



BRB No. 16-0541

RICHARD M. BRINSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CSA, LIMITED)	DATE ISSUED: <u>Apr. 20, 2017</u>
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Denying Attorney Fee of Paul C. Johnson, Jr.,
Administrative Law Judge, United States Department of Labor.

Wayne Johnson (DeCeccio & Johnson), Maitland, Florida, for claimant.

John L. Schouest and Dana Ladner (Schouest, Bamdas, Soshea & Ben-
Maier, P.L.L.C.), Houston, Texas, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Order Denying Attorney Fee (2013-LDA-00278) of
Administrative Law Judge Paul C. Johnson, Jr., 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the
Act). The amount of an attorney's fee award is discretionary and will not be set aside
unless it is shown by the challenging party to be arbitrary, capricious, an abuse of
discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry
Dock Co.*, 12 BRBS 272 (1980).

Claimant was employed by employer as a force protection officer in Kuwait. He suffered a traumatic brain injury on September 13, 2010, when he was struck in the head by a jet-ski while engaged in a recreational activity on Kuwait Bay. He was transferred to the United States and has remained hospitalized at an in-patient care facility. Claimant's guardian filed a claim under the Act on February 24, 2011. The district director notified employer on March 7, 2011 that a claim had been filed. Employer voluntarily commenced payment of compensation and medical benefits on March 18, 2011.

On January 25, 2013, employer sought referral of the claim to the Office of Administrative Law Judges (OALJ). Employer challenged coverage under the Act on the basis that the recreational injury did not arise within a "zone of special danger." In an Order dated July 22, 2013, the administrative law judge denied employer's motion for summary decision. The administrative law judge found that the obligations and conditions of claimant's job in Kuwait created a zone of special danger and that it was reasonable and foreseeable that claimant would engage in recreational activities, such as riding water crafts. Order on Motion for Summary Decision at 6. The administrative law judge issued an Order of Remand on August 15, 2013, granting employer's unopposed motion to remand the case to the district director and cancelling the hearing.

On November 2, 2015, claimant's counsel filed an attorney's fee petition with the administrative law judge, requesting a fee of \$95,014.06, representing 114 hours of services by Wayne Johnson and 95.4 hours of services by Michael Winer at an hourly rate of \$400, and \$11,014.06 in costs.¹ Employer filed objections to the fee petition. In an Order Regarding Petition for Attorney's Fees and Costs issued on February 10, 2016, the administrative law judge denied a fee for services rendered while the claim was before the district director from January 14, 2011 to January 25, 2013, and again from August 19, 2013, when he remanded the case. Order at 2; *see generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Regarding counsel's entitlement to a fee while the claim was before the OALJ, the administrative law judge found there is no evidence that the claim was successfully prosecuted, as the claim was remanded to the district director after employer withdrew its controversion. The administrative law judge also found there is no evidence that an informal conference had been held. Accordingly, the administrative law judge found that employer is not liable for an attorney's fee under Section 28(a) or Section 28(b), 33 U.S.C. §928(a), (b). The administrative law judge denied the fee petition without prejudice to enable claimant's counsel to submit evidence establishing entitlement to a fee under Section 28(a). *Id.* at 3.

¹ Mr. Winer represented claimant until May 2013 when he was replaced by Mr. Johnson.

Claimant's counsel and employer filed additional pleadings with the administrative law judge addressing the "successful prosecution" issue. In an Order Denying Attorney Fee issued on May 25, 2016, the administrative law judge found that in order to establish a successful prosecution of the claim, claimant's counsel must "show a material alteration in the parties' legal relationship once the case was remanded" by securing entitlement to benefits by formal or informal order, pursuant to 20 C.F.R. §§702.315, 702.351, which did not occur in this case. Order Denying Attorney Fee at 4. The administrative law judge again concluded that counsel did not establish employer is liable for an attorney's fee pursuant to Section 28(a). *Id.* at 2, 4.

On appeal, claimant's counsel challenges the denial of an employer-paid attorney's fee under Section 28(a) on the basis that claimant did not successfully prosecute the claim by prevailing on employer's motion for summary decision. Employer responds that the administrative law judge correctly found that counsel is not entitled to an attorney's fee under either Section 28(a) or Section 28(b).

We affirm the administrative law judge's denial of an attorney's fee payable by employer pursuant to Section 28(a), although we do so on a ground different than that used by the administrative law judge. Section 28(a) of the Act states that

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. §928(a). In this case, the district director notified employer on March 7, 2011 that claimant had filed a claim. Employer commenced payment of benefits on March 18, 2011. *See* Emp. Response Exs. A, C. Thus, as employer did not "decline to pay any compensation" within 30 days of March 7, 2011, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(a). *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014); *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).²

² Therefore, we need not address claimant's "successful prosecution" contention.

We note that claimant has not appealed the denial of an attorney's fee pursuant to Section 28(b). The administrative law judge correctly found that the absence of an informal conference precludes fee liability under Section 28(b). *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Accordingly, we affirm the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee payable by employer.

Accordingly, the administrative law judge's Order Denying Attorney Fee is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge