BRB Nos. 06-0763
and 06-0763A

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| LLOYD W. NEAL, JR. | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY | ) | DATE ISSUED: 05/31/2007 |
| | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |
| Cross-Petitioner | ) | |

Appeal of the Order Denying Payment of Legal Fee by Employer of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (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:

Claimant appeals, and employer cross-appeals, the Order Denying Payment of Legal Fee by Employer (2005-LHC-2492) of Administrative Law Judge Daniel A. Sarno, 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his lower back on March 20, 2004, while working for employer. Employer accepted liability and voluntarily began paying claimant disability and medical benefits. A controversy subsequently arose regarding the rate of payment for the reasonable and necessary services provided by claimant's physical therapist via his treating physician, Dr. Wardell, and to whom the payment should be made. Claimant requested an informal conference by letter dated June 5, 2003, to address the unpaid medical bills. The district director contacted employer by telephone on June 8, 2005, requesting information regarding employer's position, and again by letter dated June 22, 2005. The district director sent employer a letter dated July 13, 2005, stating that unless employer could identify a specific ethical or legal violation with the billing practices of Dr. Wardell, he recommended that employer pay the outstanding medical bills. On July 26, 2005, the district director sent a letter to claimant explaining that he had made a recommendation for employer to pay the medical bills, and suggested that as there had been no attempt at resolution, the matter should be referred to the Office of Administrative Law Judges for a hearing. The case was referred, but prior to the date of a formal hearing, employer agreed to pay the physical therapy bills of Dr. Wardell.

Subsequently, claimant's counsel filed a fee petition seeking an attorney's fee of $2,991.25, representing 10.92 hours of legal services at the hourly rate of $250, and 2.75 hours of paralegal services at the hourly rate of $95. Employer submitted objections to the fee petition. The administrative law judge agreed with employer's contention that the requirements of Section 28(b), 33 U.S.C. §928(b), had not been met, summarily finding that there was no informal conference or written recommendation from the district director. Thus, the administrative law judge found that employer is not liable for counsel's fee.

On appeal, claimant contends that the administrative law judge erred in finding that the requirements of Section 28(b) have not been met, and thus in denying him an employer-paid attorney's fee. Claimant contends that there was an informal conference in the instant case and that the district director recommended that employer pay the outstanding medical bills. Thus, claimant contends, as employer did not agree to pay the medical bills until after the case was transferred to the administrative law judge, employer should be held liable for his attorney's fee. Employer responds, urging affirmance of the administrative law judge's finding that there was no informal conference in this case and that there was no written recommendation from the district director. In the alternative, employer contends on cross-appeal that claimant did not successfully prosecute the case and thus is not entitled to a fee under Section 28(b). Claimant responds, urging the Board to reject employer's contention as employer agreed to pay the outstanding medical bills after the case was transferred to the administrative law judge. In addition, claimant has submitted a fee petition for work performed before the Board. Claimant has requested a fee in the amount of $2,060, representing 10.3 hours

of legal services at the hourly rate of $200. Employer has not filed objections to the fee petition.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge correctly stated that employer's liability for an attorney's fee pursuant to Section 28(b) must be addressed in view of that court's decision in *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005). Section 28(b) of the Act states:

> 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 deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board 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 employer or carrier.

33 U.S.C. §928(b). In *Edwards*, claimant requested an informal conference, and the district director instead wrote a letter to claimant stating he needed to supply additional medical evidence. Claimant declined to do so, and requested a formal hearing. Employer paid the benefits at issue before the administrative law judge held a hearing, and claimant requested an attorney's fee for work performed before the administrative law judge. The Fourth Circuit held, *inter alia*, that employer could not be held liable for claimant's attorney's fee pursuant to Section 28(b) as that section "requires *all* of the following: (1) an informal conference, (2) a written recommendation from the deputy or Board, (3) the employer's refusal to adopt the written recommendation, and the (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation." *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT)(emphasis in original). The court stated that none of the preconditions was fulfilled in that case because the district director never held an informal conference or issued a written recommendation. *Id*; *see Pittsburgh & Conneaut*

*Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *cf. Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979)(Ninth Circuit holds that written recommendation and/or refusal by employer is not absolute requirement for fee liability).

In *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006), the Board addressed the issue of fee liability in a case in which the parties communicated through correspondence with the district director. Claimant requested an informal conference. The district director issued written instructions for the claimant to attend a medical evaluation to address his ability to work and for employer to resume compensation payments for temporary total disability. Claimant attended the medical evaluation, and the district director issued a supplemental recommendation letter stating claimant could function at a sedentary level. Employer did not resume disability payments. Claimant obtained compensation as a result of proceedings before the administrative law judge. The Board held that the written correspondence between the parties and the district director constituted an informal conference as contemplated by Section 702.311, 20 C.F.R. §702.311, and that the district director issued a recommendation which employer refused. The Board therefore held that the *Edwards* criteria for fee liability under Section 28(b) were met. Subsequently, in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, [*Hassell*], 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007), the Fourth Circuit similarly held that claimant's letter requesting an informal conference and the district director's issuance of a recommendation by letter after consideration of the parties' submissions constituted an informal conference and written recommendation, pursuant to Section 702.311.

In the present case, claimant requested an informal conference to resolve the question of outstanding medical bills. A letter from employer dated June 9, 2005, refers to a telephone call with the district director on June 8, 2005. Employer reiterates its position that the medical bills have not been paid due to an administrative dispute and states that claimant should not be held personally responsible for payment of the medical bills. The district director attempted to clarify employer's position by a letter dated June 22, 2005. Subsequently, the district director notified employer that he was recommending that the outstanding medical bills be paid, unless there was a specific reason for not paying them which had not been presented. On July 26, 2005, the district director responded to claimant's request for an informal conference, stating that he had recommended that employer pay the outstanding bills.

Consistent with *Hassell* and *Anderson*, these facts establish that an informal conference was held and a written recommendation was made which addressed the outstanding issue. Section 702.311 of the regulations describes several means to

informally resolve disputes at the district director level "in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date." These include: 1) informal discussions by telephone; 2) conferences at the district director's office; and 3) written correspondence. 20 C.F.R. §702.311. The parties here attempted to resolve the issue informally before the district director at claimant's request, and under the controlling precedent of *Hassell,* the written correspondence and telephone calls were sufficient to constitute an informal conference pursuant to the regulation. Moreover, as the district director recommended that employer pay the outstanding bills to Dr. Wardell by letter dated July 13, 2005, the requirements of a written recommendation was also satisfied. Thus, the first two criteria for employer's fee liability pursuant to *Edwards* have been satisfied, and the administrative law judge's conclusion to the contrary must be reversed. *Hassell,* 477 F.3d at 127, 41 BRBS at 3-4(CRT); *Anderson,* 40 BRBS at 62.

Employer contends in its appeal that there is an alternate ground for affirming the administrative law judge's denial of an employer-paid attorney's fee as claimant did not successfully prosecute the claim. Specifically, employer contends that claimant was not prevented from undergoing treatment and was not personally responsible for the medical bills. Although employer agreed to pay for Dr. Wardell's care of claimant, including the use of a physical therapist, it disputed the amount billed and refused to pay the bills due to a "billing error." Following correspondence between the parties and the district director, the district director recommended that employer pay Dr. Wardell's outstanding bills. 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 and because it was billed by a different business entity.[1] The district director sought documentation from employer regarding its specific dispute, but did not receive a reply. Therefore, the district director transferred the case to the Office of Administrative Law Judges for resolution. After the case was transferred, employer issued payment of $3,000 to resolve the outstanding bills for claimant's therapy. Therefore, contrary to employer's contention, a controversy arose between claimant and employer as to the amount of medical benefits to which claimant was entitled and claimant used the services of an attorney to successfully obtain these medical benefits, thus satisfying the final requirements under *Edwards*. Employer's assertion that the dispute did not involve claimant but was between it and the medical provider is rejected, 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); *see generally Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). As all of the prerequisites for employer's

[1] Employer notes that it eventually settled the outstanding bills with Dr. Wardell for $3,000, rather than the original $5,000 billed.

liability under Section 28(b) have been satisfied, we reverse the administrative law judge's finding that employer is not liable for claimant's attorney's fee, and we remand the case for the administrative law judge to address counsel's fee petition and employer's objections thereto. 33 U.S.C. §928(b); *Anderson*, 40 BRBS at 62-63.

Claimant's counsel has submitted a fee petition for work performed before the Board, requesting a fee of $1,960, representing 4.5 hours of legal services at the hourly rate of $200, and 4.64 hours of services at $250 per hour.[2] Employer has not submitted objections to the fee petition. As claimant has successfully established entitlement to a fee to be paid by employer pursuant to Section 28(b), we find the hours of services requested reasonably commensurate with the necessary work performed and with the complexity of the case and the quality of the representation. *See* 20 C.F.R. §802.203(e). We award a fee for 9.14 hours of attorney services at the hourly rates of $200 and $250 per hour as these rates are reasonable for the geographic area where the claim arose. 20 C.F.R. §802.203(d)(4); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT)(4th Cir. 2004). We, therefore, award claimant's counsel an attorney's fee of $1,960, for work performed before the Board, contingent upon claimant's obtaining a fee award from the administrative law judge on remand. 33 U.S.C. §928.

[2] Counsel incorrectly calculated the total amount requested as $2,060.

Accordingly, the Order Denying Payment of Legal Fee by Employer is reversed and the case is remanded for further consideration of the fee petition. In addition, claimant's counsel is award a fee in the amount of $1,960, for work performed before the Board.

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