

VANESSA F. WALKER)
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 Claimant-Respondent)
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 v.)
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 NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: 04/26/2007
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Order on Petition for Attorney's Fee of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order on Petition for Attorney's Fee (2005-LHC-2496) of Administrative Law Judge C. Larry W. Price 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 injuries to both of her knees while working for employer on February 4, 2004. Employer accepted liability and voluntarily began paying claimant disability and medical benefits. A controversy arose regarding the appropriate rate of payment for the reasonable and necessary services provided by claimant's physical therapist via her treating physician, Dr. Wardell. Following an informal conference, the

district director issued a written statement recommending that employer pay the physical therapy bills as presented by claimant and Dr. Wardell. Employer declined to follow the district director's recommendation, and on August 31, 2005, the case was referred to the Office of Administrative Law Judges (OALJ). Prior to the date of a formal hearing, employer agreed to pay the physical therapy bills as provided by claimant's treating physician.

Claimant's counsel then filed a fee petition seeking an attorney's fee of \$2,351.25 for work performed at the OALJ level, representing 8.21 hours of attorney time at an hourly rate of \$250, and 2.25 hours of paralegal work at an hourly rate of \$95, plus \$85 in expenses. Employer submitted objections to the fee petition. The administrative law judge awarded claimant's counsel an attorney's fee of \$2,086.30 payable by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b).

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds, urging affirmance.

Employer argues that it cannot be held liable for an attorney's fee under Section 28(b) as resolution of the disputed issue, *i.e.*, reasonableness of the rates Dr. Wardell was charging employer for claimant's physical therapy, did not include any challenge to claimant's entitlement to disability and medical benefits. Specifically, employer maintains that since claimant was never denied any physical therapy and did not incur any expenses for those services, there was no outstanding claim under Section 7 of the Act, 33 U.S.C. §907, for her to successfully prosecute, and thus, no need for the services of an attorney.¹

The administrative law judge explicitly rejected employer's objection that the issue in this case was exclusively between employer and Dr. Wardell. In particular, the administrative law judge found that although employer agreed to pay for Dr. Wardell's care of claimant, including the use of a physical therapist, it, in fact, disputed its liability for the actual cost of those services. The administrative law judge determined that absent litigation, claimant most likely would have incurred the extra cost for her physical therapy. As such, he found that a dispute developed over the amount of additional compensation to which claimant was entitled, *i.e.*, the payment of Dr. Wardell's treatment of claimant, which required claimant to utilize the services of an attorney. The administrative law judge then concluded that since claimant successfully obtained additional compensation in the form of the payment of the medical benefits prescribed by

¹ Employer does not contest the amount of the attorney's fee awarded by the administrative law judge.

Dr. Wardell, her counsel is entitled to an attorney's fee for work performed at the OALJ level.

The record establishes that following an informal conference on August 4, 2005, the district director recommended that employer pay the physical therapy bills in dispute. Nevertheless, employer continued to dispute the charges submitted by Dr. Wardell for claimant's physical therapy on the basis that they did not comport with what it perceived was the customary and usual rates for such services. Employer based its position on the rates paid to its own contract provider for physical therapy services.² As a result, claimant sought documentation from employer regarding its contract rate. Employer's repeated refusals to provide the requested documentation prompted the administrative law judge, on January 19, 2006, to issue an Order instructing employer to comply with claimant's discovery request. Employer then issued payment of \$3,356 on January 30, 2006, to Dr. Wardell to resolve the outstanding bills for claimant's therapy sessions scheduled from November 2, 2004, through October 6, 2005. These facts support the administrative law judge's findings that a controversy arose between claimant and employer as to the amount of medical benefits to which claimant was entitled and that claimant used the services of an attorney to successfully obtain these medical benefits. The administrative law judge properly rejected employer's argument that the dispute did not involve claimant but was between it and the medical provider, as this argument "ignores the fact that [claimant] remains personally liable for his medical bills." *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 1302, 25 BRBS 145, 150(CRT) (5th Cir. 1992). As the remaining prerequisites for employer's liability under Section 28(b) also have been satisfied in that employer refused the district director's recommendation after the informal conference, the administrative law judge's finding that employer is liable for an attorney's fee award totaling \$2,086.30 is affirmed.³ 33 U.S.C. §928(b); *see Virginia*

² Section 7(g) of the Act, 33 U.S.C. §907(g), and its accompanying regulations, 20 C.F.R. §§702.413 – 702.416, provide employer with an avenue for addressing charges which it believes are not within the customary and usual rates for the local community. *See generally Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). Specifically, those provisions dictate that the district director must, upon an employer or carrier's written complaint, investigate any fee or charge that seems out of line with prevailing community charges. 20 C.F.R. §702.413. Employer makes no arguments regarding these provisions.

³ We note that the administrative law judge reduced the requested hourly rates for attorney and paralegal work respectively to \$225 and \$85, and the requested hours for attorney's work to 8.09 and for paralegal work to 2.13 hours. The administrative law judge rejected employer's remaining objections to the fee petition, and granted the attorney's fee as otherwise requested.

Int'l Terminals, Inc. v. Edwards, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 126 S.Ct. 478 (2005); *see generally* *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

Accordingly, the administrative law judge's Order on Petition for Attorney's Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge