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WORKERS' COMPENSATION / ATTORNEY'S FEE
AWARDS — FORM OVER SUBSTANCE?: STATUTORY
REQUIREMENTS FOR ATTORNEY'S FEE AWARDS UNDER THE
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INTRODUCTION

Thomas Bordeaux never finished the ninth grade.¹ After dropping out of school, he worked as a pipefitter's apprentice and continued to work hard manual labor for the next forty years.² In 1997, Bordeaux, then in his mid-fifties, accepted a position with Pittsburgh & Conneaut Dock Company where he worked as a structural welder and pipefitter.³ These positions required heavy lifting, manipulating powerful and heavy machinery, and climbing with tools weighing nearly fifty pounds apiece.⁴ Clearly, Bordeaux's body was his livelihood.

On September 12, 2000, Bordeaux climbed into a deep, narrow pit to clear coal mud from an intake pipe.⁵ While Bordeaux was bent over, a coworker on the surface lost control of a wet fifty-pound sandbag that fell into the pit, hitting Bordeaux at the base of his head and neck.⁶ Despite receiving emergency treatment immediately after the accident and extensive physical and cognitive therapies in the years that followed, Bordeaux continued to experience pain, dizziness, speech problems, and cognitive difficulties that precluded him from returning to work at his previous position, or even a suitable alternative.⁷

Although Bordeaux's employer voluntarily began paying some disability benefits, a dispute later arose as to the precise nature of Bordeaux's injuries⁸: Did they render him partially or totally dis-

1. Final Brief of Respondent Thomas Bordeaux at 5, Pittsburgh & Conneaut Dock Co. v. OWCP, 456 F.3d 616 (6th Cir. Aug. 25, 2005) (No. 05-3425).

2. *Id.* at 5-6.

3. *Id.* at 6.

4. *Id.*

5. *Id.*

6. *Id.*

7. Pittsburgh & Conneaut Dock Co. v. OWCP, 456 F.3d 616, 619 (6th Cir. 2006), amended by 473 F.3d 253 (6th Cir. 2007); Final Brief of Respondent Thomas Bordeaux, *supra* note 1, at 9; see also *infra* note 180 for comment regarding amended *Pittsburgh & Conneaut Dock Co.* decision.

8. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 625.

abled? Were they temporary and likely to improve with time, or had his injuries reached the maximum improvement through physical and cognitive therapy and were now permanent? More than two years after the injury occurred, Bordeaux, his employer, and a claims review officer from the Office of Workers' Compensation Programs (OWCP)⁹ held an informal conference in an attempt to reach an agreement about the extent and nature of Bordeaux's injuries.¹⁰

Although the parties tried to settle the dispute through informal proceedings, these negotiations were ultimately unsuccessful, and Bordeaux pursued a formal hearing before an administrative law judge (ALJ).¹¹ On January 21, 2004, the ALJ determined that Bordeaux was totally and permanently disabled and awarded disability benefits commensurate with injuries to that extent.¹² The ALJ also assessed Bordeaux's attorney's fees to his employer,¹³ pursuant to a provision in the workers' compensation statute controlling Bordeaux's situation.¹⁴ The employer appealed the decision to the Benefits Review Board (BRB), which affirmed the determination of total and permanent disability, as well as the attorney fee award (albeit on different grounds within the same work-

9. The U.S. Department of Labor is an executive department designed "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." 29 U.S.C. § 551 (2000). The Department has designated a number of agencies to carry out these objectives, including the Employment Standards Administration (ESA). U.S. Department of Labor, DOL Agencies, <http://www.dol.gov/dol/organization.htm> (last visited May 15, 2009). The ESA is in turn responsible for "enhanc[ing] the welfare and protect[ing] the rights of [American] workers." U.S. Department of Labor, ESA Mission Statement, <http://www.dol.gov/esa/about/mission.htm> (last visited May 15, 2009). The ESA created the Office of Workers' Compensation Programs (OWCP) to review and enforce financial protections available to injured workers covered under certain federal workers' compensation statutes. *See id.* Bordeaux was covered by such a federal statute, the Longshore and Harbor Workers' Compensation Act, and thus his claim was handled by the OWCP. It is worth noting that the OWCP representatives that oversee the informal settlement proceedings are referred to in a variety of ways in judicial and legislative materials: deputy commissioner, claims review officer, claims officer, and reviewing authority. For the purposes of this Note, these terms are essentially the same and all refer to the individuals responsible for overseeing the initial stages of the dispute resolution process.

10. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 625.

11. *Id.* at 621.

12. *Id.* at 620.

13. *Id.*

14. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (2000). As Bordeaux was engaged in maritime employment, he was a covered employee under § 902(3); thus, the subsequent dispute is governed by that Act.

ers' compensation statute).¹⁵ The employer again took issue with the determinations of the administrative review agencies and looked to the United States Court of Appeals for relief.¹⁶

In August of 2006, the Sixth Circuit affirmed the determination that Bordeaux was totally and permanently disabled and awarded the benefits attending that status, but reversed the award of attorney's fees (previously awarded under § 928(b)), citing the failure of the *claims officer* to comply with the specific provisions of the statute, namely his failure to make a written recommendation following the informal conference held four years earlier.¹⁷ In other words, six years after his injury occurred and his working career ended, Bordeaux was in the grievous position of having his total and permanent disability benefits—benefits he and his family needed in the absence of a paycheck, benefits the reviewing authorities deemed rightfully his on three separate occasions—now reduced by the cost to litigate his right to those benefits in the first place.

What if Bordeaux, who was injured in Ohio, had been injured in California instead? Even if Bordeaux's claim had taken an *identical* procedural path, he may have prevailed on his claim for attorney's fees given the current disparate treatment of attorney's fee awards under § 928(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act).¹⁸ Several jurisdictions rely strictly on the plain language of the statute to determine whether an attorney's fee award is appropriate,¹⁹ holding that if the procedural

15. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 620. The Longshore and Harbor Workers' Compensation Act authorizes an award of attorney's fees in two situations. The main difference between them concerns whether the employer has "declined to pay *any* compensation," or paid some compensation and "thereafter a controversy develops over [an] amount of *additional* compensation, if any, to which the employee may be entitled." 33 U.S.C. § 928(a)-(b) (emphasis added).

16. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 620. The appellate court reviews the administrative determinations of the administrative law judge (ALJ) and the Benefits Review Board (BRB), but does so "on a limited basis." The appellate court's sole task is to determine whether substantial evidence supported the administrative decision and whether the decision was in accordance with applicable law. *Id.* at 620-21.

17. *Id.* at 629. For the text of 33 U.S.C. § 928(b), see *infra* note 105.

18. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928(b); see, e.g., *Nat'l Steel & Shipbuilding Co. v. OWCP*, 606 F.2d 875, 882 (9th Cir. 1979) (holding that the absence of a written recommendation does not preclude recovery of claimant's attorney's fees).

19. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d 616; *Va. Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2005); *Pool Co. v. Cooper*, 274 F.3d 173 (5th Cir. 2001); *Staftex Staffing v. OWCP*, 237 F.3d 404 (5th Cir. 2000), *modified on reh'g*, 237 F.3d 409 (5th Cir. 2000); see also *Newport News Shipbuilding & Dry Dock Co. v. OWCP*, 474 F.3d 109 (4th Cir. 2006).

steps detailed in the statute are not followed precisely by all parties involved, fee shifting is prohibited. On the other hand, the Ninth Circuit has persistently declined to read such rigidity into the statute.²⁰ Instead, it turns to the underlying purpose of the LHWCA, which is to provide “quick recovery for valid workplace-injury claims without resort to the courts, and when [that] fails, claimants’ full recovery of statutory benefits without reduction by the cost of legal services.”²¹ Citing concerns about fairness, equity, and legislative intent, the Ninth Circuit has adopted a broad reading of the attorney’s fees provision to carry out the legislative intent of quick and adequate recovery of valid workplace claims.²²

There has been ongoing tension between readings confined to the (alleged) “plain language” of the statute and those broader readings that look beyond the express language of the provision to fulfill the legislature’s objectives. In essence, the controversy boils down to a question of statutory interpretation. Although the weight of authority favors a strict reading requiring absolute adherence to the procedures enumerated in 33 U.S.C. § 928, this Note posits that a broad reading is in fact more appropriate in a circumstance such as *Bordeaux’s*, where the inability to recoup attorney’s fees is the direct result of the failures of others to discharge their statutory duties. This conclusion is reached after an examination of early workplace liability theory, workers’ compensation law generally, the provisions of the LHWCA, the legislative concerns that the Act sought to address, and the policies that have been expressed in judicial opinions pertaining to the Act.

Part I of this Note discusses the evolution of the liability theory in the workplace, the circumstances that gave rise to workers’ compensation law, and the policy considerations that underpin current workers’ compensation legislation. Part II explores the genesis of workers’ compensation for maritime workers, lays out the provisions of the LHWCA, and reviews the judicial applications and interpretations of the Act since its enactment in 1927. Part III examines the ways in which the courts have interpreted and applied

20. *Everitt v. OWCP*, 107 F. App’x 750 (9th Cir. 2004); *Matulic v. OWCP*, 154 F.3d 1052 (9th Cir. 1998); *Nat’l Steel & Shipbuilding Co.*, 606 F.2d 875; *see also Savannah Mach. & Shipyard Co. v. OWCP*, 642 F.2d 887, 889-90 (5th Cir. 1981) (holding that deviation from provisions of § 928(b) does not preclude eventual recovery of attorney’s fees).

21. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 630.

22. *Nat’l Steel & Shipbuilding Co.*, 606 F.2d 875; *see also Matulic*, 154 F.3d 1052; *Todd Shipyards Corp. v. OWCP*, 950 F.2d 607 (9th Cir. 1991).

§ 928, the fee-shifting provision of the LHWCA,²³ and scrutinizes the majority and dissenting opinions of a recent Sixth Circuit decision, which deftly illustrates the continuing disparate judicial treatment of this provision of the LHWCA.

Part IV analyzes the controversy in light of the general policies underpinning workers' compensation law, the congressional intent behind the LHWCA, and the precise language employed in the disputed provision. This Note concludes that the current circuit split should be resolved in favor of a broad reading of § 928(b) to conform with the history, policy, and intent behind the LHWCA and workers' compensation statutes generally by allowing a claimant such as Bordeaux to recover the litigation costs incurred to establish his right to workers' compensation.

I. THE ADVENT OF WORKERS' COMPENSATION: A HISTORICAL PERSPECTIVE

Workers' compensation coverage is something many people take for granted—if an employee is injured while on the job, there are often provisions in place to cover medical bills, lost time, and if necessary, injuries resulting in disability. Workers' compensation did not always exist, however; it is a remedy that is little more than

23. Statutory fee-shifting provisions represent a departure from the usual rule. In the United States, the successful litigant generally is not permitted to recover his attorney's fees from the losing party. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *F.D. Rich Co., Inc. v. U.S. for the Use of Indus. Lumber Co.*, 417 U.S. 116, 126 (1974); *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Stewart v. Sonneborn*, 98 U.S. 187, 190 (1878); *see also Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851) (noting that state legislatures have “refused to allow the *honorarium* paid to counsel to be exacted from the losing party”); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (noting that the inclusion of attorney's fees in an award for damages is generally opposed). This general rule, known as the “American Rule,” is still firmly rooted in American jurisprudence, although a number of exceptions to the rule have developed in response to concerns about justice and equity. *See, e.g., F.D. Rich*, 417 U.S. at 129 (recognizing that attorney's fee awards are appropriate when the losing party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons” (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962))); *see also id.* at 130 (acknowledging that fee shifting is appropriate when the prevailing party “has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class” (citing *Hall v. Cole*, 412 U.S. 1 (1974))). The most common class of exceptions to the American Rule, however, is one created by Congress. 1 MARY FRANCIS DERFNER & ARTHUR D. WOLF, *COURT AWARDED ATTORNEY FEES* ¶ 5.01[1], at 5-3 (2008). Statutory provisions providing for fee shifting are now common and widespread. *See id.* One such legislated exception to the American Rule forms the very basis of this Note. *See* Part III, *infra*, for further discussion of the fee-shifting provision within the LHWCA.

a century old.²⁴ Subpart A of this Part looks at common law remedies available to injured workers before the modern workers' compensation system. Subpart B discusses the Industrial Revolution and the socioeconomic pressures that changed the way workplace injuries were handled in the legislature and judiciary. Subpart C outlines the basic policies underpinning modern workers' compensation legislation.

A. *Liability for Workers' Injuries Under the Common Law*

Two hundred years ago, the occurrence of workplace injuries was rare.²⁵ When a worker did sustain an injury on the job, the employer, often working closely and being friendly with the employee, might have provided the necessary medical care and financial assistance out of sympathy.²⁶ Absent this emotional response on the part of the employer, the injured worker's only alternative was to seek redress by suing the employer, alleging negligence of a common law duty.²⁷ At that time, the duties imposed on an employer under the common law were few: (1) to provide a safe place to work; (2) to provide safe appliances, tools, and equipment; (3) to give warnings of dangers of which the employee might be unaware; (4) to provide a sufficient number of fit, trained, or suitable fellow servants to perform assigned tasks; and (5) to promulgate and enforce rules relating to employee conduct that would make the work safe.²⁸ In order for a worker to recover for injuries sustained, the worker had to demonstrate a violation of one of the duties listed above and, thus, that the employer was somehow *at fault* for the worker's injury.²⁹

24. See *infra* Part I.C.

25. See SAMUEL B. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 2 (1944).

26. *Id.*

27. *Id.*; Samuel B. Horovitz, *Current Trends in Basic Principles of Workmen's Compensation*, reprinted in *CURRENT TRENDS IN WORKMEN'S COMPENSATION* 466-67 (1947) [hereinafter Horovitz, *Current Trends*].

28. ARTHUR LARSON, *WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT* § 4.30 (1984).

29. Horovitz, *Current Trends*, *supra* note 27, at 466-67.

For generations one person's liability to another was based on fault, or negligence. If none existed, there was no redress. Too bad that the worker lost a leg, or arm, or eye, in the factory, or at work elsewhere; but the employer not being at fault, it was inconceivable to the early judges that the employer should be held liable, or in any way be compelled to contribute toward medical treatment or the support of the worker or his family. No fault, no liability. No liability, and charity or the worker's savings or friends (if any) stood the entire loss.

Notwithstanding the lengthy and costly process of filing suit and the additional strain placed on an already physically and financially impaired worker,³⁰ the employee's claim had little likelihood of success in the face of the three common law defenses available to employers: the doctrines of (1) contributory negligence; (2) assumption of risk; and (3) the fellow-servant rule.³¹ Even if the worker could demonstrate the direct negligence of the employer, "recovery would be defeated by the [contributory] negligence—even much smaller in degree—of the employee."³² Similarly, if workers comprehended (or should have comprehended) risks inherent in discharging their duties and assumed those risks anyway, "the employee[s], being free to do as [they] please[], and voluntarily undergoing the dangerous conditions of the work, [have] no standing to complain when injury does occur as a result of [those] conditions."³³ Finally, if the injury sustained by the worker was not caused by the employer personally, but rather by a fellow employee, the employer was not liable for the injury under the theory that the negligence of another employee was one of the risks assumed by accepting employment.³⁴ The fellow-servant rule was particularly damaging to claims for recovery, since an employer could avoid liability under this doctrine entirely by simply staying

Id.

30. HOROVITZ, *supra* note 25, at 2 (noting that once suit had been filed, an injured worker often faced a wait of two or more years before reaching trial and that "his limited savings and public charity bore the burden" in the interim).

31. *Id.* at 2-3; Horovitz, *Current Trends*, *supra* note 27, at 467; *see also* Owens v. Union Pac. R.R. Co., 319 U.S. 715, 720-24 (1943) (discussing the scope and application of each common law defense (citing *Priestly v. Fowler*, 3 Mees & W. 1 (1837))). The contributory negligence doctrine permits an employer to escape liability for an employee's injury when the employer can demonstrate that, even though the employer has been negligent in some capacity, the injured worker was *also* somehow negligent, and thus played a role in his own injury. The assumption of risk defense is grounded in the notion that the employee is free to object to dangerous working conditions and, if the employee chooses to work in them, he has no standing to complain when he is injured as a result of them. The fellow-servant rule allows an employer to avoid liability when an employee has been injured as a result of conduct by another employee, the theory being that the employer cannot be held accountable for the actions of its staff. *See generally* LARSON, *supra* note 28, § 4.30 (describing the common law defenses and the general problems attendant thereto). For a detailed discussion of the factual and legal foundation for the holding in the British case *Priestly v. Fowler*, which established early common law pertaining to employer defenses to negligence, *see* A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 100-34 (1995).

32. LARSON, *supra* note 28, § 4.30.

33. *Id.*

34. HOROVITZ, *supra* note 25, at 3; Horovitz, *Current Trends*, *supra* note 27, at 467.

out of the workplace.³⁵ Of the small number of cases that did survive to trial and were ultimately successful, the worker's "victory" was a hollow one; "lawyer's fees, doctor's bills and other expenses often ate up a substantial portion of the award."³⁶

Returning to the circumstances of Bordeaux's injury detailed in the Introduction, how would he have fared under the common law? *Even if* Bordeaux could marshal a valid argument that his employer had neglected its duty to provide a safe place to work, or failed to provide warning of dangers about which Bordeaux was unaware, or did not provide trained and suitable coworkers to accomplish the employment tasks with which they were charged, it seems that Bordeaux's employer could almost certainly defeat his claim with one or more of the three defenses outlined above. The company might argue that Bordeaux was in part to blame for his injury because, by bending over (rather than kneeling) to clear the pipe, he exposed the area at the base of his head and neck left unprotected by his hard hat. Alternatively, his employer might argue that in accepting a position that he knew to involve heavy machinery and tools and in subsequently climbing into the pit to clear the intake pipe, he assumed the risk that one of those heavy objects might fall and injure him. The employer's strongest argument under the common law would likely be the fellow-servant defense, since it was a fellow employee, and not his employer personally, who dropped the sandbag that injured him. Overall, Bordeaux's ability to establish any liability under the common law on the part of his employer seems very unlikely. Since Bordeaux had no experience or ability to secure alternate employment,³⁷ he and his family would have to rely on any savings and the charity of friends and his community for support for the remainder of his life: a brutal and inequitable reality.

B. *The Industrial Revolution and Resulting Socioeconomic Pressures*

While the common law remedies affected relatively few people in this country's early years of agricultural and rural life, the number of people affected by these inadequate remedies exploded once

35. HOROVITZ, *supra* note 25, at 3; Horovitz, *Current Trends*, *supra* note 27, at 467.

36. HOROVITZ, *supra* note 25, at 4; Horovitz, *Current Trends*, *supra* note 27, at 467.

37. See Final Brief of Respondent Thomas Bordeaux, *supra* note 1, at 13-14 (describing Bordeaux's limited education, narrow work experience, and advanced age).

the Industrial Revolution began.³⁸ Responding to increasing pressure from injured workers and union representatives, some courts modified the existing common law fellow-servant defense with the vice-principal exception.³⁹ This exception basically excluded employees charged with carrying out the employer's common law duties to provide a safe work environment, adequate tools, and suitably-trained coworkers, from the group of employees to be considered the injured employee's "fellow-servant[s]."⁴⁰ Similarly, state and federal governments passed legislation that chipped away at the draconian results of the common law, but these legislative modifications continued to center on fault, rather than the relationship of the employee to the employer.⁴¹ Despite the judicial and legislative modifications, the basic provisions of the common law were still intact and binding upon the courts.⁴²

38. Horovitz, *Current Trends*, *supra* note 27, at 466 ("As the factory system grew, as industries of all kinds brought large numbers of workers into close contact with machinery and with each other, the number of injuries and fatalities skyrocketed. Injured workers and their dependents were compelled to look to the courts for redress.").

39. *See, e.g.*, *New Eng. R.R. Co. v. Conroy*, 175 U.S. 323, 345 (1899). An employer's liability for the negligence of an employee that injures another hinges on:

the character of the act If the act is one done in the discharge of some [common law] duty of the master to the servant, then negligence in that act is the negligence of the master; but if it be not one in the discharge of such [common law] duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.

Id. *See generally* *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 386-90 (1893) (providing in-depth discussion of the duties of the master to the servant, as well as the scope of same).

40. *Balt. & Ohio R.R. Co.*, 149 U.S. at 386-90; *see also* LARSON, *supra* note 28, § 4.40 (noting that the vice-principal exception was "[t]he principal modification of the common law defenses").

41. *See, e.g.*, Federal Employers' Liability Act of 1908, ch. 149, § 1, 35 Stat. 65, 65 (codified as amended at 45 U.S.C. § 51 (2000)) (eliminated contributory negligence and assumption of risk defenses in cases involving safety violations); Georgia Act of 1855, 1855 Ga. Laws 155 (eliminated the fellow-servant defense for railroad employers); LARSON, *supra* note 28, § 4.50 ("These so-called employers' liability statutes did not aspire to create any new principle of liability applicable to the employment relation as such. The most they ever set out to accomplish was the restoration of the employee to a position no worse than that of a stranger injured by the negligence of the employer or his servants.").

42. Horovitz, *Current Trends*, *supra* note 27, at 468; *see also* *W. Indemnity Co. v. Pillsbury*, 151 P. 398, 401 (Cal. 1915) ("[T]hese statutes, one and all, rest on the underlying notion that the common-law remedy by action, with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or that of the employé, it is inequitable and unsuited to the conditions of modern industry.").

Responding to the voting power of the people increasingly affected by injuries and death in the Industrial Age,⁴³ state governments began to acknowledge the need for a radical overhaul of the current treatment of workplace injury claims.⁴⁴ Taking cues from a German model of workers' compensation legislation which compensated employees based on their role as *employees*, rather than as simply parties injured due to the negligence of another,⁴⁵ various state governments formed commissions at the turn of the century to evaluate potential solutions to the workers' compensation problem.⁴⁶ Although application of the first state workers' compensation statutes were delayed on constitutional grounds,⁴⁷ the new objectives underpinning these first enactments were clear:

[T]o make the risk of the accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article and borne by the community in general.

. . . .

[T]o substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of their death; to provide a speedy and inexpensive method by which such compensation might be made to such employees or

43. HOROVITZ, *Current Trends*, *supra* note 27, at 468.

44. LARSON, *supra* note 28, § 5.20; *see also* HOROVITZ, *supra* note 25, at 6; 1 WILLIAM R. SCHNEIDER, *THE LAW OF WORKMEN'S COMPENSATION* 2 (1932); HOROVITZ, *Current Trends*, *supra* note 27, at 469.

Legislate as we may in the line of stringent requirements for safety devices . . . the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food.

HOROVITZ, *supra* note 25, at 6 (quoting *Borgnis v. Falk Co.*, 133 N.W. 209, 215 (Wis. 1911)).

45. HOROVITZ, *supra* note 25, at 5; HOROVITZ, *Current Trends*, *supra* note 27, at 469; *see also* LARSON, *supra* note 28, § 5.20.

46. LARSON, *supra* note 28, § 5.20.

47. *Franklin v. United Railway & Electric Co.*, 2 Balt. City Rep. 309 (1904), held unconstitutional a 1902 Maryland law establishing an "accident fund" for injured miners on the basis that it violated the separation of powers doctrine and deprived the defendant of a jury trial. Similarly, *Cunningham v. Northwestern Improvement Co.*, 119 P. 554 (Mont. 1911), held unconstitutional a 1908 Montana law creating an indemnity fund to compensate injured employees on the grounds that, once compensation had been paid under the statute, the employer was still potentially liable in the courts for damages. In other words, the statute failed to provide the employer with equal protection of the laws by potentially subjecting it to double payments. *See* HOROVITZ, *supra* note 25, at 6; LARSON, *supra* note 28, § 5.20; HOROVITZ, *Current Trends*, *supra* note 27, at 469-70.

those dependent upon them and which is more in harmony with modern methods of industry. . . . [and] to substitute a more uniform scale of compensation in case of accidental injury or death, than the ordinary varying and widely divergent estimates of juries⁴⁸

Consequently, once the constitutional issues had been resolved, adoption of workers' compensation legislation was rapid. By 1920, employees in the vast majority of states could recover for their employment injuries under newly enacted workers' compensation statutes.⁴⁹

C. *Modern Workers' Compensation Legislation*

More than a century has gone by since Maryland passed the first workers' compensation statute in 1902.⁵⁰ In that time, the state and federal governments have wrestled with the boundaries of compensation legislation, but overall have exhibited a general tendency towards enlarging the scope of coverage as to the types of activities, persons, injuries (and more recently, diseases⁵¹), and occupations covered.⁵² As of 1995, the U.S. Chamber of Commerce stated six basic objectives underlying workers' compensation legislation:

1. To provide sure, prompt and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault;
2. To provide a single remedy and reduce court delays, costs and workloads arising out of personal injury litigation;
3. To relieve public and private charities of financial drains incidental to uncompensated industrial accidents;
4. To eliminate payment of fees to lawyers and witnesses as well as to time-consuming trials and appeals;
5. To encourage maximum employer interest in safety and rehabilitation through appropriate experience-rating mechanisms; and

48. 1 SCHNEIDER, *supra* note 44, at 2, 4-5; *see, e.g.*, *Bundy v. Vt. State Highway Dep't*, 146 A. 68, 69 (Vt. 1929) ("The ultimate purpose of the Workmen's Compensation Act . . . is to treat the cost of personal injuries incidental to the employment as part of the cost of the business.").

49. LARSON, *supra* note 28, § 5.30.

50. *Id.* § 5.20.

51. *See, e.g.*, Federal Coal Mine Health & Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (codified as amended at 30 U.S.C. § 901 (2000)) (providing compensation benefits for coal miners totally disabled by pneumoconiosis, or "black lung disease," arising out of their work in coal mines).

52. LARSON, *supra* note 28, § 5.30.

6. To promote frank study of causes of accidents—rather than concealment of fault—reducing preventable accidents and human suffering.⁵³

Much has changed about the way workplace injuries are handled since the pre-Industrial Revolution era. Although workers' compensation, as a body of law, is now accepted as a "given," it took time for it to spread to the great number of industries that it affects today. The first attempts to secure compensation for injuries sustained, whether under the common law or the initial workers' compensation statutes, were made by employees of the railroad and mining industries.⁵⁴ The LHWCA covers employees engaged in maritime employment,⁵⁵ and just like any other industry that presently enjoys the protections of a workers' compensation statute, it took time for the legislature to promulgate workers' compensation laws that covered maritime workers specifically.

II. WORKERS' COMPENSATION FOR MARITIME AND HARBOR WORKERS

Just as the first state workers' compensation statutes were struck down as unconstitutional, the same was true for the preliminary attempts to apply state law compensation law to maritime workers.⁵⁶ The first attempt was *Southern Pacific Co. v. Jensen*, which involved a claim for death benefits under the Workmen's Compensation Act of New York.⁵⁷ The dispute hinged largely on jurisdictional issues, namely, that the decedent was engaged in maritime employment, and jurisdiction over maritime matters is delegated exclusively to the federal government pursuant to Article III, Section 2 of the Constitution.⁵⁸ Accordingly, the Court held that

53. MARGARET C. JASPER, *WORKERS' COMPENSATION LAW* 2 (1997) (citing U.S. CHAMBER OF COMMERCE, 1995 ANALYSIS OF WORKERS' COMPENSATION LAWS (1995)).

54. See, e.g., *Owens v. Union Pac. R.R. Co.*, 319 U.S. 715 (1943); *New Eng. R.R. Co. v. Conroy*, 175 U.S. 323, 345 (1899); *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 386-90 (1893); *W. Indem. Co. v. Pillsbury*, 151 P. 398, 401 (Cal. 1915); *Franklin v. United Ry. & Elec. Co.*, 2 Balt. City Rep. 309 (Md. 1904); *Cunningham v. Nw. Improvement Co.*, 119 P. 554 (Mont. 1911).

55. 33 U.S.C. § 902(3) (2000).

56. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

57. *Jensen*, 244 U.S. 205.

58. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . to all Cases of admiralty and maritime Jurisdiction."). See generally Charles Clark, *The Expanding Coverage of the Longshoremen's and Harbor Worker's Compen-*

the New York statute was invalid in that it appropriated power exclusively within the jurisdiction of the federal government.⁵⁹

The next attempt to apply state compensation law to maritime workers came in 1920 with *Knickerbocker Ice Co. v. Stewart*,⁶⁰ which failed for similar jurisdictional reasons. After the decision in *Jensen*, the Congress explicitly reserved jurisdiction over workers' compensation law of any state to the district courts.⁶¹ Yet, the Supreme Court struck down this attempt to apply state compensation law to maritime employees, stating that the Constitution gave Congress a nondelegable power to legislate admiralty and maritime law.⁶²

Finally recognizing the need to legislate directly, Congress provided workers' compensation coverage to maritime employees when it enacted the LHWCA in 1927. Subpart A that follows briefly discusses the basic features of the 1927 enactment, as well as the notable changes incorporated by the amendments in 1972 and 1984. Subpart B discusses the policies that have emerged from judicial application of the LHWCA.

A. *LHWCA: Original Enactment and Amendments*

The original version of the LHWCA⁶³ had a simple stated goal: “[t]o provide compensation for disability or death resulting from injury to employees in certain maritime employments.”⁶⁴ The sub-

sation Act, 43 LA. L. REV. 849 (1983); Charles F. Tucker, *Coverage and Procedure Under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments*, 55 TUL. L. REV. 1056 (1981) (discussing the *Jensen* case in greater detail, along with the jurisdictional issues that remained even after the passage of the LHWCA).

59. *Jensen*, 244 U.S. at 217-18.

60. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

61. *Id.* at 156.

62. *Id.* at 164 (referencing U.S. CONST. art I, § 8). Four years after the *Knickerbocker* decision, the Supreme Court issued yet another opinion on the inapplicability of state compensation laws to maritime workers. Perhaps realizing that Congress had not picked up on the subtleties of the previous two decisions, it took a more direct approach in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924), when it stated:

Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employers' Liability Law or general provisions for compensating injured employees; but it may not be delegated to the several states.

Id. at 227.

63. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (2000)).

64. *Id.*

sections of the Act defined the injuries covered,⁶⁵ definitions and exclusiveness of liability,⁶⁶ and claims procedures (including procedure for claims that the employer disputed).⁶⁷ However, the original enactment did not include the fee-shifting provision for attorney's fees that appeared in later versions. Instead, section 28 of the 1927 LHWCA limited any claim for fees for services to those which the deputy commissioner specifically approved, and those fees that were approved constituted a lien on the compensation award,⁶⁸ effectively reducing the funds actually awarded to the injured employee, as in other areas of litigation that follow the American Rule.⁶⁹ Despite being drafted and enacted in the early stages of workers' compensation law, the 1927 version of the LHWCA remained largely intact for nearly fifty years.

The LHWCA underwent a major overhaul in 1972, in part to clarify and expand the class of employees that came under the jurisdiction of the LHWCA.⁷⁰ In addition to expanding the class of

65. *Id.* § 3(a) ("Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery . . . may not validly be provided by State law.").

66. *Id.* § 4(b) ("Compensation shall be payable irrespective of fault as a cause for the injury."); *Id.* § 5 ("The liability . . . prescribed . . . shall be exclusive . . . except that if an employer fails to secure payment of compensation as required by this Act, [the injured worker] may elect to . . . maintain an action at law or in admiralty. . . . [D]efendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.").

67. *Id.* §§ 12-23.

68. *Id.* § 28(a).

69. *See supra* note 23 for discussion of the American Rule.

70. *See generally* Clark, *supra* note 58, at 852-54; Tucker, *supra* note 58, at 1056-60. Under the 1927 LHWCA, the express language of the statute confined coverage only to those employees injured "upon the navigable waters of the United States" when recovery is not "validly" available under state law. Longshoremen's and Harbor Workers' Compensation Act § 3(a). The courts struggled with this bright jurisdictional line between state and federal claims, since the nature of some employment and resulting claims left unclear whether the state or federal compensation legislation properly applied (this jurisdictional grey area later became known as the "twilight zone"). *See* Clark, *supra* note 58, at 853. Applying for compensation in the wrong forum could potentially leave the worker without any recovery at all due to expiration of the pertinent statute of limitations. *See* Tucker, *supra* note 58, at 1059. Although the courts eventually developed a concurrent jurisdiction doctrine to address "twilight zone" coverage issues, additional interpretive questions arose as to whether maritime workers injured on the shoreside of the twilight zone could still be covered under the LHWCA. *Id.*; *see also* Clark, *supra* note 58, at 853. The judiciary, however, was unwilling to accept and apply this interpretation in the absence of Congressional authority. Clark, *supra* note 58, at 853 n.37. Congress addressed these issues directly in the 1972 Amendments to the LHWCA.

workers whose injuries would fall within the scope of the LHWCA⁷¹ and increasing benefit awards for those workers (or their families in the case of death),⁷² the 1972 Amendments eliminated the requirement that the injured employee have no valid recovery available under state law to be eligible for LHWCA coverage.⁷³ The Amendments also reformed and standardized administrative procedures concerning claims for compensation.⁷⁴ This included two changes to the decision review process: access to an internal administrative review⁷⁵ and, more significantly for the purposes of this Note, the addition of an attorney fee-shifting provision for injured employees forced to resort to the services of an attorney to secure the compensation benefits the employer was unwilling to pay.⁷⁶ Overall, the sweeping changes enacted by the 1972 Amendments were evidence of the congressional intent “to provide a *modern* workmen’s compensation program for a substantial number of American workers and their families.”⁷⁷

B. *Judicial Application of the LHWCA*

Since the LHWCA’s enactment in 1927, the courts that apply its provisions have consistently and repeatedly stressed the importance of liberal application in favor of the injured worker.⁷⁸ This

71. Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(c), 86 Stat. 1251, 1251 (codified as amended at 33 U.S.C. 902 (2000)) (expanding coverage to those injuries occurring on navigable waters to include “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in the loading, unloading, repairing, or building a vessel”).

72. *Id.* § 5.

73. *Id.* § 2(c).

74. *Id.* § 14.

75. *Id.* § 15. A worker had to resort directly to the district court for review of any compensation award under the LHWCA of 1927.

76. *Id.* § 13; *see infra* Part III.

77. H.R. REP. NO. 92-1441, *as reprinted in* 1972 U.S.C.C.A.N. 4698, 4711 (emphasis added). Congress passed another Amendment to the LHWCA in 1984, but the changes enacted did not substantively change matters relating to the claims review process that is of primary concern in this Note. Longshore and Harbor Workers’ Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984) (codified as amended at 33 U.S.C. §§ 901-950).

78. *See* OWCP v. Perini N. River Assocs., 459 U.S. 297, 315-16 (1983); Voris v. Eikel, 346 U.S. 328, 333 (1953) (“This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.” (citing *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932))); *Pillsbury v. United Eng’g Co.*, 342 U.S. 197, 200 (1952) (“[T]his is a humanitarian Act, and . . . should be construed liberally to effectuate its purposes.”); *Balt. & Phila. Steamboat Co.*, 284 U.S. 408; *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3d Cir. 1939); *Candado Stevedoring Corp. v.*

subpart will review some of the key decisions that have shaped the judiciary's treatment of the Act.

Only five years after the LHWCA was enacted, the Court's decision in *Baltimore & Philadelphia Steamboat Co. v. Norton*⁷⁹ established some basic policy considerations still in use today. While the specific facts of the case are somewhat unremarkable,⁸⁰ the Court made the following statement as to its approach in construing and applying the statute:

[Workers' compensation] laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and *should be construed liberally in furtherance of the purpose for which they were enacted* and, if possible, *so as to avoid incongruous or harsh results*.⁸¹

In the decade that followed, several Federal Courts of Appeal decisions reinforced the importance of liberal application. In *Candado Stevedoring Corp. v. Lowe*,⁸² an employee of Candado Stevedoring Corporation was injured while working on a barge owned by Ira S. Bushey & Sons, Inc.⁸³ The injured employee originally filed suit against the barge owner, alleging negligence for a defective hatch cover,⁸⁴ but later, for reasons not within the record, had a default judgment entered against him. The court subsequently entered a decree absolving the barge owner of liability entirely.⁸⁵

At some point after the court decree was entered, the claimant also filed a claim for compensation from his employer, Candado,

Lowe, 85 F.2d 119 (2d Cir. 1936); *see also* Metro. Stevedore Co. v. Brickner, 11 F.3d 887, 889 (9th Cir. 1993); Holcomb v. Robert W. Kirk & Assocs., Inc., 655 F.2d 589, 592 (5th Cir. 1981); Mich. Mut. Liab. Co. v. Arrien, 344 F.2d 640, 647 (2d Cir. 1965) ("The effort in every case should . . . be to follow the Supreme Court's twice-voiced directive that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'").

79. *Balt. & Phila. Steamboat Co.*, 284 U.S. 408.

80. The claim, brought by the employer of an injured longshore worker, involved a dispute over the computation method of the claimant's compensation award, as determined by the application of various equations based on the type and duration of disability suffered. *Id.* at 410-12.

81. *Id.* at 414 (emphasis added) (citing *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930)).

82. *Candado Stevedoring Corp.*, 85 F.2d 119.

83. *Id.* at 120.

84. *Id.*

85. *Id.*

and was awarded compensation to be paid by the employer.⁸⁶ The employer appealed the award to the Second Circuit Court of Appeals, arguing that the earlier default in the case against the barge owner amounted to a forfeiture of his right to compensation.⁸⁷ Upholding the claimant's award from the deputy commissioner and lower court, the Second Circuit restated that the right to compensation ought to be "treated in a liberal spirit and only denied where some injustice or injury to the employer appears."⁸⁸ Noting that the employer failed to preserve the issue on which it later relied, the court went on to comment that "[t]he right of the employee should not be defeated by mere technicalities."⁸⁹

The Court of Appeals for the Third Circuit weighed in on the issue of application in *Southern Steamship Co. v. Norton*.⁹⁰ The claimant in that case, Jackson, sustained a back injury and was sent to his employer's physician for evaluation and treatment.⁹¹ After a month of treatment, Jackson returned to his job for four days but was dismissed for reasons unrelated to his injury.⁹² The compensation claim submitted to the deputy commissioner resulted in a determination of partial disability, which, in turn, resulted in reduced earning capacity and an associated compensation award.⁹³

The employer sought judicial review of the award, arguing that Jackson's dismissal for independent reasons precluded his partial disability recovery on the grounds of decreased earning capacity.⁹⁴ Once the case reached the Third Circuit, the court noted that the employer was essentially requesting that it reweigh the evidence already assessed by the deputy commissioner.⁹⁵ Refusing to do so, the court pointed out that its role was simply to assess whether there was sufficient evidence to support the deputy commissioner's determination, as evaluated against "a liberal construction of the Act" and a presumption "that doubts should be resolved in [the claimant's] favor."⁹⁶

86. *Id.*

87. *Id.*

88. *Id.* at 121.

89. *Id.*

90. *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3d Cir. 1939).

91. *Id.* at 826.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 826-27.

96. *Id.* at 827 (citing *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 404, 414 (1932); *Fid. & Cas. Co. of N.Y. v. Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932)).

In just over a decade, these three decisions ushered in an established preference for a liberal construction of the LHWCA in favor of the injured worker, and subsequent decisions only reinforced this approach.⁹⁷ One case even upheld a compensation award in the absence of written notice of injury to the employer, ostensibly a requirement under § 912 of the LHWCA.⁹⁸ In *Voris v. Eikel*, the Supreme Court ruled in favor of a worker seriously injured in an incident witnessed by many people, including at least one supervisor,⁹⁹ despite the claimant's failure to submit written notice of injury to his employer until long after the thirty-day notice window had lapsed.¹⁰⁰ Noting its duty to construe the statute liberally so as to avoid "harsh and incongruous results," the Court reviewed the circumstances of the injury and rejected the employer's argument that the claim for compensation was defeated due to lack of suffi-

97. See *OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 315-16 (1983); *Voris v. Eikel*, 346 U.S. 328, 333 (1953) ("This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." (citing *Balt. & Phila. Steamboat Co.*, 284 U.S. at 414)); *Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 200 (1952) ("[T]his is a humanitarian Act, and . . . should be construed liberally to effectuate its purposes . . ."); see also *Metro. Stevedore Co. v. Brickner*, 11 F.3d 887, 889 (9th Cir. 1993); *Holcomb v. Robert W. Kirk & Assocs., Inc.*, 655 F.2d 589, 592 (5th Cir. 1981); *Mich. Mut. Liab. Co. v. Arrien*, 344 F.2d 640, 647 (2d Cir. 1965) ("The effort in every case should . . . be to follow the Supreme Court's twice-voiced directive that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" (quoting *Reed v. S.S. Yaka*, 373 U.S. 410, 415 (1963); *Voris*, 346 U.S. at 333)).

98. *Voris*, 346 U.S. 328. The original language of 33 U.S.C. § 912 provides, in part:

(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of injury or death, and shall be signed by the employee or by some person on his behalf

....

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 12, 44 Stat. 1424, 1431 (1927) (codified as amended at 33 U.S.C. § 912 (2000)).

99. *Voris*, 346 U.S. at 330-32.

100. *Id.* at 330.

cient notice.¹⁰¹ The LHWCA, it held, was “designed to provide compensation for the included workers, regardless of whether written notice was given.”¹⁰² In sum, the courts have established a long and consistent record of liberal application of the LHWCA to an injured worker’s claim for compensation benefits.

III. THE CURRENT CONTROVERSY OVER § 928(b)

So what’s the problem? The LHWCA was enacted to provide injured maritime workers access to workers’ compensation benefits similar to those available to their landward peers,¹⁰³ and court rulings since its inception indicate a clear preference toward liberal interpretation that will award those benefits to the injured employee.¹⁰⁴ It seems only logical then that the courts’ decisions would reflect this longstanding preference on *all* provisions of the LHWCA, including those for attorney’s fees.

Section 928 of the current version of the LHWCA provides for an award of attorney’s fees in two distinct circumstances.¹⁰⁵ Sub-

101. *Id.* at 332-34. The claimant was injured when a flash fire broke out in the hold of a ship, causing workers to “fle[e] in terror.” *Id.* at 330. In the midst of the commotion, with many people present, the claimant was struck by a beam with such force that the blow rendered him unable to walk. *Id.* Immediately thereafter, several of his supervisors were orally informed of the serious injury, and one such supervisor maneuvered the claimant to his car, drove him home, and promised to take him to a doctor. *Id.* at 332. Despite this course of events, formal *written* notice was not submitted until six months after the accident, and the employer tried to use this fact as leverage to escape liability, alleging that 33 U.S.C. § 912(d) is not satisfied unless the employer has “actual personal knowledge of the injury.” *Id.* Citing ample evidence that the employer had actual notice of the injury and the supervisors’ failure to follow internal injury reporting procedures, the court declined to accept the employer’s argument, decriing it as “indefensible.” *Id.*

102. *Id.* at 334.

103. Longshoremen’s and Harbor Workers’ Compensation Act, at Introduction (stating that the purpose of the Act is “[t]o provide compensation for disability or death resulting from injury to employees in certain maritime employments”).

104. *See* *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408 (1932); *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3d Cir. 1939); *Candado Stevedoring Corp. v. Lowe*, 85 F.2d 119 (2d Cir. 1936); cases cited *supra* note 97.

105. Section 928 provides in part:

(a) 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

section (a) of § 928 addresses the circumstances in which an employer has refused to pay *any* compensation after receipt of notice of injury and the claimant is thereafter successful in securing compensation benefits with the assistance of counsel. Subsection (b) covers those circumstances in which the employer has paid *some* compensation after receipt of notice of injury, but the precise compensation due is disputed by the employer and employee. In such a case, subsection (b) provides a procedure for the employee, employer, and reviewing authority to follow in resolving the dispute. If the dispute is resolved in favor of the employee who secures compensation in addition to that which the employer originally paid, a reasonable attorney's fee "shall" be awarded.¹⁰⁶

When Congress drafted the attorney's fee provisions of the LHWCA, it likely envisioned a § 928(b) dispute to play out as follows: First, the employer would offer some compensation to its employee following a workplace injury, but the parties would ultimately disagree on the precise amount of compensation due. The parties would refer the dispute to an OWCP claims officer who would schedule an informal conference between the parties in an attempt to mediate a settlement. After the informal conference, the claims officer, having heard arguments from both employer and

directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(b) 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. . . . 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(a)-(b) (2000).

106. *Id.* § 928(b).

employee, would issue a written recommendation suggesting the terms of settlement. If both parties accepted the recommendation, the dispute was settled. If the employer refused to accept the recommendation, the employer might choose to make a second offer of settlement. If the employee was still dissatisfied with the offer tendered and subsequently obtained a greater award through formal proceedings with the help of an attorney, § 928(b) provides a mechanism by which the employee could recoup the legal fees she incurred to secure the additional compensation.

Although the procedure outlined in the statute seems fairly straightforward on paper, compliance has proven difficult in practice. The controversy and the topic of this Note, centers on the required *degree* of compliance with the procedure in subsection (b).¹⁰⁷ Must each step be followed precisely in order to authorize an award of attorney's fees to the successful claimant? Is substantial compliance sufficient? Curiously, the Courts of Appeals do not agree on the circumstances that warrant attorney's fees under § 928, and the Supreme Court has not yet ruled on the issue. The controversy regarding § 928(b) essentially boils down to a question of statutory interpretation: are the provisions outlined in the section properly treated as rigid preconditions to recovery or merely as procedural elements to the dispute resolution process? Subpart A of this Part discusses the historical disagreement between the circuits and their respective reasoning on the issue. Finally, subpart B discusses a recent decision in the Court of Appeals for the Sixth Circuit, which served as the Circuit's first opinion on the issue of attorney's fees awarded under § 928(b), and attempts to discover whether the decision settles the dispute or simply further confuses an already complex issue.

A. *The Circuit Split*

1. The Ninth Circuit: *National Steel & Shipbuilding Co. v. Office of Workers' Compensation Programs*

The Court of Appeals for the Ninth Circuit issued one of the first major decisions interpreting § 928(b) in *National Steel & Ship-*

107. While the focus of this Note is solely on the controversy around subsection (b) of § 928 of the LHWCA, it is worth noting that there is also some dispute about the circumstances giving rise to a proper award of attorney's fees under subsection (a). Disagreement exists as to what constitutes a failure to pay "any" compensation under the subsection, what formality is required to constitute "filing a claim," and how the courts should handle supplemental claims (i.e., a temporary total disability that later gives rise to a permanent partial disability claim stemming from the same injury).

building Co. v. Office of Workers' Compensation Programs.¹⁰⁸ The employee, Holston, injured his right knee while working for National Steel in August of 1974,¹⁰⁹ and his employer paid temporary total disability benefits under the LHWCA between the date of injury and his return to work in May 1975.¹¹⁰ Holston filed a claim for permanent partial disability benefits two months later, apparently still suffering from the injury.¹¹¹ The claimant and his employer, National Steel, were unable to agree either on the extent of the injury, or his average weekly wage,¹¹² and submitted the dispute to an informal conference before an assistant deputy commissioner from the Department of Labor.¹¹³ The informal conference, which took place on January 26, 1976, did not resolve the dispute, and the Commissioner referred the matter directly to formal hearing before an ALJ, without issuing any written recommendation as to the how the dispute ought to be resolved.¹¹⁴ The ALJ sided with Holston's assertions as to the weekly wage he was entitled to,¹¹⁵ as well as the extent of the permanent partial disability.¹¹⁶ The ALJ further ordered the employer to pay \$1200 of Holston's attorney's fees pursuant to § 928(b).¹¹⁷ The employer appealed to the BRB, which not only affirmed the ALJ's determinations, but also assessed an additional \$1200 in attorney's fees for the claimant's representation during the appeal.¹¹⁸ The employer again appealed.¹¹⁹

Holston's employer argued that an award of attorney's fees under § 928(b) was improper because the deputy commissioner did not issue a written recommendation for the employer to accept or

108. *Nat'l Steel & Shipbuilding Co. v. OWCP*, 606 F.2d 875 (9th Cir. 1979).

109. *Id.* at 877.

110. *Id.*

111. *Id.*

112. An injured worker's average weekly wage serves as the basis upon which compensation amounts are calculated for the great majority of disabilities. See 33 U.S.C. §§ 908-910 (2000).

113. *Nat'l Steel & Shipbuilding Co.*, 606 F.2d at 877.

114. *Id.*

115. Holston asserted that his weekly wage was \$244.66 at the time of his injury, approximately \$35 more than the weekly wage his employer contended. *Id.* at 877-78. This difference would have amounted to nearly a \$2000 deficiency at the end of one year.

116. Holston contended that his injury resulted in a permanent twenty-five percent (partial) loss of use of his leg; the ALJ determined that a twenty percent loss was reasonable and computed Holston's compensation on that basis. *Id.*

117. *Id.* at 878.

118. *Id.* at 878, 881.

119. *See id.* at 878.

reject and that the absence of this element precluded recovery.¹²⁰ Citing the purpose of the statute, the Ninth Circuit rejected this argument and upheld the assessment of attorney's fees under § 928(b), stating, "[w]e do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition . . . [of] liability for attorney's fees."¹²¹ The court went on to say that it "would not set aside" the attorney's fee award even if it "were . . . to view the language requiring a written recommendation as a precondition to liability for fees,"¹²² since the recommendation that *did* follow the informal conference was referral to the ALJ, and that the course of proceedings allowed the court to infer that "any explicit recommendation would have been rejected by one of the parties."¹²³ In other words, the course of proceedings dictated by § 928(b) still did or would have substantively occurred so as to have advanced the matter to formal proceedings.¹²⁴

In reaching its decision, the *National Steel* court relied on the purpose of the statute and the intent of the legislature enacting it, which was the assessment of attorney's fees in connection with a *dispute over compensation* resolved in favor of the employee through formal proceedings.¹²⁵ Two subsequent Ninth Circuit cases served to clarify the rule of law first expressed in *National Steel*.¹²⁶

120. *Id.* at 881.

121. *Id.* at 882 ("The purpose of the statute is to authorize the assessment of legal fees against employers in cases where the *existence or extent of liability is controverted* and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel." (emphasis added) (citing H.R. REP. NO. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4717)). Although the court cited the House Report to the 1972 LHWCA amendments, the court actually misrepresented the substance of the Report. *See* H.R. REP. NO. 92-1441; *see also* Pittsburgh & Conneaut Dock Co. v. OWCP, 456 F.3d 616, 629 (6th Cir. 2006), *amended by* 473 F.3d 253 (6th Cir. 2007).

122. *Nat'l Steel & Shipbuilding Co.*, 606 F.2d at 882.

123. *Id.* The court also commented on the employer's failure to bring the omitted written recommendation to the attention of the ALJ until it was no longer possible to cure this defect. *Id.* Under those facts, the court indicated that it would not have overturned the lower court's award of attorney's fees, even if it *did* view the written recommendation as a precondition to recovery. *Id.*

124. *See id.*

125. *Id.* ("The congressional intent was to limit liability to cases in which *the parties disputed the existence or extent of liability*, whether or not the employer had actually rejected an administrative recommendation." (emphasis added)).

126. *See* Matulic v. OWCP, 154 F.3d 1052 (9th Cir. 1998); Todd Shipyards Corp. v. OWCP, 950 F.2d 607 (9th Cir. 1991).

*Todd Shipyards Corp. v. Office of Workers' Compensation Programs*¹²⁷ involved a compensation dispute that was submitted to, and resolved at, the informal conference held before the deputy commissioner.¹²⁸ At that conference, the employer acknowledged that the employee was permanently and totally disabled as a result of his injury and prepared a stipulation that admitted the claimant's right to compensation benefits associated therewith.¹²⁹ The parties did not agree, however, on the employer's liability for claimant's attorney's fees, and that issue was eventually resolved in formal proceedings before the BRB, which assessed \$5000 of the claimant's attorney's fees to the employer pursuant to § 928(b).¹³⁰ On appeal however, the Ninth Circuit overturned the award since

there was no controversy concerning liability on the amount of compensation to be paid after the informal conference. [Those] issues were resolved by [the employer's] concession and the parties' stipulation. Section 928(b) does not authorize the payment of attorneys' fees if the only unresolved issue is whether attorneys' fees awarded should be for services performed prior to the successful termination of the informal conference.¹³¹

Citing its earlier holding in *National Steel*, the Ninth Circuit declined to extend attorney's fees awards to circumstances in which there was no dispute over liability to be resolved in formal proceedings.¹³²

The Ninth Circuit again addressed the nature of the dispute and an associated assessment of attorney's fees in *Matulic v. Office of Workers' Compensation Programs*.¹³³ Matulic, the claimant, was injured in September 1989, and his employer voluntarily paid temporary total disability benefits from the time of injury until his return to work in December.¹³⁴ After his return to work, Matulic applied for permanent partial disability benefits, and a dispute arose between employer and employee as to the extent of the injury.¹³⁵ The parties presented the dispute to the OWCP for resolution, and the OWCP issued a written recommendation as to the

127. *Todd Shipyards Corp.*, 950 F.2d 607.

128. *Id.* at 609.

129. *Id.*

130. *Id.*

131. *Id.* at 611.

132. *Id.* at 610-11.

133. *Matulic v. OWCP*, 154 F.3d 1052 (9th Cir. 1998).

134. *Id.* at 1055.

135. *Id.*

extent of disability, as well as the weekly wage for use in benefit compensation calculations.¹³⁶ The written recommendation, however, was issued without an informal conference being held despite the repeated requests from both employer and employee.¹³⁷ When the parties were unable to settle the matter, and the OWCP also failed to issue a final Compensation Order, the parties turned to an ALJ for resolution.¹³⁸

The ALJ determined that Matulic suffered a five percent permanent disability as a result of his injury, set the weekly wage amount upon which his compensation would be based, and denied Matulic an award of attorney's fees.¹³⁹ Apparently dissatisfied with this result, the claimant filed an appeal with the BRB contesting the method of weekly wage calculation and the denial of attorney's fees, but the BRB affirmed.¹⁴⁰ Matulic petitioned for appellate review, and the case came before the Ninth Circuit.¹⁴¹

As to the weekly wage computation, the court found that Matulic was entitled to greater compensation than that which the employer was willing to pay.¹⁴² As to the attorney's fees, the court contrasted Matulic's case with that of the employee in *Todd Shipyards* and reversed the denial of attorney's fees.¹⁴³ Finding that the amount of compensation *did* remain in dispute after an attempt at informal resolution,¹⁴⁴ and that the claimant, through his attorney, was subsequently successful in obtaining a greater award in formal proceedings, the court held that Matulic was entitled to attorney's

136. *Id.*

137. *Id.*

138. *Id.* Although the Ninth Circuit's decision does not disclose the details of the OWCP's written recommendation issued in the absence of an informal conference, the fact that the parties continued to disagree indicates that the recommendation was rejected by either the employer or employee, thus requiring the issue to be resolved via formal proceedings. *See id.*

139. *Id.*

140. *Id.* The BRB did not assess the ALJ determinations, but rather failed to take any action on the appeal for one year—conduct which had the effect of automatically affirming the ALJ's finding. *Id.*

141. *Id.*

142. *Id.* at 1056-57. The wage dispute centered around which of three calculation methods was appropriate. *Id.* at 1055-56. Matulic, who ultimately prevailed, maintained that he was entitled to a calculation method that yielded a weekly amount greater than his employer was willing to pay. *Id.* at 1056-67.

143. *Id.* at 1060.

144. The court glossed over the lack of an informal conference on this point, and instead considered the written recommendation "the functional equivalent of an informal conference" for the purposes of assessing the dispute resolution process. *Id.*

fees on that basis.¹⁴⁵ The fact that the employer did not formally reject the original recommendation by the OWCP made no difference to the court, since the dispute clearly continued despite that recommendation.¹⁴⁶ In other words, the court, relying on the purpose of the statute as originally stated in *National Steel*, focused on the course of dispute resolution and the fact that the claimant prevailed in formal proceedings.¹⁴⁷

Overall, *National Steel*, *Todd Shipyards*, and *Matulic* all demonstrate the Ninth Circuit's focus on the course of proceedings and its disregard of the provisions of § 928(b) as "precondition[s] to the imposition of liability for attorney's fees."¹⁴⁸ The Courts of Appeal for the Fifth and Fourth Circuits, however, take a decidedly different approach.

2. The Courts of Appeal for the Fifth and Fourth Circuits:
Pool Co. v. Cooper and *Virginia International*
Terminals, Inc. v. Edwards

Although the Fifth Circuit issued a number of opinions relating to the application of § 928(b) following the 1972 LHWCA Amendments,¹⁴⁹ the 2001 decision in *Pool Co. v. Cooper* is probably its clearest and most strongly worded opinion on the issue of attorney's fees. In *Cooper*, the claimant sustained a knee injury requiring surgery in 1989.¹⁵⁰ His employer voluntarily paid temporary

145. *Id.* at 1061.

146. *Id.* at 1060. Part of the employer's argument that it was not liable for claimant's attorney's fees was its agreement to be bound by the recommendation of the OWCP. *Id.* Given that the dispute was not resolved at that point, it is fair to assume that the recommendation was favorable to the employer and that it "accepted" the recommendation so as not to be liable for attorney's fees. *Cf.* 33 U.S.C. § 928(b) (2000) ("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."). Even if the employer "accepted" the compensation recommendation, however, § 928(b) also provides a mechanism by which the employee may reject the employer's tender of compensation and potentially still recover attorney's fees in connection with formal proceedings to settle the issue. *Id.*; *see supra* note 105.

147. *Matulic*, 154 F.3d at 1060-61.

148. *Nat'l Steel & Shipbuilding Co. v. OWCP*, 606 F.2d 875, 882 (9th Cir. 1979); *see also Matulic*, 154 F.3d at 1060-61; *Todd Shipyards Corp. v. OWCP*, 950 F.2d 607, 610-11 (9th Cir. 1991) (focusing on the nature of the disputes before the court, rather than the presence or absence of the provisions of § 928(b), when determining the propriety of attorney's fee awards).

149. *See Staftex Staffing v. OWCP*, 237 F.3d 404 (5th Cir. 2000), *modified on reh'g*, 237 F.3d 409 (5th Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908 (5th Cir. 1997); *Savannah Mach. & Shipyard Co. v. OWCP*, 642 F.2d 887 (5th Cir. 1981).

150. *Pool Co. v. Cooper*, 274 F.3d 173, 175 (5th Cir. 2001).

total compensation benefits while he was recuperating and continued to pay permanent partial disability benefits after he resumed his position in 1990.¹⁵¹ Unfortunately, Cooper injured his knee a second time in 1992, requiring another surgery.¹⁵² Once again, the employer voluntarily paid temporary total disability benefits, and later, permanent partial disability benefits.¹⁵³ One year after the second surgery, Cooper's surgeon determined that the knee had improved as much as could be expected, resulting in a twenty percent loss of use.¹⁵⁴ Within two months of the surgeon's disability determination, Cooper's employer stopped making all disability payments.¹⁵⁵ Unable to return to his previous position as a deckhand, Cooper sought alternate employment as a security guard, but continued to experience pain in his knee.¹⁵⁶

In February 1995, Cooper filed a claim for additional benefits with the OWCP.¹⁵⁷ His previous employer disputed his right to any additional benefits and filed the appropriate forms with the OWCP.¹⁵⁸ Although advised by the OWCP of Pool Company's position, Cooper never replied.¹⁵⁹ By 1997, and after yet another surgery, Cooper again sought additional benefits in connection with his knee injury, this time before an ALJ.¹⁶⁰ The ALJ made a number of determinations as to the duration and nature of disability in the preceding years and consequently awarded benefits pursuant to those determinations.¹⁶¹ The judge, and later, the BRB, also awarded Cooper his attorney's fees.¹⁶²

Once the case was before the Fifth Circuit, the issue of attorney's fees under § 928(b) was disposed of quickly. While the Ninth Circuit evaluated the course of proceedings in connection with a dispute over compensation, the Fifth Circuit summarily dismissed this evaluation in favor of a straightforward, if not rigid, assessment:

It is clear that the BRB erred in awarding attorney's fees under § [9]28(b). Pool did pay compensation without an award; a con-

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 176.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 176-77.

162. *Id.* at 177.

troverly about the amount of additional compensation did subsequently arise; and Cooper subsequently did obtain a compensation award in excess of what Pool was willing to pay. However, as the parties concur, no informal conference with the Department of Labor ever took place. Under the law of our Circuit, *that fact poses an absolute bar to an award of attorney's fees under § [9]28(b)*.¹⁶³

The *Cooper* decision served to solidify and clarify that which earlier Fifth Circuit cases had already established—§ 928(b) is to be construed strictly and its provisions are to be considered preconditions to recovery of attorney's fees.¹⁶⁴

In 2005, the Fourth Circuit adopted the Fifth Circuit's approach to § 928(b) in *Virginia International Terminals, Inc. v. Edwards*.¹⁶⁵ In that case, the claimant, Edwards, was injured on February 22, 2002 and filed a claim for disability benefits on February 28, 2002.¹⁶⁶ His employer promptly paid temporary total benefits for the period from February 26, March 31, when a doctor determined that Edwards could return to work.¹⁶⁷ In July, however, Edwards, through counsel, requested benefits for the three days between the date of injury and the commencement of disability payments, and further requested an informal conference in connection with same.¹⁶⁸ The OWCP communicated the request to Edwards's employer, which responded with a request for medical records to support the claim for benefits during those three days.¹⁶⁹ Edwards refused to supply the documentation and instead asked that the matter be formally resolved before an ALJ.¹⁷⁰ Instead of

163. *Id.* at 186 (emphasis added). The court did, however, award attorney's fees under § 928(a). *Id.*

164. *See* *Staftex Staffing v. OWCP*, 237 F.3d 404, 408-09 (5th Cir. 2000), *modified on reh'g*, 237 F.3d 409 (5th Cir. 2000). In *Staftex Staffing*, the court denied an attorney's fee award since the disputed issue was never submitted to an informal conference, and a written recommendation was never issued. *Id.* However, upon rehearing, the award of attorney's fees was reinstated. *Id.*; *see also* *FMC Corp. v. Perez*, 128 F.3d 908, 910 (5th Cir. 1997) (denying an award of attorney's fees, noting its propriety under § 928(b) "only if the dispute has been the subject of an informal conference with the Department of Labor"); *Savannah Mach. & Shipyard Co. v. OWCP*, 642 F.2d 887, 890 (5th Cir. 1981) ("[I]f the other *requirements of section [9]28(b)* are met, an employee who accepts partial compensation, but who claims additional compensation, may receive attorney's fees." (emphasis added)); *infra* Part V.

165. *Va. Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2005).

166. *Id.* at 315.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

pursuing formal proceedings, the employer chose instead simply to pay disability benefits for the three days and close the matter.¹⁷¹ Edwards then petitioned the court for attorney's fees incurred in connection with the disputed three days.¹⁷² Although the ALJ rejected the claim based on the provisions of § 928(b), the BRB awarded attorney's fees pursuant to § 928(a).¹⁷³ The employer appealed to the Court of Appeals for relief, arguing that neither subsection justified the award.¹⁷⁴

After meticulously analyzing the language of both subsections and how they relate to one another,¹⁷⁵ the court agreed with the employer that neither subsection allowed for an award of attorney's fees in this case.¹⁷⁶ As to § 928(b), the court referred to the provisions of the section as "mandatory statutory conditions,"¹⁷⁷ and held that "[t]he failure to hold an informal conference or issue a written recommendation is fatal to a claim for attorney's fees under the plain terms of section 928(b)."¹⁷⁸

Like the Fifth Circuit in *Cooper*, the Fourth Circuit adopted a bright-line rule as to the propriety of attorney's fee awards under § 928(b)—if all of the provisions of the subsection have not been met, an award of attorney's fees is not appropriate.¹⁷⁹ With the Ninth Circuit firmly rooted in its "course of dispute resolution" approach to the imposition of attorney's fees under § 928(b), and the Fifth and Fourth Circuits just as firmly rooted in their bright-line "provisions as preconditions to recovery" approach, which approach is correct?

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 316-17. The court relied heavily on the notion that adjacent sections of the same statute must be read together and that in order to give both sections distinct meaning, subsection (b) must be read strictly. *See id.*

176. *Id.* at 316.

177. *Id.* at 318.

178. *Id.* The court repeated this sentiment later on in the opinion: "Plainly, under section 928(b), a fee award is not available absent an informal conference and written recommendation. None occurred here, and so Edwards was not entitled to a fee award under this subsection." *Id.* at 318-19.

179. *Id.* at 319; *see also* *Newport News Shipbuilding & Dry Dock Co. v. OWCP (Moody)*, 474 F.3d 109, 114 (4th Cir. 2006) ("Because [claimant] satisfies all of the requirements of § 928(b), he is entitled to an award of the attorney's fees he incurred . . ."); *Newport News Shipbuilding & Dry Dock Co. v. OWCP (Hassell)*, 477 F.3d 123, 126 (4th Cir. 2007) ("The threshold requirements of § 928(b) are satisfied . . .").

B. *The Sixth Circuit Weighs In: Pittsburgh & Conneaut Dock Co. v. OWCP*

1. Background

In 2006, the Court of Appeals for the Sixth Circuit issued its first opinion on circumstances warranting attorney's fees under § 928(b).¹⁸⁰ *Pittsburgh & Conneaut Dock Co. v. OWCP*¹⁸¹ involved an injury that rendered the claimant permanently and totally disabled, and unable to return to work.¹⁸² Before the disability determination through formal proceedings before an ALJ, the claimant, Bordeaux, underwent years of medical and psychological treatment as well as physical and cognitive therapies in an attempt to improve the cognitive functions damaged by the injury.¹⁸³ Although Bordeaux exhibited some improvement, his recovery arguably plateaued by the time the issue of disability was determined at the formal hearing.¹⁸⁴ The "plateau" formed the central issue in the dispute: the employer contended that Bordeaux's cognitive injuries had not yet reached maximum medical improvement and thus were not "permanent."¹⁸⁵ Since Bordeaux's doctors had noted that there was a possibility that additional psychotherapy and antidepressant medications might improve Bordeaux's cognitive functions,¹⁸⁶ the employer refused to pay permanent total disability benefits.¹⁸⁷

180. *Pittsburgh & Conneaut Dock Co. v. OWCP*, 456 F.3d 616, 627 (6th Cir. 2006), *amended by* 473 F.3d 253 (6th Cir. 2007). The amended decision reflects only a technical change in the decision, remanding the matter for additional proceedings to set the amount of attorney fees charged to the claimant pursuant to § 928(c) of the statute. *See Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 267. Section 928(c) requires that the claimant's attorney's fees, when assessed to the claimant, must be approved and fixed by the deputy commissioner, BRB, or court. *See* 33 U.S.C. § 928(c) (2000).

181. For the facts of *Pittsburgh & Conneaut Dock Co.*, see *supra* notes 1-17 and accompanying text.

182. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 619-20.

183. *Id.* Bordeaux attended speech therapy to help with his memory and attention span, took a variety of antidepressants to treat anxiety and depression (each of which produced intolerable side effects and ultimately had to be stopped), and was examined and treated by a psychologist, a neuropsychologist, and a neurologist, all in an attempt to find a course or courses of treatment that would improve his disability. *Id.*

184. *Id.* Bordeaux's psychologist and neuropsychologist both testified at the formal hearing that his cognitive injuries had reached "maximum medical improvement." His neurologist testified that additional psychotherapy, as urged by the employer, would not treat his cognitive problems, nor improve the degree of cognitive disability. *Id.*

185. *Id.* at 621.

186. *Id.*

187. *Id.* at 622. Although ultimately unsuccessful, the employer even went so far as to file a motion to compel Bordeaux to undergo additional psychotherapy (which

Bordeaux and his employer had initially attempted to settle the matter informally¹⁸⁸ via the LHWCA's dispute resolution process.¹⁸⁹ Following the informal conference held on September 19, 2002, the claims review officer from the OWCP issued a written recommendation, but, curiously, one that stated he was not making a recommendation since the parties were attempting to settle.¹⁹⁰ In any event, settlement never occurred and the matter was formally determined by the ALJ decision issued in January of 2004, which awarded medical benefits, temporary total disability compensation from the date of injury until August 20, 2002, and permanent total disability compensation from that point on.¹⁹¹ The ALJ also assessed attorney's fees pursuant to § 928(a) of the LHWCA. The employer appealed this decision to the BRB, but the BRB upheld the ALJ's award, including that for attorney's fees—but this time pursuant to § 928(b).¹⁹² When the employer again appealed the decision, the Court of Appeals for the Sixth Circuit affirmed the previous decisions, *except* with regard to the award of attorney's fees.¹⁹³

2. Majority Opinion

Noting the existing circuit split regarding the interpretation and application of § 928(b),¹⁹⁴ the Sixth Circuit first examined the

included resuming the antidepressants that his body was unable to tolerate) or have his compensation benefits suspended. *Id.* at 623.

188. The employer contended that three informal conferences were held in connection with the extent and permanence of Bordeaux's injuries, but the court only found evidence of one in the record. *Id.* at 625 n.3.

189. *See* 33 U.S.C. §§ 914(d), 914(h), 919 (2000).

190. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 625. The respondent Bordeaux's appellate brief alleges that the claims review officer actually recommended a settlement figure of \$200,000. *See* Final Brief of Respondent Thomas Bordeaux, *supra* note 1, at 31. However, the petitioner-employer's brief states that the claims review officer made no recommendation in writing as to the disposition of the "permanence of disability" dispute. Final Brief of Petitioners at 33-34, *Pittsburgh & Conneaut Dock Co. v. OWCP*, (6th Cir. 2005) (No. 05-3425).

191. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 620. August 20, 2002, was the date that the ALJ determined that Bordeaux became permanently totally disabled, presumably based on testimony from one of the doctors, who determined that August 20, 2002 to be the date on which Bordeaux's injuries had reached "maximum medical improvement." *Id.*

192. *Id.* *See supra* note 105 and accompanying text to compare the language of subsections (a) and (b), and the circumstances under which each subsection should be applied.

193. *Id.* at 629.

194. *Id.* at 627.

holdings of the Fourth, Fifth, and Ninth Circuits.¹⁹⁵ Finding merit in reliance on the plain language of § 928(b) by the Fourth and Fifth Circuits, the Sixth Circuit adopted the bright line, “provisions as preconditions to recovery” approach.¹⁹⁶ After determining that the plain language of the section is clear and unambiguous,¹⁹⁷ the majority attacked the Ninth Circuit’s reliance on statutory purpose and legislative history first expressed in *National Steel* as inappropriate considering the plain language of the statute.¹⁹⁸ Finding “no written recommendation regarding the disposition of the controversy,” the court reversed the BRB’s award of attorney’s fees under § 928(b); and finding § 928(a) inapplicable as well,¹⁹⁹ the court declined an award of attorney’s fees altogether.²⁰⁰

3. The Dissenting Opinion

Despite the relative ease with which the majority was able to reach its decision on the matter of attorney’s fees, one judge wrote a dissent to express her disagreement with both the reasoning and the result:

Denying fees to Bordeaux based on rigid formalities that are not expressly mandated by the statute is contrary to two of the primary concerns underlying the [LHWCA]: the availability of quick recovery for valid workplace-injury claims without resort to the courts, and when this fails, claimants’ full recovery of statutory benefits without reduction by the cost of legal services.²⁰¹

Judge Moore wrote that she would have awarded Bordeaux’s attorney’s fees under either § 928(a) or (b).²⁰²

With regard to § 928(b) specifically, Judge Moore took issue with the majority’s characterization of the plain language of the subsection dictating preconditions to recovery when the statute

195. *Id.* at 627-29.

196. *Id.* at 628.

197. *Id.* (“The language of subsection (b) plainly states that in order for fees to be assessed under its terms there must be a written recommendation containing a suggested disposition of the controversy.”).

198. *Id.* at 629. Notwithstanding the improper use of legislative history when the language is clear, the majority also went on to note that the court in *National Steel* actually misstated the legislative history on which it relied, and for that reason as well, found the Ninth Circuit’s approach faulty and without merit. *Id.*; see *supra* notes 108-125 and accompanying text.

199. *Id.* at 626-27.

200. *Id.* at 629.

201. *Id.* at 629-30 (Moore, J., dissenting) (citation omitted).

202. *Id.* at 635.

does not identify them as such.²⁰³ She noted that the subsection is silent as to a situation like Bordeaux's, in which the provisions outlined in the subsection have not been met "through no fault of the claimant, but rather as a result of the agency's failure to follow its duties."²⁰⁴ Clearly distressed by the effect of the majority's decision on people situated similarly to Bordeaux, Judge Moore emphasized the failure of the agency to discharge its statutory duties²⁰⁵ and the absence of fault (and control) the claimant had over his ability to cure the dispute procedure's shortcomings.²⁰⁶ Reasoning that denying attorney's fees pursuant to § 928(b) in these circumstances "would be at odds with the policies underlying the [LHWCA]," Judge Moore concluded that Bordeaux should have recovered his attorney's fees pursuant to that subsection.²⁰⁷

With nearly thirty years of reasoning employed by four separate courts of appeal and the circuit split still intact, the question remains: what is the proper interpretation and application of the provisions of § 928(b) of the LHWCA? By undertaking inquiries into (1) the plain meaning of the subsection; (2) the legislative intent embodied in both the language of the Act as a whole and as represented in judicial decisions since the Act's enactment; and (3) the genesis of workers' compensation law, this Note attempts to answer that precise question in Part IV.

IV. EQUITY AND HISTORY DEMAND SUBSTANCE OVER FORM

The LHWCA provides a compensation mechanism for on-the-job injuries sustained by maritime workers.²⁰⁸ The purpose underlying the statute is to provide prompt and adequate compensation

203. *Id.* at 634.

204. *Id.*

205. *Id.*

[T]he claims officer failed to follow his statutory obligation of making a recommendation disposing of the controversy and instead directly contravened the statute by stating that he was making "no recommendation." . . . The employer should not secure a windfall because the claims officer shirked his statutory duty, particularly when nothing in the statute mandates that we enforce such preconditions to recovery.

Id. (citation omitted).

206. *Id.* ("Bordeaux requested and participated in the informal conference. . . . It is no fault of Bordeaux that the claims review officer did not make a recommendation on the disputed issue."); *see also id.* at 634 n.7 ("[T]he lack of a written recommendation was in no way a result of any deficiency on the part of Bordeaux.")

207. *Id.* at 635.

208. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2000).

for valid workplace injury claims.²⁰⁹ When injured workers have not successfully obtained adequate compensation for their injuries through the statutory claims process, and subsequently must resort to the courts to secure those benefits, the LHWCA also provides a mechanism in two limited circumstances for the successful claimant to shift his or her legal fees to the employer. Subsection (a) of § 928 addresses the circumstance when the employer disputes liability and refuses to pay any compensation,²¹⁰ while subsection (b) addresses the circumstance in which the employer paid some compensation, but a dispute later arises as to the amount of compensation due.²¹¹ Aside from these circumstances, the statute expressly prohibits fee-shifting in any other situation.²¹²

The courts are particularly divided over appropriate attorney's fee awards under subsection (b), which delineates procedural antecedents for recovery of attorney's fees.²¹³ The controversy is one of statutory interpretation: are the provisions of subsection (b) rigid prerequisites to fee awards? The Fourth, Fifth, and most recently, the Sixth Circuits have ruled in favor of strict statutory interpretation, citing the plain language of subsection (b) and holding that the absence of precise compliance with its provisions precludes recovery of the claimant's attorney's fees.²¹⁴ The Ninth Circuit, however, has favored a broad statutory interpretation, and, citing the statute's purpose, has held that provisions of subsection (b) are not to be read as inflexible preconditions to a claimant's award of attorney's fees.²¹⁵

209. *Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 630 (Moore, J., dissenting).

210. 33 U.S.C. § 928(a).

211. *Id.* § 928(b).

212. *Id.*

213. *Id.*

214. *See Pittsburgh & Conneaut Dock Co.*, 456 F.3d at 629 (reversing an award of attorney's fees, citing the absence of a written recommendation); *Va. Int'l Terminals v. Edwards*, 398 F.3d 313, 319 (4th Cir. 2005) (affirming the BRB's denial of attorney's fees under subsection (b), citing the absence of both an informal conference and written recommendation); *Pool Co. v. Cooper*, 274 F.3d 173, 186 (5th Cir. 2001) (reversing an award of attorney's fees under subsection (b), citing the absence of an informal conference); *see also Newport News Shipbuilding & Dry Dock Co. v. OWCP*, 474 F.3d 109, 113 (4th Cir. 2006) (affirming an award of attorney's fees, citing the occurrence of an informal conference on the disputed matter, a written recommendation, the employer's rejection of the recommendation, and the claimant's subsequent use of an attorney to secure compensation benefits in excess of those the employer originally tendered).

215. *See Nat'l Steel & Shipbuilding Co. v. OWCP*, 606 F.2d 875, 882 (9th Cir. 1979) (affirming an award of attorney's fees under subsection (b) in the absence of a written recommendation, citing the general statutory purpose "to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is

Which interpretation is correct? Based on the language of the statute, the historical context that gave rise to workers' compensation law, and the judiciary's well-established policy of liberal interpretation and broad application of the LHWCA, the Ninth Circuit's approach, which embraces the liberal policies of eighty years of precedent, is the proper analytical framework.

A. *The Statute's "Plain Meaning" Is Not Plain*

The first place to start in questions of statutory interpretation is the language itself.²¹⁶ When the meaning of statutory language is clear, the courts must enforce the statute according to its terms.²¹⁷ What, then, is the plain meaning of § 928(b)?

The courts often utilize canons of construction as interpretive aids when they are asked to assign meaning to statutory language. Many basic canons of construction concern how language is used and how to discern meaning from the language employed.²¹⁸ For example, an initial inquiry might evaluate whether the terms utilized in the subsection are used in their ordinary sense or are "terms of art" to which the legislature has assigned a special meaning.²¹⁹ Since the controversy around subsection (b) centers on whether the steps provided are strict prerequisites to attorney's fee awards, it is important to focus on the words associated with each of those steps.

controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel"); *see also* *Matulic v. OWCP*, 154 F.3d 1052, 1060-61 (9th Cir. 1998) (in awarding attorney's fees, analysis focused on the statutory purpose stated in *National Steel* and did not assess the extent of adherence to the provisions outlined in subsection (b)); *cf.* *Todd Shipyards Corp. v. OWCP*, 950 F.2d 607, 610-11 (9th Cir. 1991) (in reversing award of attorney's fees, contrasted statutory purpose stated in *National Steel* and noted that there was no controversy following an informal conference, nor a subsequent formal proceeding to secure additional benefits).

216. *See* *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself."); *see also* *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981); *Appleton v. First Nat'l Bank of Ohio*, 62 F.3d 791, 801 (6th Cir. 1995).

217. *United States v. Ron Pair Enter.*, 489 U.S. 235, 242 (1989); *see also* YULE KIM, CONG. RESEARCH SERV., *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* 4 (2008), www.fas.org/sgp/crs/misc/97-589.pdf. The so-called "plain meaning rule" states that when the meaning of the statutory language is clear, the judiciary need not undertake any further investigation to discern meaning; there is a presumption that the statute means what it says, and if that meaning is clear, that is the end of judicial analysis. *Id.*

218. *KIM*, *supra* note 217, at summary.

219. *Id.* at 5-6.

In this case, the operative word is “shall,”²²⁰ which is commonly understood to mean that the action is mandatory as opposed to discretionary.²²¹

What then, are the mandatory directives? The Fourth, Fifth, and Sixth Circuits have determined that the “plain meaning” of the statute mandates, at the very least, the occurrence of the informal conference and the issuance of the written recommendation, as these elements of § 928(b) have been amply litigated.²²² This interpretation, however, is inaccurate: careful evaluation of the language surrounding the all-important word “shall” in every instance produces a slightly different meaning. The statute’s use of “shall” creates statutory obligations for the deputy commissioner or Board and the employer, rather than creating threshold events for attorney’s fee awards. The phrase “the deputy commissioner or Board *shall set the matter* for an informal conference” is quite different than “an informal conference *shall be required*.”²²³ This is also true for the written recommendation: “the deputy commissioner or Board *shall recommend* in writing” does not imply “a written recommendation *shall be required*.”²²⁴ In other words, rather than simply requiring that certain events occur and assigning that responsibility to everyone by specifying no one, the statute mandates the discharge of a duty by specifically assigning it to the deputy commissioner or Board. In the sense that Congress means what it says and chooses its language carefully, it is reasonable that the plain meaning of the statute *creates a statutory duty that is chargeable to the claims review officer* and not a threshold event in the

220. Relevant excerpts from 33 U.S.C. § 928(b) include “deputy commissioner or Board *shall set the matter* for an informal conference,” “deputy commissioner or Board *shall recommend* in writing a disposition of the controversy,” “employer or carrier . . . *shall pay* [the recommended compensation] or tender to the employee [a written counter offer],” and “if the compensation thereafter awarded is greater than the amount paid . . . reasonable attorney’s fee[s] . . . *shall be awarded* in addition to the amount of compensation.” 33 U.S.C. § 928(b) (2000) (emphases added).

221. KIM, *supra* note 217, at 9.

222. See *supra* Parts III.A.2 and III.B.2 for a discussion of those cases addressing informal conferences and written recommendations pursuant to § 928(b).

223. The statute actually reads, in part

If . . . a controversy develops over the amount of additional compensation . . . 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*.

33 U.S.C. § 928(b) (emphases added).

224. See *id.* (emphases added).

dispute resolution process, as interpreted by the Fourth, Fifth, and Sixth Circuits.

If all parties involved—employer, employee, and claims review officer—participate in the dispute resolution process as Congress had envisioned, the distinction between threshold preconditions to recovery and the discharge of statutory duties is irrelevant because all steps are satisfied. The distinction becomes relevant when the steps are not followed precisely,²²⁵ thus illuminating the provision's latent ambiguity. What exactly is required under § 928(b): the occurrence of threshold events or the discharge of statutory duties?

Since the courts have found merit in the “threshold event” interpretation, and the “plain meaning” of subsection (b) is unclear in light of the possible “statutory duty” interpretation, the next step the court would undertake is to evaluate whether there are “equally plausible interpretations.” If so, the court must take pains to choose a reading that would “avoid a patently unjust result.”²²⁶ Bordeaux's situation is a prime example for this sort of evaluation. Courts applying the strict “threshold event” interpretation would deny recovery of attorney's fees. This result however is unjust for Bordeaux, the injured worker, since his ability to recover the legal fees he incurred during the lengthy process to obtain additional compensation was completely barred as a consequence of a third party's failure to issue the written recommendation.²²⁷ No matter how precisely Bordeaux followed the prescribed claims process, this oversight, willful or merely negligent, cut into his compensation award by thousands of dollars. The failure of the deputy commissioner resulted in prejudice to the claimant, as the dissenting judge zealously pointed out.²²⁸

If the court instead read the statute liberally to require only that the commissioner issue a recommendation, the court might still award Bordeaux his attorney's fees, since failure to comply was not the fault of the claimant. Further, the substantive process still occurred: a dispute arose as to the extent of the employer's liability

225. See cases discussed *supra* Part III.

226. 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12 (7th ed. 2007); see also *United States v. Am. Trucking Ass'ns Inc.*, 310 U.S. 534, 543 (1940) (“[W]hen the plain meaning . . . produce[s] . . . an unreasonable [result] ‘plainly at variance with the policy of the legislation as a whole,’ [we are to] follow[] that purpose, rather than the literal words.” (footnote omitted)).

227. *Pittsburgh & Conneaut Dock Co. v. OWCP*, 456 F.3d 616, 629 (6th Cir. 2006), *amended by* 473 F.3d 253 (6th Cir. 2007).

228. *Id.* at 634 (Moore, J., dissenting).

for the claimant's injuries; the dispute was not resolved by the prescribed administrative proceedings; and the claimant, with the assistance of counsel, resorted to the courts to obtain a compensation award greater than that which the employer was initially willing to pay. To the extent that the two readings are equally plausible, the canon of construction favoring results that do not produce injustice clearly supports a liberal construction of § 928(b).

It is true that the plain meaning of the statutory language is generally regarded as conclusive evidence of its intended application and, in the absence of ambiguity, there is no need for further judicial analysis.²²⁹ The Supreme Court long ago recognized, however, that the plain-meaning rule "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."²³⁰ More than fifty years later, the Court reaffirmed this notion in *Watt v. Alaska*, wherein it recognized that "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."²³¹ Bordeaux's situation presents precisely such a dilemma: even supposing that the language of § 928(b) is sufficiently plain so as not to trigger additional assessment pursuant to a determination of ambiguity, could Congress have ever intended the courts to adopt such a mindlessly literal reading in light of the circumstances under which the legislation was originally passed?

B. *The History and Intent of the Statute Support a Broad Interpretation and Liberal Application*

In light of the potential ambiguity regarding the plain meaning, or alternatively, an inexplicably literal reading, of the language of § 928(b), it is appropriate to consider a few other canons of construction. When the precise meaning of statutory language is unclear, and as a consequence, the proper interpretation and application are unknowable, courts' analyses have long relied on the basic rule that "a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes."²³²

229. For a discussion of the plain-meaning rule, see *supra* note 217 and accompanying text.

230. *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

231. *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

232. *KIM*, *supra* note 217, at 2; see also *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, [the court] look[s] not only to

In this case, there is ample statutory context and statutory purpose to consult. This Note reviewed the socioeconomic circumstances that gave rise to workers' compensation as a body of law.²³³ Under the common law, workers often had exceedingly limited remedies for injuries, and could rely only on the discretionary generosity of their employers, families, or friends.²³⁴ Those that could resort to the courts experienced great delay in receiving compensation (if any compensation were received at all), significant cost, and wildly inconsistent results. Unsatisfied with this state of affairs, lawmakers revamped the system to humanize and standardize injury compensation proceedings. Two main objectives were borne out of workers' unsatisfactory experience with the compensation "system" as it existed prior to the turn of the twentieth century: (1) to provide injured workers a prompt, uniform, and efficient compensation process without having to resort to the courts;²³⁵ and (2) to assess the costs of injury to the industries that produced them.²³⁶

In other words, workers' compensation arose as a *remedial* alternative to the inadequate and inequitable remedies originally available at common law. Statutes that are remedial in nature ought to be liberally construed to effectuate that purpose.²³⁷ Over the last century, workers' compensation legislation has exhibited a general trend of enlarging the scope of coverage to an increasing number of activities, persons, and injuries.²³⁸ From this general trend, one could reasonably infer a congressional intent to broaden, rather than narrow, the application of workers' compensation legislation. As a general matter, Congress has indicated a preference for broad and liberal application of the workers' compensation statutory remedies, consistent with the general rule regarding remedial legislation.²³⁹ Inasmuch as attorney's fee awards under the

the particular statutory language, but to the design of the statute as a whole and to its object and policy."); 2A SINGER & SINGER, *supra* note 226, § 46:5.

233. See *supra* Part I.

234. HOROVITZ, *supra* note 25, at 2.

235. 1 SCHNEIDER, *supra* note 44, at 4-5.

236. *Id.* at 2; see, e.g., *Bundy v. Vt. State Highway Dep't*, 146 A. 68, 69 (Vt. 1929) ("The ultimate purpose of the Workmen's Compensation Act . . . is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business." (citation omitted)).

237. See *Staftex Staffing v. OWCP*, 237 F.3d 404, 406 (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991).

238. LARSON, *supra* note 28, at 28.

239. See, e.g., *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) ("[Broad] construction is appropriate for this remedial legislation."); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (the court's interpretation of "the statute is consistent with the

LHWCA are remedial in nature, it follows that their application requires adherence to the general rule: broad interpretation and liberal application.

The same is true for the more specific workers' compensation provisions of the LHWCA. The LHWCA was passed in response to repeated failed attempts to apply state compensation remedies for injuries sustained by workers under maritime and admiralty law.²⁴⁰ The concern about leaving an injured worker without a practical remedy, or any remedy at all, provides some insight about the motivations behind the Act's enactment. The purpose of the LHWCA, as restated by the *Baltimore & Philadelphia Steamboat* court, is to relieve an injured worker of the financial burdens associated with his injury and, further, to assign the cost of injury to the industry that produced it.²⁴¹

In the years following enactment, the legislature and courts have taken steps to effectuate and broaden this basic purpose. The 1972 LHWCA Amendments were passed to "provide adequate income replacement," noting that "adequate workmen's compensation benefits are . . . essential to meeting the needs of the injured employee and his family."²⁴² This is evidence of Congress's intent to ensure adequate compensation. The 1972 Amendments also increased scope of coverage landward, to cover those workers injured in the previously legal "grey area" between the shore and "navigable waters." This single addition produced widespread change for claims under the LHWCA, as it provided remedies for those workers previously left without, which is further evidence of a congressional objective to ensure that all those in need of coverage could avail themselves of the LHWCA's remedies, a sort of no-maritime-worker-left-behind approach.

The courts have similarly stressed the importance of liberal construction, beginning in 1932 with *Baltimore & Philadelphia Steamboat*. Even in cases where the precise requirements of the

canon of construction that remedial statutes should be liberally construed"); *Tcherpnin v. Knight*, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); *Stewart v. Kahn*, 78 U.S. (1 Wall.) 493, 504 (1870) ("The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment.").

240. For discussion of jurisdictional "hiccups" when maritime workers compensation was beginning to take shape, see *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and companion cases cited *supra* Part II.

241. See *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932).

242. H.R. REP. NO. 92-1441 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4699.

statute have not been carried out, the courts have looked to the substantive aspects of the process and the overall fairness of the result, taking care to avoid any unduly severe, unfair, or anomalous consequence to the worker.²⁴³ Only in the most isolated, well-defined situations have the courts been unwilling to extend liberal construction to claimants.²⁴⁴

Insofar as both the legislature and judiciary have expressed a clear preference for broad statutory interpretation and liberal construction to effectuate the purpose of adequate compensation for maritime workers, that construction ought to apply to the application of attorney's fee awards under § 928(b). Strict compliance leads to fewer attorneys' fee awards, and fewer attorneys' fee awards will lead to a reduction of compensation benefits by the cost to secure them.

Requiring strict compliance with the provisions of the statute not only contradicts the plain language of the Act and the overwhelming history of liberal application of other provisions of the LHWCA, but also contradicts the considerations that created workers' compensation law in the first place. Accordingly, the Fourth, Fifth, and Sixth Circuits' "provisions as preconditions to recovery" approach is unfounded.

C. *Congress Would Not Have Intended to Hold Others' Failures to Discharge Their Statutory Duties Against the Injured Worker*

Returning for a moment to the language of subsection (b), the plain-meaning assessment revealed certain *statutory duties* related to the disputed claim.²⁴⁵ As a result of the statutory obligations, this Note finally contends that when the claimant has undertaken good faith attempts to participate in the dispute resolution process, and either the reviewing authority or the employer (or both) has failed to discharge its statutory obligations under subsection (b), the court ought to construe the subsection liberally on grounds of eq-

243. See, e.g., *Voris v. Eikel*, 346 U.S. 328, 334 (1953); *supra* notes 99-102 and accompanying text.

244. The courts have drawn the "liberal construction" line in two situations: those in which the claimant is pursuing a claim without merit—for example, *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993)—and those in which a liberal construction in favor of the claimant would require the court to pervert or alter the plain meaning of the language employed by Congress—for example, *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952), and *OWCP v. Robertson*, 625 F.2d 873 (9th Cir. 1980).

245. See *supra* Part IV.A.

uity and of the LHWCA's purpose of adequate compensation undiminished by the cost to litigate the right to that compensation.

Had the drafters anticipated the possibility that all parties may not participate in the administrative claims dispute resolution process as required by statute, they likely would have pointed to the purpose of compensating valid workplace injuries.²⁴⁶ Accordingly, courts should consider the longstanding notion that the LHWCA should be liberally construed to avoid harsh and incongruous results.²⁴⁷ Congress could not have viewed the statutory failures of others as posing a legitimate bar to a claimant's recovery of attorney's fees. Allowing a party to evade his responsibility would enable the employer to avoid assessment of legal fees by simply—and without penalty—failing to discharge his statutory obligations.²⁴⁸ Leaving the claimant to shoulder the financial burden of even the most legitimate claim is *completely contrary to the very spirit of the Act*. Accordingly, had the drafters anticipated this bad faith scenario, they almost certainly would have closed this legislative loophole. As the legislature did not contemplate this possibility, courts must construe § 928(b) liberally so as to avoid the harsh and incongruous consequences of strict construction.

This approach best achieves the goal of adequate and prompt compensation for valid workplace injuries without resort to the courts. Legislatures and courts are concerned with fairness and equity. In fact, the inclusion of a fee-shifting provision in the LHWCA may have been another congressional mechanism to effectuate its general purpose. If employers are on notice that they may bear the cost of a successful claimant's attorney's fees (should the matter end up in court), they may be encouraged to negotiate a compensation benefit in good faith, promptly, fairly, and efficiently. Ultimately, these are the key concerns of an injured worker and the concerns that motivated workers' compensation statutes in the first

246. Congress apparently presumed that the reviewing authority and employer would discharge their duties as directed, and did not contemplate the consequence if they failed to do so, as there is no provision addressing such a situation. “[W]here the drafters of a statute did not contemplate a specific situation, that statute should be construed in conformity with the probable intent of the draftsmen as if they had anticipated the situation as it had been presented to the court.” 2A SINGER & SINGER, *supra* note 226, § 45:12.

247. See *supra* note 78 and accompanying text.

248. Failure to tender the additional compensation that the employee believes is due (a “precondition” in jurisdictions employing strict statutory construction of § 928(b)) could potentially bar recovery for even the most legitimate claim.

place. A liberal reading of subsection (b) achieves all of these goals.

D. *Embedded in the Statute Is an Additional Workable Approach*

Despite the overwhelming trend to liberally construe other provisions of the LHWCA, the majority of circuits that have interpreted the fee-shifting provision have done so strictly, citing the plain language and treating the steps outlined as threshold events for fee recovery. The Ninth Circuit's rule of liberal construction makes it seem a renegade circuit on this issue. A closer look at the decisions denying attorney's fees awards, however, suggests that the courts might be doing something more substantive than merely applying an overly strict construction.

In *Virginia International Terminals, Inc. v. Edwards*, for example, the employer voluntarily paid benefits for the employee's injury in the absence of any award.²⁴⁹ The three-day compensation gap was initially disputed, but ultimately settled when the employer chose to pay the disputed amount rather than subject itself to litigation.²⁵⁰ Although the Fourth Circuit based its opinion on the lack of the informal conference and associated written recommendation,²⁵¹ the court's holding suggests a commitment to the broader purpose of the statute of creating a process for employers and employees to settle their disputes.

In substance, the employer did exactly what it was supposed to do. Virginia International was willing to participate in the review process regarding the disputed three days and, having decided to avoid litigation and its associated costs and delay, simply paid the additional benefits. The employer left the table with knowledge that the matter had been efficiently attended to, and the employee obtained prompt compensation. If the court were then also to assess attorney's fees, it would in essence be penalizing the very behavior the statute sought to encourage. What motivation is there to negotiate in good faith if the court could still assess attorney's fees despite the employer's most virtuous treatment of a worker's claim?

The holding in *Pool Co. v. Cooper* provides another illustration of this point. In that case, the injured worker properly initiated a

249. See *Va. Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 315 (4th Cir. 2005).

250. *Id.*

251. *Id.* at 316-17.

claim for benefits but failed to respond to the preliminary correspondence from the OWCP and the employer, which would have enabled the matter to proceed to the informal conference stage.²⁵² The Fifth Circuit reversed the attorney's fee award, again based on the lack of an informal conference and written recommendation.²⁵³ Yet, as in *Edwards*, the court may have been making a common-sense judgment based on fairness to the employer, who was willing to negotiate the claim according to the terms prescribed in the statute. Here, it was the *claimant* who failed to participate in the process. It seems fundamentally unfair to reward the claimant's failure to follow through from the "purse" of the party that remained willing to engage in the review process in good faith.

A more workable rule, then, is one that considers the provisions of subsection (b) but does not view them as rigid preconditions to attorney's fee awards. The liberal construction overwhelmingly preferred can still be facilitated by looking at the conduct of the parties in the midst of the claims process: actions that suggest bad faith or lack of fair play on the part of the employer ought to increase the court's likelihood of assessing attorney's fees. In cases where the claimant has "dropped the ball" while the employer remained a willing participant in the process, the courts might curtail the liberal construction so as to effectuate both the purposes of the statute as well as overall fairness to all parties involved. In cases where the employer or claims review officer impedes informal dispute resolution, the courts ought to award attorney's fees to a successful claimant as often as the statute permits. The employer and claims officer should not have any incentive to engage in conduct that has the potential to further injure a claimant. To interpret the fee-shifting provision of the LHWCA in any other manner will only perpetuate injustice for those in circumstances like *Bordeaux*.

CONCLUSION

The Industrial Revolution produced injuries and socio-economic hardship that prompted the state and federal governments to reevaluate treatment of the labor force. The modern workers' compensation theory that has evolved operates to protect and compensate injured workers adequately, promptly, and without regard to fault. Both state and federal legislatures have had ample practice in

252. *Pool Co. v. Cooper*, 274 F.3d 173, 176, 186 (5th Cir. 2001).

253. *Id.* at 186.

drafting statutes to carry out these goals, and the language Congress has chosen is owed significant deference. The Courts of Appeal for the Fourth, Fifth, and Sixth Circuits have perverted the meaning of § 928(b) of the LHWCA, inferring strict requirements where Congress did not intend such rigidity. The result is a contradiction of the liberal compensation goals established through many years of legislative development and judicial application, undermining the very purpose of workers' compensation law. For workers like Bordeaux, those decisions can effectively victimize the employee twice—first, at the time of injury, and second, when the cost to fight for the right to compensation effectively reduces any award obtained.

A more appropriate approach to this problem is to evaluate the course of dispute resolution proceedings between the parties. It is critical that the courts are mindful of the context in which the injury and subsequent dispute arose, as well as the objectives of the LHWCA. Bordeaux did everything in his power to follow procedure and participate in the dispute resolution process. Had the injury occurred in the Ninth Circuit, the court no doubt would have recognized that Bordeaux's situation was exactly the sort that Congress had in mind when it provided for attorney's fee awards. Instead, the Sixth Circuit's decision effectively negated the very workers' compensation goals Bordeaux expected would protect him—his injuries were permanent, his compensation delayed, and, in view of the decision in *Pittsburgh & Conneaut Dock Co.*, resort to the court made his compensation inadequate. For Bordeaux, the injustice is unconscionable.

*Danielle S. Michaud**

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