

BRB Nos. 06-0872  
and 07-0412

CARL E. DEVOR )  
)  
Claimant-Respondent )  
)  
v. )  
)  
DEPARTMENT OF THE ARMY ) DATE ISSUED: 09/27/2007  
)  
and )  
)  
BROADSPIRE )  
)  
Employer/Carrier- )  
Petitioners )  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )  
) ORDER on MOTION  
Respondent ) for RECONSIDERATION

The Board has received claimant's motion for reconsideration of its decision in *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant requests reconsideration only of the Board's reversal of the administrative law judge's award of an attorney's fee payable by employer. BRB No. 07-0412. Claimant alleges that the Board erred in stating that employer voluntarily paid benefits from the date of injury. Accordingly, he argues that Section 28(b) of the Act, 33 U.S.C. §928(b), is inapplicable to the fee award. Contrary to claimant's assertion, the parties stipulated before the administrative law judge that employer's payment of benefits was voluntary. Decision and Order at 3; see *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4<sup>th</sup> Cir. 1996); *Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519 (2<sup>d</sup> Cir. 1984). Moreover, Section 28(a), 33 U.S.C. §928(a), is inapplicable because employer was voluntarily paying benefits as of its receipt of the notice of claimant's October 2000 claim for benefits from the district director. See *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Employer's on-going payments of

temporary total disability benefits continued until August 2004.<sup>1</sup> Section 28(b) is therefore the only means available for claimant to obtain an employer-paid fee. As the district director did not issue a written recommendation following the informal conference, the Board properly concluded that employer cannot be held liable for an attorney's fee under Section 28(b). *Davis v. Eller & Co.*, 41 BRBS 58 (2007); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP [Bordeaux]*, 473 F.3d 253, 40 BRBS 73(CRT) (6<sup>th</sup> Cir. 2007).

Claimant has not established error in the Board's decision; therefore, his motion for reconsideration is denied.<sup>2</sup> 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(c), 802.407, 802.409.

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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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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>1</sup>Apparently, employer paid temporary total disability benefits for the periods between the date of injury and May 2000 pursuant to a stipulated compensation order of the administrative law judge issued in October 2001. This does not affect the applicability of Section 28(a), (b) as employer's payments continued from July 2000 to August 2004. Any error by the administrative law judge or the Board in stating that payments were voluntary from the date of injury is harmless.

<sup>2</sup>Although claimant initially requested an opportunity to file a brief in response to employer's appeal because he believed he had not received a copy of employer's petition for review and brief, counsel subsequently informed the Board that he had received employer's petition for review and brief in a timely fashion but misfiled it and, therefore, did not act upon it. As an additional brief would not assist claimant in establishing employer's liability for a fee on the facts presented herein, we deny the request to file a brief.