

TONY A. VERCHER)
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 Claimant-Respondent)
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 v.)
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 CERES MARINE TERMINALS) DATE ISSUED: 08/08/2005
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Motion for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Order Denying Motion for Reconsideration (2003-LHC-0862) of Administrative Law Judge Ralph A. Romano 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. To briefly reiterate the facts of this case, claimant sustained a work-related injury on October 28, 2002. Employer voluntarily paid claimant temporary total disability benefits based on an average weekly wage of \$512.01, for the period from October 29, 2002 to December 3, 2002, when claimant returned to work. Claimant asserted, however, that his compensation payments

should have been based on an average weekly wage of \$536.27, and, thus, requested that an informal conference be scheduled to address the average weekly wage issue. Thereafter, a series of letters were exchanged among claimant, employer and the district director regarding the issue of claimant's average weekly wage. On January 9, 2003, with the average weekly wage issue still not resolved, claimant requested that the case be transferred to the Office of Administrative Law Judges, and, on January 16, 2003, the district director referred the case to that office. Claimant and employer continued to exchange correspondence and documentation regarding claimant's average weekly wage, and on March 5, 2003, employer agreed to claimant's \$536.27 average weekly wage calculation, paid claimant the amount owed based on the higher average weekly wage, and requested that the scheduled hearing be canceled. The administrative law judge accordingly canceled the hearing and remanded the case to the district director.

Thereafter, claimant's counsel filed a petition for an attorney's fee in the amount of \$953.25 for work performed before the administrative law judge. Employer filed objections, arguing that it was not liable for claimant's attorney's fee for the following reasons: 1) claimant did not cooperate with the requests by the district director and employer for wage information, and once counsel provided the information, employer concurred in the calculation; 2) employer did not controvert the claim; 3) no informal conference was held; and 4) the amount of the fee requested by counsel was unreasonable in light of claimant's limited success.

In a one-sentence Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded the requested attorney's fee in its entirety to be assessed against employer. The administrative law judge did not specify whether employer was liable for the fee under Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §928(a), (b). Employer appealed the administrative law judge's fee award to the Board. In a Decision and Order issued on March 17, 2004, the Board vacated the administrative law judge's fee award on the basis that it did not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), and remanded the case for the administrative law judge to address employer's specific objections to the attorney's fee requested. While the Board observed that its remand of the case made it unnecessary to consider all of the arguments raised on appeal by employer, it did state in a footnote that, as the case did not arise within the jurisdiction of the Fifth Circuit "the lack of an informal conference does not necessarily preclude employer's liability for an attorney's fee pursuant to Section 28(b) of the Act, if that section is otherwise applicable." *Vercher v. Ceres Marine Terminals*, BRB No. 03-0481 (Mar. 17, 2004)(unpublished), *slip op.* at 3-4 n.3.

In his Decision and Order on Remand, the administrative law judge again awarded claimant's counsel his requested fee. The administrative law judge did not specify which subsection of Section 28 served as the basis for the assessment of the fee against employer. The administrative law judge stated in a footnote that employer's argument that the absence of an informal conference bars a fee award is without merit. Decision and Order on Remand at 1 n.1. The administrative law judge summarily denied

employer's motion for reconsideration of the fee award.

Employer appeals, challenging the administrative law judge's assessment of an attorney's fee against it. In support of its position on appeal, employer has filed a supplemental pleading contending that this case is controlled by the recent decision of the United States Court of Appeals for the Fourth Circuit in *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *pet. for cert. pending* 05-61, which was issued subsequent to the briefing in this appeal.¹

Employer's liability for an attorney's fee is governed by Section 28(a) and (b) of the Act, which states in pertinent part:

(a) 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 chapter 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

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . 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 the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid 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

¹ In response to employer's supplemental pleading, claimant filed a motion requesting that the instant case be held in abeyance pending a decision on the motion for rehearing in the *Edwards* case. The Fourth Circuit denied the motion for *en banc* rehearing on April 14, 2005. Claimant's motion that this case be held in abeyance therefore is denied. 20 C.F.R §802.219(h).

employer or carrier.

33 U.S.C. §928(a), (b); *see also* 33 U.S.C. §914(a), (b).² In *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), the Fourth Circuit held that in order to hold an employer liable for claimant's attorney's fee under Section 28(b), the following requirements must be satisfied: 1) an informal conference was held, 2) the district director made a written recommendation, 3) the employer refused to adopt the written recommendation, and 4) the claimant used the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. 398 F.3d at 318, 39 BRBS at 4(CRT). The Fourth Circuit accordingly held that under the plain language of Section 28(b) the failure of the district director to hold an informal conference or to issue a written recommendation bars an employer's liability for claimant's attorney's fees under that subsection. *Id.*; *Accord Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 119(CRT) (5th Cir. 2001) (the absence of an informal conference is an absolute bar to an award of attorney's fees under Section 28(b)); *Cf. National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979)(absence of written recommendation does not preclude applicability of Section 28(b)). The Fourth Circuit also addressed the applicability of Section 28(a), holding that where the employer voluntarily paid compensation within the thirty-day period after it received formal notice of the claim from the district director, the claimant is not entitled to a fee award under Section 28(a) if he subsequently seeks additional benefits for the same injury.³ *Edwards*,

² Section 14 states in pertinent part:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the [district director] determines that payment in installments should be made monthly or at some other period.

33 U.S.C. §914(a), (b).

³ In its discussion of the applicability of Section 28(a) in *Edwards*, 398 F.3d at 317-318, 39 BRBS at 4(CRT), the Fourth Circuit distinguished *Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 119(CRT) (5th Cir. 2001)(employer held liable under Section 28(a) where it declined to pay compensation within 30 days after its receipt of written notice of claimant's compensation claim; employer's prior voluntary compensation payments which *preceded* its receipt of such notice held to be irrelevant to

398 F.3d at 318, 39 BRBS at 4(CRT).

In light of the intervening decision of the Fourth Circuit in *Edwards*, we cannot affirm the administrative law judge's award of attorney's fees in this case. Moreover, in view of the lack of any findings relevant to fee liability, we must vacate the fee award and remand the case to the administrative law judge for reconsideration. Initially, the administrative law judge must determine whether fee liability is governed by Section 28(a) or (b). While the record establishes that payments were made by employer, the initial determination as to the applicable subsection turns on whether payments were timely under the Act. 33 U.S.C. §928(a), (b); *see Edwards*, 398 F.3d at 316-318, 39 BRBS at 3-4(CRT); *Richardson*, 336 F.3d at 1105, 37 BRBS at 81(CRT); *Pool Co.*, 274 F.3d at 185-187, 35 BRBS at 118-119(CRT). If employer promptly instituted timely payments and Section 28(b) thus applies, the administrative law judge must address employer's contentions concerning the lack of informal conference, *see* 20 C.F.R. §§702.311-702.316, and any other issues necessary to resolution of this issue. The administrative law judge may reopen the record if necessary for resolution of the liability issue. *See* 20 C.F.R. §§702.319, 702.338, 802.405(a).

Claimant's counsel has filed a fee petition with the Board requesting a fee of \$1,606.50 for work performed before the Board in the previous appeal, *Vercher*, BRB No. 03-0481. Employer has filed objections to the fee petition. Claimant has not yet prevailed as this case is being remanded. Thus, the fee request for work performed in BRB No. 03-0481 is denied at this time.⁴

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Order Denying Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

employer's liability under Section 28(a)), and *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105, 37 BRBS 80, 81(CRT) (9th Cir. 2003)(fees are awardable under Section 28(a) where the employer declines to pay compensation within the 30-day period after receipt of notice of the claim notwithstanding employer's voluntary payment of compensation prior to receiving formal notice). The Fourth Circuit contrasted the factual situation presented in *Edwards*, where the employer voluntarily paid compensation within 30 days after the claimant's formal compensation claim was filed and claimant thereafter sought additional compensation which employer refused to pay, with *Pool Co.* and *Richardson*, where the employers declined to pay compensation *after* the formal claims for compensation were filed. *Edwards*, 398 F.3d at 317-318, 39 BRBS at 4(CRT).

⁴ In the event that claimant prevails before the administrative law judge on remand, counsel may resubmit his fee petition. 20 C.F.R. §802.203(c).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge