WARREN SIMMONS	)	BRB No. 11-0424
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/09/2012
	)	
Self-Insured Employer-Respondent	)	
	)	
WARREN SIMMONS	)	BRB No. 11-0536
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Compensation Order Attorney's Fees, the Compensation Order Denial of Attorney Fees on Reconsideration, and the Compensation Order Denial of Attorney's Fees on Reconsideration of David A. Duhon, District Director, and the Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order Attorney's Fees, the Compensation Order Denial of Attorney Fees on Reconsideration, and the Compensation Order Denial of Attorney's Fees on Reconsideration (Case No. 07-172083) of District Director David A. Duhon, and employer appeals the Decision and Order Awarding Attorney Fees (2009-LHC-1746) of Administrative Law Judge Clement J. Kennington 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). The attorney's fee award will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant injured his ankles at work on October 7, 2004. Employer began paying temporary total disability benefits immediately and paid through June 13, 2005. Claimant filed a claim for additional benefits under the Act, and the district director sent employer notice of the claim on July 27, 2005. Employer controverted the claim on August 16, 2005, but, nevertheless, within 30 days of its receipt of the notice of the claim paid claimant additional temporary total disability benefits for July 21 and 22, 2005, and from August 2, 2005, through May 10, 2007. In 2006, claimant sought additional compensation, claiming he sustained a back injury in the 2004 work incident, and employer controverted this claim. At the time employer received notice of the second "claim," it was paying claimant temporary total disability benefits.

An informal conference was held in July 2009. In the written recommendation, the district director stated, *inter alia*, that Dr. Juneau is claimant's treating physician and claimant is not authorized to switch to another physician, and he recommended that claimant submit medical reports to determine whether he is entitled to benefits for his back condition. At claimant's request, the case was transferred to the Office of Administrative Law Judges (OALJ) on August 11, 2009. The administrative law judge found that employer had constructively denied claimant treatment because Dr. Juneau twice told claimant he could do nothing further for him, despite his continued pain. Thus, the administrative law judge found that claimant did not need authorization to see Dr. Rosenfeld. The administrative law judge awarded claimant temporary total disability compensation and medical benefits for Dr. Rosenfeld's services related to the back condition, which he found was work-related. Following the administrative law judge's award of benefits, claimant's counsel filed fee applications with both the district director and the administrative law judge.

Before the district director, counsel requested a fee of $3,562.50 for 14.25 hours of work at a rate of $250 per hour. Employer objected, arguing that it is not liable for a fee, and if it is, the fee should be reduced. The district director found Section 28(a) of the Act inapplicable because employer was voluntarily paying benefits to claimant. 33 U.S.C. §928(a). As the district director did not recommend a change of physician or the payment of any benefits and the recommendation was not rejected by employer, the district director also found that counsel is not entitled to an employer-paid attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b); *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). The district director denied claimant's motions for reconsideration.[1] Claimant appeals the denial of an employer-paid fee, arguing that he successfully prosecuted his claim or, alternatively, that employer's "bad faith" provides an exception such that Section 28(b) applies. Employer responds, urging affirmance. BRB No. 11-0424.

Before the administrative law judge, counsel requested a fee of $17,690.42, representing 70.5 hours of work at $250 per hour, plus $65.42 in expenses. The administrative law judge, over employer's objections, determined that claimant had successfully prosecuted his case and that his counsel is entitled to an employer-paid fee under Section 28(a) of the Act, 33 U.S.C. §928(a). The administrative law judge made no reductions to the hours claimed or hourly rate requested and awarded the fee counsel requested; however, he denied the costs claimed. Employer appeals the administrative law judge's fee award contending the administrative law judge erred in finding Section 28(a) applicable. Employer further contends it is not liable for claimant's attorney's fee pursuant to Section 28(b). BRB No. 11-0536.

Generally, Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim and claimant successfully prosecutes his claim. Section 28(b) applies when the employer begins paying benefits voluntarily, a controversy arises regarding the claimant's entitlement to additional benefits, and claimant obtains an award after employer refuses to pay benefits recommended by the district director. 33 U.S.C. §928(a), (b); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *see FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). In this case, the administrative law

[1]On January 31, 2011, between the issuance dates of the two orders on motions for reconsideration, the district director issued another order stating that claimant agreed to pay counsel's fee of $3,562.50. Thus, the district director awarded claimant's counsel a fee payable by claimant as a lien on his compensation. *See* 33 U.S.C. §928(c).

judge applied Section 28(a) and awarded counsel an employer-paid fee, and the district director applied Section 28(b) and denied counsel an employer-paid fee.

Claimant was injured on October 7, 2004. The parties agree that employer paid claimant temporary total disability benefits from October 8, 2004, until June 13, 2005, after which claimant filed a claim for compensation. Upon receiving the notice of the claim from the district director on July 27, 2005, employer reinstated temporary total disability benefits payments from August 2, 2005, through May 4, 2007. Thus, within 30 days of receiving notice of the claim from the district director in 2005 employer paid claimant benefits. These facts preclude application of Section 28(a) as a matter of law. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006). That claimant subsequently sought additional benefits for a back injury arising out of the same work incident does not make Section 28(a) applicable. Rather, it is employer's actions within 30 days of its receipt of the initial claim for a work injury that governs the applicability of Section 28(a). *Id.* In any event, employer was paying claimant temporary total disability benefits when it received notice of the "second claim" in April or May 2006. Thus, Section 28(a) is not applicable to this case, as employer did not refuse to pay any benefits within 30 days of its receipt of the claim. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). Claimant's success in pursuing his claim is not, alone, sufficient to shift fee liability to employer pursuant to Section 28(a). Accordingly, we reverse the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(a).

As employer paid claimant benefits within 30 days of receiving the notice of the claim, employer's liability for claimant's fee must be evaluated pursuant to Section 28(b). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the following are prerequisites to an employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *See, e.g., 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); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000).

The district director held an informal conference on July 14, 2009. In his memorandum of informal conference dated July 15, 2009, the district director advised that Dr. Rosenfeld is not authorized to treat claimant; Dr. Juneau is the authorized treating physician. The district director stated that Dr. Juneau had not commented on any additional disability related to claimant's back condition. The district director advised

claimant to submit medical reports from Dr. Juneau on claimant's disability status to determine if additional compensation is owed. Employer did not refuse these recommendations. In response to the district director's memorandum and instead of submitting the requested medical reports, claimant requested on August 7, 2010, that the case be transferred to the OALJ for a formal hearing.

We reject claimant's contention that employer is liable for his attorney's fee pursuant to Section 28(b). Employer did not reject the district director's written recommendation, which is one of the required elements of Section 28(b). *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). That the administrative law judge subsequently agreed with claimant's contentions does not supercede the fact that employer did not reject the district director's recommendation. *Id.* The *Andrepont* court noted this type of anomalous result, but stated Congress must address it. *Id.*, 566 F.3d at 421, 43 BRBS at 31(CRT). Therefore, we affirm the district director's denial of an attorney's fee payable by employer pursuant to Section 28(b).[2] As the administrative law judge incorrectly found employer liable for a fee pursuant to Section 28(a) and as Section 28(b) does not apply, we reverse the administrative law judge's award of an attorney's fee payable by employer.

[2]We reject claimant's contention that there is an "equitable exception" which requires applying Section 28(b) in this case despite the absence of one or more of its prerequisites. Not only is the case cited by claimant an unpublished Fifth Circuit case lacking precedential value, but nowhere did the court state that there exists such an exception. *Craven v. Director, OWCP*, No. 09-60903, 45 BRBS 5(CRT) (5th Cir. Jan. 13, 2011). Rather, the court stated that, even if there were such an exception, it was not applicable in the case before it, and it held that the administrative law judge erred in finding bad faith on the undisputed facts of the case. Similarly, the district director rationally found that employer's actions in this case did not rise to the level of "bad faith" and claimant has not demonstrated error in the finding that employer merely took a litigation position that it was not liable for Dr. Rosenfeld's services.

Accordingly, we affirm the district director's denial of an employer-paid attorney's fee. We reverse the administrative law judge's award of an employer-paid attorney's fee.

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