BRB No. 06-0789

HERBERT A. BOWE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 05/31/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fee of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Christopher R. Hedrick (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:

Employer appeals the Order Awarding Attorney Fee (2005-LHC-1829) 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 may be set aside only if the challenging party shows it 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 a back injury on September 12, 1997, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability for periods between September 13, 1997, and May 26, 1998

and between June 19, 2003, and December 12, 2004.[1] On December 13, 2004, employer initiated payments of compensation to claimant for temporary partial disability at a weekly rate of $398.57. In a letter to the district director dated January 31, 2005, claimant stated that it was his understanding that the issue of his entitlement to permanent total disability benefits would not be resolved at the district director level and he therefore requested that the case be transferred to the Office of Administrative Law Judges (OALJ) for a hearing on that issue. Following referral of the case to the OALJ, claimant requested that the case be remanded to the district director, and in an Order issued March 14, 2005, the case was remanded to the district director for further action. In a letter to claimant's counsel dated March 17, 2005, the district director wrote as follows:

> This will serve to respond to your letter dated March 5, 2005 requesting that an informal conference be held so that a recommendation can be made.
>
> You have produced nothing to show that Mr. Bowe is permanently and totally disabled at this time. The medical in the file supports that Mr. Bowe is partially disabled and the employer is paying temporary partial disability and supports their position with the medical evidence.
>
> Your claim for permanent total disability is denied.

Claimant's Response Brief at Attachment 2.

On May 31, 2005, claimant submitted a Pre-Hearing Statement (LS-18) requesting a hearing on the issues of *inter alia*, his entitlement to permanent total disability benefits, and on June 3, 2005, the case was referred to the OALJ. By letter to claimant dated June 29, 2005, employer offered to pay claimant permanent partial disability compensation in the amount of $398.57 per week. Upon claimant's refusal of this offer, employer terminated its voluntary payment of temporary partial compensation to claimant. In a Notice of Final Payment or Suspension of Compensation Payments (LS-208) dated June 29, 2005, employer indicated that its final payment of temporary partial disability in the amount of $398.57 per week was made to claimant on June 26, 2005. In a letter dated August 15, 2005, claimant advised the administrative law judge that employer had terminated all compensation payments. Thereafter, the case was remanded to the district

[1] Although it cannot be determined from the record before us whether these payments were timely in relation to employer's receipt of the notice of claimant's claim, no party contends that fee liability in this case can be predicated on Section 28(a) of the Act, 33 U.S.C. §928(a). *See Wilson v. Virginia Int'l Terminals*, 40 BRBS 46, 48 n.3 (2006).

director pursuant to the parties' request and on September 30, 2005, the district director issued a Compensation Order – Award of Compensation in which, based on the parties' agreement and stipulations, claimant was awarded permanent partial disability compensation from December 13, 2004 to the present and continuing in the amount of $420.50 per week.

Claimant's counsel subsequently submitted a petition to the administrative law judge requesting an attorney's fee of $3,877.50, representing 15.51 hours of attorney time at a rate of $250 per hour, plus expenses of $115.95. In his Order Awarding Attorney Fee, the administrative law judge addressed employer's objections to its liability for a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and to the requested hourly rate, various itemized services and the requested costs. The administrative law judge found employer liable for claimant's attorney's fee under Section 28(b), disallowed an entry for .25 hour, but otherwise rejected employer's objections to the fee petition. Accordingly, claimant's attorney was awarded a fee of $3,815.00, plus costs of $115.95, payable by employer.

On appeal, employer challenges the administrative law judge's finding that it is liable for claimant's attorney's fee under Section 28(b).[2] Claimant responds, urging affirmance.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, employer's liability for an attorney's fee pursuant to Section 28(b) must be addressed in view of that circuit 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

[2] In its appeal to the Board, employer contests only the administrative law judge's finding that it is liable for claimant's attorney's fee under Section 28(b) and does not contest the amount of the fee awarded by the administrative law judge.

> 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*, the Fourth Circuit held that the following are prerequisites to employer's liability under Section 28(b): (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 was willing to pay after the written recommendation. *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co., v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *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 its recent decision in *Hassell*, the Fourth Circuit held that written correspondence between the district director and the parties can serve as the functional equivalent of an informal conference. *Hassell*, 477 F.3d at 127, 41 BRBS at 3(CRT); *see also Matulic*, 154 F.3d at 1060, 32 BRBS at 154(CRT); *Anderson v. Associated Naval Architects*, 40 BRBS 57, 60-61 (2006). Moreover, the court held in *Hassell* that the district director's letters can be treated as a written recommendation. *Hassell*, 477 F.3d at 127, 41 BRBS at 3(CRT); *see also Anderson*, 40 BRBS at 60-61(CRT). In holding that written communications may be treated as both an informal conference and a written recommendation, the Fourth Circuit observed that the regulations governing claims under the Act afford considerable discretion to the district director in handling claims and conducting informal conferences, and that Section 702.311 of the Act's implementing regulations, 20 C.F.R. §702.311, specifically provides that some cases may be handled by written correspondence. *Hassell*, 477 F.3d at 127, 41 BRBS at 4(CRT); *see also Anderson*, 40 BRBS at 60-61.

We affirm the administrative law judge's conclusion that the requirements of Section 28(b) were satisfied in this case, although not on the precise reasoning employed

by the administrative law judge. The administrative law judge found that the requirements for employer liability under Section 28(b) were satisfied on the basis that the district director's Compensation Order satisfies the requirements of an informal conference and written recommendation by the district director. *See* Order Awarding Attorney Fee at 2. Although we agree with employer that the district director's Compensation Order, which was issued on the basis of the parties' stipulations, cannot be viewed as the functional equivalent of an informal conference and written recommendation from the district director, the prerequisites to employer's liability under Section 28(b) are satisfied by the earlier proceedings in the district director's office. As argued by claimant in his response brief,[3] the correspondence including claimant's March 2005 request for an informal conference and recommendation and the district director's March 17, 2005, response constitutes an informal conference under Section 702.311.[4] *See Hassell*, 477 F.3d at 127, 41 BRBS at 3-4(CRT); *see also Anderson*, 40 BRBS at 60-61. Moreover, this letter must be viewed as a recommendation that employer continue its voluntary payments of temporary partial disability benefits to claimant. *Id.* Thereafter, although employer initially continued to pay such benefits to claimant for approximately three months following the district director's recommendation, employer terminated all compensation payments to claimant as of June 26, 2005. The termination of temporary partial disability benefit payments by employer constitutes a rejection by employer of the district director's recommendation that employer continue to pay those benefits. *See Anderson*, 40 BRBS at 62. Lastly, the district director's Compensation Order, based on the parties' stipulations, awarded claimant permanent partial disability benefits at the rate of $420.50 per week. Employer had previously paid claimant temporary partial disability benefits and offered to pay permanent partial disability benefits at the lower weekly rate of $398.57; moreover, as set forth previously, employer terminated all compensation payments to claimant on June 26, 2005. Thus, claimant utilized an attorney to obtain a greater award than employer paid or tendered following the district director's March 17, 2005, written recommendation. *See Anderson*, 40 BRBS at 62. Thus, as the record in this case establishes that each of the four prerequisites to employer's liability under Section 28(b) was met, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee under that subsection of the Act.

[3] Claimant's argument in his response brief is addressed as it provides an alternate ground for affirming the administrative law judge's decision. *See King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87 (1983).

[4] This correspondence is similar to that in *Hassell*, as claimant in that case wrote to the district director to request a conference and the district director responded by letter with his recommendations.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge