



BRB No. 17-0268

LEROY SMITH	)	
(DECEASED)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NICOR NATIONAL	)	
	)	DATE ISSUED: <u>Sept. 20, 2017</u>
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH,	)	
PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Compensation Orders of David A. Duhon, District Director, United States Department of Labor.

Francis B. Mulhall, Metairie, Louisiana, for claimant.

Sidney W. Degan III, Foster P. Nash III and Jeffrey C. Brennan (Degan, Blanchard & Nash), New Orleans, Louisiana, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant’s counsel appeals the Compensation Orders (OWCP No. 07-112461) of District Director David A. Duhon 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, based on 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 while working as a sandblaster/painter for employer on November 4, 1988. Employer voluntarily paid claimant benefits.<sup>1</sup> A controversy subsequently arose, and the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. By decision dated November 3, 2004, Administrative Law Judge Richard D. Mills found claimant entitled to permanent total disability benefits from June 28, 1996 and continuing based on an average weekly wage of \$360, as well as medical benefits. In a Supplemental Decision and Order Awarding Attorney Fees dated November 7, 2005, Judge Mills found claimant's counsel entitled to an attorney's fee, payable by employer, totaling \$30,843.20 for work performed while the case was pending before the OALJ.

In October 2014, claimant and employer reached a Section 8(i) settlement, 33 U.S.C. §908(i), whereby claimant received \$225,000 for disability benefits and a structured Medicare Set-Aside to cover the costs of future medical care. The settlement stated that the "parties agree that counsel for Claimant will submit a fee petition for his attorney fee to the district director." Settlement Agreement at 16. The parties' agreement was approved by the district director on November 20, 2014.<sup>2</sup> On May 25, 2016, claimant's counsel filed with the district director a petition seeking an attorney's fee totaling \$53,889.77, representing 124.3 hours of attorney time at an hourly rate of \$300, 102.8 hours of attorney time at an hourly rate of \$160, and \$140.04 in costs, for work performed before the district director between September 28, 2005 and April 29, 2016. Employer filed objections.

In his Compensation Order dated July 13, 2016, the district director denied claimant's counsel's request for an attorney's fee payable by employer pursuant to Sections 28(a) and (b), 33 U.S.C. §928(a), (b), because employer voluntarily paid compensation to claimant within 30 days of the receipt of the claim and "no informal conference was held from which employer refused to accept the recommendation." July 13, 2016 Order at 3. The order also advised claimant's counsel that he should inform the district director within 30 days if he wished to seek an attorney's fee as a lien on claimant's benefits under Section 28(c), 33 U.S.C. §928(c). In September 2016, counsel filed with the district director a Supplemental Attorney Fee Petition seeking \$5,372.50 in additional fees under Section 28(c), representing 15.35 hours of work from May 23 through September 2, 2016. The district director, in a Compensation Order dated October 24, 2016, denied counsel's request for an attorney's fee under Section 28(c) as

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<sup>1</sup>Employer paid claimant temporary total disability benefits from November 4, 1988 through March 23, 1998, and temporary partial disability benefits thereafter through November 2004.

<sup>2</sup>Claimant died on January 11, 2016.

untimely because counsel did not advise the district director that he wished to pursue an award under that provision within 30 days of the July 13, 2016 order. The district director denied counsel's motion for reconsideration.

On appeal, claimant's counsel appeals the district director's denial of an employer-paid attorney's fee.<sup>3</sup> Employer responds, urging affirmance of the district director's orders. Claimant's counsel filed a reply brief.

Counsel contends the district director erred by denying him an employer-paid attorney's fee under Sections 28(a) or (b) of the Act. Section 28(a) of the Act states:

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 Act, 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. . .

33 U.S.C. §928(a) (emphasis added). A prerequisite for an employer's liability under Section 28(a) is that it refused to pay "any compensation" within 30 days of its receipt of the notice of the claim from the district director. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). In this case, the district director found that employer received notice of claimant's claim from the district director on May 23, 1990. Employer had initiated its payment of disability benefits to claimant in November 1988 and these benefits continued after employer received notice of the claim. Thus, as employer did not "decline to pay any compensation" within 30 days of May 23, 1990, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(a). *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); *see also Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). As the district director's conclusion that employer is not liable for an attorney's fee pursuant to Section 28(a) accords with law, we affirm the district director's denial of counsel's request for an employer-paid attorney's fee under Section 28(a). *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT).

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<sup>3</sup>The district director's denial of an attorney's fee payable as a lien against claimant's compensation under Section 28(c) is affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Section 28(b) of the Act 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 is greater than the amount paid or tendered by 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. . . .

33 U.S.C. §928(b). The Fifth Circuit has strictly interpreted Section 28(b), and held that the following are prerequisites to an employer's liability under Section 28(b): (1) an informal conference on a disputed issue has been held; (2) a written recommendation from the district director on that issue has been made; (3) the employer refuses to accept the written recommendation; and (4) the employee achieves a greater award than that which the employer was willing to pay after the written recommendation. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); *Staftex 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); *see also Pittsburgh & Conneaut Dock v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6<sup>th</sup> Cir. 2007); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). If any element is missing, an employer cannot be held liable for a fee under Section 28(b). *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT) (no rejection of the written recommendation); *Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT) (no written recommendation addressing same issue as before the administrative law judge); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (no informal conference or written recommendation).

The district director stated that the only informal conference conducted subsequent to Judge Mills's decision involved employer's request in 2008 that claimant be ordered to attend a medical examination, which the district director granted, and employer

accepted.<sup>4</sup> Thus, because the record does not contain evidence that any other informal conference occurred after claimant's claim was resolved by Judge Mills in November 2004,<sup>5</sup> the district director properly concluded that counsel is not entitled to an employer-paid attorney's fee under Section 28(b). *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT). We, therefore, affirm the district director's denial of an attorney's fee under Section 28(b).

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<sup>4</sup>Judge Mills's November 3, 2004 decision notes that an informal conference was held on September 17, 2003, but there is no evidence regarding any written recommendation.

<sup>5</sup>The work for which counsel now seeks an attorney's fee was performed after Judge Mills issued his November 3, 2004 decision awarding claimant permanent total disability and medical benefits. Counsel states that he repeatedly had to write to employer's carrier regarding late-issued compensation checks, which on one occasion prompted him to contact the district director via fax for assistance. Counsel submits with his petition for review letters documenting his efforts to collect these late payments. These letters cannot be considered "an informal conference by correspondence" because they are not "between" the district director and the parties. *See* 20 C.F.R. §702.311 (permits informal conferences by way of telephone calls and written correspondence among the parties and the district director); *News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007) (correspondence); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007) (telephone). While counsel assisted claimant in obtaining late compensation payments, employer cannot be held liable for these services when the statutory requirements are not satisfied. *See Andrepoint*, 566 F.3d at 421, 43 BRBS 31(CRT) (noting anomalous results, but stating only Congress can remedy such problems).

Accordingly, the district director's Compensation Orders denying claimant's counsel an attorney's fee are affirmed.

SO ORDERED.

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge