

BRB No. 08-0210

K.C.)
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 Claimant-Respondent)
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 v.)
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 NORTHROP GRUMMAN SHIP SYSTEMS,) DATE ISSUED: 09/10/2008
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Employer's Motion for Reconsideration of C. Richard Avery, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Employer's Motion for Reconsideration (2006-LHC-1158) of Administrative Law Judge C. Richard Avery 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 must be affirmed unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back on July 23, 2004, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability during four days in August 2004 and continuously from October 18, 2004,

through March 14, 2005. EX 6 at 2. Employer then voluntarily paid claimant compensation for partial disability. EXs 6 at 3; 7. On April 6, 2005, claimant filed a claim under the Act alleging that he was entitled to temporary total disability benefits and that employer was paying compensation based on an inaccurate average weekly wage. CX 1. On May 26, 2005, employer revised its calculation of claimant's average weekly wage from \$892.50 to \$911.54. EX 6 at 4. The district director held an informal conference on August 25, 2005, to address the issues of average weekly wage, the nature and extent of claimant's disability, and whether claimant's cervical condition is related to the work injury; no recommendation was issued addressing the disputed issues. Rather, the parties were directed to file medical and wage information in order that a recommendation could be rendered on the disputed issues of average weekly wage and the cause of claimant's neck condition. EX 11. On February 13, 2006, claimant requested that a second informal conference be scheduled; however, on March 17, 2006, claimant requested referral of the claim to the Office of Administrative Law Judges for a formal hearing. Employer's br. at EX B. Claimant underwent surgery on October 6, 2006, to implant a spinal cord stimulator, and employer voluntarily commenced paying compensation for temporary total disability.

Since the parties stipulated prior to the hearing that claimant's average weekly wage is \$911.54, the sole issue before the administrative law judge was the nature and extent of claimant's disability from January 25, 2005, to October 5, 2006. In his Decision and Order, the administrative law judge found that while claimant's back condition had not reached maximum medical improvement, there was no dispute that claimant is unable to return to his usual employment in the paint department, and that the evidence established that claimant was unable to perform any work during the disputed period. Accordingly, the administrative law judge found claimant entitled to temporary total disability benefits from January 25, 2005, through October 5, 2006.

Claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$16,714.31, representing 80.375 hours of attorney time at \$200 per hour, and expenses in the amount of \$639.31. In his Supplemental Decision and Order, the administrative law judge determined that as employer made voluntary payments of compensation to claimant within 30 days of receiving claimant's claim, employer was not liable for counsel's requested fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Next, the administrative law judge addressed employer's objections to its liability for any fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge found that while no written recommendation had been made by the district director, the facts of this case mandated that employer be held liable for claimant's counsel's fee pursuant to Section 28(b). Accordingly, while rejecting employer's item-specific objections to claimant's counsel's fee, the administrative law judge awarded counsel a reduced fee of \$10,716.67, to reflect claimant's degree of success. In his order on reconsideration, the administrative law judge found no compelling reason to grant employer's motion for reconsideration, stating that the lack of

a written recommendation should not benefit employer and deprive claimant's counsel of a fee.

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's attorney's fee as the requirements for the applicability of Section 28(b) have not been met in this case. Claimant responds, urging affirmance of the attorney fee award against employer under Section 28(a), (b), or, in the alternative, against claimant under Section 28(c).

We initially address claimant's contention that employer is liable for an attorney's fee pursuant to Section 28(a). The Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's decision. *See Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004). Section 28(a) provides for an employer-paid fee if employer declines to pay any compensation within 30 days of the date it receives notice of the claim from the district director.¹ *See Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *see generally W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). In this case, the facts demonstrate that employer was voluntarily paying claimant compensation for partial disability at the time when the claimant filed his claim. As the administrative law judge properly found that these payments preclude employer's liability for a fee pursuant to Section 28(a), notwithstanding claimant's eventual recovery of compensation greater than employer paid, we reject claimant's contention that employer is liable for his counsel's fee pursuant to Section 28(a) and affirm the administrative law judge's conclusion. *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (Hall, J., concurring), *aff'g on recon.*, 41 BRBS 1 (2007) (Hall, J., dissenting); *see also Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981).

¹ Section 28(a) states, in relevant part:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a).

Employer challenges the administrative law judge's award of an employer-paid fee pursuant to Section 28(b). Section 28(b) of the Act states, in relevant part:

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 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 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). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has strictly construed the language of Section 28(b). In *Stafstex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), the court enumerated three criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; and (3) the employer's refusal of the recommendation. *Stafstex Staffing*, 237 F.3d at 409, 34 BRBS at 47(CRT); *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *FMC Corp. v. Perez*, 128 F.3d 908, 909-911, 31 BRBS 162, 163(CRT) (5th Cir. 1997) (stating Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by "accepting the . . . Commissioner's recommendations"); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Davis v. Eller & Co.*, 41 BRBS 58, (2007); *see Andrepont*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring).

In considering claimant's counsel's request for an employer-paid fee, the administrative law judge framed the issue before him as presenting the question of whether, on the facts of this case, the absence of a written recommendation from the district director barred claimant's counsel's recovery of a fee payable by employer under Section 28(b). Supp. Decision and Order at 2. Finding that employer failed to provide the wage records requested following the informal conference, the administrative law

judge concluded that employer did not have “clean hands” in this instance. *Id.* at 3. Next, citing the dissenting opinion in *Pittsburgh & Conneaut Dock Co.*, 473 F.3d 253, 40 BRBS 73(CRT), the administrative law judge concluded that “the lack of a written recommendation should not benefit the Employer who in essence sabotaged the District Director’s ability to render a written recommendation on the contested issues in this claim.”² *Id.* at 3 – 4. Thus, the administrative law judge held employer liable for claimant’s attorney’s fee pursuant to Section 28(b).

Employer contends that the administrative law judge erred in holding it liable for claimant’s attorney’s fee pursuant to Section 28(b) as no written recommendation was made regarding the issue of claimant’s entitlement to temporary total disability benefits. We agree. In this case, an informal conference was held on August 25, 2005. The LS-280, Memorandum of Informal Conference, states that the issues discussed were average weekly wage, medical-causation, nature and extent, and permanency. EX 11. The memorandum states under “Summary of the Informal Conference and Recommendation:”

Parties have attempted to settle this claim. Current medical information should be provided to this office. Wage information should be provided to this office and to Ms. Dulin prior to issuing recommendation with regard to average weekly wage. The employer/carrier is required to submitted (sic) an 8(f) (33 U.S.C. 908(f)) application to this office within 30 days from the date of maximum medical improvement. If maximum medical improvement has not been attained then the issue of 8(f) is premature.

Id. In his order awarding an attorney’s fee payable by employer, the administrative law judge acknowledged that a written recommendation was not made in this case; regardless of this omission, the administrative law judge concluded that the humanitarian purpose of the Act and its fee shifting provisions dictate that employer should not secure a windfall as a result of its inaction following the informal conference. Section 28(b) of the Act, however, contains no equitable exclusion which would nullify the three statutorily enumerated criteria for fee liability to be assessed under that section. *See* 33 U.S.C. §928(b); *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT). Thus, as a written recommendation on the issues in dispute after an informal conference is necessary to confer fee liability on employer pursuant to Section 28(b), and as it is undisputed that no recommendation was issued in this case addressing the nature and extent of claimant’s

² In *Pittsburgh & Conneaut Dock Co.*, claimant raised entitlement to permanent disability benefits at the informal conference, the issue on which he prevailed before the administrative law judge. The district director, however, did not issue any recommendation as the parties were considering settlement. The Sixth Circuit held that fee liability pursuant to Section 28(b) did not shift to employer since the district director made no recommendation on the issue favorably decided by the administrative law judge.

disability, we hold that employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) for work performed before the administrative law judge as the mandatory statutory conditions set forth in the section have not been met. *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT); *see also Pittsburgh & Conneaut Dock Co.*, 473 F.3d 253, 40 BRBS 37(CRT); *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT); *R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008); *Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Therefore, we reverse the administrative law judge's award of an attorney's fee payable by employer pursuant to Section 28(b).³ However, since claimant did obtain compensation, counsel may be entitled to a fee assessed against claimant pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *See Andrepont*, 41 BRBS 73; *Boe v. Dept. of the Navy/MWR*, 34 BRBS 108 (2000). Under such circumstances, any fee approved must take into account the amount of benefits awarded and the financial circumstances of the claimant. 20 C.F.R. §702.132. The case is therefore remanded for the administrative law judge to consider an attorney's fee payable by claimant.

Accordingly, the administrative law judge's determination that employer is liable for claimant's counsel's fee is reversed. The case is remanded for consideration of an attorney's fee payable by claimant.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

³ In light of our decision, employer's Motion for Summary Reversal is moot.