

BRB No. 08-0222

N.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 07/24/2008
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, LTD), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (2006-LHC-1241) of Administrative Law Judge Lee J. Romero, 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.* (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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained injuries to his right forearm, elbow, shoulder and neck, as well as a cracked sternum, and busted lip as a result of fall he incurred in the course of his work for employer on March 7, 2002. Following a period of physical therapy, claimant's

treating physician, Dr. Barnes, released him to light-duty work with minimal use of the right arm in October 2002. Based on his restrictions, employer placed claimant in its bicycle shop at his regular wages where he fixed flat tires and washed coveralls. Claimant's alternate work, however, ended on January 23, 2003, and he was placed on industrial leave.

Meanwhile, claimant had surgical procedures performed on his right shoulder in March and July 2003, and was subsequently released by Dr. Barnes first to sedentary work in September 2003, and then to light work in October 2003. Employer, however, had no suitable alternate work available to claimant within its facility, and a dispute arose regarding the nature and extent of claimant's condition. In his initial decision dated February 2, 2005, the administrative law judge found claimant entitled to a continuing award of temporary total disability benefits from March 7, 2002,<sup>1</sup> and to medical benefits. Claimant's counsel subsequently sought an attorney's fee for work performed before the administrative law judge. The administrative law judge awarded claimant's counsel an attorney's fee, payable by employer, totaling \$14,665.

Claimant continued to treat with Dr. Barnes who opined, on December 8, 2004, that claimant had reached maximum medical improvement with regard to his injuries. Dr. Barnes assessed claimant with a 35 percent permanent impairment rating for his right elbow, and released him to return to work as of December 9, 2004, with permanent restrictions of no overhead work, and maximum carrying and lifting of 20 pounds with his right arm. On May 11, 2005, Dr. Barnes placed additional physical restrictions on claimant of no crawling and no ladder climbing.

Employer recalled claimant to work on March 22, 2005, to perform a modified welding job at his regular wages and hours, which he successfully performed until August 29, 2005, when the occurrence of Hurricane Katrina temporarily displaced all of employer's welders from their jobs. Claimant returned to work in October 2005, assisting in the clean-up and maintenance of employer's shipyard, but he was placed on industrial leave on December 6, 2005, because employer did not have any work available to him within his restrictions. Employer recalled claimant to work on September 11, 2006.

On April 4, 2005, employer sought modification of the administrative law judge's initial decision, asserting that there had been a change in claimant's economic and

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<sup>1</sup> The administrative law judge found that claimant had not yet reached maximum medical improvement. This finding was based on the parties' stipulation to that effect, as well as the administrative law judge's finding that there was no evidence to contradict evidence that claimant's condition continued to improve.

physical condition. An informal conference was held on April 4, 2006, with the district director recommending that the case be referred to the Office of Administrative Law Judges for a modification hearing. On September 5, 2006, claimant filed a cross-petition for modification raising, essentially, the same points as employer. A hearing was held on September 13, 2006,<sup>2</sup> which led to the issuance of the administrative law judge's decision dated August 17, 2007. The administrative law judge granted employer's modification request, finding that employer established a change in claimant's physical and economic condition.<sup>3</sup>

The administrative law judge thus modified his original decision to reflect claimant's entitlement to temporary total disability benefits from March 7, 2002 to December 8, 2004, permanent total disability benefits from December 9, 2004 to March 21, 2005, and from December 7, 2005 to September 12, 2006, as well as an award of permanent partial disability benefits, pursuant to the schedule, based on a 35 percent permanent partial impairment of the right arm. 33 U.S.C. §908(c)(1), (19). Additionally, the administrative law judge found employer entitled to a credit for benefits paid pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j). He also found that claimant's counsel was not entitled to an attorney's fee payable by employer pursuant to Section 28(b), 33 U.S.C. §928(b), for services provided with regard to the modification proceedings because there was no informal conference and employer paid claimant temporary total disability at all times since the issuance of the administrative law judge's prior award.

Addressing claimant's request for reconsideration, the administrative law judge stated that his denial of an attorney's fee under Section 28(b) was based on his findings that the district director did not issue any written recommendation, that employer did not refuse any recommendation, that claimant did not obtain greater compensation than that tendered by employer, and that claimant did not successfully defend against employer's petition for modification. Moreover, the administrative law judge found that claimant's counsel is not entitled to an attorney's fee as a lien on claimant's compensation pursuant

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<sup>2</sup> At the hearing, the administrative law judge rejected claimant's Cross-Petition for Modification as he found it was essentially duplicative of prior filings made by the parties with regard to modification. Hearing Transcript dated September 13, 2006, at 20-22.

<sup>3</sup> Specifically, the administrative law judge found that employer established a physical change in condition by virtue of the fact that claimant had reached maximum medical improvement as of December 8, 2004, and that employer established an economic change in condition as it provided claimant with suitable alternate employment within its facility from March 22, 2005 through December 6, 2005, and from September 12, 2006 to the present.

to Section 28(c) of the Act, 33 U.S.C. §928(c), as he concluded that there was no successful prosecution by claimant in this case.

On appeal, claimant challenges the administrative law judge's denial of an attorney's fee for work performed with regard to employer's modification request. Employer responds, urging affirmance.

Claimant's counsel argues that she is entitled to an attorney's fee in this case as she was successful in defending against employer's petition for modification and also prevailed on claimant's cross-petition for modification. In support of her position, claimant's counsel cites *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988), for the proposition that she is entitled to an attorney's fee payable by employer because employer did not stipulate to the benefits which claimant was eventually successful in recovering. She maintains that employer's request to transfer the case to the Office of Administrative Law Judges for a formal hearing on modification required claimant to engage counsel to both defend employer's modification and to succeed in obtaining entitlement to those benefits to which employer refused to stipulate. Claimant's counsel alternatively argues that she is entitled to an attorney's fee under Section 28(c) as a lien against the compensation awarded claimant.

In order for an employer to be liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that an informal conference must have been held, a written recommendation disposing of the controversy must have been made, employer must have rejected that recommendation, and claimant must have used the services of an attorney to secure greater compensation than employer paid or tendered. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5<sup>th</sup> Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5<sup>th</sup> Cir. 1997); *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.*, 41 BRBS 1 (2007) (Hall, J., dissenting).

In this case, claimant's counsel contends she is entitled to an employer-paid fee because she successfully defended the claim against employer's motion for modification. We reject this contention. The parties stipulated that, pursuant to the administrative law judge's prior decision, employer paid and was continuing to pay claimant temporary total disability benefits. Decision and Order at 3. Employer sought modification to reduce these benefits as claimant had reached maximum medical improvement and returned to work. As a result of the modification proceedings, claimant did not retain entitlement to

the total disability benefits previously awarded. While he received permanent total disability benefits when he was not working, the administrative law judge found he had no loss in wage-earning capacity and thus was not entitled to benefits during his periods of employment. The administrative law judge thus terminated claimant's ongoing award as of September 12, 2006. The administrative law judge further found that employer had agreed to the 35 percent permanent partial disability award claimant was entitled to receive under the schedule. Under these circumstances, claimant did not successfully defend against employer's modification petition, and employer therefore cannot be held liable for an attorney's fee under Section 28(b).<sup>4</sup> We, therefore, affirm the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee payable by employer pursuant to Section 28(b) of the Act.<sup>5</sup>

Where employer is not liable for a claimant's attorney's fee, the attorney's fee may be assessed against claimant as a lien on his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c).<sup>6</sup> The regulation at 20 C.F.R. §702.132 provides,

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<sup>4</sup> We reject claimant's contention that the Board's decision in *Coats*, 21 BRBS 77, mandates that employer is liable for an attorney's fee under Section 28(b) in this case. In *Coats*, claimant successfully modified a nominal permanent partial disability award to one for permanent total disability, and the Board held employer liable for the attorney's fee for this successful modification even though the benefits were paid by the Special Fund under 33 U.S.C. §908(f). In contrast, in this case claimant did not establish entitlement to total disability for the full period previously paid by employer or to any continuing award.

<sup>5</sup> We thus need not address whether the fact that the district director did not issue a written recommendation after the informal conference, apparently because both parties wanted referral to the administrative law judge, *see* HT at 17, Employer's Brief at 10, would also preclude employer's liability on the facts presented. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Andrepoint*, 41 BRBS 73; *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

<sup>6</sup> Section 28(c) provides, in pertinent part:

In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or

*inter alia*, that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. The administrative law judge found that claimant's counsel is not entitled to an attorney's fee payable by claimant as a lien on compensation under Section 28(c) because "a successful prosecution is a pre-requisite for an award of fees from any source." Order on Recon. at 2. We cannot affirm the denial of a fee to be paid by claimant on this basis. Claimant has been awarded benefits by the administrative law judge, specifically an award of permanent total disability benefits as well as a scheduled award. Thus, claimant was successful in obtaining benefits, and counsel may receive a fee for her services pursuant to Section 28(c), 33 U.S.C. §928(c). *See Andrepont*, 41 BRBS 73.

The case is remanded for the administrative law judge to consider assessing the fees incurred on modification against claimant as a lien upon his compensation award pursuant to Section 28(c). In order to do so, the administrative law judge must first determine whether, after factoring in employer's credit under Section 14(j), claimant is owed any compensation from which a lien for an attorney's fee could be assessed. 33 U.S.C. §928(c). If so, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132. We, therefore, vacate the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee under Section 28(c), and remand the case for further consideration of this issue. *Andrepont*, 41 BRBS 73.

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court shall fix in the award approving the fee, such lien and manner of payment.

33 U.S.C. §928(c).

Accordingly, the administrative law judge's finding that employer is not liable for an attorney's fee in this case under Section 28(b) is affirmed. The administrative law judge's denial of an attorney's fee under Section 28(c) is vacated, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL  
Administrative Appeals Judge