

C.G.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WALLENIUS WILHELMSSEN LINES)	DATE ISSUED: 10/17/2008
)	
and)	
)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration and Order Denying Claimant's Motion for Reconsideration of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Reconsideration and Order Denying Claimant's Motion for Reconsideration (2006-LHC-1621) of Administrative Law Judge Adele Higgins Odegard 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 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).

Claimant, a lasher, suffered an injury to his left knee during the course of his employment on June 24, 2005. Following surgery on August 26, 2005, and a course of physical therapy, claimant was released to full duty in November 2005. Subsequently, claimant sought compensation for a permanent partial impairment to his lower left leg. In her Decision and Order, the administrative law judge awarded claimant compensation for a 15 percent permanent partial impairment to his lower left extremity, 33 U.S.C. §908(c)(2), (19), as well as medical benefits. Additionally, the administrative law judge stated that employer is liable for claimant's attorney's fee, as her award was greater than the benefits for the eight percent impairment employer had paid.

Employer filed a motion for reconsideration. In her Decision and Order on Reconsideration, the administrative law judge addressed employer's argument that it is not liable for an attorney's fee as the requirements of Section 28(b), 33 U.S.C. §928(b), had not been met. Finding that the district director had not issued a written recommendation following the informal conference, the administrative law judge found that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). The administrative law judge denied claimant's subsequent motion for reconsideration. *See Order Denying Claimant's Motion for Reconsideration.*

Claimant appeals, contending the administrative law judge erred in denying an attorney's fee payable by employer pursuant to Section 28(b).¹ Employer responds, urging affirmance.

In order for employer to be held liable for claimant's attorney's fee pursuant to Section 28(b), the United States Court of Appeals for the Fourth Circuit has held that 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. *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*

¹ Claimant does not contend employer is liable for a fee pursuant to Section 28(a), 33 U.S.C. §928(a). Employer was paying claimant benefits at the time the district director served employer with notice of claimant's claim. *See Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring) (decision on recon.).

[*Moody*], 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006). The administrative law judge found that the district director held an informal conference, but did not issue a written recommendation and, therefore, that employer did not refuse to adopt it. Thus, the administrative law judge found employer is not liable for claimant's attorney's fee.

Claimant contends that an informal conference was held and a written recommendation was made thus entitling claimant to an attorney's fee payable by employer pursuant to Section 28(b). It is acknowledged by employer that a telephonic informal conference was held on May 31, 2006. 20 C.F.R. §702.311. Following the conference, the district director issued a Memorandum of Informal Conference dated June 7, 2006. This memorandum discussed the parties' attempt to settle the case pursuant to Section 8(i), 33 U.S.C. §908(i), and claimant's subsequent correspondence that he could not agree to a settlement due to claimant's need for future medical treatment. Claimant requested that the case be transferred to the Office of Administrative Law Judges (OALJ), which the district director stated she would do. Under the heading "Action by Employer/Carrier," employer was advised to submit forms "in compliance with the above recommendations."²

We affirm the administrative law judge's finding that the district director did not issue a written recommendation and that employer, therefore, cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). The district director stated she would refer the case to the OALJ as claimant would not agree to a settlement. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007). In context, it is apparent that the action "recommended" to employer is without substance as the district director did not recommend that employer pay any type of compensation, and thus there was no basis for employer to file a form agreeing to pay compensation or controverting the claim. *See R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). As the administrative law judge's finding that all the requirements for fee liability were not met in this case is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *R.S.*, 42 BRBS 11; *Davis v. Eller & Co.*, 41 BRBS 58 (2007); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

² The memorandum references Form LS-206, which is a "Payment of Compensation Without Award" form, and Form LS-208, which is a "Notice of Final Payment or Suspension of Compensation Payments" form. If employer controverted the claim, a notice of controversion, Form LS-207, was to be filed.

Accordingly, the administrative law judge's Decision and Order on Reconsideration and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge