transcript was necessary if it was required for the preparation of the claimant's post-hearing brief. Parkhill-Goodloe Co., Inc. v. McIntosh, 550 F.2d 1283 (**5th Cir.** 1977), cert. denied, 434 **U.S.** 1033 (1978); Ascione v. Universal Terminal & Stevedoring Corp., 4 BRBS 44 (1976); Tortorici v. Hellenic Lines, Ltd., 3 BRBS 210 (1976).

The Board has now held that the cost of a hearing transcript, as well as a transcript of a physician's deposition, are reasonable and necessary expenses as a matter of law. Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981); Luce v. Bath Iron Works Corp., 12 BRBS 162 (1979); Collins v. Todd Shipyards, Inc., 11 BRBS 232 (1979).

28.6.7.4 Travel Expenses

Section 28(d) does not specifically allow travel expenses for an attorney, but since the Board has held that reasonable and necessary costs and expenses incurred by a claimant during the course of a proceeding are reasonable, Bradshaw, 3 BRBS 195, where the claimant's attorney has incurred reasonable and necessary **travel expenses in excess of normal overhead**, such expenses may be considered by the judge in assessing a fee award against the employer under Section 28(a). Harrod v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 592 (1981) (1.5 hours between attorney's office and place of hearing is too lengthy to be considered incidental overhead expense); Griffin v. Virginia International Terminals, Inc., 29 BRBS 133 (1995) (20 to 22 miles each way to hearing was local in nature to become part of overhead); Stillwell v. Home Indem. Co., 5 BRBS 436 (1977), pet. for review dismissed, 597 F.2d 87 (**6th Cir.**), cert. denied, 444 **U.S.** 869 (1979); Bradshaw, 3 BRBS 195.

See also Ryan-Walsh Stevedoring Co., Inc. v. Trainer, 601 F.2d 1306 (**5th Cir.** 1979) (court allowed, as cost to the prevailing claimant's attorney, an amount for travel to the appellate hearing for oral argument under Section 28(a)). Both travel time and costs may be awarded, with the

standard being whether such costs are reasonable and necessary and in excess of that normally considered overhead. See Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982); Lopes v. New Bedford Stevedoring Corp., 12 BRBS 170 (1979).

The Board has held, however, that where matters could have been handled by telephone or by letter, travel time and expenses for consultation with a claimant who is too disabled to travel are not compensable. Davenport v. Apex Decorating Co., Inc., 18 BRBS 194 (1986). Additionally, travel expenses will be awarded if **necessitated by a lack of competent counsel in area**; otherwise, it is considered part of normal overhead. Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

The LHWCA and regulations do not provide for payment of travel expenses incurred by a claimant. Love v. Potomac Iron Works, 16 BRBS 250 (1984). Moreover, as Section 28(d) provides for an award of costs only where attorney's fees are awarded and no fee was awarded here, the claimant's costs of $144.00 to attend an informal conference were not reimbursable. Id.

Attorney Waiting Time

Three and one half hours of time an attorney spent waiting for the hearing to begin is also necessary and reasonable inasmuch as the attorney was ordered to be present although he was not notified of when his case would be called. Harrod, 14 BRBS 592. The Board noted that there was no indication in Harrod that the delay was caused, either in whole or in part, by counsel's actions.

28.6.7.5 Miscellaneous Cost of Claimant

Necessary and reasonable costs incurred by a claimant do not include the cost of an **economic projection** of claimant's loss of wages prepared by an economic consulting firm, Smelcer v. National Steel & Shipbuilding Co., 6 BRBS 215 (1977), nor having the claimant accompanied to a medical examination, Cahill v. International Terminal Operating Co., 14 BRBS 483 (1981). In Brown v. Bethlehem Steel Corp., 20 BRBS 26 (1987), the Board held that postage was considered part of attorney overhead; furthermore, phone calls will be disallowed when improperly documented.

Photocopying Expenses

In Cahill, the Board allowed **photocopying expenses** where reasonable and necessary for preparation or presentation of case. Subsequently, in Pritt v. Director, OWCP, 9 BLR 1-159 (1986), a black lung case, the Board affirmed the district director's finding that photocopying costs were part of overhead and that furthermore "to the extent Cahill is inconsistent with Pritt, Cahill is overruled."

In Picinich v. Lockheed Shipbuilding, 23 BRBS 128 (1989), however, the Board distinguished Pritt stating that it is empowered to award fees commensurate with necessary work done before it and "to the extent the Board finds a request for photocopying expenses reasonable and necessary to work performed before the Board, they won't be automatically disallowed as office

overhead." Further, the Board noted that the employer could challenge on the grounds that costs are not necessary in view of the circumstances of the case or that the claimant's attorney had not established reasonableness by itemizing with specificity. Finally, the Board held that it "remains within the discretion of the district director or the judge to find, in any given case, based on the record evidence, that photocopying expenses are, or are not, part of attorney overhead, or that such expenses were unnecessary or unreasonable."

[ED NOTE:** Perhaps a distinction can be drawn between photocopying in an attorney's office and photocopying at, for example, a hospital to obtain copies of medical records.**]

On-line Computer Legal Research

On-line computer legal research costs are not taxable expenses to the employer/carrier. Migis v. Pearle Vision, Inc., 944 F.Supp. 508, 518 (**N.D. Tex.** 1996), aff'd in part, rev'd in part on other grounds, 135 F.3d 1041, 1049 (**5th Cir.** 1998). The court held in Migis that on-line research costs are "akin to overhead costs which cannot be recovered under 28 U.S.C. § 1920." Id. The rationale in Migis has been followed by at least one administrative law judge. Estay v. Terminal Stevedores, Inc., 96-LHC-1966 (June 15, 1998) (Romero, ALJ), aff'd in part, remanded in part on other grounds, BRB No. 98-0841 (March 15, 1999) (unpublished).

28.7 AUTHORITY TO AWARD FEES

28.7.1 Generally

Level of Proceedings

Section 28 and 20 C.F.R. § 702.132 provide that an attorney seeking a fee shall make application to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were rendered.

Generally, each body independently determines the worth of the representation. Holliday v. Todd Shipyards Corp., 654 F.2d 415, (**5th Cir.** 1981), overruled by Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (**5th Cir.** 1990); Ayers Steamship Co. v. Bryant, 544 F.2d 812 (**5th Cir.** 1977).

Pre-Controversion Fees

In Liggett v. Crescent City Marine Ways & Drydock Co., Inc., 31 BRBS 135 (1997), the Board formally overturned the jurisprudence regarding the awarding of attorney's fees for services rendered prior to the claim being controverted. Following the holding in the Black Lung case of Jackson v. Jewell Ridge Coal Corp., 21 BLR 1-27 (1997) (en banc) (Smith and Dolder, JJ., disenting); the Board ruled that the Employer was liable for the pre-controversion fees. The rational for the new holding is that Hensley v. Eckerhart, 461 **U.S.** 424 (1983), mandates the use of a two step procedure for the determination of what are reasonable fees. The Board is using the open definition of "reasonable attorney's fees" to allow the **district directors** to award fees for work preformed prior to the running of the **statutorily** mandated bar in Section 28(a) which prevents the assessing of liability for attorney's fees until: (a) 30 days after the employer receives notice of the claim; or (b) at the point of controversion.

The new holding is limited in its application as the Fourth and Fifth Circuit's have rulings on point holding that pre-controversion fees are not awardable in these situations. See Kemp v. Newport New Shipbuilding & Dry Dock Co., 805 F.2d 1152, 19 BRBS 50 (CRT) (**4th Cir.** 1986); Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179, 185 (1993), aff'd mem., 12 F.3d 209 (**5th Cir.** 1993). There is also the possibility that the holding will be limited in the **Ninth Circuit** depending on whether the future jurisprudence follows the holding in Anderson or by Todd Shipyards Corp. v. Director, OWCP [Watts], 950 F.2d 607, 25 BRBS 65 (CRT) (**9th Cir.** 1991).

It is the position of the Office of Administrative Law Judges that Liggett only applies to discretionary awards of the district director, which are directly appealable to the Board. The holding in Liggett should not change the normal criteria for the awarding of attorney's fees under an Order issued though the Office of Administrative Law Judges.

Historical Note

Initially, the Board held that the ALJ could award a fee to a claimant's attorney for work performed before the district director if the judge conducted an evidentiary hearing on the matter so as to comply with due process. Fino v. Bethlehem Steel Corp., 5 BRBS 223 (1976). An ALJ was not required, however, to award fees for services rendered at the district director level since the claimant's attorney could apply directly to the district director for such a fee. Sierra v. Maher Terminals, 7 BRBS 20 (1977).

The Board followed Fino in numerous cases modifying it somewhat to require that the judge hold a hearing only where the employer specifically objected to the request and the objection raised a bona fide factual question. See Ballard v. Newport News Shipbuilding & Dry Dock Co, 8 BRBS 676 (1978).

The **Fourth Circuit**, however, held that an ALJ lacked authority to award a fee for work performed at the district director level. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 594 F.2d 986 (**4th Cir.** 1979). See also C & P Tel. Co. v. Director, OWCP, 615 F.2d 1368 (**D.C. Cir.** 1980) (per curiam), rev'g in relevant part Jones v. Chesapeake & Potomac Tel. Co., 11 BRBS 7 (1979).

In view of the **Fourth Circuit's** decision in Watkins, the Board reconsidered its prior holdings allowing the administrative law judge to award a fee for work performed before the district director and, in Owens v. Newport News Shipbuilding & Dry Dock Co., 11 BRBS 409 (1979), it held that each administrative level should award fees for services rendered at such level where a fee is otherwise proper.

If the order does not delineate between fees awarded for work performed before the OALJ and those performed at the district director level, the entire award will be vacated and the case remanded. Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). Compare Miller, 14 BRBS 811, wherein the Board modified an award to recover only time claimed after the date of the referral letter.

28.7.2 Claims Examiner's Authority

In cases where the parties are unable to settle at the district director level, but do reach a settlement before the OALJ hearing, the Board still requires the claimant's attorney to apply to the administrative law judge for all services performed after the informal conference proceedings were ended to the date the judge issues the decision. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980); Brown v. General Dynamics Corp./Elec. Boat Div., 12 BRBS 528 (1980); Ross v. General Dynamics Corp./Elec. Boat Div., 11 BRBS 449 (1979).

A claims examiner does not have the authority to approve or award an attorney's fee pursuant to Section 28. Tupper v. Teledyne Movable Offshore, 13 BRBS 614 (1981); Hernandez v. Sealand Serv., Inc., 9 BRBS 1076 (1978); Mazzella, 8 BRBS 755 and 9 BRBS 191; Perdomo v. Tug & Barge

Dry Dock, 8 BRBS 756 (1978). An assistant district director has the authority to award a fee only if the assistant has been authorized to perform the functions of the district director. Hill v. Nacirema Operating Co., 12 BRBS 119 (1980), appeal dismissed sub nom. Nacirema Operating Co. v. Director, OWCP, 80-1366 (**4th Cir.** July 25, 1980).

These rulings are based on the premise that although administrative or ministerial acts may be delegated, the district director lacks authority to delegate discretionary or quasi-judicial acts. See Mazzella v. United Terminals, 9 BRBS 191 (1978). In Bradley v. Director, OWCP, 8 BLR 1-418 (1985), a black lung case, the Board held that a claims examiner properly issued an order setting a time limit for filing a fee petition as that was a ministerial act.

ALJ Level

It is now well-settled that an ALJ can only award fees for services performed before OALJ, i.e., the hours spent between the close of the informal conference proceedings before the district director and the issuance of the judge's decision and order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980).

Additional cases:

(1) The Board has held that the **letter of referral** from the district director to the Office of Administrative Law Judges provides the best indication of the date informal conference proceedings terminated. Prolerized New England Co. v. Miller, 691 F.2d 45 (**1st Cir.** 1982); Fitzgerald v. RCA Int'l Serv. Corp., 15 BRBS 345 (1983).

(2) **Post-decision and order billable hours** generally should not be awarded by the ALJ. Smith v. Aerojet Gen'l Shipyards, 16 BRBS 49 (1983); Lumsdon v. Portland Stevedoring Co., 7 BRBS 415 (1978). See also Collins v. Todd Shipyards, Inc., 11 BRBS 232 (1979). The **exceptions to this rule** are the hours awarded for reading the decision and calculating the benefits awarded to the client. Nelson v. Stevedoring Services of America, 29 BRBS 90, 95 (1995); Everett v. Ingalls Shipbuilding, Inc., 33 BRBS 38 (1999), en banc on recon., upholding 32 BRBS 279(1998)("Wind-up" time included time spent invol.ving the forwarding of the compensation payment to the claimant, an explanation to the claimant that employer had not provided the wage records necessary to determine whether the proper amount of benefits had been paid, and counsel's subsequent efforts to procure the requisite records and ensure that the proper amount of compensation had been paid.) The Board stated that such "'wind up' services are routinely awarded by the administrative law judge, who is in the best position to evaluate the reasonableness of the time claimed."

[ED. NOTE:** The en banc Board in Everett distinguished that case from Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904, 31 BRBS 150 (CRT)(**5th Cir.** 1997). In Wilkerson, the employer began paying the claimant compensation prior to the time the case was transferred to OALJ. Despite this payment, the claimant continued to pursue his claim before an ALJ seeking additional benefits, prejudgment interest, Section 14(e) penalties and an attorney's fee. The **Fifth Circuit** held that the claimant was not entitled to any additional compensation, or to interest and a Section 14(e) assessment and thus concluded that the claimant's counsel was not entitled to recover an attorney's fee for the work performed in pursuing the claimant's unsuccessful claim. According to the Board, the distinguishing feature in Everette was that the claimant never sought any additional compensation without success. Rather, the claimant obtained a voluntary payment from the employer. The Board opined that counsel's work subsequent to the payment was an effort to "wind-up" the claimant's claim and ensure that the claimant received everything to which she was entitled pursuant to the employer's voluntary payment of benefits.**]

The ALJ can award fees for services performed before him even where the case is being appealed. Williams v. Halter Marine Serv., Inc., 19 BRBS 248 (1987); Norat v. Universal Terminal & Stevedoring Corp., 9 BRBS 875 (1979).

[ED. NOTE:** The law is well established that an award of attorney's fees and costs is not enforceable, and therefore not collectible, until all appeals are exhausted. Williams v. Halter Marine Service, Inc., 19 BRBS 248, 253 (1987). However, the ALJ can proceed in one of two ways. The judge can either postpone adjudicating all attorney fee related issues pending the outcome of the appeal of the case-in-chief, or the ALJ can proceed to adjudicate these issues but hold the awarding of an actual attorney fee in abeyance until the outcome of the appeal. The reader is cautioned that, no matter which method the ALJ chooses the party should not unilaterally ignore an attorney fee related order (i.e., order to file an attorney fee request or brief the fee request, or brief the opposition to the fee request) simply because the case-in-chief has been appealed. The party that does so, does so at his or her own peril.**]

Board Level

The Board does not have the authority to award a fee for any work performed before the ALJ. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988); Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd sub nom. Kahny v. OWCP, 729 F.2d 777 (**5th Cir.** 1984), overruled by Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (**5th Cir.** 1991); Dygert v. Manufacturer's Packaging Co., 10 BRBS 1036 (1979); Thensted v. Litton Sys., Inc., 5 BRBS 231 (1976).

Court Level

Similarly, the circuit courts only have authority to award attorney's fees for work done on appeal from the Board, but not for work done before the judge or the Board. Ford Aerospace & Communication Corp. v. Boling, 684 F.2d 640 (**9th Cir.** 1982); Ayers Steamship Co. v. Bryant, 544

F.2d 812 (**5th Cir.** 1977). But see Hensley v. Washington Metro. Area Transit Auth., 690 F.2d 1054 (**D.C. Cir.** 1982), where the **District of Columbia Circuit** awarded attorney's fees for work performed before the **Supreme Court** in view of the **Supreme Court's** explicit choice to leave the fee decision to the circuit court, although the circuit court also held that it had no authority to award costs incurred for services before the **Supreme Court**.

28.7.3 Order

The district director's fee award must be contained in an order. A letter instructing employer of its liability and setting the amount of the fee is insufficient. Thornton v. Beltway Carpet Serv., Inc., 16 BRBS 29 (1983); Carpenter v. Lockheed Shipbuilding & Constr. Co., 14 BRBS 382 (1981); Hill, 12 BRBS 119; Lopes v. New Bedford Stevedoring Corp., 12 BRBS 170 (1979). See also Keith v. General Dynamics Corp./Quincy Div., 13 BRBS 404 (1981) (explanation for reductions must also be contained in order).

28.8 PENALTY FOR UNAPPROVED ATTORNEY FEE

Section 28(e) provides:

> **A person who receives a fee, gratuity, or other consideration on account of services rendered as a representative of a claimant, unless the consideration is approved by the deputy commissioner, administrative law judge, Board, or court, or who makes it a business to solicit employment for a lawyer, or for himself, with respect to a claim or award for compensation under this Act, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or be imprisoned for not more than one year or both.**

33 U.S.C. § 928(e).

Section 28(e) provides for a fine and/or imprisonment to a person who is convicted of receiving a fee or other consideration for services rendered as a representative of a claimant without approval by the district director, ALJ, Board, or circuit court. 33 U.S.C. § 928(e); 20 C.F.R. § 702.133.

28.9 ATTORNEY'S FEES AND SETTLEMENTS

The LHWCA does not prohibit the parties to a claim from agreeing on an appropriate attorney's fee. The Board has held that a settlement agreement in and of itself is not sufficient to mandate an award of the agreed upon fee; the fee request must comply with the requirements of 20 C.F.R. § 702.132 and Section 28. Ballard v. General Dynamics Corp., 12 BRBS 966 (1980).

The **Seventh Circuit** has held that Section 28(a) of the LHWCA indicates that an award of fees requires administrative or judicial approval even when an employer agrees with the claimant's counsel on the appropriate award. Eifler v. Peabody Coal Co., 27 BRBS 168 (CRT) (1993) (this is a Black Lung Act decision; however, the Black Lung Act, by reference, incorporates the relevant provisions of the LHWCA and its regulations. 30 U.S.C. § 932(a)).

As long as the parties have engaged in arm's length negotiations, however, the fee agreement infers an element of reasonableness and should be approved if there is no evidence of collusion and it is not clearly excessive. Id. The private agreement concerning claimant's attorney's fees, however, cannot be determinative of a fee award without official approval. Lauzon v. Strachan Shipping Co., 782 F.2d 1217 (**5th Cir.** 1985); Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986).

If the parties desire to settle attorney's fees as part of the complete settlement agreement a **fully itemized description** of attorney's fees must be specified as required by 20 C.F.R. § 702.132. Additionally, the attorney fee amount must be stated totally separate from the compensation amount, not as a subtotal of a complete settlement package amount. See 20 C.F.R. § 702.242(b)(1).

Further, if the settlement agreement is automatically approved due to the inaction of the judge after 30 days, as provided in 20 C.F.R. § 702.241(d), the attorney fees provision shall also be considered approved within the meaning of Section 28(e). 20 C.F.R. § 702.241(e); 20 C.F.R. § 702.242(b)(1). If the attorney fee portion of the settlement has not been itemized, however, the entire settlement package will be deemed incomplete and not approved. 20 C.F.R. § 702.242(b)(1).

The LHWCA also does not prohibit an employer and a claimant from agreeing to a settlement which discharges both the claimant's attorney's fees and claimant’s compensation due from the employer, even though the agreement does not specify the exact amount of the attorney's fee. Carswell v. Wills Trucking, 13 BRBS 340 (1981). Because the amount of a claimant's compensation is then dependent upon and interrelated with the amount for the claimant's attorney's fee, however, the Board has required in such cases that:

(1) the judge specifically determine that the amount of compensation after the attorney's fee is deducted is in the best interest of the claimant; and

(2) at the time the claimant signs the agreement, the claimant is cognizant of the amount, or at least the minimum amount, to be received from the total settlement proceeds.

Carswell, 13 BRBS 340.

These requirements also apply when the parties agree to a settlement amount, but it is unclear whether the parties understand that the settlement encompasses only compensation or both compensation and the attorney's fee. Aquilino v. ITT Continental Baking Co., 13 BRBS 576 (1981); Enright v. St. Louis Ship, 13 BRBS 573 (1981).

The requirement that a claimant be cognizant of the amount he will receive from the total settlement proceeds is not met if it is unclear whether the claimant understands that he is responsible for paying the fees from the settlement proceeds, which would thereby reduce the amount of compensation he would receive. Gjertson v. Pacific Architects & Eng'rs, Inc., 14 BRBS 885 (1981); Jankowski v. United Terminals, Inc., 13 BRBS 727 (1981); Enright, 13 BRBS 573.

If the minimum amount of compensation the claimant would actually receive can be determined by calculation from the figures given in the agreement, however, the second Carswell requirement is met. Rohm v. Republican Nat'l Comm., 14 BRBS 266 (1981); Barber v. FNC Marine & Rail Equip. Div., 13 BRBS 1081 (1981) (Board nonetheless remanded for "best interests" determination).

Although the parties may sign an agreement regarding the attorney's fee, the claimant's attorney must still file a proper fee application in compliance with 20 C.F.R. § 702.132. Ballard, 12 BRBS 966. The presiding officer must decide whether the attorney's fee derived under such an agreement is reasonable, Jaworski, 13 BRBS 727, and if the amount of the attorney's fee requested is substantially reduced, a sufficient explanation for the reduction must be provided. Enright, 13 BRBS 573.

If the parties dispute what services the attorney's fee encompasses (before the ALJ alone, or before both the Board and the judge), the Board has remanded for a factual determination. See Carpenter v. Lockheed Shipbuilding & Constr. Co., 14 BRBS 382 (1981); Ware v. Int'l Great Lakes Shipping Co., 13 BRBS 535 (1981).

Additionally, although the settlement attorney's fee may encompass services rendered at different levels, the district director still has the authority to review and approve the attorney's fee. Gjertson v. Pacific Architects & Eng'rs, Inc., 14 BRBS 885 (1981).

The Board has affirmed a judge's rejection of an agreement that the claimant was to be liable for the attorney's fee in consideration of employer's stipulations where no other consideration was provided by employer, the evidence overwhelmingly supported liability, and the judge stated he

would not automatically accept the stipulations. Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237 (1986).

28.9.1 Interest

Interest is not assessed on attorney's fee awards. Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 29 BRBS 43 (CRT) (**5th Cir.** 1995) (Interest is not available on attorney's fee awards.); Hobbs v. Director, OWCP, 820 F.2d 1528 (**9th Cir.** 1987); Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988); Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988); Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988) (Board held that since attorney's fees are not compensation there is no authority under the LHWCA for awarding interest); Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984). But see Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991), where the Board allowed an hourly rate greater than that in effect at the time the attorney rendered services to compensate for the "unusually protracted course of litigation." Additionally, in the case of Guidry v. Booker Drilling Co., 901 F.2d 485, 23 BRBS 82 (CRT) (**5th Cir.** 1990) the court found that interest was owed on an unpaid attorney fee in an enforcement proceeding. The court found that counsel was entitled to pre-and post- judgment interest noting that interest provides an incentive for attorneys to represent longshoremen because they will receive the full value of the fees to which they are entitled under the LHWCA.

28.10 APPEALS OF FEE AWARDS

28.10.1 Standard of Review

The amount of a fee award is discretionary and may be set aside only if the challenging party shows the award is arbitrary, capricious, an abuse of discretion, or not in accordance with the law. Offshore Food Serv., Inc. v. Benefits Review Bd., 524 F.2d 967 (**5th Cir.** 1975); Rogers v. Ingalls Shipbuilding, 28 BRBS 89 (1993); Devine v. Atlantic Container Lines, 23 BRBS 280 (1990); Picinich v. Lockheed Shipbuilding, 23 BRBS 128 (1989); Maddon v. Western Asbestos Co., 23 BRBS 55 (1989); Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989); Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988); Powers v. General Dynamics Corp., 20 BRBS 119 (1987); Stowars v. Bethlehem Steel Corp., 19 BRBS 134 (1986).

In Marcum v. Director, OWCP, 12 BRBS 355, 358 (1980), a black lung case, the Board held that abuse of discretion must be found in cases where improper standards or procedure have been applied and in cases where there is a clearly erroneous finding of fact.

The Board has affirmed fee reductions where fully explained and reasonable. Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989); Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989). See Davenport v. Apex Decorating Co., Inc., 18 BRBS 194 (1986); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984).

Burdens

Pursuant to 20 C.F.R. § 702.132(a), any counsel seeking an attorney's fee has the burden to produce a fee petition which is supported by a complete statement of the extent and character of the necessary work done. Parks v. Newport News Shipbuilding & Dry Dock Co., 32 BRBS 90(1998).

The party challenging a fee award bears the burden of showing that the award is unreasonable, i.e., arbitrary, capricious, or an abuse of discretion. Corcoran v. Preferred Stone Setting, 12 BRBS 201 (1980); Branda v. Universal Maritime Serv. Corp., 7 BRBS 546 (1978); McCue v. International Terminal Operating Co., 4 BRBS 235 (1976). See also Doty v. Farmers Export Co., 12 BRBS 785 (1980) (award is not *per se* unreasonable where judge awards all attorneys in consolidated cases the same fee).

Where employer makes general allegations that a fee is excessive or unreasonable, without challenging specific findings or providing support for the allegation, it fails to meet the burden of proving that the fee is unreasonable. Maddon v. Western Asbestos Co., 23 BRBS 55 (1989); Forlong v. American Sec. & Trust Co., 21 BRBS 155 (1988); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941 (**5th Cir.** 1991). See also Le Batard v. Ingalls Shipbuilding Div., Litton Sys., 10 BRBS 317 (1979) (employer's mere assertion that rate is not a customary local rate is insufficient).

Similarly, the claimant does not show an award is inadequate by arguing that a greater fee is due because of results obtained or otherwise showing the ALJ's reason for a reduction are unsupported. See Lopez v. Atlantic Container Line, Ltd., 6 BRBS 458 (1977); Weber v. General Dynamics Corp., 5 BRBS 112 (1976). See also Jaqua v. Pro-Football, Inc., 12 BRBS 572 (1980) (claimant met his burden where judge's specific findings did not support his reductions).

Generally, if the Board finds the judge's fee award was erroneous, it will vacate and remand the award for reconsideration or sufficient explanation. Beacham v. Atlantic & Gulf Stevedores, Inc., 7 BRBS 940 (1978). The Board has, however, occasionally modified the ALJ's award instead of remanding the case. Tornabene v. Marine Repair Serv., Inc., 12 BRBS 532 (1980); Freer v. Duncanson-Harrelson Co., 9 BRBS 888 (1979), aff'd in part, rev'd in part on other grounds sub nom. Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336 (**9th Cir.** 1982), vacated on other grounds, 462 **U.S.** 1101 (1983), decision on remand, 713 F.2d 462 (**9th Cir.** 1983); De Felice v. Pittston Stevedoring Corp., 8 BRBS 206 (1978).

The courts have questioned the Board's authority to modify a fee award and, in a case arising under the Federal Mine Safety and Health Act, the **Third Circuit** found that the Board exceeded its authority when it modified a judge's fee award since the record did not contain sufficient findings by the judge concerning the factors he relied upon in making the award. Director, OWCP v. U.S. Steel Corp., 606 F.2d 53 (**3d Cir.** 1979).

In Hilyer v. Morrison-Knudsen Construction Co., 670 F.2d 208 (**D.C. Cir.** 1981), rev'd on other grounds sub nom. Morrison-Knudsen Construction Co. v Director, OWCP, 461 **U.S.** 624 (1983), however, the court held that the Board has the authority to modify a fee award where the determination of the fee is based solely on the record and the complete record is before the Board. See also Peterson v. Washington Metro. Area Transit Auth., 13 BRBS 891 (1981) (Board finds remand is unnecessary in the interest of judicial economy when Board is presented with a full factual record in the case).

If the ALJ fails to address a fee application for services rendered before him, the Board will remand to the judge to make a determination on the fee request. Ramos v. Universal Dredging Corp., 15 BRBS 140 (1982); Longo v. Universal Terminal & Stevedoring Corp., Inc., 2 BRBS 357 (1975).

28.10.2 Timely Appeal/Finality

Board review of a fee award must be sought within 30 days after the award. See Hawkins v. Golden Commissary, 8 BRBS 664 (1978); 33 U.S.C. § 921(a); 20 C.F.R. § 802.205. If a motion for review is not filed timely, the Board will grant a motion to dismiss. Beavers v. Lockheed Shipbuilding & Constr. Co., 1 BRBS 490 (1975).

If a claim is appealed timely pursuant to Section 21(a), the fee award is not final. A fee award is not a "compensation order" and, therefore, does not become effective until all appeals are

exhausted. Wells v. Int'l Great Lakes Shipping Co., 693 F.2d 663 (**7th Cir.** 1982); Spinner v. Safeway Stores, Inc., 18 BRBS 155 (1986); Williams v. Halter Marine Service, Inc., 19 BRBS 248, 253 (1987); Jenkins v. Federal Marine Terminal, 14 BRBS 380 (1981).

[ED. NOTE: *The law is well established that an award of attorney's fees and costs is not enforceable, and therefore not collectible, until all appeals are exhausted. Williams v. Halter Marine Service, Inc., 19 BRBS 248, 253 (1987). However, the ALJ can proceed in one of two ways. The judge can either postpone adjudicating all attorney fee related issues pending the outcome of the appeal of the case-in-chief, or the ALJ can proceed to adjudicate these issues but hold the awarding of an actual attorney fee in abeyance until the outcome of the appeal. The reader is cautioned that, no matter which method the ALJ chooses the party should not unilaterally ignore an attorney fee related order (i.e., order to file an attorney fee request or brief the fee request, or brief the opposition to the fee request) simply because the case-in-chief has been appealed. The party that does so, does so at his or her own peril.]*

Fee awards are not subject to enforcement under Section 18 during pendency of an appeal. Wells, 693 F.2d 663; Williams v. Halter Marine Serv., Inc., 19 BRBS 248 (1987) (citing Bruce v. Atlantic Marine, Inc., 12 BRBS 65 (1980)); Jenkins, 14 BRBS 380. Therefore, although the ALJ may award fees for a claim that has been appealed, such fees **need not be paid until** the compensation order becomes final, and no stay of payment of the fees is necessary. Jenkins, 14 BRBS 380; Bruce v. Atlantic Marine, Inc., 12 BRBS 65 (1980), aff'd, 661 F.2d 898 (**5th Cir.** 1981).

Although the ALJ has jurisdiction to grant an unenforceable attorney's fee for purposes of administrative convenience while a case is on appeal, the exercise of such jurisdiction is discretionary. Bruce v. Atlantic Marine, 12 BRBS 65 (1980); Norat v. Universal Terminal & Stevedoring Corp., 9 BRBS 875 (1979); Kilsby v. Diamond M Drilling Co., 8 BRBS 473 (1978). Therefore, it is within the administrative law judge's discretion to determine that a fee petition received while a case is on appeal is premature. Section 28 manifests a Congressional intent to assess attorney fee liability on an employer only when the claimant is ultimately successful. See Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 **U.S.** 240, 262 (1975); Hole v. Miami Shipyards Corp., 640 F.2d 769 (**5th Cir.** 1981).

As attorney's fees are not "compensation," Section 22 does not apply and fee awards may not be modified. Greenhouse v. Ingalls Shipbuilding, Inc., 31 BRBS 41 (1997); Fortier v. Bath Iron Works Corp., 15 BRBS 261 (1982).

Note, however, that in Vonthronsohnhaus v. Ingalls Shipbuilding, Inc., 24 BRBS 154 (1990), although the Board remanded the case for consideration of the issue of suitable alternative employment, it also held that the judge's prior award of fees was due and payable. The Board deemed the fee award final in this case because employer did not challenge the claimant's entitlement to benefits on appeal, and the Board found that the claimant would at least be entitled to permanent partial disability exceeding the employer's voluntary payments. Id.

28.10.3 Direct Appeal

Since assessment of an attorney's fee by the district director is a discretionary act, review of a fee award, in general, is properly sought by filing a notice of appeal with the Board. The judge has no discretion to review the adequacy of a fee award approved or awarded by the district director for services performed at the Director's level. Mazzella v. United Terminals, 8 BRBS 755, reaff'd on recon., 9 BRBS 191 (1978); Ellis v. Blake Constr. Co., 8 BRBS 650 (1978); Hawkins v. Golden Commissary, 8 BRBS 664 (1978); Campbell v. Blake Constr. Co., 8 BRBS 667 (1978). Cf. Pratt v. Honolulu Shipyard, Inc., 23 BRBS 297(ALJ)(1989).

Unless an issue of fact is presented, attorney's fee awards by the district director, regarding both amounts and liability should be directly appealed from the district director to the Board. Jarrell v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 216 (1987).

When the appeal regarding the fee involves a legal issue, the proper route for the appeal is directly to the Board. Taylor v. Cactus Int'l., Inc., 13 BRBS 458 (1981); Tupper v. Teledyne Movable Offshore, 13 BRBS 614 (1981); Lonergan v. Ira S. Bushey & Sons, Inc., 11 BRBS 345 (1979).

Where the appeal of a fee award involves a factual issue, however, the case must be referred to an ALJ. Mazzella v. United Terminals, 8 BRBS 755 (1978). Initially, the Board held that liability for attorney fees involves a question of fact and, consequently, that where liability for a fee is not resolved, resort must be had to the formal hearing procedure. Jarrell v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 423 (1979). See Baker v. Todd Shipyards Corp., 12 BRBS 309 (1980).

In Glenn v. Tampa Ship Repair & Dry Dock, 18 BRBS 205 (1986), however, the Board held that direct appeal to the Board of issues involving attorney fee liability is appropriate where no factual issues are disputed. The Board overruled Jarrell, as well as Taylor, to the extent that those decisions are inconsistent with this holding.

[ED. NOTE:** Jarrell had indicated that the legal issue of whether or not a claimant or employer is liable for fees must first be reviewed by an ALJ. In Glenn, the Board found that such an issue should be appealed directly to the Board. Taylor had indicated that a controversy regarding attorney's fee liability is a factual determination to be made by the ALJ. In Glenn, the Board found the contrary, that is, that fee liability is generally a legal issue as it usually involves an application of Section 28 to the uncontested circumstances of a case.**]

In Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 33 BRBS 209 (CRT)(**9th Cir.** 2000), cert. denied, 121 S.Ct. 378 (2000), the **Ninth Circuit** determined that a party challenging an attorney's fee award made by the district director does not have a right to a formal hearing before the OALJ when there are no factual issues in dispute. According to the **Ninth Circuit**, Section 19(c) "does not necessarily require an evidentiary hearing before an ALJ on all contested issues" and

Section 19(d) "does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues."

This determination is "at odds" with the **Seventh Circuit's** opinion in Pearce v. Director, OWCP, 647 F.2d 716 (**7th Cir.** 1981). The Pearce court concluded that the LHWCA and its regulations made no distinction between requests for hearings on claims that are "adjudicatory" in nature and those that are "administrative" in nature. Therefore, the Pearce court held that the district director has a duty to transfer disputes to the OALJ because the Board has "no authority to consider or review the evidence that [has] been gathered by the deputy commissioner" because the Board can only review a "hearing record" and such a record can only be developed in an ALJ proceeding.

28.10.4 Requirements Regarding Objections Below

An employer must raise objections to an attorney's fee application or award in a timely fashion, exhausting remedies at the hearing level and preserving issues for appeal. Monahan v. Portland Stevedoring Co., 8 BRBS 653 (1978). Generally, if the employer does not object to the award of a fee below, it cannot object to the fee on appeal. Sea-Land Servs., Inc. v. Director, OWCP, 685 F.2d 1121 (**9th Cir.** 1982); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989); Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989); Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988). Moreover, if the employer objects to the fee below based on one issue, but raises a new issue on appeal, the Board will not consider the new issue. Corcoran v. Preferred Stone Setting, 12 BRBS 201 (1980).

The refusal to consider issues not raised below is limited, however, and does not extend to legal issues arising after the judge's decision and order is issued.

Cases:

(1) The Board considered the director's objection to the assessment of a fee against the Special Fund raised for the first time on appeal, where the judge made the assessment in a supplementary order. Monaghan v. Portland Stevedoring Co., 11 BRBS 190 (1979).

(2) In Luna v. Todd Shipyards Corp., 12 BRBS 70 (1980), the Board considered the issue concerning the propriety of awarding an attorney's fee contemporaneously with a compensation award even though the issue was not raised below since the Board found the issue did not arise until after the administrative law judge's decision was issued.

Although the duty to object is generally that of the employer, where the claimant fails to object to the judge's award of fees and costs of the first administrative hearing, but raised an objection after the ALJ's decision on remand, the Board refused to consider the objection since it was raised untimely. Morgan v. Marine Corps Exch., 14 BRBS 784 (1982).