BRB Nos. 07-0664
and 07-0664A

R.S. Claimant-Respondent Cross-Petitioner v. VIRGINIA INTERNATIONAL TERMINALS and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier-Petitioners Cross-Respondents	)	DATE ISSUED: 03/28/20082008 DECISION and ORDER

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

Gregory E. Camden (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Supplemental Decision and Order Awarding Attorney Fees (2006-LHC-01486) 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). 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 suffered a work-related knee injury on September 2, 2003. He continued to work as a crane operator, periodically seeking medical treatment for the injury. Claimant underwent knee surgery on March 23, 2004, and was out of work until August 3, 2005, when he was released to return to his usual position for eight hours per day. Employer voluntarily paid temporary total disability benefits. Thereafter, a dispute arose over the extent of claimant's right knee disability and, thus, claimant underwent an independent medical examination by Dr. Crawford, who opined that claimant had a 52 percent impairment. After correspondence with the parties, the district director recommended by letter dated January 20, 2006, that employer pay claimant temporary total disability benefits from March 23, 2004, and continuing until claimant could return to work or suitable alternate employment was identified and permanent partial disability pursuant to the schedule, 33 U.S.C. §908(c)(2), for a 52 percent impairment of the right leg thereafter.

On February 1, 2006, claimant's attorney requested the case be transferred to the Office of Administrative Law Judges (OALJ) for a hearing "on the issue of permanent total disability benefits." The case was transferred on February 23, 2006, over employer's objection that claimant had not previously raised entitlement to permanent total disability benefits. The district director subsequently acknowledged that the case had been improperly transferred due to his failure to permit employer to submit an application for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge remanded the case to the district director on April 11, 2006. On April 27, 2006, claimant filed with the district director a new pre-hearing statement raising as issues: (1) back problems as a compensable consequence of the leg injury; (2) permanent partial disability benefits for a loss in wage-earning capacity between August 3, 2005 and April 10, 2006; (3) entitlement to permanent total disability benefits from April 11, 2006 and continuing; and (4) employer's failure to pay permanent partial disability benefits pursuant to the schedule for the 52 percent impairment of his right leg. Emp. Ex. 17. On May 3, 2006, employer accepted the district director's prior recommendation that it pay claimant permanent partial disability benefits for a 52 percent impairment of the right leg. Emp. Ex. 18. Claimant requested that the case be transferred to the OALJ on May 24, 2006. Prior to the transmittal of the claim, claimant requested a recommendation on the issue of medical treatment for his back injury. The district

director did not issue any additional recommendations, and he transferred the case to the OALJ on June 12, 2006.[1]

In his Decision and Order on the merits of the claim, the administrative law judge found that claimant's back injury is causally related to his right knee injury and thus is compensable under the Act. Consequently, the administrative law judge awarded claimant temporary total disability benefits commencing April 11, 2006. The administrative law judge denied claimant's request for temporary partial disability benefits from August 3, 2005 to April 10, 2006, based on a loss in wage-earning capacity as claimant was entitled to permanent partial disability under Section 8(c)(2) for his right knee injury during this period. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Subsequently, claimant's attorney submitted to the administrative law judge an application for an attorney's fee in the amount of $13,459.55, representing 47.94 hours of legal services at the hourly rate of $250 and 15.53 hours of paralegal services at the hourly rate of $95, plus $633.83 in costs. The administrative law judge found that employer is liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and found that the fee requested was reasonable given the complexity of this case.

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's attorney's fee as the requirements for the applicability of Section 28(b) have not been met in this case. Claimant responds, urging affirmance of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees as it is in accordance with law. Alternatively, claimant contends on cross-appeal that the administrative law judge erred in failing to address his contention that employer should be held liable for claimant's attorney's fee pursuant to Federal Rule of Civil Procedure (FRCP) 11. Employer contends in response that FRCP 11 is not applicable under the circumstances of this case.

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[1] Employer requested on June 16, 2006, that the district director set the case for conference on the issues raised by claimant. The district director replied by letter dated June 20, 2006, that the case had been transferred and that the OWCP no longer had jurisdiction.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132.[2] Section 28(b) of the Act states, in relevant part:

> 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 deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner 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 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). Thus, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has held that, in order for employer to be liable under Section 28(b), the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer voluntarily paid. *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 [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Davis v. Eller & Co.*, 41 BRBS 58, (2007); *see Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring).

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[2] Neither party contended below or on appeal that Section 28(a) is applicable in the instant case.

The administrative law judge found that these requirements were satisfied in this case. He found that an informal conference was held by correspondence among the parties culminating in the district director's written recommendation on January 20, 2006, that employer pay claimant temporary total disability until claimant returned to work and permanent partial disability benefits for a 52 percent impairment. The administrative law judge found that employer refused the recommendation to pay benefits for a 52 percent impairment and that claimant obtained temporary total disability benefits as a result of the proceedings before the administrative law judge. Thus, the administrative law judge held employer liable for claimant's attorney's fee pursuant to Section 28(b).

Employer contends that the administrative law judge erred in holding it liable for the attorney's fee as the informal conference held by the district director did not address the issue on which claimant was successful before the administrative law judge. Employer contends that no informal conference was held or recommendation made on the issue of the compensability of claimant's back condition and therefore, that fee liability is not borne by employer. The United States Court of Appeals for the Sixth Circuit held in *Pittsburgh & Conneaut Dock Co. v. Director, OWCP,* 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007), that fee liability pursuant to Section 28(b) does not shift to employer in a case where, as in the instant case, the district director made no recommendation on the issue favorably decided by the administrative law judge.[3] Similarly, in *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000), the United States Court of Appeals for the Fifth Circuit initially held that employer was not liable for claimant's attorney's fee because the issue on which claimant prevailed, average weekly wage, was not at issue at the informal conference. On rehearing, the court held that employer was liable for the fee because employer did not timely accept the recommendation to pay permanent total disability benefits at a certain compensation rate and, at the hearing before the administrative law judge, raised a lower average weekly wage, which the administrative law judge rejected. *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). Thus, the Fifth Circuit also reviewed the record for a recommendation on the issue on which claimant succeeded, finding this requirement was met as the compensation rate recommended by the district director implicitly included average weekly wage.

This case arises within the jurisdiction of the Fourth Circuit, which has not addressed the precise issue presented in this case. However, this court has been at the forefront in strictly construing the language of Section 28(b), *Edwards,* 398 F.3d at 31, 29

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[3] In *Pittsburgh & Conneaut Dock Co.,* claimant raised entitlement to permanent disability benefits at the informal conference, the issue on which he prevailed before the administrative law judge. The district director, however, did not issue any recommendation as the parties were considering settlement.

BRBS at 4(CRT), and the Board has likewise applied a strict construction of Section 28(b) to cases arising in this jurisdiction. *See Wilson v. Virginia Int'l Terminals,* 40 BRBS 46 (2006) (the Board affirmed the administrative law judge's finding that employer's acceptance of the district director's recommendation to pay nothing further precluded employer's liability for an attorney's fee under Section 28(b), notwithstanding the administrative law judge's award of greater benefits). After reviewing the necessary requirements of Section 28(b), we agree with employer that the administrative law judge erred in finding it liable for claimant's attorney's fee on the facts in this case.

The administrative law judge correctly found that correspondence between the parties and the district director may serve as the "functional equivalent of an informal conference." 20 C.F.R. §702.311; *Hassell,* 477 F.3d at 127, 41 BRBS at 3-4(CRT). However, in this case, the correspondence and the subsequent written recommendation related to the issue of the extent of claimant's right knee impairment. Although employer did not accept this recommendation in a timely manner, employer did agree to pay claimant benefits for a 52 percent impairment of his right leg after the case was remanded to the district director.[4] The issue of the extent of claimant's permanent impairment was not presented to the administrative law judge for adjudication, and thus claimant did not "succeed" on the issue of the degree of claimant's scheduled permanent partial disability in the proceedings before the administrative law judge.

The administrative law judge found that employer contested its liability for claimant's back condition, and he found that claimant's back injury is causally related to his right knee injury and thus compensable. Employer correctly contends, however, that any issues concerning claimant's back injury were not the subject of an informal conference or written recommendation by the district director. Moreover, the issue which was the subject of the "informal conference" and subsequent recommendation was resolved before the case was transferred to the administrative law judge on June 12, 2006. Under these circumstances, the requirements for liability under Section 28(b) listed in *Edwards* are not met. Thus, as the district director made no recommendation on the issue favorably decided by the administrative law judge, we hold that employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) for work performed before the administrative law judge. *Pittsburgh & Conneaut Dock Co.,* 473 F.3d at 265, 40 BRBS at 81(CRT); *see also Staftex Staffing,* 237 F.3d 409, 34 BRBS 105(CRT). Therefore, we reverse the administrative law judge's award of an attorney's fee payable by employer pursuant to Section 28(b).

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[4] Employer's lack of timely acceptance of the district director's recommendation may be relevant to fee liability before the district director, but not the administrative law judge on the facts here, because the administrative law judge did not adjudicate this issue.

On cross-appeal, claimant contends that the administrative law judge erred in failing to address his contention that an attorney's fee should be awarded based on FRCP 11(c), as employer violated Rule 11(b).[5] We disagree. Congress has specifically provided an exception to the "American Rule" by specifying circumstances when employer is liable for claimant's attorney's fee under the Act, 33 U.S.C. §928(a), (b), as well as those where claimant is liable for his own counsel's fee, 33 U.S.C. §928(c).[6] Contrary to claimant's contention on cross-appeal, the administrative law judge has the authority to award an attorney's fee to be paid by employer only if the provisions of Section 28(a) or (b) are met. No party contends that Section 28(a) applies. Moreover, as discussed, we have reversed the administrative law judge's finding that Section 28(b) is applicable under the facts of this case. 33 U.S.C. §928(b). In addition, FRCP 11 is not applicable to proceedings before the district director, administrative law judge or Board. *Boland Marine & Manufacturing Co. v. Rihner,* 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner,* 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). Therefore, employer may not be held liable for claimant's attorney's fee pursuant to Rule 11.

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[5] Rule 11(b) states:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
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Rule 11(c) provides sanctions for violations of Rule 11(b).

[6] The general "American Rule" is that absent express statutory language or an enforceable contract, litigants pay their own attorneys' fees and that such fees are not recoverable as costs. *Alyeska Pipe Line Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The Supreme Court noted in *Alyeska* that Section 28 of the Longshore Act was one instance where Congress has made a "specific and explicit" provision for the allowance of attorneys' fees. *Alyeska*, 421 U.S. at 260 n.33.

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). 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. §702.132(a). Therefore, as the administrative law judge did not address the applicability of Section 28(c), 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 Supplemental Decision and Order Awarding Attorney Fees awarding an attorney fee payable by employer is reversed, and the case is remanded for consideration of an attorney's fee payable by claimant.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge