

P.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE	)	DATE ISSUED: 10/30/2008
CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	DECISION and ORDER
Respondents	)	

Appeal of the Supplemental Decision and Order Denying Attorney Fees of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

S. Scott Bluestein (Bluestein Law Firm, P.A.), Mount Pleasant, South Carolina, for claimant.

J. Hubert Wood, III (Wood & Warder, LLC), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (2006-LHC-01940) of Administrative Law Judge Kenneth A. Krantz 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 amount of an attorney's fee award is discretionary, and 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a neck injury while working for employer on July 25, 2003. As a result, employer paid temporary total disability compensation from July 31, 2003, to July 13, 2005. On July 8, 2005, employer received notice from the district director that claimant filed a claim for benefits related to the July 25, 2003, work injury. In response, employer, on July 21, 2005, controverted claimant's entitlement to temporary total disability benefits, but commenced paying permanent partial disability benefits from July 14, 2005, at a weekly rate of \$684.03.

An informal conference was held on November 8, 2005, at which time claimant alleged that he had not yet attained maximum medical improvement for his psychiatric condition which, he claimed, was related to the work accident and resulting physical injury he sustained on July 25, 2003. Claimant thus sought reinstatement of temporary total disability benefits, as well as authorization to obtain treatment from a psychiatrist. Noting the "absence of any medical evidence supporting the asserted psychiatric claim," the district director stated that she could not "recommend compensation or medical benefits for such condition." Memo of Informal Conf. at 2 (Nov. 9, 2005). At claimant's request, the district director subsequently reviewed additional evidence submitted in support of his claim of a work-related psychiatric condition. She concluded, however, by letter dated January 31, 2006, that the evidence remained insufficient to alter her "previous opinion," *i.e.*, that claimant had not established a causal nexus between his alleged psychiatric condition and his work for employer, and thus, informed claimant of his option to pursue a formal hearing before an administrative law judge.

Before the administrative law judge, claimant reiterated his position that he is entitled to temporary total disability benefits, as well as medical benefits relating to his alleged work-related psychiatric condition. In his Decision and Order dated June 26, 2007, the administrative law judge found that claimant established that his psychological impairment is a compensable consequence of his traumatic neck and back injury. He thus found claimant entitled to an ongoing award of temporary total disability benefits for his work-related psychiatric condition from July 31, 2003, as well as medical benefits relating to all past, present, and future treatment of that condition.

Claimant's counsel subsequently filed a petition seeking an attorney's fee totaling \$26,491.82 for work performed before the administrative law judge.<sup>1</sup> Employer filed objections to the fee petition. Claimant's counsel filed a reply to the objections, in which he requested an additional \$1,243.73 in fees and costs for work performed since the filing

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<sup>1</sup> Claimant's counsel's fee request totaling \$26,491.82, represented 103.53 hours of attorney time at an hourly rate of \$205.00, 40.2 hours of paralegal and legal assistant work at an hourly rate of \$95, and \$1,448.49 in costs.

of the fee petition. In his Supplemental Decision and Order Denying Attorney Fees, the administrative law judge denied an attorney's fee, payable by employer, under either Section 28(a) or Section 28(b) of the Act.<sup>2</sup> 33 U.S.C. §928(a), (b). Specifically, the administrative law judge found that employer's initial voluntary payment of benefits in this case precluded its liability for an attorney's fee under Section 28(a), and that Section 28(b) was inapplicable because employer fully complied with the district director's written recommendation.

On appeal, claimant contends the administrative law judge erred in finding that Section 28(a) does not apply as employer denied the liability asserted by the claim, specifically for temporary total disability and medical benefits related to the psychological condition resulting from his July 25, 2003, work injury. Claimant argues that employer's refusal to authorize and pay for claimant's treatment of his psychological condition by Dr. Waid prompted him to retain counsel who successfully prosecuted his claim, entitling him to an attorney's fee payable by employer pursuant to Section 28(a). Employer responds, urging affirmance.

Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director, it declines to pay *any* compensation. 33 U.S.C. §928(a); *Va. 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); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003); *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Employer's liability for a fee pursuant to Section 28(a) is predicated on employer's payment or non-payment of benefits in the 30 days after its receipt of the claim. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Moody)*, 474 F.3d 109, 40 BRBS 69(CRT) (4<sup>th</sup> Cir. 2006); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Andrepoint*, 41 BRBS 73.

In this case, employer voluntarily paid claimant compensation for permanent partial disability within 30 days after claimant filed his claim for temporary total disability benefits. For the reasons stated in *Andrepoint*, 41 BRBS 73, we affirm the administrative law judge's finding that Section 28(a) does not apply in the instant case. In its decision on reconsideration in *Andrepoint*, the Board held that the text of Section

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<sup>2</sup> The administrative law judge also found that claimant's counsel has not requested an attorney's fee paid by claimant under Section 28(c), 33 U.S.C. §928(c).

28(a) states that employer's liability is premised on its declining to pay *any* benefits,<sup>3</sup> and that employer's payment of partial benefits after a claim is filed precludes fee liability pursuant to Section 28(a), notwithstanding claimant's eventual recovery of compensation greater than employer paid. *Andrepoint*, 41 BRBS 73; *see also Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). Moreover, the administrative law judge's finding that employer is not liable for an attorney's fee under Section 28(b) is affirmed as it is not challenged on appeal.<sup>4</sup> *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). We, therefore, affirm the administrative law judge's denial of an attorney's fee payable by employer.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees is affirmed.

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

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<sup>3</sup> In light of the express language of Section 28(a), and employer's continued payment of partial disability benefits after the claim was filed in this case, we reject claimant's assertion that employer's separate refusal to pay for psychological treatment is sufficient to make employer liable for an attorney's fee. Specifically, the injuries and resulting disability and medical benefits sought by claimant in this case all stem from the same work injury and have been pursued pursuant to the same claim for purposes of determining employer's liability for an attorney's fee under Section 28(a).

<sup>4</sup> In any event, employer did not refuse the district director's written recommendation in this case, *i.e.*, the district director stated that she could not recommend that employer pay total disability or medical benefits relating to claimant's psychological condition. Thus, pursuant to Section 28(b), employer cannot be held liable for an attorney's fee under that provision. *See* 33 U.S.C. §928(b); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *see also Andrepoint*, 41 BRBS 1.

