

BRB No. 08-0114

W.F.)
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 Claimant-Petitioner)
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 v.)
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 LOGISTEC, USA, INCORPORATED) DATE ISSUED: 07/14/2008
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 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Denying Attorney Fees Under Section 28(a)(b) of David Groeneveld, District Director, United States Department of Labor.

Robert B. Keville (Susman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Christopher J. Field (Field Womack & Kawczynski LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Denying Attorney Fees Under Section 28(a)(b) (Case No. 01-159152) of District Director David Groeneveld 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.

Claimant injured his left knee on August 21, 2003, and as a result was unable to perform his usual work from October 29, 2003, until October 18, 2004. Claimant filed a claim for benefits on October 31, 2003. The district director sent employer notice of the claim on November 4, 2003. Employer commenced the payment of benefits on November 14, 2003. Employer paid temporary total disability benefits for November 1 and 2, 2003, and from February 9 through September 21, 2004, and temporary partial disability benefits from November 3, 2003 through February 8, 2004. Upon reaching maximum medical improvement, claimant sought permanent partial disability benefits; the parties agreed that claimant is entitled to a scheduled award pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), for a 23 percent permanent impairment of the left lower extremity.

Subsequently, claimant's counsel sought an attorney's fee of \$6,547.47, representing 18 hours of attorney work at \$225 per hour and paralegal work consisting of 38.6 hours at \$65 per hour, and 6.1 hours at the rate of \$25 per hour, plus costs of \$154.97. The district director awarded this fee payable by employer. Employer appealed. The Board vacated the fee award and remanded the case for the district director to address employer's objections, apply the appropriate law to determine employer's liability for any fee, and to explain his rationale for his conclusions. *W.F. v. Logistec, USA, Inc.*, BRB No. 06-0700 (Feb. 27, 2007)(unpub.).

On remand, the district director found that claimant's attorney is not entitled to a fee payable by employer under either Section 28(a) or (b), 33 U.S.C. §928(a), (b). Accordingly, he denied a fee payable by employer and stated that claimant's attorney may submit a fee application requesting a fee payable by claimant. 33 U.S.C. §928(c).

Claimant appeals, contending that the district director erred in finding that employer is not liable for his attorney's fee pursuant to Section 28(b). Employer responds, urging affirmance.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. 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 3313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). As employer commenced the payment of benefits within 30 days of its receipt of the claim from the district director, the district director properly found that employer is not liable for claimant's attorney's fee pursuant to Section 28(a). *Day v. James Marine, Inc.*, 518 F.3d 411 (6th Cir. 2008); *A.M. v. Electric Boat Corp.*, ___ BRBS ___, BRB No. 07-0791 (June 18, 2008); *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007).

Claimant contends that employer's liability for his attorney's fee arises under Section 28(b). In order for employer to be held liable pursuant to Section 28(b), that section requires all of the following: (1) an informal conference, (2) a written recommendation from the district director, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer paid or tendered after the written recommendation. *See Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). The district director stated that none of the preconditions was fulfilled in this case because no informal conference was held and no written recommendation was issued.

Claimant initially argues that the informal conference requirement was met with respect to the correspondence and telephone calls among the parties and the district director's office from January 7, 2004 through October 21, 2005. Assuming, *arguendo*, that this correspondence and the calls meet the requirement for an informal conference,¹ *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); 20 C.F.R. §702.311, the requirement that a written recommendation be issued by the district director has not been met in this case. *Devor*, 41 BRBS 77. Although claimant obtained employer's agreement to pay disputed amounts only after the correspondence and calls among the parties and the district director's office,² the district director stated he never issued any written recommendations. The absence of a written recommendation precludes employer's liability for an attorney's fee pursuant to Section 28(b). *Devor*, 41 BRBS at 84. Moreover, contrary to claimant's contention, there is no equitable basis by which employer can be held liable for claimant's fee, notwithstanding the necessity of counsel's services in obtaining disputed payments. *See R.S. v. Virginia Int'l Terminals*, ___ BRBS ___, BRB Nos. 07-0664/A (March 28, 2008). We, therefore, affirm the district director's denial of an attorney's fee payable by employer.

¹ The district director stated that no informal conferences were held.

² Disputes between the parties arose over claimant's medical treatment, mileage reimbursement, and the degree of claimant's permanent impairment, but each was resolved without a written recommendation.

Accordingly, the district director's Order Denying Attorney Fees Under Section 28(a)(b) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge