

BENNY R. EDWARDS )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 VIRGINIA INTERNATIONAL )  
 TERMINALS ) DATE ISSUED: Nov. 25, 2003  
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 and )  
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 SIGNAL ADMINISTRATION )  
 c/o ABERCROMBIE, SIMMONS )  
 & GILLETE OF VIRGINIA )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney's Fees of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

F. Nash Bilisoly (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney's Fees(2002-LHC-2713) of Administrative Law Judge Richard E. Huddleston 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 the challenging

party shows it 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).

Claimant was injured on February 22, 2002. Employer paid benefits without an award commencing February 26, 2002. Employer terminated benefits on April 16, 2002, when claimant was released to return to full duty work. On July 23, 2002, claimant's counsel wrote to the Office of Workers' Compensation Programs requesting benefits for the period from February 23 to 25, 2002, as well as reimbursement of certain medical expenses. Counsel requested that the district director schedule an informal conference. On August 1, 2002, the district director wrote to claimant's counsel, requesting that he "provide medical to support the claim" in that employer's position is that claimant did not lose time until February 26. The district director also informed claimant that employer would pay the medical bills. Also by letter dated August 1, 2002, employer advised claimant's counsel that there was no medical support for disability benefits until February 26, when claimant was placed on restricted duty.

Claimant responded by letters to the district director dated August 15 and August 26, 2002, reiterating his position that claimant was disabled on February 23; stating that he did not feel a conference was appropriate given the tenor of employer's letter; stating that the district director should forward the claim to the Office of Administrative Law Judges (OALJ) if the district director did not feel a conference was appropriate; stating that, currently, he did not have medicals to back up his claim, and that he may have to depose the doctor; and stating that claimant would testify as to his disability but that counsel realized this would "not carry the day" at the district director level. Claimant attached a Form LS-18 pre-hearing statement to his August 15 letter. On August 22, 2002, the district director forwarded the case to the OALJ. On August 27, 2002, employer paid claimant benefits for the three days in question. On October 7, 2002, the administrative law judge remanded the case to the district director, pursuant to 20 C.F.R. §702.351 which applies when the controversion of the claim is withdrawn.

Claimant's counsel subsequently sought an attorney's fee for work performed before the administrative law judge, in the amount of \$117. Employer objected to its liability for a fee pursuant to Section 28(b), 33 U.S.C. §928(b), on the ground that there was no informal conference before the district director. The administrative law judge found that because no informal conference was held, and more importantly, because the district director never made a recommendation with which employer refused to comply, employer cannot be held liable for claimant's attorney's fee under Section 28(b) notwithstanding that employer did not pay benefits until after the case was transferred to the OALJ.

On appeal, claimant contends that since it is within the discretion of the district director to call an informal conference, the lack of such a conference cannot be relied on by employer to avoid paying an attorney's fee. Claimant contends that it is the practice of this district director to review the file and then to determine if an informal conference

would be worthwhile. In this case, claimant contends that the district director communicated with both parties and then forwarded the claim to the OALJ. Finally, claimant contends that since this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Fifth Circuit's decision in *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT) (5<sup>th</sup> Cir. 2000), on which the administrative law judge relied, is not controlling precedent. Employer responds in support of the administrative law judge's decision. We do not reach the parties' specific contentions regarding Section 28(b) as the case may be resolved by application of Section 28(a).

We reverse the administrative law judge's denial of an attorney's fee payable by employer and hold that under the facts of this case employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Section 28(a) 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 deputy commissioner, 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). In *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001), the Fifth Circuit denied claimant an employer-paid attorney's fee pursuant to Section 28(b) due to the lack of informal conference before the district director. The court, however, held employer liable for claimant's attorney's fee pursuant to Section 28(a), on facts similar to those in this case. In *Pool Co.*, the employer voluntarily paid claimant benefits, before claimant filed any claim. Employer stopped making payments, and claimant thereafter filed a claim for additional benefits. Employer controverted the claim within 30 days of receiving written notice of it. The case went before an administrative law judge and claimant obtained an award of additional benefits. In holding employer liable for claimant's attorney's fee under the plain language of Section 28(a), the Fifth Circuit stated, "we find no basis in any statute, regulation, or case law for the BRB's holding that [employer's] prior voluntary payment of benefits precluded liability under § 28(a). Such payments preceded [employer's] receipt of written notice of [claimant's] claim, and are thus irrelevant to the question of an award under § 28(a)." *Id.*, 274 F.3d at 186-187, 35 BRBS at 119(CRT). The Ninth Circuit recently agreed with this interpretation of Section 28(a). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003) (but holding that employer is not liable for a fee because claimant did not successfully prosecute his claim).

In this case, employer voluntarily paid benefits after claimant's injury, and ceased payments upon claimant's ability to return to work. Thereafter, claimant filed a claim on July 23, 2002, which employer "declined to pay" by letter dated August 1, 2002, prior to the expiration of 30 days. After the case was referred to the OALJ, employer agreed to pay additional benefits. Thus, claimant successfully prosecuted his claim before the administrative law judge. Pursuant to the reasoning in *Pool Co.*, we hold that employer is liable for claimant's attorney's fee pursuant to Section 28(a). We reverse the administrative law judge's finding that employer is not liable for claimant's attorney's fee and we remand the case to the administrative law judge to determine the amount of the fee due claimant's counsel. 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney's Fees is reversed. The case is remanded for consideration of counsel's fee petition.

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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BETTY JEAN HALL  
Administrative Appeals Judge