A MOVABLE OBJECT: ATTORNEY FEE AWARDS UNDER SECTION 28 OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. § 928 (1994)

INTRODUCTION

This paper focuses on the development, current application, and recent judicial interpretation of attorney fee awards under Section 28 of the Longshore and Harbor Workers' Compensation Act.

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I. INTRODUCTION

In 1927, the Longshore and Harbor Workers' Compensation Act ("LHWCA")[1] was passed to provide protection for shoreside maritime workers[2] in case of personal injury or death sustained in the course of their employment. Since its creation, the LHWCA has provided a legal remedy for injured maritime workers, or their families in cases of death, to compensate them for lost wages and medical expenses. The enforcement of injured workers' rights is paramount to the foundation of the Act. When a worker files a claim under the LHWCA, the Department of Labor acts as an intermediary between the claimant, the employer, and the insurance carrier. The Department of Labor also assumes the role of an advocate for claimants to aid in the protection of their rights and to further their interests.[3] Despite the Department of Labor's stance as an advocate, a claimant is still entitled to hire an attorney to act on his behalf. Under certain circumstances, however, the employer or insurance carrier must pay the claimant's attorney's fees and expenses under the provisions of the Act. Section 28 of the LHWCA, together with its

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[1] 33 U.S.C. §§ 901-950 (1994).

[2] Persons engaged in maritime employment may be separated into two broad groups. The first group consists of members of the crew of a vessel in navigation and are covered under the Jones Act. The focus of this article, however, deals with the second group of maritime workers. Generally, this group consists of local waterfront workers doing a variety of ship to shore duties. For example, longshoremen, harbor workers, ship repairmen, shipbuilders, and shipbreakers. *See* 1A BENEDICT'S ON ADMIRALTY 1-2 (Matthew Bender 1994).

[3] "The Director shall, upon request, provide persons covered by the Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim." 20 C.F.R. § 702.136 (1997).

accompanying regulations,[4] provides the authority for the award of these fees to a claimant's attorney. Although the general policy behind attorney fee awards is sound, problems have arisen with section 28 as to when fees can be assessed, whether all conditions in section 28 have been met, and, if imposed, whether such fees are commensurate with the services rendered.[5]

Much of the current discussion regarding the payment of attorneys' fees centers around the various decisions by Administrative Law Judges, the Benefits Review Board, and the federal Circuit Courts interpreting section 28 since the Act's amendments in 1972. Despite the express directives of section 28, the case law has developed into an ever-growing list of reasons for the employer to be responsible for claimants' attorneys' fees. As a result of the difficult application of section 28 and the continued disparity among court decisions, attorney fee awards under the Act have become an increasingly litigated issue. At the core of confusion surrounding section 28 are issues such as what constitutes "successful prosecution" of a claim and what factors should be considered in calculating "reasonable" attorneys' fees. Often times, this leads to gridlock following an award or agreement regarding compensation and medical benefits because a determination must still be made whether a fee is owed and, if so, the amount of such fee. Ultimately, this struggle over attorney fee awards as an additional benefit may prove to be a detriment to everyone involved--the employer, carrier, and claimant.

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[4] *See* 20 C.F.R. §§ 702.132-702.135 (1997).

[5] *See* 1A BENEDICT'S ON ADMIRALTY 4-261 (Matthew Bender 1994) (stating that "[i]n order to ensure that able and experienced attorneys are available to claimants seeking enforcement of their rights under the Act, such fees are to be commensurate with the services rendered").

II. THE DEVELOPMENT OF ATTORNEY FEE AWARDS UNDER SECTION 28

A. An Early Concept: Liens on Compensation

The entitlement of the claimant's counsel to an attorney's fee award from the employer or insurance carrier is governed by section 28 of the LHWCA.[6] At the time of the creation of the Act, section 28 provided that claims for legal services, once approved by the Deputy Commissioner, would act as a lien upon the claimant's compensation.[7] This lien would act to reduce the amount of compensation paid to the Claimant. For instance, it could be deducted from a lump sum settlement or from weekly compensation checks paid to an injured claimant. The effect of this did not preclude a claimant from retaining an attorney to aid him in prosecuting his claim. However, it did prohibit the fees from being assessed directly against an employer or insurance carrier, regardless of the outcome of the claim. Thus, prior to 1972, "no statutory provision imposed liability upon the employer for a separate award of attorney's fees."[8] This was the established rule regarding attorneys' fees until the passage of the 1972 Amendments to the LHWCA.

B. The Turning Point: The 1972 Amendments

In 1972, Congress enacted amendments which extensively revised the LHWCA. In adopting the amendments, Congress established that "adequate workmen's compensation benefits are not only

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[6] *See* 33 U.S.C. § 928.

[7] *See* Savannah Machine & Shipyard Co. v. Director, OWCP, 642 F.2d 887, 888 (5th Cir. 1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1180 (9th Cir. 1976).

[8] *Savannah*, 642 F.2d at 888.

essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."[9] The amendments, among other things, restructured section 28 thereby changing the prior scheme which had previously placed a lien on the claimant's compensation.

Congress essentially created exceptions to the rule that claimants must pay their own attorneys' fees. The Act specifies two situations in which an attorney's fee can be awarded against an employer or its insurance carrier.[10] These exceptions are contained in section 28(a) and 28(b).[11] Generally speaking, section 28(a) applies when an employer denies a claimant's entitlement to *any* compensation or continued compensation benefits.[12] Conversely, section 28(b) applies when there is a controversy as to the *nature and extent* of the claimant's disability.[13] The language of the amendments unequivocally established that these are the only two exceptions: "In all other cases any claim for legal services shall not be assessed against the employer or carrier."[14] Equally important as the express language contained in section 28 is the legislative intent behind the Act. An examination of Congress' intent reveals the crucial distinction between sections 28(a) and

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[9] H. Rep. No. 1441, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 3 U.S. Code Cong. Admin. News 4698, 4699 (1972).

[10] *See Savannah Machine*, 642 F.2d at 888-89.

[11] 33 U.S.C. § 928.

[12] *See* 33 U.S.C. § 928(a).

[13] *See* 33 U.S.C. § 928(b); Baker v. Todd Shipyards Corp., 12 BRBS 309 (1980).

[14] 33 U.S.C. § 928(b).

28(b).[15] The difference in applying section 28(a) or 28(b), essentially, is whether the employer or carrier has paid any compensation to the claimant for his claim. Therefore, because section 28 provides the only statutory authority to award attorneys' fees to a claimant's attorney, if neither of the conditions in section 28(a) nor 28(b) are present, then each litigant must bear his or her own attorney's fees.

The amendments have, in effect, created a third form of compensation or benefit that a claimant could not previously recover under the LHWCA. This new trilogy consists of medical benefits, wage compensation, and attorneys' fees. Section 28, as amended, now represents another financial safety net of the LHWCA, as well as, a significant source of exposure to loss for an employer and carrier.

C. The American Rule

The limitation imposed by section 28 on an employer or insurance carrier's liability for payment of a claimant's attorney's fee is in accord with the general practice followed in the

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[15] In the section-by-section analysis of Senate Bill 2318, the report states in relevant part:

> *Section 13* amends section 28.
>
> Subsection (a) would require the award of an attorney's fee payable by the employer if the employer had refused payment of compensation and the employee had hired an attorney to successfully prosecute a claim. The fee would be approved by the deputy commissioner, Board, or Court, as applicable.
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> Subsection (b) would require an informal conference before the deputy commissioner if the employer offered to pay compensation without an award and there was a controversy over the amount of compensation.

S. Rep. No. 1125, 92d Cong., 2d Sess. 22-23 (1972), *reprinted in* 1 Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, at 84-85 (1972).

American judicial system. Under the well-established American rule used in the federal courts, "'absent statute or enforceable contract, litigants pay their own attorney's fees.'"[16] In their continued support of the American rule, Congress stated that "[i]n all cases other than those specified above [sections 28(a) and 28(b)], attorneys' fees may not be assessed against the employer."[17] With the enactment of the 1972 amendments, Congress has sought to provide an incentive for employers to pay valid claims instead of contesting them and also to ensure that the value of an employee's statutory benefits could not be diminished by the costs of legal services.[18] Therefore, if an employer or carrier does not comply with the Department of Labor by paying or tendering compensation to the claimant, then they will be subject to the provisions of section 28. However, if the employer or carrier does adhere to the provisions, then contrary findings impose obligations upon the employer outside of the statutory language.

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[16] Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1004 (5th Cir. 1995) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975)); *accord* Holliday v. Todd Shipyards Corp., 654 F.2d 415, 419 (5th Cir. 1981), *overruled on other grounds*, Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (5th Cir. 1990); Director v. Robertson, 625 F.2d 873, 876 (9th Cir. 1980).

[17] H. Rep. No. 1441, 92d Cong., 2d Sess. 20 (1972), *reprinted in* 3 U.S. Code Cong. & Admin. News 4698, 4717 (1972).

[18] *See* Oilfield Safety & Mach. Specialties v. Harman Unlimited, 625 F.2d 1248, 1257 (5th Cir. 1980).

III. THE CURRENT APPLICATION OF ATTORNEY FEE AWARDS UNDER SECTION 28

A. Section 28(a): Successful Prosecution of a Claim

The LHWCA specifically sets out the only two situations in which fees can be awarded against an employer and/or its insurance carrier. The first of these two provisions, 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 ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier 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.[19]

When a claimant initially sustains an injury in the course of his employment, he is required to file an "Employee's Claim For Compensation" (LS-203) which is issued by the United States Department of Labor's Employment Standards Administration Office of Workers' Compensation Programs. Once the Department of Labor receives his LS-203, it will file a "Notice To Employer And Insurance Carrier That Claim Has Been Filed" (LS-215a). For purposes of section 28(a), this acts as notice of the claimant's claim and is paramount in determining whether attorneys' fees can be assessed against the employer and/or insurance carrier. As such, the courts have found that notice *must* be received by the employer from the Department of Labor in order to trigger an award of attorneys' fees. This requirement has been strictly interpreted even when an employer had actual

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[19] 33 U.S.C. § 928(a).

written notice.[20] Thus, by its own terms, section 28(a) may be invoked *only* when an employer fails to pay *any* compensation to a claimant within thirty days after receiving written notice of the claimant having filed a claim. Therefore, section 28(a) is rendered inapplicable in any case where the employer is voluntarily paying compensation and medical expenses[21] prior to the claimant filing an LS-203 *and* prior to the employer receiving written notice from the Department of Labor.[22]

The Fifth Circuit, in *Savannah Machine & Shipyard Co. v. Director, OWCP*,[23] recognized that whether section 28(a) applies to the facts of a given case depends on whether the employer has timely paid compensation benefits: "Section 28(a) authorizes the award of attorney's fees in cases in which the employer refuses to pay any compensation for a work-related injury and the claimant consequently uses the services of an attorney to successfully prosecute his or her claim."[24]

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[20] *See* Watkins v. Ingalls Shipbuilding, Inc., 26 BRBS 179 (1985). The BRB focused on the actual source of the notice to the employer. The employer and the Department of Labor received an LS-203 on April 8, 1987 and a Notice of Controversion was filed on April 20, 1987. The District Director did not forward the LS-203 until December 1, 1987. Despite written notice eight months prior, the employer was not found liable for fees prior to December 1, 1987. *Id.*

[21] The claimant's employer/carrier is required to file a "Payment Of Compensation Without Award" (LS-206) with the Department of Labor. This form acts to notify the Department of Labor that the employer/carrier is paying compensation benefits to the claimant without a formal award from a claims examiner from the Department of Labor.

[22] For evidentiary purposes, the date that the LS-203 is filed, the date of receipt of notice, and the beginning date of compensation payments can be confirmed by the Department of Labor.

[23] 642 F.2d 887 (5th Cir. 1981).

[24] *Id.* at 889.

Where an employer pays some compensation without an award and within the thirty-day period, section 28(a) does not apply.[25] The Court ultimately opined that "33 U.S.C. § 928(b) rather than § 928(a) of the Act applies here because the Company had already tendered some compensation to [the claimant]."[26]

The express provisions of section 28(a) encourage the employer to further the basic policy of the Act, namely, to provide prompt and certain payment of compensation to injured workers without protracted litigation.[27] If an employer does not pay benefits timely, it will be subject to the provisions of section 28(a), thereby owing the claimant's attorney's fees. Conversely, if an employer does pay benefits timely, it is not required to pay a claimant's attorney's fees unless all of the detailed conditions of section 28(b) occur. Thus, making timely payment of benefits provides an incentive for employers and carriers to avoid being liable for such fees. If an employer pays compensation within the time allowed under section 28(a) and thus, avoids liability, the Claimant may still establish entitlement to fees pursuant to section 28(b). This section provides for the only other statutory circumstance for assessment of a reasonable attorney's fee for the claimant against an employer or insurance carrier.

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[25] *Id.*; *see also* Henley v. Lear Siegler, Inc., 14 BRBS 970, 973 (Ben. Rev. Bd. 1982).

[26] *Id.*; *see also* George Hyman Construction Co. v. Brooks, 963 F.2d 1532, 1536 n.2 (D.C. Cir. 1992).

[27] *See Savannah Machine*, 642 F.2d at 889 n.6; *see also Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir. 1972) (noting the legislative intention to encourage the voluntary payment of compensation benefits to injured employees and to discourage the utilization of formal judiciary proceedings).

B. Section 28(b): Successful Prosecution for Additional Compensation

Section 28(b) is the second and final provision which provides the authority for an award of an attorney's fee to a claimant's attorney from the employer and/or its insurance carrier. Section 28(b) provides:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, 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 refuse 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 907(e) of this title 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.[28]

Rather than a "twin" provision, section 28(b) stands in sharp contrast to section 28(a). The

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[28] 33 U.S.C. § 928(b).

first of these provisions, section 28(a), simply requires the employer or carrier to decline to pay any compensation within 30 days of receipt of written notice of a claim for compensation on the ground that there is no liability for compensation under the Act. In other words, the employer or carrier refuses the claim in its entirety. However, the second provision, section 28(b), provides for the more complex situations that arise when the employer or carrier pays the claim initially, but a dispute arises at some point over the amount of compensation that is owed.

IV. AREAS OF DIFFICULTY

It is important to recognize that just because there is a dispute and the claimant hires an attorney, responsibility is not automatically transferred for the payment of attorneys' fees from the claimant to the employer. Instead, section 28(b) sets forth a series of events that must occur before the payment of attorneys' fees shifts from the claimant to the employer. These mandates are the source of confusion and litigation which have plagued attorney fee awards under the Act.

A. Conditions Precedent to Section 28(b)

1. Payment of Compensation

The first condition that must be present to invoke section 28(b) is for the employer or carrier to have paid or tendered payment of compensation without an award pursuant to section 914(a) and (b). Section 914(a) simply deals with the manner in which payments must be made to the claimant by the employer. It states that the employer is required to pay compensation "periodically, promptly, and directly to the person entitled thereto, without an award, except

where liability to pay compensation is controverted by the Employer."[29] Furthermore, section 914(b) sets forth the period in which the employer is designated to make installment payments to the claimant. It requires the first compensation payment to be made within fourteen days after the Employer learns of the injury or death.[30] Thus, if an employer or carrier has made payments to the claimant pursuant to sections 914(a) and (b), then the first condition of section 28(b) has been met.

2. The "Controversy"

Section 28(b) states that when "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 or Board shall recommend in writing a disposition of the controversy."[31] This clause simply means that there must be a "controversy" between the claimant and his employer over compensation payments.

There are two evident problems with this clause. First, the case law provides no definition for the term "controversy." Although this does not seem crucial at first glance, it becomes so

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[29] 33 U.S.C. § 914(a).

[30] 33 U.S.C. § 914(b). Section 912 outlines the notice requirements for a covered injury or death. *See* 33 U.S.C. § 912. Section 912(a) requires the employee to notify the employer and the Department of Labor within thirty days of the injury or death. In the case of occupational disease, notice is due within one year of the date the employee or the claimant becomes aware the disease is related to employment. Subsection 914(e) provides for an additional ten percent surcharge if it is not paid within the fourteen day period. The ten percent surcharge is subject to the right of the employer to controvert, in writing, by filing a form prescribed by the Secretary outlining the grounds for controversion. *See* 33 U.S.C. § 914(e).

[31] 33 U.S.C. § 928(b).

further into the statute because if an employer is held liable for attorneys' fees, then they begin to accrue from the date of said "controversy."

After the commencement of a claim, it is typical for questions to arise regarding the claimant's medical treatment and compensation payments. Examples of disputes for medical treatment include the changing of treating physicians, examinations by a physician of the employer's choice, or independent medical examinations by the Department of Labor. On the other hand, examples of compensation disputes involve such areas as the calculation of average weekly wage, the applicable compensation rate, the nature of the disability, periods of disability, or the degree of disability. All of these items have a direct and substantial effect on the compensation payments, if any, owed to the claimant. Moreover, these compensation and medical issues are often times related. For example, if one of the parties objected to a percentage disability rating to a scheduled member by a physician, a subsequent dispute regarding the compensation owed for the scheduled injury would be intertwined. Thus, absent any judicial or legislative guidance, the actual date of a controversy can be very allusive.

The second problem with this clause arises because the statute only addresses controversies as to compensation. Nowhere does the statute address controversies in the event that they relate solely to medical expenses. Therefore, a strict reading of the Act would cause a claimant to bear his own attorney's fees if his controversy related only to medical expenses.

3. The Employer's 14-Day Grace Period Following the Informal Conference

The Department of Labor, at the request of a party or on their own motion, will then hold

an informal conference to remedy a dispute between the parties.[32] Following the informal conference, the claim's examiner for the Department of Labor will then make written recommendations regarding the issues as provided for by statute.[33] The next step requires affirmative action by the employer. In relevant part, section 28(b) provides that "[i]f 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."[34] Hence, this clause gives the employer a fourteen day grace period in which to comply or to refuse the written recommendations of the Department of Labor. Strictly construed, no action may be taken by anyone during this time period until the employer has responded to the Department of Labor's recommendations.

4. Claimant's Utilization of Counsel

Once the employer takes action pursuant to his fourteen day window, the employee may then decide to refuse to accept such payment or tender of compensation, and thereafter utilize the

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[32] The claims examiners are charged with receiving claims, notifying the proper parties, investigating claims, and holding informal conferences to resolve disputes. *See* 33 U.S.C. § 919 (a)-(c). The goal of this procedure is to ensure informality with prompt decision-making. *See* Leonard v. Liberty Mutual Insurance Co., 267 F.2d 421, 424 (3rd Cir. 1959). However, if the matter cannot be amicably resolved without litigation, the claim is then referred to trial before an Administrative Law Judge. *See* 33 U.S.C. § 919(d).

[33] Despite the express provision mandating that the Department of Labor make written recommendations regarding the status or action to be taken by either side, it is not uncommon in practice for the Department to fail to comply with this provision.

[34] 33 U.S.C. 928(b).

services of an attorney.[35] Thus, according to the plain reading of section 28(b), it is not until all of the preceding conditions have occurred that the claimant's attorney's fees can be charged against the employer. Furthermore, the statute tends to entitle the claimant to attorney's fees when "thereafter utilizes the services of an attorney at law." If so, a claimant would never be able to recover attorney's fees until some point after the employer's fourteen day grace period following the Department of Labor's informal conference.

B. Calculating Attorney Fee Awards

In order to encourage the informal and amicable resolution of claims, the provisions of section 28(b) do not contemplate the award of attorneys' fees against the employer until the informal proceedings have broken down and it is necessary to resolve matters by trial. Consequently, section 28(b) limits the award of attorney's fees against the employer to services provided *after* the breakdown of the informal process in which the services must have resulted in a greater award than the amount already paid by the employer. Therefore, if all of the mandatory conditions of section 28(b) have been met and the claimant has hired an attorney, then "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."[36]

This is a unique clause in the statute because it poses a significant limit on an award amount. For instance, assume that an employer has paid the claimant $100,000.00 in compensation and medical benefits while still controverting the claim. Also, assume that the

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[35] *See* 33 U.S.C. 928(b).

[36] 33 U.S.C. § 928(b).

claimant, with the aid of an attorney, receives a judgment from an Administrative Law Judge or the Benefits Review Board for compensation totaling $102,000.00. Therefore, pursuant to section 28(b), the claimant's attorney should only receive a fee award based solely upon a net profit of $2,000.00. Typically, cases under the LHWCA take anywhere from a few months to several years to come to a close. If this is the scenario, then the benefits to a claimant's attorney in accepting such cases are substantially restricted. In LHWCA cases, claimants' attorneys argue that they spend substantial time on the cases and incur costs for legal assistants, law clerks, and legal secretaries, thereby substantiating a need for fees that are consistent with the work that they perform . On the other hand, employers and carriers hold that section 28(b) mandates that fees be based *solely* upon the difference between the amount awarded and the amount tendered or paid. Ultimately, there is a need for judicial and legislative clarification to address situations such as the one posed and to eliminate the ambiguity as to whether to award fees commensurate with services rendered or to follow the express provisions of section 28(b).

C. An Exception: Independent Medical Examinations

The clause at the end of section 28(b) provides an exception to the assessment of fees against an employer. It provides that if the controversies involve the extent or disability of the injury, and if the employer offers to submit the case to a physician selected by the Department of Labor and offers to tender compensation based on the evaluation of that doctor, then the "previous sentence" will not apply.[37] The "previous sentence" is the one granting reasonable attorneys' fees

[37] 33 U.S.C. 928(b).

to the claimant. Therefore, if the employer offers to submit the case to an independent medical examiner and offers to pay compensation according to his recommendation, then the employer will not be liable for the claimant's attorney's fees. This method of avoidance of attorneys' fees, however, is often times not exercised by employers or carriers. There are several reasons for this failure to act,[38] but one valid example involves the abundance of uncertainties surrounding a physician's diagnosis. A report from an OWCP physician may substantially alter the whole body impairment rating, the date of maximum medical improvement, or the vocational limitations of a claimant. This can result in dramatic changes to the amount of compensation and medical benefits that a claimant may be entitled to receive. The physician may make a finding which will substantially reduce the amount of benefits that a claimant may receive. However, the diagnosis may also significantly increase the amount that an employer must pay to the claimant. Even if the employer subsequently declines to make an offer based on the physician's report, it will not only be subject to attorneys' fees again, but it will have a significant finding against it when the time comes to settle or try the case. Therefore, this provision may be a gamble for the employer because, on one hand, it may exempt itself from an attorney's fee award, but, on the other hand, it may ultimately be to the detriment of the carrier if a higher disability rating is found. Nevertheless, it is important for all parties to a claim to be aware of the existence of this provision and the possible effects that it may have if it is utilized.

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[38] *See e.g.*, Universal Terminal & Stevedoring Corp. v. Parker, 587 F.2d 608 (3d Cir. 1978); Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984).

V. RECENT FIFTH CIRCUIT CASE LAW INTERPRETING SECTION 28

The following is a survey of recent Fifth Circuit case law interpreting section 28 of the LHWCA:

5th Circuit:	
Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997 (5th Cir. 1995)	*-holding the employer liable for attorney fees for ceasing payment of LHWCA death benefits and contesting compensability for underlying claim, whereby claimant successfully recovered the full amount of his claim*
Ingall's Shipbuilding, Inc. v. Director, OWCP, 991 F.2d 163 (5th Cir. 1993)	*-involving a worker who suffered work-related hearing loss but no "impairment" that was entitled to attorney fees only as to the successful claim for medical benefits for examination by audiologist; the fee had to be tailored to limited success*
Ingall's Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088 (5th Cir. 1990)	*-finding attorney fees award based on obtaining for claimants a lump-sum settlement under section of statute applicable to active workers could not stand after appeals court determined that recovery was properly based under a different section of the statute which did not provide for lump-sum payment*
Quave v. Progress Marine, 918 F.2d 33 (5th Cir. 1990)	*-stating that a claimant who succeeded in recovering an award of prejudgment interest on benefits under the LHWCA could be awarded attorney fees, where employer had denied interest claim*

V. CONCLUSION

The importance of the LHWCA is clear. It provides statutory protection for injured maritime workers, or their families in cases of death, for the recovery of lost wages and medical expenses.

These remedies constitute the legislature's attempt to compensate longshore and harbor workers who have been legitimately injured in the course of their employment. However, pursuing these "hard" damages is not as simple as the workers or their families may expect. Naturally, there is a struggle between the claimant, the employer, and the insurance carrier. Thus, it is necessary for claimants to utilize the services of an attorney.

Consistent with the American rule regarding attorney fees, claimants must bear their own costs. However, as examined, section 28 provides two instances when the claimant's employer must pay for the claimant's attorney. These exceptions penalize employers who either refuse to pay anything to a claimant or who pay, but the court later finds that additional money is owed to the claimant.

Because section 28 is the only authority to assess attorney fee awards against employers and carriers in longshore claims, it has become an increased area of maritime litigation. This is fueled especially in light of the inconsistency among decisions by Administrative Law Judges, the Benefits Review Board, and the federal Circuit Courts. Inevitably, ambiguity and confusion are the result. Ultimately, however, in wading through the merky waters of section 28, the original intent of Congress should not be lost; that is, to protect the rights of injured claimants and to provide full compensation to them and their families.