

CHARLES A. HAYWOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING,	)	DATE ISSUED: 10/29/2010
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Award of Attorney's Fee of T.A. Magyar, District Director,  
United States Department of Labor.

Charles A. Haywood, Hayes, Virginia, *pro se*.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Award of Attorney's Fee (Case No. 05-124390) of District Director T.A. Magyar 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). In reviewing an appeal of a fee award where claimant is not represented by counsel, the Board will review the district director's fee order to determine if the fee award is arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant injured his left knee on October 6, 2006, during the course of his employment for employer. On January 24, 2007, claimant retained Richard Donaldson to represent him. On February 1, 2007, Mr. Donaldson wrote to the district director's office to request an informal conference to discuss claimant's entitlement to compensation under the Act for temporary total disability. Employer received its copy of this request on February 9, 2007. On March 4, 2007, employer voluntarily paid claimant compensation, and an informal conference was not held.

On August 19, 2009, Mr. Donaldson submitted a fee petition to the district director requesting an attorney's fee of \$7,225, representing 28.5 hours of attorney time from January 24, 2007 to January 28, 2009, at \$250 per hour, payable by claimant. Claimant challenged the fee petition on the basis that employer was liable for a fee, and claimant also asserted that he was unable to pay the fee. An informal conference was held on October 8, 2009, to resolve the issue of fee liability. In her Memorandum of Informal Conference, the district director stated that employer is not liable for a fee under Section 28(a), 33 U.S.C. §928(a), because it voluntarily paid claimant compensation within 30 days after receiving claimant's request for an informal conference, and that claimant is responsible for the fee. The district director stated that Mr. Donaldson's offer to reduce his fee to \$4,500 to resolve this matter is reasonable and that claimant submitted no evidence regarding his ability to pay the fee. In her October 13, 2009, fee order, the district director awarded Mr. Donaldson an attorney's fee of \$4,500, payable by claimant pursuant to Section 28(c), 33 U.S.C. §928(c). The district director noted that the parties have agreed that payment of the fee will be made in installments.

On appeal, claimant, without the assistance of counsel, challenges the district director's fee award. Neither employer nor Mr. Donaldson has responded to claimant's appeal.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132. Under Section 28(a) of the Act,<sup>1</sup> if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 960 (2005). Under Section 28(b) of the

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<sup>1</sup> Section 28(a) states, in relevant part:

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 [district director], 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. . . .

33 U.S.C. §928(a).

Act,<sup>2</sup> when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b); *see Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).

Section 28(a) states that employer will be liable for claimant's attorney's fee if it declines to pay any compensation within 30 days of its receipt of the claim from the district director. In this case, the district director stated that, "[A] review of the file shows that a conference request was received on February 9, 200[7] and that employer tendered the first payment of compensation on March 4, 2007." Award of Attorney's Fee at 2. The district director thus concluded that "[I]nasmuch as payment was tendered in less than thirty (30) days, Claimant is responsible for payment of the fees." *Id.*

The district director erred in selecting the date that employer received claimant's request for an informal conference as the basis for her determination that employer is not liable for a fee under Section 28(a). Pursuant to Section 28(a), the pertinent date that begins the 30-day period in which an employer must commence payment of compensation without an award if it is to avoid liability for an attorney's fee is the date that employer received written notice of the claim from the district director. *See*

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<sup>2</sup> Section 28(b) states:

If the employer or carrier pays or tenders payment of compensation without an award . . . 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 (sic) 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 . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

*Edwards*, 398 F.3d at 316-318, 39 BRBS at 3-4(CRT); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5<sup>th</sup> Cir. 2003); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001). Based on the record before the Board, we cannot discern this date.<sup>3</sup> Consequently, we cannot determine whether the district director's finding that claimant is not entitled to an employer-paid attorney's fee pursuant to Section 28(a) is in accordance with law. *Id.* Accordingly, the district director's finding that employer is not liable for a fee under Section 28(a) is vacated,<sup>4</sup> and the case is remanded for her to re-assess employer's liability for claimant's counsel's attorney's fee pursuant to this section.<sup>5</sup> *See generally W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

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<sup>3</sup> We note that counsel's attorney's fee petition indicates that claimant's LS-203 claim form, and employer's LS-202, First Report of Injury form and LS-207, Notice of Controversion of Right to Compensation form, were all filed on or before January 30, 2007.

<sup>4</sup> The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an award of an attorney's fee pursuant to Section 28(b) requires all of the following: (1) an informal conference, (2) a written recommendation from the district director; (3) the employer's refusal to adopt the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer paid or tendered after the written recommendation. *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4<sup>th</sup> Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4<sup>th</sup> Cir. 2006). In this case, there is nothing to suggest that an informal conference was held on claimant's claim for benefits or that the district director issued a written recommendation. Accordingly, employer is not liable for a fee under Section 28(b). *See Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *see generally R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

<sup>5</sup> With regard to Section 28(c), the district director appropriately addressed claimant's ability to pay his attorney's fee and concluded, after finding that claimant offered no evidence to establish his financial circumstances, that a reduced fee of \$4,500, payable in installments, is not unduly burdensome. 20 C.F.R. §702.132(a); *see generally Boe v. Dept. of the Army/MWR*, 34 BRBS 108 (2000). As the district director's findings are consistent with the requirements of Section 28(c), 33 U.S.C. §928(c), the district director may award an attorney's fee of \$4,500, payable as a lien upon claimant's compensation, should she determine, on remand, that claimant is not entitled to an

Accordingly, the district director's Award of Attorney's Fee is vacated, and the case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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employer-paid attorney's fee under Section 28(a). *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989).