

ROBERT W. TIMMS)
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 Claimant-Petitioner)
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 v.)
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 P & O PORTS BALTIMORE,) DATE ISSUED: 10/24/2005
 INCORPORATED)
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 Self-Insured Employer) DECISION and ORDER

Claimant was working as a container repairman for Marine Repair Service of Maryland when he was diagnosed with work-related bilateral carpal tunnel syndrome. Prior to undergoing surgery for the condition, claimant began working for P&O Ports Baltimore in June 2002, where he continued to work as a container repairman. Claimant underwent surgery on his left hand on June 3, 2003 and on his right hand on July 8, 2003. Claimant originally sought benefits under the Act against Marine Repair Service in November 2001. However, prior to the hearing on March 13, 2003, Marine Repair Service impleaded P&O Ports alleging it was the employer to last expose claimant to injurious stimuli, and the hearing date was rescheduled for May 9, 2003. Prior to this

hearing, claimant's attorney informed the administrative law judge that P&O Ports accepted liability and the parties requested that the case be remanded to the district director. The case was remanded to the district director on May 8, 2003.

Subsequently, claimant's counsel submitted a fee petition requesting \$5,495, representing 31.4 hours of legal services performed before the administrative law judge at the hourly rate of \$175, and an additional \$282.52 in expenses. In a decision issued on June 27, 2003, the administrative law judge found that Marine Repair Service is not liable for a fee as it is not the employer responsible for claimant's compensation. The administrative law judge also found that P&O Ports cannot be liable for the fee, as no formal award was entered against it, and moreover, as P&O Ports agreed to pay the claim once it became aware of its potential liability. Therefore, the administrative law judge denied the fee petition. This decision was not appealed.

According to claimant's counsel's brief, claimant and P&O Ports finalized the outstanding issues regarding the bilateral carpal tunnel syndrome claim in November 2004. Claimant's counsel submitted a second fee petition to the administrative law judge on November 9, 2004. Counsel requested a fee in the amount of \$3,395, representing 19.4 hours of legal services before the administrative law judge at the hourly rate of \$175, and an additional \$190.88 for expenses.

The administrative law judge found that claimant did not serve the fee petition on P&O Ports, and that this, alone, is a sufficient reason to deny the fee request. The administrative law judge also found, consistent with his earlier decision, that Marine Repair Service cannot be held liable for an attorney's fee because it was not held liable for claimant's compensation or medical benefits. In addition, the administrative law judge found that P&O Ports "promptly took action" upon receiving notice of the claim, requesting remand to the district director for informal resolution. Therefore, the administrative law judge found that neither employer is liable for claimant's counsel's fee, and he denied claimant's counsel an attorney's fee.

On appeal, claimant's counsel contends only that the administrative law judge failed to address whether claimant can be held liable for an attorney's fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant has been served with a copy of his counsel's pleadings to the Board.

If an employer is not liable for an attorney's fee under Section 28(a) or (b), the attorney's fee may be assessed against claimant as a lien on his compensation pursuant to

Section 28(c) of the Act, 33 U.S.C. §928(c).¹ The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the amount of benefits awarded is a factor relevant to the amount of a fee award, and that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. 20 C.F.R. §703.132(a). Although the administrative law judge found that neither employer is liable for claimant's attorney's fee under Section 28(a) or (b), the administrative law judge did not address the applicability of Section 28(c). Therefore, as the administrative law judge did not address the applicability of Section 28(c) or the reasonableness of the fee requested, the case is remanded for the administrative law judge to consider an attorney's fee payable as a lien on claimant's compensation. *See Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

Accordingly, the administrative law judge's Order denying an attorney's fee is vacated, and the case is remanded for consideration of an attorney's fee payable by claimant.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

¹ As claimant's counsel does not contest the finding that neither employer is liable for his attorney's fee, we will not address the administrative law judge's order in this regard.