BRB No. 08-0310

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<tr><td>D.M.

Claimant-Petitioner

v.

MARINE REPAIR SERVICE

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED

Employer/Carrier-Respondents</td><td>)
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DATE ISSUED: 09/16/2008

DECISION and ORDER</td></tr>
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Appeal of the Order Denying Attorney Fee and Paralegal Fee Petition of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Adam S. Rafal and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Attorney Fee and Paralegal Fee Petition (2007-LHC-1227) of Administrative Law Judge Alan L. Bergstrom 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, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). 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).

Claimant was injured on March 13, 2006, during the course of his employment. Claimant filed a claim on March 31, 2006. Employer filed a Notice of Payment Without Award form on April 7, 2006, indicating it was paying claimant temporary total disability benefits at a compensation rate of $400 per week. Claimant received his first check on April 17, 2006. Because there was an issue involving a Section 14(e) assessment, 33 U.S.C. §914(e), and the management of claimant's medical treatment, claimant sought an informal conference. The conference was held on May 3, 2006. The district director recommended that employer pay a Section 14(e) assessment; however, he stated that the management of claimant's medical care was sufficient. Employer paid the Section 14(e) assessment and adjusted claimant's compensation rate to $387 per week to reflect a corrected calculation of claimant's average weekly wage. Employer has continued to pay temporary total disability benefits at this rate.

In June 2006, the district director questioned the status of the case and indicated his intent to close the file if there were no further issues. On July 16, 2006, claimant sent a letter to the district director requesting an informal conference on the issue of claimant's entitlement to a compensation order awarding benefits. His letter stated:

> At this time my client would like to be placed under an award Order concerning his entitlement to benefits. I would appreciate your scheduling an informal conference concerning my client's entitlement to an award Order.

The district director responded, stating:

> This will serve to respond to your letter dated July 17, 2006 requesting an informal conference on the issue of an award order.
>
> I will be pleased to issue an order based upon the stipulations of the parties without holding an Informal Conference.
>
> I would remind you that [employer/carrier] are represented by [counsel] and perhaps you should contact [counsel] concerning this matter.

In reply, on July 31, 2006, claimant sent a letter to the district director and to employer with proposed stipulations. Receiving no response from employer regarding the stipulations, on February 28, 2007, claimant sent another letter to the district director, again requesting an informal conference. The district director stated:

> The claimant continues to receive temporary total disability benefits from the insurance carrier and to receive medical treatment. As this office has previously advised insurance carriers and self-insured employers when they wanted a claimant to enter into stipulation agreements, we cannot make the parties sign stipulation agreements or enter an order without signed stipulations and whether one side or the other refuses to sign the document is not an issue that can be resolved by informal conference.

He also advised claimant's counsel to file a pre-hearing statement if he wished the case transferred to the Office of Administrative Law Judges. Claimant did so, and the case was transmitted on April 16, 2007, only to be remanded on August 6, 2007, at the request of the parties. The parties signed stipulations on September 4, 2007, and on October 4, 2007, the district director entered a compensation order based on those stipulations.[1]

Claimant's counsel submitted a fee petition to the administrative law judge.[2] Employer objected to the fee, arguing that the requirements of Section 28(b), 33 U.S.C. §928(b), were not satisfied or, alternatively, that the fee request was unreasonable and specific entries were objectionable. Claimant replied that the requirements were satisfied by the written request for an informal conference on July 17, 2006, and the district director's recommendation on July 18, 2006, which employer rejected by failing to sign the stipulations. Order at 1-2.

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[1]The stipulations signed upon remand were the same as claimant presented to employer prior to transfer of the case to the administrative law judge, and they provided for the continued payment of temporary total disability benefits in the amount of $387 per week.

[2]Counsel requested $5,535.50, representing 18.45 hours of attorney work performed between April 26, 2007, and October 5, 2007, at an hourly rate of $300. The petition also included a request for $498.75 for 5.25 hours of paralegal work at a rate of $95 per hour. The administrative law judge noted that claimant later withdrew the request for a fee for the period after August 14, 2007, later making the request for a fee for those services to the district director.

The administrative law judge found that a fee is not payable under Section 28(a), 33 U.S.C. §928(a), because employer did not decline to pay compensation on or before the 30th day following the filing of the claim. Order at 3. The administrative law judge also found that a fee was not payable under Section 28(b). Although he noted there was an earlier informal conference and written recommendation on the Section 14(e) matter, he found there was no informal conference or written recommendation, and no rejection by employer, on the issue of claimant's entitlement to a compensation order – the sole issue that came before him. Order at 3-4. The administrative law judge also addressed, *sua sponte*, whether a fee is payable by claimant under Section 28(c), 33 U.S.C. §928(c). He found that no fee is payable under that section because counsel failed to establish that claimant was in a financial position to pay such a fee, as there were no additional benefits received as a result of the proceedings before him. Order at 5. Claimant appeals the denial of a fee payable under Section 28(b), (c), and employer responds on the Section 28(b) issue, urging affirmance.

As employer began paying benefits within the 30 days following its receipt of the claim from the district director, employer is not liable for a fee pursuant to Section 28(a). *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, identified the prerequisites to an employer's liability for a fee under Section 28(b) as: (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. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Moody*, 474 F.3d 109, 40 BRBS 69(CRT); *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT); *R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

Claimant contends the prerequisites were satisfied by the correspondence between his counsel and the district director and that employer's failure to sign the stipulations constituted a rejection of the district director's recommendation. Although claimant correctly states that an informal conference may be conducted in person, on the phone or by correspondence, 20 C.F.R. §702.331; *Hassell*, 477 F.3d 123, 41 BRBS 1(CRT), we need not address whether the written documents functioned as an informal conference because other Section 28(b) prerequisites are missing in this case. Specifically, the district director stated that he would be willing to issue an order once he received signed stipulations from the parties. In his second reply concerning the stipulations, the district director stated he cannot issue an order without a signed agreement, *see* 20 C.F.R. §§702.315 702.316, and he cannot force a party to sign stipulations. At no time did he

recommend that employer take some specific action. As there was no written recommendation by the district director, we reject claimant's contention that he is entitled to a fee pursuant to Section 28((b). *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT).

Contrary to claimant's contention, the Fourth Circuit's decision in *Hassell* is distinguishable. In *Hassell*, the parties agreed that claimant was entitled to benefits for a 19 percent permanent partial impairment, but employer conditioned its payment on claimant's acceptance of stipulations including a clause to which claimant did not agree. Following claimant's written request for an informal conference, the district director recommended by letter that the employer pay benefits for that rating and that claimant was not required to sign the stipulations as a condition of receiving benefits. Before the administrative law judge, the parties agreed to the stipulations without the disputed clause, and the administrative law judge entered the agreed award of benefits. The court held that the letters between the claimant and the district director were "the functional equivalent of an informal conference," *see* 20 C.F.R. §702.311, and the district director's letter recommending that the employer pay benefits and that claimant did not have to sign the stipulations satisfied the written recommendation requirement. *Hassell*, 477 F.3d at 128, 41 BRBS at 3-4(CRT). The employer then refused to adopt this recommendation. As claimant thereafter obtained benefits for the 19 percent impairment without the challenged stipulation, the court held he obtained a greater award than he could have obtained without litigating the case. Having satisfied all of the requirements of Section 28(b), the claimant's attorney was entitled to a fee payable by the employer. *Id.*

Unlike *Hassell*, the administrative law judge here rationally concluded that the district director did not make any recommendation to resolve this claim. The absence of a written recommendation is a bar to an employer's liability for a fee under Section 28(b). *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *R.S.*, 42 BRBS 11. Moreover, unlike *Hassell,* the administrative law judge correctly stated, albeit in his Section 28(c), 33 U.S.C. §928(c), discussion, that claimant did not obtain compensation greater than employer was paying as the result of the proceedings before the administrative law judge. Employer was paying benefits at the same rate as in the order ultimately entered at all relevant times and all other issues were resolved. Where a claimant does not obtain additional compensation from employer, Section 28(b) cannot apply. *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). Accordingly, we affirm the administrative law judge's denial of a fee payable by employer pursuant to Section 28(b).

Claimant's counsel next argues that he is entitled to a fee paid by claimant as a lien against his compensation under Section 28(c). The administrative law judge addressed Section 28(c) and stated that no fee is payable by claimant because claimant did not obtain additional benefits pursuant to a decision of the administrative law judge and because claimant's counsel did not establish that claimant is in a financial position to

pay an attorney's fee. Order at 5. Counsel asks the Board to reverse the administrative law judge's decision on Section 28(c) because the administrative law judge addressed the issue *sua sponte.*

The administrative law judge is correct in stating that claimant obtained only the amount of benefits that employer had been paying all along. However, the applicability of Section 28(c) does not depend on a claimant's receipt of additional benefits. Instead, if the employer cannot be held liable for an attorney's fee under Section 28(a) or (b), then the claimant may be held liable for any necessary work performed on his behalf under Section 28(c) as a lien on his compensation. 33 U.S.C. §928(c);[3] 20 C.F.R. §702.132(a).[4] Thus, where claimant obtains benefits, as here, he may be held liable for his attorney's fee pursuant to Section 28(c) for any necessary work performed before the administrative law judge. In such cases Section 702.132(a) also requires consideration of claimant's financial circumstances. In this case, the administrative law judge stated that counsel failed to demonstrate claimant's financial ability to pay a fee, however, the administrative law judge addressed Section 28(c) *sua sponte*. The denial of a fee under Section 28(c) is therefore vacated. The case is remanded to the administrative law judge for consideration of claimant's financial ability to pay an attorney's fee pursuant to Section 28(c), given the amount of benefits awarded, and a reasonable fee for any necessary work performed by claimant's attorney in obtaining a formal compensation order. *See Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting), *appeal pending*, No. 08-60251 (5th Cir.).

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[3]Section 28(c) states:

> In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

[4]Section 702.132(a), 20 C.F.R. §702.132(a), provides in pertinent part:

> Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant.

Accordingly, the administrative law judge's Order Denying Attorney Fee pursuant to Section 28(c) is vacated, and the case is remanded for consideration consistent with this opinion. In all other respects, the administrative law judge's Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge