BRB Nos. 07-0664
and 07-0664A

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| R.S. | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| VIRGINIA INTERNATIONAL TERMINALS | ) | DATE ISSUED: 08/12/2008 |
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| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
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| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | ORDER on MOTION for RECONSIDERATION |

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case. *R.S. v. Virginia International Terminals*, 42 BRBS 11 (2008); 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Claimant contends that the Board erred in holding that employer is not liable for his attorney's fee pursuant to 33 U.S.C. §928(b) because the district director recommended that employer pay temporary total disability benefits through August 6, 2005, employer did not do so, and such were awarded by the administrative law judge. Claimant thus contends that he successfully obtained benefits which employer refused to pay after the district director's written recommendation. Employer responds, urging the Board to deny claimant's motion for reconsideration.

In its decision, the Board stated that the administrative law judge correctly found that correspondence between the parties and the district director may serve as the "functional equivalent of an informal conference." 20 C.F.R. §702.311; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 127, 41 BRBS 1, 3-4 (CRT) (4th Cir. 2007). The Board stated, however that, in this case, the correspondence and the district director's subsequent written recommendation related solely to the issue of the extent of claimant's right knee impairment. *R.S.*, 42 BRBS at

13-14. Specifically, the district director recommended on January 20, 2006, that employer pay "temporary total disability from March 23, 2004 and continuing, until such time as the claimant is returned to work or suitable alternate employer is identified, and thereafter for compensation for permanent partial disability [for a 52 percent permanent partial impairment of the left lower extremity]." Cl. Ex. 4. The record indicates that at least by January 27, 2006, seven days after the informal conference, employer paid claimant temporary total disability benefits from the date of surgery, March 23, 2004, until he returned to work on August 6, 2005. Cl. Exs. 5, 9. Subsequently, employer accepted the district director's recommendation to pay claimant scheduled benefits for a 52 percent permanent knee impairment. Cl. Ex. 7; *see R.S.*, 42 BRBS at 14, n.4.

At the hearing before the administrative law judge, the issue of the extent and nature of claimant's knee impairment was not adjudicated. Rather, employer contested its liability for claimant's back condition. The administrative law judge found that claimant's back injury is causally related to his right knee injury and therefore is compensable. The administrative law judge awarded temporary total disability for the back injury commencing April 11, 2006. The administrative law judge, in addition, memorialized employer's prior payments of temporary total disability for the knee injury itself. He did not award any benefits for the knee injury that employer had not paid prior to the claim's referral.

As the Board stated in its decision, the district director made no recommendation on the issue favorably decided by the administrative law judge, which is a requirement under a strict construction of Section 28(b). *See Virginia Int'l Terminals 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); *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). Claimant has not demonstrated error in this determination. That the administrative law judge re-stated in the "Order" portion of his decision the temporary total disability benefits which employer had paid prior to referral does not reflect that the administrative law judge favorably adjudicated an issue on which the district director made a recommendation. Therefore, we affirm our holding 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.

Accordingly, claimant's motion for reconsideration is denied. The Board's Decision and Order is affirmed. 20 C.F.R. §§801.301(c), 802.409.

SO ORDERED.

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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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JUDITH S. BOGGS
Administrative Appeals Judge