BRB No. 11-0451

STEVEN A. ROCHELLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAST COAST CRANES AND ELECTRIC, INCORPORATED	)	DATE ISSUED: 01/19/2012
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and the Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (John D. Gibbons & Associates, P.C.), Mobile, Alabama, for claimant.

Edward S. Johnson and Gavin H. Guillot (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and Decision and Order Denying Claimant's Motion for Reconsideration (2009-LHC-0750) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended,

33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On September 27, 2006, claimant injured his back while working on a crane. Employer voluntarily paid temporary total disability benefits beginning on October 13, 2006, retroactive to October 2, 2006, and ending February 25, 2008, when employer learned that claimant had returned to work with another employer, Barnhardt Crane. Claimant filed a claim for benefits on February 10, 2007. On October 27, 2008, he requested an informal conference, which was held on January 27, 2009. At the informal conference, claimant alleged that his treating physician, Dr. Muhlbauer, referred him to a pain management specialist, but that employer denied authorization. He also alleged that he was entitled to permanent partial disability benefits. Employer contended it had no record of any referral to a pain management physician by Dr. Muhlbauer, and that, because there was no evidence to show that claimant suffered any wage loss, no future disability benefits were owed. The district director issued his recommendations on January 27, 2009, stating that claimant needed to submit evidence to support his claims. On February 5, 2009, after claimant submitted evidence of the medical referral, the district director recommended that employer authorize treatment. However, on February 13, 2009, prior to receiving employer's authorization, claimant requested a formal hearing, which was held on July 19, 2010. The parties disputed the nature and extent of claimant's disability and claimant's entitlement to Section 7, 33 U.S.C. §907, medical benefits.[2] In a Decision and Order dated November 16, 2010, the administrative law judge awarded claimant temporary total disability benefits from September 27, 2006, through January 20, 2008, but held that claimant was not entitled to disability compensation for the period between January 20, 2008, and May 13, 2010, when he was earning greater wages at Barnhardt Crane. The administrative law judge also awarded claimant permanent total disability benefits from May 13, 2010, through July 14, 2010,

[1]Although the administrative law judge titled his decision as awarding an attorney's fee, he denied counsel's request for an attorney's fee pursuant to Section 28(a), (b), 33 U.S.C. §928(a), (b).

[2]Nonetheless, the administrative law judge noted that employer did not argue that the treatment sought by claimant for his work-related injury was either unreasonable or unnecessary; employer contended it had paid all medical benefits and it stated its intention to continue to accept responsibility for all reasonable costs associated with the treatment of claimant's work-related injury. Employer did contend that claimant did not suffer a loss of earning capacity due to his work-related disability and offered two labor market surveys, dated June 18, 2010, and July 14, 2010, to establish the existence of suitable alternate employment.

and permanent partial disability benefits thereafter. The administrative law judge ordered employer to pay all reasonable and necessary past and future medical expenses for his work injury.[3] The award was not appealed.

Claimant's counsel subsequently submitted to the administrative law judge a petition for an attorney's fee, requesting $64,042.15 for work performed and expenses associated with this case. The administrative law judge denied the request under Section 28(a), (b), 33 U.S.C. §928(a), (b). He found Section 28(a) was inapplicable, and he relied on *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009) to deny the fee request under Section 28(b), finding that the criteria for employer liability had not been met because employer accepted and complied with the recommendations set forth by the district director. Claimant filed a motion for reconsideration, which was summarily denied. Claimant appeals the administrative law judge's denial of an attorney's fee payable by employer pursuant to Section 28(b).[4] Employer responds, urging affirmance.

Section 28(b) of the Act, 33 U.S.C. §928(b), applies where an employer pays or tenders payment of compensation without an award and thereafter a controversy arises over additional compensation.[5] This case arises within the jurisdiction of the United

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[3]Claimant apparently did not aver that any particular medical bills had not been paid. *See* n.2, *supra.*

[4]The administrative law judge properly found Section 28(a) inapplicable as employer was paying claimant benefits at the time employer received notice of claimant's claim from the district director. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

[5]Section 28(b) states in relevant part:

> 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 [district director] or Board shall set the matter for an informal conference and following such conference the [district director] 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

States Court of Appeals for the Fifth Circuit. The Fifth Circuit has enumerated the following criteria for an employer to be held liable for a fee under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; (3) the employer's refusal of the recommendation; and (4) the claimant's obtaining greater compensation than that paid or tendered by the employer. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000).

In this case, the administrative law judge found that the criteria of Section 28(b) for holding employer liable for an attorney's fee were not satisfied. Following the informal conference, which was held on January 27, 2009, the district director made the following recommendation:

> Claimant should present medical reports showing that Dr. Muhlbauer has referred him for pain management. If he indeed has recommended such, the employer/carrier would owed [*sic*] this treatment with Dr. Steuer. Claimant should also present medical reports which list his work restrictions and also forward his post accident wages to support a claim for future indemnity benefits. Any indemnity benefits would be limited to section 8(c)(21). At this point, an entitlement to indemnity benefits has not been established. The parties are encouraged to discuss settlement of this claim. In the event this recommendation is rejected by either of the parties, enclosed are Pre-Hearing Statements which must be completed and returned to this office within (21) days for referral to a Formal Hearing.

Memorandum of Informal Conference (Jan. 27, 2009). Thus, this memorandum did not recommend that employer take any action at that time. On January 29, 2009, and February 4, 2009, respectively, claimant sent to the district director the referral to a pain management physician made by his treating physician and records confirming his treatment with Dr. Steuer. By letter dated February 5, 2009, the district director informed both parties of his receipt of these documents and he recommended that employer

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> 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.

33 U.S.C. §928(b).

"authorize the treatment with Dr. Steuer without delay." The district director made no further recommendations. Employer received the recommendation on February 9, 2009, and by letters dated February 20, 2009, informed claimant and the district director that it authorized Dr. Steuer to evaluate and treat claimant for his work-related injuries.

Clamant contends that, although employer authorized treatment with Dr. Steuer on February 20, 2009, as the district director recommended, it effectively rejected the recommendation because it failed to pay Dr. Steuer's medical bills in a timely manner. Thus, claimant avers that the criteria for holding employer liable for a fee under Section 28(b) have been met, as the employer did not pay the medical bills until after the case was referred for a formal hearing.[6]

We reject claimant's contention of error. As the administrative law judge found, employer timely complied with the district director's written recommendation to authorize treatment with Dr. Steuer, and the district director did not issue any recommendations, nor did claimant raise any issue before the district director, regarding a dispute over the payment of medical bills. Moreover, claimant, and not employer, requested a formal hearing eight days after the district director recommended authorization of treatment with Dr. Steuer. *Carey*, 627 F.3d 979, 44 BRBS 83(CRT). As there was no informal conference or written recommendation regarding any dispute over the timely payment of Dr. Steuer's medical bills, and as employer complied with the district director's recommendation to authorize treatment, the criteria for fee liability under Section 28(b) have not been met. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). Consequently, we affirm the administrative law judge's denial of an employer-paid attorney's fee pursuant to Section 28(b).[7]

[6]Claimant asserts that the bills were not paid until mid-2010. Employer states it did not receive Dr. Steuer's bills until June 1, 2010, when claimant's counsel attached them to the deposition of Dr. Richey, an associate of Dr. Steuer, and that it timely paid the bill after it received it.

[7]Although claimant obtained permanent partial disability benefits before the administrative law judge, the district director did not recommend that employer take any action on this issue. Further, claimant does not allege on appeal that the award of permanent partial disability benefits supports an employer-paid attorney's fee.

Accordingly, the administrative law judge's Supplemental Decision and Order denying an attorney's fee and the Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge