

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 23-0312

WILLIAM J. BURTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DELTA TERMINAL SERVICES)	
)	
and)	
)	
THE GRAY INSURANCE COMPANY)	DATE ISSUED: 08/12/2024
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order of Denial of Attorney Fee Application and the Order Denying Motion to Reconsider Order of Denial of Attorney Fee Application of David A. Duhon, District Director, United States Department of Labor.

William S. Vincent, Jr., and W. Jared Vincent (The Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for Claimant.

Christopher M. Landry and Kyle C. Matthias (The Monson Law Firm, LLC), Mandeville, Louisiana, for Employer and its Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals the Order of Denial of Attorney Fee Application and the Order Denying Motion to Reconsider Order of Denial of Attorney Fee Application of District Director David R. Duhon (OWCP No. LS-07159117) rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Pool Co. v. Cooper*, 274 F.3d 173, 178 (5th Cir. 2001).

This is the third time this case is on appeal before the Benefits Review Board. In pertinent part, Claimant sustained work-related injuries on December 14 and 20, 2000, Employer filed a Notice of Controversion on January 3, 2001, after receiving notice of the injuries but voluntarily paid disability compensation and provided medical benefits until terminating all benefits on December 26, 2001.¹ Thereafter, on February 21, 2002, Claimant filed a claim with the Office of Workers' Compensation Programs (OWCP) for additional disability and medical benefits. On May 7, 2004, Administrative Law Judge C. Richard Avery (ALJ) awarded Claimant additional total disability benefits, reimbursement for reasonable and necessary medical expenses, and continuing medical treatment with Dr. Narinder Gupta and Dr. Robert Davis. *Burton v. Delta Terminal Servs.*, Case No. 2003-LHC-00971, slip. op. (ALJ May 7, 2004).² On May 16, 2005, the Board vacated the award

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because Claimant was injured in Louisiana. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

² In a supplemental decision and order, the ALJ awarded Claimant's counsel an attorney's fee of \$20,906.25 and \$4,638.25 in expenses, to be paid by Employer. The ALJ did not indicate whether Employer was liable under Section 28(a) or (b), 33 U.S.C. §928(a),

for medical treatment and remanded the case to the ALJ to determine whether Claimant sought authorization for treatment with Dr. David Rosenfeld, Dr. John McCain, and Dr. Gupta, and whether treatment rendered by Drs. Rosenfeld and McCain was reasonable and necessary. *Burton v. Delta Terminal Servs.*, BRB No. 04-0752, slip. op. (May 16, 2005) (unpub.). On remand, the ALJ found Claimant sought authorization for treatment with Dr. Gupta but not Drs. McCain and Rosenfeld. *Burton v. Delta Terminal Servs.*, Case No. 2003-LHC-00971, slip. op. (ALJ Oct. 19, 2005). Claimant appealed, and Employer cross-appealed the decision. On September 28, 2006, the Board modified the ALJ's award for reimbursement of Dr. Gupta's treatment prior to December 17, 2001, reversed the ALJ's denial of medical treatment with Drs. McCain and Rosenfeld, and remanded the case to the ALJ to determine whether the treatment Claimant received from Drs. McCain and Rosenfeld was reasonable and necessary. *Burton v. Delta Terminal Servs.*, BRB Nos. 06-0222/A, slip. op. (Sept. 28, 2005) (unpub.). In his second decision on remand, the ALJ found the treatment Dr. McCain rendered was reasonable and necessary, but Dr. Rosenfeld's treatment was not. *Burton v. Delta Terminal Servs.*, Case No. 2003-LHC-00971, slip. op. (ALJ June 12, 2007).³ Neither Claimant nor Employer appealed the second decision on remand.

During adjudication of his claim, Claimant continued treating with his chosen pain management physician, Dr. Gupta, until February 24, 2005. According to Dr. Gupta, he stopped treating Claimant because he had not received payment from Employer for his bills and required Claimant to pay out-of-pocket for treatment. Claimant's Exhibit on Reconsideration (CXR) 2.⁴ On December 7, 2009, Dr. Gupta notified Claimant's counsel there was an outstanding balance of \$15,870.19 on Claimant's account for treatment provided through February 2005. CXR 6 at 1. Claimant returned to Dr. Gupta for treatment in December 2011. CXR 2.

On October 31, 2013, Claimant's counsel sent Employer a letter demanding \$5,760 for Claimant's out-of-pocket expenses for treatment with Dr. Gupta between June 21, 2012,

(b); however, counsel indicates, and the Director, Office of Workers' Compensation Programs (Director) seems to agree, the fee was awarded under Section 28(a). Cl. Pet. For Rev. at 1-2; Cl. Brief at 4; Dir. Resp. Brief at 3.

³ In a third supplemental decision and order, the ALJ awarded Claimant's counsel a fee of \$3,687.50 to be paid by Employer, noting Employer did not raise any objections to the fee petition.

⁴ Dr. Gupta confirmed he received \$14,160.81 from Employer on December 27, 2005, in payment for Claimant's treatment bill.

and October 8, 2013. CXR 7. Employer responded on December 10, 2013, stating it had no record of Claimant's treatment with Dr. Gupta since December 2004 and would not reimburse the expenses until it received the bills on Health Care Financing Administration (HCFA) forms and contemporaneous treatment notes showing the treatment was reasonable and necessary for Claimant's work injuries. CXR 4. On January 13, 2014, Claimant's counsel forwarded Employer's response to Dr. Gupta and requested he provide the necessary documentation. CXR 6 at 2. On June 30, 2015, Employer sent Dr. Gupta a letter requesting the bills and corresponding medical treatment reports for processing. *Id.* at 3. On October 6, 2015, Claimant sent a letter to Dr. Gupta requesting itemized bills for all treatment rendered to Claimant. *Id.* at 12-15.

In the meantime, on April 30, 2015, Employer filed a motion for modification of the ALJ's award of benefits based on a change in Claimant's condition. 33 U.S.C. §922. Because Claimant had not treated with either Dr. McCain or Dr. Gupta since 2009, Employer asserted there was no documentation to substantiate any ongoing disability. CXR 8.⁵ On November 18, 2015, Employer withdrew its petition for modification in light of Dr. Gupta's August 2015 treatment report indicating Claimant was still disabled. CXR 6 at 18. On December 3, 2015, Claimant's counsel filed a fee petition, requesting \$18,318.35 for work performed from August 24, 2007, through November 24, 2015, and costs from March 5, 2008, through October 16, 2015. Employer opposed the fee petition.

On May 12, 2016, Claimant requested an informal conference to address his outstanding medical bills and reimbursement of his out-of-pocket medical expenses. Along with his request, he submitted a letter from Dr. Gupta stating the doctor ceased treating Claimant because Employer did not provide payment for the treatment. CXRs 2,

⁵ Subsequently, on June 25, 2015, Employer filed a letter with the OWCP requesting an order requiring Claimant to attend an appointment with Dr. Gupta. Employer scheduled, and Claimant attended, an appointment with Dr. Gupta on August 5, 2015, during which Dr. Gupta opined Claimant remains disabled and recommended additional treatment. CXR 6 at 4-5. Claimant attended a second appointment with Dr. Gupta on September 24, 2015, and sought authorization for the recommended medical treatment, which Employer approved on September 28, 2015. *Id.* at 6-11. In addition, Claimant requested an informal conference to discuss Employer's pending claim for modification and its "refusal to pay back medical expenses." *Id.* at 10. On October 8, 2015, Claimant submitted documentation regarding his prescription medications from April 1, 2014, through October 6, 2015, to the OWCP. On October 27, 2015, Employer filed a Form LS-207, Notice of Controversy of Right to Compensation, objecting to payment for prescriptions written by physicians other than Dr. Gupta, Claimant's choice of physician. *Id.* at 16-17.

6 at 21-23. Claimant again requested an informal conference on July 11, 2016, and on December 14, 2016. *See* CXRs 3, 5, 6 at 25-31.

On January 18, 2017, the parties participated in an informal conference to address the issue of payments and reimbursement for Claimant's medical bills and prescriptions. The claims examiner deferred making a recommendation because additional documentation was needed from Dr. Gupta stating his reasons for not treating Claimant. Employer's Informal Conference Exhibit (EX) 2. On January 20, 2017, Claimant sent Employer Dr. Gupta's bills and treatment records. CXR 6 at 34. Pursuant to the informal conference memorandum, Claimant also provided a copy of Dr. Gupta's March 24, 2016 letter, CXR 2, to the OWCP. CXR 6 at 35-36. On February 2, 2017, Employer confirmed receipt of Dr. Gupta's bills and treatment records and promptly remitted payment to Dr. Gupta on February 21 and March 3, 2017. *Id.* at 38-42. Thereafter, Dr. Gupta directly reimbursed Claimant for cash payments (\$7,300) he received from Claimant for his treatment. *Id.* at 43-45.⁶

In January 2020, Claimant passed away. In an effort to "clean up all unresolved issues," Claimant's counsel sent a letter to Employer on August 18, 2022, regarding his outstanding fee petition from 2015, as well as a new fee petition for work performed from December 3, 2015, through April 5, 2017.⁷ On January 6, 2023, he filed an amended fee petition, requesting \$3,318.75 for work performed from December 3, 2015, to March 6, 2017. Employer filed its opposition to both fee petitions.

⁶ In April or May 2017, Claimant requested an informal conference to address Employer's reimbursement to Claimant for his prescription expenses and co-payments. Employer opposed Claimant's request, stating it did not receive medical reports showing the prescriptions were related to his work injury and the reasonableness and necessity of those prescriptions. It also noted it would not reimburse Claimant for prescriptions written by physicians other than Dr. Gupta. On May 15, 2017, Employer supplemented its response, stating it would not reimburse Claimant for any out-of-pocket prescription expenses he accrued during 2007, 2011, and 2017 because it had provided Claimant prescription cards during these years and there would have been no out-of-pocket expenses if he had used the prescription cards as directed. Meanwhile, Claimant continued requesting a full accounting of all his prescription bills that Employer paid or reimbursed, and on August 14, 2018, he filed a letter with the OWCP stating Employer owed Claimant \$40,598.30 for his prescription-related expenses.

⁷ Counsel requested a fee of \$4,784.38 for services rendered during this period.

On February 14, 2023, the district director held an informal conference to discuss the outstanding attorney's fee petitions.⁸ After the conference, Claimant's counsel submitted a February 15, 2023 letter from Dr. Gupta stating he provided Employer a copy of his medical treatment report and bill "shortly after each appointment" with Claimant. CXR 6 at 53. Employer responded, asserting Dr. Gupta's letter is "vague, ambiguous and does not provide a timeline for what medical bills he is actually asserting reimbursement for, or that he is referencing." Further, Employer contended Claimant previously made the same argument at the January 18, 2017 informal conference, and that Employer paid Dr. Gupta's bills upon receipt of the bills and his corresponding medical treatment records. With its response, Employer filed a letter and claim notes from Carrier's claims adjuster stating she had no record of receiving bills and medical treatment records from Dr. Gupta from December 6, 2011, through March 3, 2017. EX 1.

On March 10, 2023, the district director denied Claimant's counsel's petitions for an attorney's fee, finding counsel "has not established that he obtained benefits that were not voluntarily paid" by Employer. Claimant moved for reconsideration, asserting his fee petitions are "supplemental" petitions for "additional attorney fees in the same compensation matter," and he is not required to assert a new right to an attorney's fee under Section 28 because he was previously awarded a fee under Section 28(a) and (b), 33 U.S.C. §928.⁹ Employer opposed Claimant's motion for reconsideration. On April 28, 2023, the district director denied Claimant's motion for reconsideration. He found the medical bill issue resolved once Dr. Gupta furnished a copy of his medical treatment reports and bills, and there was no evidence that Employer denied medical benefits or refused to pay Dr. Gupta's bills. Consequently, he determined an attorney's fee could not be assessed against Employer.

On appeal, Claimant's counsel contends he is entitled to a fee under Section 28(a) because Employer did not timely pay Dr. Gupta's bills pursuant to the ALJ's previous decision, and it improperly requested Section 22 modification, thereby necessitating some of the post-adjudication work for which he requested a fee.¹⁰ Employer responds, asserting

⁸ The parties agreed to a continuance on the issue of outstanding medical expenses and reimbursement for prescription costs.

⁹ In the alternative, he asserted his demand for reimbursement for Dr. Gupta's bills on October 31, 2013, constituted a new claim and Employer's failure to pay those bills within thirty days satisfied the Section 28(a) criteria.

¹⁰ Based on our review of the fee petitions, there are no time entries specifying work related to Employer's Section 22 modification request.

counsel's appeal should be dismissed because he failed to properly serve Employer his appeal filings. Alternatively, it urges affirmance of the district director's denial of an employer-paid attorney's fee, contending his finding that Claimant received no benefit as a result of counsel's post-adjudication work is supported by substantial evidence, and therefore that finding precludes the assessment of an attorney's fee against Employer under both Section 28(a) and (b). The Director, Office of Workers' Compensation Programs (Director) responds, urging the Board to remand the case to the district director for a determination of Employer's liability for an attorney's fee under Section 28(a). Claimant filed a reply to Employer's response. Employer filed a reply to the Director's response.

Initially, we reject Employer's request to dismiss Claimant's appeal for failing to serve his notice of appeal, motions for extension, petition for review, and statement in support of his petition for review on Employer. Employer asserts it first received notice of Claimant's pending appeal via the Board's August 22, 2023 order accepting Claimant's petition for review and brief, giving Employer thirty days from the date of the order to file its response to Claimant's petition for review. Emp. Resp. at 3-4. However, Employer did not request an extension of time to file its response or separately move for dismissal of Claimant's petition for review. 20 C.F.R. §§802.219(b), 802.401(b).¹¹ Because Employer failed to separately move for dismissal under 20 C.F.R. §802.219(b), *see Milam v. Mason Technologies*, 34 BRBS 168, 169 (2000), or show it was prejudiced by Claimant's failure to properly serve Employer his appeal filings to the Board, we reject Employer's request to dismiss Claimant's appeal.

As to the merits of Claimant's appeal, the first issue before the Board is whether an attorney's fee for post-adjudication work in this case may be assessed against Employer under Section 28(a) or (b). Claimant contends Section 28(a) applies because Employer refused to comply with the ALJ's previous award for medical treatment with Dr. Gupta and declined to pay Dr. Gupta's bills. He contends the work performed post-adjudication was necessary to secure and maintain Claimant's payment of medical benefits he was previously awarded. Employer argues it is not liable for an attorney's fee under Section 28(a) or (b) because Claimant did not secure any new or additional benefits beyond what was formerly awarded. The Director contends Section 28(a) applies because Employer did not pay any benefits within thirty days of receiving notice of Claimant's claim when it was

¹¹ The Board's letter acknowledging Claimant's appeal, dated June 5, 2023, contains a certificate of service confirming service upon Employer's counsel via his mailing address of record. 20 C.F.R. §§802.208(a)(3), 802.210. This is the same address the Board used to serve its August 22, 2023 order on Employer's counsel.

initially filed. He asserts that once the conditions of Section 28(a) are met, an attorney's fee should be assessed under that subsection for the entirety of the claim.

Section 28 of the Act provides for an attorney's fee in two circumstances. 33 U.S.C. §928. Under Section 28(a), an attorney's fee may be assessed against the employer if the employer refuses to pay any compensation after the filing of a claim and the claimant subsequently successfully prosecutes the claim with the assistance of an attorney. 33 U.S.C. §928(a).¹² In this regard, "the relevant period for determining if the employer has tendered some compensation is the thirty days after the filing of the written claim." *Andrepoint v. Murphy Exploration and Production Co.*, 566 F.3d 415, 419 (5th Cir. 2009); *see also Pool Co. v. Cooper*, 274 F.3d 173, 186-187 (5th Cir. 2001). Under Section 28(b), an attorney's fee may be assessed where the employer voluntarily pays some compensation without an award and a controversy thereafter arises over the amount of compensation. 33 U.S.C. §928(b).¹³ In the United States Court of Appeals for the Fifth Circuit, within whose

¹² Section 28(a) states:

(a) Attorney's fee; successful prosecution of claim

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.

33 U.S.C. §928(a).

¹³ Section 28(b) states:

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

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

jurisdiction this case arises, each of the following conditions must be met for assessment of an attorney's fee under Section 28(b): (1) an informal conference is held, (2) a written recommendation is issued, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *FMC v. Perez*, 128 F.3d 908, 909-910 (5th Cir. 1997); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005). Under both subsections (a) and (b), "compensation" includes disability benefits as well as medical benefits. *Oilfield Safety and Mach. Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 1257 (5th Cir. 1980); *Taylor v. SSA Cooper, LLC*, 51 BRBS 11 (2017)

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[s] 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.

33 U.S.C. §928(b).

In this case, the district director who initially awarded counsel an employer-paid attorney's fee erroneously did so under Section 28(b) of the Act, 33 U.S.C. §928(b).¹⁴ As stated above, following Claimant's December 2000 work injury, Employer filed a Notice of Controversion but voluntarily paid disability and medical benefits until December 26, 2001. Thereafter, on February 21, 2002, Claimant formally filed his claim for compensation, but Employer did not pay any benefits within thirty days, and, thereafter, Claimant utilized the services of an attorney to successfully prosecute his claim – eventually being awarded the disability and medical benefits for which Employer had denied liability.¹⁵ Instead of assessing Employer's actions after Claimant filed his claim form (LS-203), the district director incorrectly focused on the date Employer filed its first report of injury (Form LS-202), its voluntary payment of compensation benefits thereafter, and the parties' request for a hearing before the OALJ after the claims examiner's initial recommendation.¹⁶ Though Employer voluntarily paid Claimant disability compensation and provided medical treatment after his work injury and until December 26, 2001, there is no evidence it paid any benefits within thirty days of receiving notice of Claimant's February 21, 2002 claim. *Andrepoint*, 566 F.3d at 419; *Cooper*, 274 F.2d at 186-187. Consequently, as Claimant and the Director assert, the original fee awards in this case should have been assessed against Employer under Section 28(a). *Edwards*, 398 F.3d at 316-318; *Cooper*, 274 F.3d at 186-187; *A.M. v. Electric Boat Corp.*, 42 BRBS 30, 33 (2008); *see also Day v. James Marine, Inc.*, 518 F.3d 411, 414-415 (6th Cir. 2008).

Notwithstanding the applicability of Section 28(a) to allow an employer-paid fee originally, the issue now is whether Section 28(a) applies to post-adjudication work

¹⁴ On July 10, 2004, the district director issued a compensation order awarding a fee of \$2,165.62 to be paid by Employer to Claimant's counsel under Section 28(b) of the Act, 33 U.S.C. §928(b).

¹⁵ Employer specifically denied liability for Claimant's depression and medical expenses associated with his pain management and psychiatric treatment. The ALJ found Claimant's chronic pain and depression were related to the work injury and awarded continuing reasonable and necessary medical treatment with Drs. Gupta and Davis and outstanding medical expenses for such treatment. *See Burton v. Delta Terminal Servs.*, Case No. 2003-LHC-00971, slip. op. at 2, 16-17, 21-22, 26 (ALJ May 7, 2004).

¹⁶ The district director stated Employer controverted the claim and terminated benefits as of December 26, 2001, and the claim "remained in disputed status from that date until the formal hearing."

Claimant's counsel performed from August 24, 2007, through April 5, 2017.¹⁷ Claimant and the Director contend it does and further assert that once the conditions of Section 28(a) have been met, as in this case, Claimant is not required to reestablish those conditions in order for his counsel's fee to be assessed against Employer for work performed post-adjudication.

Initially, we agree with the argument Claimant and the Director assert: that Employer's liability for an attorney's fee under Section 28(a) does not end after a final order is issued. The Board has held that once fee liability is established under Section 28(a), "Section 28(a) must be applied to the entire claim." *W.G. v. Marine Terminals Corp.*, 41 BRBS 13, 15 (2007); *see also Day*, 518 F.3d at 420-421. Likewise, we agree that a claimant need not reestablish the conditions of Section 28(a).¹⁸ However a reasonable fee may be assessed against the employer only when the post-adjudication work for which the fee is requested was necessary. *See Nelson v. Stevedoring Servs. of America*, 29 BRBS 90, 95 (1995). When assessing the reasonableness of an attorney fee, the adjudicator "shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded." 20 C.F.R. §702.132. The applicable regulation additionally provides "[a]ny fee approved shall be reasonably commensurate with the necessary work done." *Id.* Consequently, Employer is liable for Claimant's counsel's fee request for his post-adjudication work, provided counsel establishes the work was *necessary* to defend or maintain payment of Claimant's benefits, and the fee is reasonable in consideration of the necessary work performed.¹⁹

¹⁷ Claimant's supplemental fee petition, filed on January 26, 2023, is for work performed through March 6, 2017, but his second fee petition, filed on August 18, 2022, is for work performed through April 5, 2017.

¹⁸ To clarify, Claimant's pursuit of reimbursement for his out-of-pocket medical expenses and payment of Dr. Gupta's bills is part and parcel of his original claim for medical treatment with Dr. Gupta as his chosen pain management physician and does not represent a new claim. Moreover, the applicability of Section 28(a) in this case does not require Employer to deny liability for Dr. Gupta's bills or refuse to reimburse Claimant for his out-of-pocket expenses associated with the medical treatment he received from Dr. Gupta because the decisive period for determining the applicability of Section 28(a) is thirty days from when Employer received notice of Claimant's February 2002 claim from the OWCP. *Andrepoint*, 566 F.3d at 419; *see also Cooper*, 274 F.2d at 186-187; *but see infra* note 19.

¹⁹ Whether Employer denied payment of Dr. Gupta's medical bills or any perceived delay in paying those medical bills is relevant when assessing the necessity of the legal

In this case, following informal conference requests in which Claimant alleged Employer had refused to pay the medical bills Dr. Gupta submitted, the district director found Employer had been “paying all benefits due per the ALJ’s order” and noted there was no evidence that Employer denied liability or refused to pay for Dr. Gupta’s treatment. Finding no refusal of benefits on Employer’s part, he denied Claimant’s counsel’s request for an employer-paid attorney’s fee.²⁰

Claimant contends Employer failed to pay Dr. Gupta’s bills, requiring him to pay out-of-pocket for his treatment and to seek pain management treatment and prescriptions from other physicians. Employer argues it never disputed Claimant’s entitlement to medical treatment with Dr. Gupta pursuant to the ALJ’s 2004 decision, nor did it refuse to pay Dr. Gupta’s bills. Rather, Employer asserts it was unaware of Claimant’s ongoing

work performed and the reasonableness of the attorney fee requested, rather than to whether Claimant is entitled to an employer-paid attorney’s fee under Section 28(a). *See* 33 U.S.C. §928(a); 20 C.F.R. §702.132.

²⁰ The district director denied the fee request and denied Claimant’s counsel’s request for reconsideration. In his findings on reconsideration, the district director wrote:

The fees requested by Claimant’s counsel post-ALJ order cannot be assessed against the Employer/Carrier in this case. The Employer/Carrier was paying all benefits due per the ALJ’s order. Claimant’s counsel’s actions after the case was adjudicated involved the resolution of charges by Dr. Gupta that should have been submitted with corresponding medical reports to the Employer/Carrier for payment. Dr. Gupta started charging the claimant cash when he was not getting paid by the Employer/Carrier. That issue was resolved when the Employer/Carrier obtained medical reports corresponding to the charges. *The administrative file does not reflect that the Employer/Carrier denied or refused those benefits/bills.* While I acknowledge that Claimant’s Counsel’s efforts resulted in Dr. Gupta reimbursing the claimant; this benefit gained is not additional payments the Employer/Carrier refused to pay... Claimant’s attorney was not successful in obtaining any benefits due from the Employer/Carrier on behalf of claimant after the ALJ’s adjudication of this case.

Pursuant to Section 702.132 of the regulations, considering the time spent, lack of benefit gained and lack of complexity of issues, attorney fees [] are denied in their entirety.

Order Denying Recons. at 3 (emphasis added).

treatment with Dr. Gupta and Dr. Gupta's outstanding bills, and it tendered payment once it received the bills and corresponding medical records in February and March 2017.²¹ The Director asserts the district director did not sufficiently address the issue.

In the 2004 decision, the ALJ awarded Claimant "all future reasonable and necessary medical expenses" and continuing treatment with Dr. Gupta under Section 7 of the Act, 33 U.S.C. §907. Section 7 requires an employer to pay for reasonable and necessary treatment related to a claimant's work injury; however, it is the claimant's burden to show the expenses are for treatment that is reasonable, necessary, and related to the injury. *Id.*; *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186-187 (1988). Claimant's counsel has failed to establish the district director abused his discretion in denying an attorney fee for services performed related to payment of Dr. Gupta's bills. As the district director found and the evidence shows, Employer never denied or refused payment for any awarded treatment or Dr. Gupta's bills. Specifically, we reject the Director's assertion that the district director did not make sufficient findings as to whether Employer received contemporaneous medical treatment records and bills from Dr. Gupta and declined to pay them. The district director found Employer was paying all benefits due under the ALJ's compensation order, but the "charges by Dr. Gupta . . . should have been submitted with corresponding medical reports." Order Denying Recons. at 3. So Claimant needed to submit Dr. Gupta's medical treatment records along with the medical bills to Employer to establish the expenses were for treatment that was reasonable, necessary and related to the injury. *Ballesteros*, 20 BRBS at 186-187; *see* 20 C.F.R. §§702.401, 702.402, 702.407. The district director found that once Claimant provided Employer with the required documentation, it promptly paid Dr. Gupta's bills. The district director's findings resolve the question of when Employer received the requisite documentation, and what it did once it received the medical reports. Because Claimant's, Claimant's counsel's, or Dr. Gupta's delay in providing the requisite documentation delayed Employer's payment of those bills and caused the protracted post-adjudication dispute, we reject counsel's contentions and affirm the district director's denial of a fee for work necessitated by that delay.²²

²¹ Employer also contends its request for Section 22 modification was premised on the lack of medical documentation to substantiate any ongoing disability.

²² Claimant's counsel's fee petitions contain itemized entries for work unrelated to Dr. Gupta's bills, and we affirm the district director's denial of a fee for those services as unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see also supra* note 10 (no entries related to motion for Section 22 modification; therefore, we reject any argument that the motion required additional services).

Accordingly, we affirm the district director's Order of Denial of Attorney Fee Application and the Order Denying Motion to Reconsider Order of Denial of Attorney Fee Application.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge