BRB No. 10-0393

MICHAEL P. CONEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED: 11/24/2010
	)	
and	)	
	)	
LUMBERMAN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Employer's Motion for Reconsideration; Denying Claimant's Motion for Reconsideration; And Denying Petitions for Attorney's Fees of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

E. Alfred Smith (E. Alfred Smith & Associates), Wayne, Pennsylvania, for claimant.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Granting Employer's Motion for Reconsideration; Denying Claimant's Motion for Reconsideration; And Denying Petitions for Attorney's Fees (2009-LHC-00228) of Administrative Law Judge Janice K. Bullard 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). We must affirm the administrative law judge's findings of

fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On June 15, 2001, while performing his duties as a lasher on a container ship, unhooking a three-rod lash, claimant's foot got caught in a grating on the ship. He twisted to push the rod out of his way to free his foot and injured his back. Claimant could not continue to work and was taken for medical attention. Employer paid temporary total disability benefits to claimant from June 16, 2001, to January 25, 2002, February 22 to March 15, 2002, March 28 to September 28, 2003, and from August 9, 2004, and continuing, at a rate of $800.08 per week. Claimant filed a claim for benefits for the periods during which benefits were not paid as well as for continuing disability and medical benefits and interest.[1]

In a decision issued on December 17, 2009, and filed on December 21, 2009, the administrative law judge found that employer did not establish suitable alternate employment, claimant is permanently totally disabled, and employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 34, 37, 39. The administrative law judge awarded claimant permanent total disability benefits and interest and stated that claimant's counsel should file a fee petition. Decision and Order at 39-40. Both parties filed motions for reconsideration.

Employer timely moved for reconsideration of the administrative law judge's invitation for counsel to file a fee petition, asserting that he is not entitled to a fee under either Section 28(a) or 28(b) of the Act, 33 U.S.C. §928(a), (b). The administrative law judge agreed and denied the fee request. Order on Recon. at 5. By motion dated January 14, 2010, claimant asked the administrative law judge to consider the request for medical benefits, as it was not addressed in the decision awarding benefits. Employer objected on the ground that the motion was not timely filed. The administrative law judge denied claimant's motion because it was untimely and because he did not request a waiver of the time limit for filing a motion for reconsideration. Additionally, the administrative law judge denied the motion on substantive grounds because there is no evidence in the record nor any proffered of claimant's unreimbursed medical bills. Order on Recon. at 5-6. Claimant appeals, and employer responds, urging affirmance.

[1]It is unclear from the record when claimant filed his claim. *See* discussion, *infra*.

Medical Benefits

Claimant contends the administrative law judge erred in finding his motion for reconsideration untimely and in failing to address his request that employer be held liable for Dr. Park's bills. Specifically, claimant asserts that this issue was addressed at the hearing and that the administrative law judge's ruling did not require him to submit medical bills at that time.[2] Claimant also states he entitled his motion "Petition for Further Consideration" because the administrative law judge did not address the issue of liability for medical benefits,[3] and, therefore, implicitly, there can be no "reconsideration," so the motion should not be considered "untimely" under "motion for reconsideration" terms.

As claimant's motion questioned the propriety of the administrative law judge's decision, it was reasonable for the administrative law judge to consider it a "motion for reconsideration." Additionally, although counsel informed the administrative law judge in a letter dated December 5, 2009, and received by the administrative law judge's office on December 7, 2009, that he would be out of town for two weeks beginning December 21, 2009, the administrative law judge did not err in not considering the letter as a request to waive, or a motion to extend, the time for filing a motion for reconsideration, as the language in the letter does not ask for an extension of time.[4] Counsel did not receive the administrative law judge's decision until he returned from his trip, and he filed his motion within 10 days of the date of his *receipt* of the decision. A timely motion for reconsideration of an administrative law judge's decision is one that is filed "not later than 10 days from the date the decision or order was *filed*" with the district director's office. 20 C.F.R. §802.206(b)(1) (emphasis added); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001) (FRCP Rule 6(a) applies - the 10-

[2]Claimant avers that employer stopped paying medical expenses at some point and Medicare and the PMTA-ILA stepped in to allow claimant to continue receiving medical treatment.

[3]In her decision, the administrative law judge stated: "As the record reflects that Claimant's condition is unlikely to improve, and no further medical treatment has been recommended. (sic) The record contains no request of future medical treatment." Decision and Order at 37.

[4]After informing the administrative law judge that he would be out-of-town and would not return until January 4, 2010, counsel stated: "If you are planning to set a deadline for me to observe, I request that you take the foregoing into consideration." Cl. Brief at 9.

day limit excludes Saturdays, Sundays and holidays). As the decision was filed on December 21, 2009, and the motion was dated January 14, 2010, the administrative law judge did not err in finding that the motion was not filed within the 10-day timeframe permitted for filing motions of reconsideration, 20 C.F.R. §802.206(b)(1), and we affirm that finding.

With regard to the substantive aspect of this issue, the parties agreed at the hearing to defer addressing the actual dollar amount of the various medical bills until after the issue of whether employer is responsible for them had been addressed.[5] Tr. at 7. Consequently, claimant did not submit medical bills into the record. In denying claimant's motion, the administrative law judge rejected claimant's statement that her Decision and Order "clearly imputes responsibility for medical bills to Employer." Order on Recon. at 6. While acknowledging her error in bifurcating at the hearing the disability and medical benefits issues, the administrative law judge also noted that at no time has claimant proffered evidence of unpaid medical bills. Order on Recon. at 6. The right to necessary medical benefits is never time-barred, and is contingent only upon a causal relationship between the injury and the work. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Claimant's remedy, therefore, is to file a new claim for medical benefits.[6]

Attorney's Fee

Claimant also contends the administrative law judge erred in denying counsel an attorney's fee payable by employer. Specifically, claimant contends employer failed to comply with the district director's instructions and, therefore, made it impossible for the district director to issue any recommendation. He urges the Board to remand the case for reconsideration of an employer-paid fee. Employer urges the Board to affirm the administrative law judge's decision denying a fee.

In addressing employer's motion on reconsideration regarding fee liability, the administrative law judge stated that, as employer paid medical and disability compensation "immediately after the accident . . . the requisite elements for shifting fees to Employer set forth by §28(a) of the Act have not been met." Order on Recon. at 3.

[5]Claimant asserts that employer accepted Dr. Park as claimant's treating physician but has not paid any of his bills.

[6]Claimant argues that Medicare paid for a portion of his medical expenses and has a lien. When the administrative law judge addresses the medical expenses, she must also address Medicare's entitlement to repayment if it intervenes.

She then addressed liability under Section 28(b) and concluded that counsel also is not entitled to a fee under that section. The administrative law judge stated:

> Informal conferences were conducted; the Director did not issue any written recommendation that Employer rejected, and Claimant's counsel has not demonstrated that litigation of the claim secured more compensation than a recommendation by the Director contemplated. Employer has refuted Claimant's contention that it had intentionally failed to file a written position statement with the Director as directed, because Claimant's own action made such filing moot.

Order on Recon. at 5.

Counsel contends the administrative law judge erred in denying a fee under Section 28(b).[7] *See also* 20 C.F.R. §702.316. The courts have held that four requirements must be met for an employer to be held liable for an attorney's fee under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept 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. *See, e.g., Andrepont*

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[7]Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award ... and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] 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 ... 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) (emphasis added).

v. Murphy Exploration & Prod. Co., 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied* 546 U.S. 960 (2005). The Board follows this law in the United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, as the Third Circuit has not spoken on the issue. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In this case, there were three informal conferences. In the memorandum for the May 29, 2002, informal conference, the district director recommended that the parties "attempt to agree upon a physician they will rely upon to be an IME in this case." She also stated: "Parties will discuss the doctors they will consider for their choice of IME and further action will be taken as indicated." Although no agreement was reached, it appears the parties complied with the recommendation to "discuss" the matter and "attempt" to resolve it. Thus, it cannot be said that employer rejected this recommendation.

In April 2003, the parties reached an interim agreement to reinstate voluntary payments of temporary total disability benefits during the course of claimant's third-party proceedings and to select a mutually-agreeable treating physician. Motion for Interest at exhs. L-N. On December 17, 2003, a second informal conference was held. The district director stated that the terms of the interim agreement expired without the parties agreeing on a doctor, and both parties requested the case be referred to the Office of Administrative Law Judges. Emp. Ex. 29. The case was referred but later remanded for continuing settlement negotiations.

On May 28, 2008, a third informal conference was held. The district director set forth claimant's claims for temporary total disability benefits for the intermittent periods and continuing, interest, medical benefits, repayment of Medicare paid-bills, and an attorney's fee of approximately $150,000; she noted employer stated that the fee request of $150,000 cannot be settled. After acknowledging that the case has been in negotiations for a long time but was presumptively resolvable,[8] the district director concluded that the fee will be the real source of contention and advised claimant's counsel to read *Edwards* and *Pittsburgh & Conneaut Dock* prior to filing the fee petition. She then stated: "No recommendation is being made at this time. Parties have indicated they would like to continue settlement discussions. Further action will be taken as needed." Emp. Ex. 29. On October 14, 2008, prior to any recommendation being made

[8]The resolution of this case was delayed by third-party proceedings and extensive negotiations.

by the district director, claimant's counsel informed the district director that settlement negotiations were at an impasse and that claimant wanted to proceed to formal hearing. Counsel requested a Pre-Hearing Statement form. On October 20, 2008, the district director sent the parties the LS-18 Pre-Hearing Statement form.[9] Emp. Obj. to Fee Petition at exhs. A-B.

The administrative law judge denied claimant's counsel an employer-paid fee because the district director did not make a recommendation after the last informal conference in light of claimant's request for a hearing which "deprived the OWCP of jurisdiction to make a recommendation."[10] Order on Recon. at 4. This case resembles *Devor,* 41 BRBS 77, where the employer's liability for a fee was precluded pursuant to Section 28(b) because the district director did not write a recommendation due to the parties' request for referral to the Office of Administrative Law Judges. The Board followed the precedent set in the United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits in denying an employer-paid fee. *Devor*, 41 BRBS at 83-84. As the district director here did not make a written recommendation which employer rejected, Section 28(b) is inapplicable. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Thompson v. Northrop Grumman Shipbuilding, Inc.*, __ BRBS __, BRB No. 10-0168 (Sept. 8, 2010); *Devor*, 41 BRBS at 83-84. Therefore, we affirm the finding that employer cannot be held liable for an attorney's fee under Section 28(b).

[9]Pursuant to a telephone conversation with the district director, claimant sent a letter dated October 28, 2008, to the district director explaining his frustration with trying to settle the case and his position on the various outstanding issues. In his introductory paragraph, counsel stated: "After you make your recommendation, will you kindly give us the usual period within which to determine if your recommendation is satisfactory to Mr. Coney. If the employer or Mr. Coney rejects the recommendation, then we request that you forward to us the Pre-Hearing Statement for us to complete and return to you so you can refer this to Judge Romano." M/Interest at exh. Z. At this point, however, claimant had already requested transfer of the case, and the district director did not issue any further recommendations.

[10]The administrative law judge declined to construe employer's failure to file a statement of contested issues with the district director as a refusal to comply with a written recommendation. She stated that such a statement was no longer relevant to the district director after claimant asked for a transfer. Order on Recon. at 4.

Although claimant did not specifically appeal the administrative law judge's finding regarding the applicability of Section 28(a), he seeks remand for the administrative law judge to award an employer-paid fee. As Section 28(b) is inapplicable, only Section 28(a) provides an alternative mechanism to award an employer-paid attorney's fee. Under Section 28(a), an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any benefits. 33 U.S.C. §928(a); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Fee liability pursuant to Section 28(a) is not precluded if the employer pays benefits before a claim is filed and then terminates benefits, or if the employer pays benefits after the thirty days has expired.[11] *Id.*; *see also Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In this case, the administrative law judge found that Section 28(a) is inapplicable because employer immediately paid benefits following claimant's injury. This is not the correct legal standard for ascertaining the applicability of Section 28(a). *Id.* Moreover, nothing in the record establishes when claimant filed his claim for benefits or when the district director notified employer of the claim. Thus, the relevant 30-day period is unknown. As there are periods during which employer was not paying benefits, Emp. Exs. 2-3, and as it is unclear from the record whether the Section 28(a) criteria have been satisfied, the administrative law judge's finding that Section 28(a) is inapplicable cannot be affirmed. Therefore, we vacate the denial of an employer-paid attorney's fee and remand the case for the administrative law judge to reconsider whether employer is liable for an attorney's fee under Section 28(a).[12]

[11]Additionally, for Section 28(a) to apply, the claimant must utilize the services of an attorney in the "successful prosecution of his claim." 33 U.S.C. §928(a); 20 C.F.R. §702.134(a). Claimant here engaged the services of an attorney and successfully prosecuted his claim by obtaining an award of permanent total disability benefits from the date of injury and interest, and the award has not been challenged.

[12]If Section 28(a) is found to be inapplicable, then counsel may be entitled to a fee payable by claimant pursuant to Section 28(c), 33 U.S.C. §928(c), if he files a fee petition so requesting. *Gordon*, 41 BRBS at 15.

Accordingly, the administrative law judge's order denying counsel an attorney's fee under Section 28(a) is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Order on Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge