

BRB No. 91-1911

JAMES E. SMITH)	
)	
Claimant)	
)	
v.)	
)	
SOUTHWEST MARINE,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
INDUSTRIAL INDEMNITY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
ROBERT W. HUNT, M.D.)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Howard D. Sacks, San Pedro, California, for the petitioner

Jack Williams, Glendale, California, for the employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Robert W. Hunt, M.D., appeals the Decision and Order on Reconsideration (87-LHC-736) of Administrative Law Judge Edward C. Burch 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant allegedly was injured in an accident at work on March 27, 1986. Employer authorized claimant to see Dr. Krishna, but in addition, claimant saw Dr. Hunt on a referral from his

attorney. Dr. Hunt testified that his office sought authorization from employer to treat claimant, and that the request went unanswered.

In March 1987, claimant and employer entered into a settlement of claimant's disability claim for \$3,250. 33 U.S.C. §908(i) (1988). The claim for medical benefits was not settled. In a separate letter, employer agreed to hold claimant harmless from the responsibility for payment of the unpaid medical bills of Dr. Hunt. Nevertheless, employer did not pay Dr. Hunt's fees, and Dr. Hunt brought a claim under the Act for payment of his bills. Employer controverted the claim on the ground that claimant fraudulently sought benefits, as no work accident occurred, and that, therefore, claimant is not entitled to medical benefits. Employer further contended that it did not authorize Dr. Hunt to treat claimant.

In a Decision and Order issued on March 3, 1990, Administrative Law Judge Robert L. Ramsey ordered employer to pay the outstanding bills of Dr. Hunt in the amount of \$878.75. Judge Ramsey determined that it was immaterial whether or not Dr. Hunt was authorized to treat claimant in view of employer's agreement to hold claimant harmless for the bills. Judge Ramsey further found that Dr. Hunt's services were necessary and his fees reasonable. Employer did not appeal this decision.

Dr. Hunt, however, sought reconsideration of the Decision and Order, contending he is entitled to an award of pre-judgment interest on the overdue bills and that his attorney is entitled to a fee payable by employer for the services rendered in pursuit of the claim. Administrative Law Judge Burch¹ denied the interest claim based on the Board's decision in *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988)(Feirtag, J., dissenting). He denied the request for an attorney's fee, finding that Section 28 of the Act, 33 U.S.C. §928, does not provide for a fee to a medical provider, and that the "bad faith" exception to the "American Rule" that litigants pay their own attorney's fees is not applicable as employer's conduct in denying payment of the bills was insufficiently egregious.

Dr. Hunt appeals, contending he is entitled to interest on the overdue medical bills and an attorney's fee. Employer responds, urging affirmance of the Decision and Order on Reconsideration. Claimant has not participated in this appeal.

The resolution of the issues presented in this appeal is controlled by the decision of the United States Court of Appeals for the Ninth Circuit in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991). In *Hunt*, the court first addressed the Board's holding in *Pirozzi*, 21

BRBS at 294, that health care providers are not entitled to interest on amounts owed them by an employer. The Board reasoned that the equitable principles that mandate interest on unpaid disability benefits are not applicable to payments owed to a provider.² *Id.* at 297. The Ninth Circuit

¹Judge Ramsey was no longer available to the Office of Administrative Law Judges.

²The Board left open the possibility that a claimant who paid medical benefits himself could

rejected this reasoning. It adopted the position of the Director, Office of Workers' Compensation Program (the Director), that interest is payable whether reimbursement is owed to the provider or to the employee. *Hunt*, 999 F.2d at 422, 27 BRBS at 88-89 (CRT). The court stated that to hold otherwise would increase the cost of medical services as providers wait for payment, and could lead to the providers' attempting to collect their fees from claimants, resulting in economic harm. *Id.*

The court also held that medical providers are entitled to attorney's fees under the Act payable by the employer. In *Bjazeovich*, 25 BRBS at 240, the Board had held to the contrary, finding that a provider is not a "person seeking benefits" under Section 28(a) of the Act,³ inasmuch as he is not an employee or qualified survivor entitled to receive disability or death benefits under Section 8 or 9, 33 U.S.C. §§908, 909, or an injured worker entitled to payment of medical expenses for a work-related injury pursuant to Section 7, 33 U.S.C. §907.⁴ The Ninth Circuit, although agreeing that a provider's right to recovery is contingent upon the claimant's right, stated that this fact does not prove that the provider is statutorily incapable of "seeking benefits" on claimant's behalf. *Hunt*, 999 F.2d at 423-424, 27 BRBS at 90 (CRT). The court agreed with the Director that Section 7(d)(3) of the Act,⁵ 33 U.S.C. §907(d)(3), grants medical providers standing to "seek to recover an injured employee's medical benefits to the extent that the benefits are owed to the provider in satisfaction of unpaid bills." *Id.*, 999 F.2d at 424, 27 BRBS at 91 (CRT). Thus, as a "person seeking benefits," the provider is entitled an attorney's fee under Section 28(a) of the Act payable by employer. *Id.*

receive interest on the medical benefits owed to him.

³Section 28(a) states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the *person seeking benefits* shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final. (emphasis added).

⁴The Board also stated that the medical provider is not a "claimant" under 20 C.F.R. §701.301(16), as he has no independent right to medical benefits; his right is derivative of claimant's right.

⁵Section 7(d)(3) states:

The Secretary may, upon application by a party in interest, make an award for the reasonable value of [] medical or surgical treatment so obtained by the employee.

This case arises within the jurisdiction of the Ninth Circuit, and, in fact, involves the same medical provider as in *Hunt*. The decision in *Hunt*, therefore, is binding precedent, and we hold that Dr. Hunt is entitled to interest on the overdue medical bills, and an attorney's fee payable by employer under Section 28(a) of the Act.⁶ Judge Burch's findings to the contrary are reversed. The case is remanded for the entry of an award of interest at the appropriate rate, *see Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on recon.*, 17 BRBS 20 (1985), and for consideration of Dr. Hunt's counsel's fee petition. 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Decision and Order on Reconsideration is reversed, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁶Thus, we need not address Dr. Hunt's contention that employer should be liable for his attorney's fee under the "bad faith" exception to the American Rule. *See Hunt*, 999 F.2d at 424 n.3, 27 BRBS at 92 n.3 (CRT).