BRB No. 06-0670

| | | |
|---|---|---|
| JOHNNIE DAVIS | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ELLER & COMPANY | ) | DATE ISSUED: 06/04/2007 |
| | ) | |
| and | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Attorney Fee Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Laurence F. Valle (Valle, Craig, Sioli & Lynott, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (2005-LHC-01487) 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured at work on March 25, 2004, when he fell and broke his wrist and hurt his lower back and shoulder. Although the injuries to claimant's lower back and shoulder resolved, he continued to complain of pain and swelling in his left wrist. He began treatment with Dr. Dennis, an orthopedic hand surgeon, who recommended that claimant undergo surgery to repair the ligamentous tendon in his left wrist. Claimant was also evaluated by Drs. Cummings and Eastlick, who opined that the tendon tear was not related to claimant's work injury and that he had reached maximum medical improvement with no impairment or restrictions from returning to his regular duties. Employer voluntarily paid temporary total disability benefits from March 25, 2004 to March 9, 2005, but stopped when Dr. Stringham released claimant for full-duty work with no restrictions for his back injury and Dr. Eastlick released claimant for full-duty work with no restrictions for his left wrist fracture. Claimant sought continued medical treatment for his left wrist and continuing temporary total disability benefits under the Act.

Claimant filed a formal claim for benefits on December 9, 2004. Cl. Ex. 1. Claimant requested a telephonic informal conference by letters dated January 4, 2005 and March 3, 2005. Subsequently, claimant spoke with employer's representative, who advised that as a result of Dr. Eastwick's report of January 24, 2005, all compensation was being terminated and the surgery recommended by Dr. Dennis would not be authorized. Claimant thus believed that informal resolution could not be reached. Accordingly, claimant notified the district director of the conversation with employer's representative and requested by letter dated March 21, 2005, that the case be transferred for a formal hearing.

In his Decision and Order, the administrative law judge found that claimant's ligament tear is related to his work injury on March 25, 2004, and that the surgery recommended by Dr. Dennis is reasonable and necessary. Therefore, the administrative law judge ordered employer to provide continued treatment for claimant's left wrist pain. In addition, the administrative law judge found that claimant established that he has not reached maximum medical improvement and that he cannot return to his former duties as a longshoreman. Thus, as employer did not submit any evidence of suitable alternate employment, the administrative law judge found that claimant is entitled to continuing temporary total disability benefits.

Subsequently, claimant's counsel submitted a petition for an attorney's fee, requesting $12,020, representing 60.1 hours of legal services at the hourly rate of $200, plus expenses of $2,093.81 for a total fee of $14,113.81. Employer objected to the fee petition, contending that it is not liable for a fee under Section 28 of the Act as it voluntarily paid temporary total disability benefits upon receipt of the claim, and there was no informal conference in this case. Otherwise, employer did not file specific objections to the amount requested. The administrative law judge found that the decision

of the United States Court of Appeals for the Fourth Circuit in *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005), does not apply in the Eleventh Circuit, the jurisdiction in which the present case arises. Thus, the administrative law judge found that even though no informal conference was held, a dispute arose over additional compensation and claimant's counsel successfully prosecuted the claim. Accordingly, the administrative law judge awarded claimant's counsel a fee in the amount requested, $14,113.81, to be paid by employer pursuant to Section 28(b).

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's attorney fee pursuant to Section 28(b) as there was no informal conference in this case. Employer contends that the clear language of the Act requires an informal conference and that the majority of circuits that have addressed this issue have held that an informal conference is necessary to hold employer liable for claimant's attorney fee under Section 28(b) of the Act. Claimant responds, urging affirmance of the administrative law judge's decision, noting that he requested an informal conference in the instant case, but employer's representative indicated that an informal resolution could not be reached. In addition, claimant notes that the Board has not applied the decisions in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), and *Edwards* outside of the Fifth and Fourth Circuits respectively.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer.[1] 33 U.S.C. §928(a). Under Section 28(b) of the Act:

> 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,

[1] It is undisputed that Section 28(a) is inapplicable in the instant case. Claimant filed his formal claim on December 9, 2004, and employer had been paying temporary total disability benefits from the date of the accident, March 25, 2004, and continued to pay through March 2005.

> 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 the 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). The Board's approach to fee liability under Section 28(b) has been consistent with the case law of the United States Court of Appeals for the Ninth Circuit, as that court was for many years the only one to address the specific language of Section 28(b). *See Caine v. Washington Metropolitan Area Transit Authority,* 19 BRBS 180 (1986). The Ninth Circuit has held employers liable for attorney's fees under Section 28(b) regardless of whether the literal terms of the statute were met, based on its view that "[t]he purpose of the statute is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel." *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1979). In *National Steel*, the Ninth Circuit held employer liable where there was a recommendation after an informal conference was held, but the recommendation was not in writing. *National Steel*, 606 F.2d at 881, 11 BRBS at 73. Alternatively, the court stated that it was clear from the facts in that case that one of the parties would have rejected any recommendation, as the district director referred the case for a formal hearing upon conclusion of the informal conference. As claimant gained greater compensation before the administrative law judge, the court held employer liable for claimant's attorney's fee. *Id*. More recently the Ninth Circuit assessed attorney's fees under Section 28(b) where, following a written recommendation which the court found was the functional equivalent of an informal conference, claimant ultimately prevailed on issues that remained in dispute. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Quoting the above language, the court reiterated that the claimant is entitled to a fee where the extent of liability is controverted and claimant successfully obtains increased compensation regardless of whether employer specifically rejected an administrative recommendation. *Id.* Similarly, the determinative factor in the Board's assessing fee liability pursuant to Section 28(b) was claimant's success in obtaining greater compensation than employer paid or tendered. *Caine*, 19 BRBS 180; s*ee also Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 813, 5 BRBS 317, 318 (5th Cir. 1977); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir.

1976); *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291, 1297 n.14 (2d Cir. 1974); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

However, the Fourth, Fifth and Sixth Circuits more recently have taken a strict construction approach to fee liability under Section 28(b). In *Edwards*, claimant requested an informal conference on his entitlement to additional disability benefits for three days, but the district director refused to schedule the conference, instead writing a letter to claimant stating that he needed to supply additional medical evidence. Claimant did not do so, but requested a formal hearing. After referral to an administrative law judge, employer agreed to pay compensation for the three additional days; therefore, the claim was never litigated before the administrative law judge. The Fourth Circuit held that employer is not liable for claimant's attorney's fee pursuant to Section 28(b) of the Act. Interpreting the language of Section 28(b), the court stated that it "requires *all* of the following: (1) an informal conference, (2) a written recommendation from the [district director] or Board, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation." *Edwards*, 398 F.3d at 317, 39 BRBS at 4(CRT) (emphasis in original). The Fourth Circuit held that employer was not liable as none of the preconditions was fulfilled because the district director never held an informal conference or issued a written recommendation.[2] *Id.*

In *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), the Fifth Circuit considered a case in which the employer voluntarily paid disability benefits to claimant, but ceased making all such payments on April 25, 1994. The claimant filed his claim for additional benefits on February 25, 1995, and employer controverted further liability. The administrative law judge found that employer was liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, which was reversed by the Board on appeal. However, the Board held that the employer was liable for an attorney's fee pursuant to Section 28(b) of the Act. The Fifth Circuit held that the Board erred in holding that employer was liable for claimant's attorney's fees under Section 28(b) of the Act as the lack of an informal conference "poses an absolute bar to an award of attorney's fees under §28(b)." *Pool Co.*, 274 F.3d at 185, 35 BRBS at 119(CRT); *see James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *Staftex Staffing v. Director, OWCP*, 232 F.3d 431, 34 BRBS 105 (5th Cir. 2000). The court declined to consider claimant's arguments that this requirement should not apply, which

[2] The Fourth Circuit and the Board subsequently held, based on the regulation at 20 C.F.R. §702.311, that an informal conference can be accomplished by way of written correspondence between the parties and the district director. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006).

included the assertion that an informal conference would have served no purpose as employer would not have complied with the recommendation, due to its existing precedent and because it held employer liable for the attorney's fee under Section 28(a).

The Sixth Circuit considered a case in which an informal conference was held, but the district director stated that he was not making a recommendation because the parties were considering settlement. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007). The court held that the district director must make a recommendation on the issue favorably decided by administrative law judge in order to shift fee liability to employer. The court held that the plain language of the statute supports the approach taken by the Fourth and Fifth Circuits, rather than the Ninth Circuit. The court stated that under the plain language of Section 28(b), in order for fees to be assessed against employer there must be a written recommendation containing a suggested disposition of the controversy. The Sixth Circuit was not persuaded by the Ninth Circuit's interpretation of the legislative history, as the court noted that the legislative history of subsection (b) deals with "cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, despite the written recommendation of the deputy commissioner." *Pittsburgh & Conneaut Dock Co.*, 473 F.3d at 266, 40 BRBS at 82(CRT), citing H.R. Rep. No. 92-1441 (1972), reprinted in 1972 U.S.S.C.A.N. 4698, 4717.

The Board's recent decisions have adopted the strict construction mandated by *Edwards* and *Pool Co.* in cases arising in the Fourth and Fifth Circuits. *See Andrepont v. Murphy Exploration & Production Co.*, 41 BRBS 1 (2007)(Hall, J., dissenting) (motion for recon. pending); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).[3] The United States Court of Appeals for the Eleventh Circuit has not addressed the statutory language of Section 28(b). Nonetheless, given the recent trend in the case law, we also adopt a stricter construction of Section 28(b) and will apply it in all circuits which have not addressed the issue. *Cf. Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT); *National Steel*, 606 F.2d 875, 11 BRBS 68.[4] Thus, in order for employer to be liable under Section 28(b), an informal conference is required. In this case, the parties stipulated that no

[3] In both cases, an informal conference was held and a written recommendation issued. However, employers did not refuse the recommendations, as the district director recommended that no further benefits were due. Claimants nonetheless pursued their claims to the administrative law judge and succeeded in obtaining additional benefits. Although the other elements were thus met, the Board held the lack of an employer "refusal" precluded liability under Section 28(b) under the controlling precedent.

[4] We note that in both *Matulic* and *National Steel* an informal conference, or its equivalent, occurred.

informal conference was held. Indeed, claimant cancelled his request for a conference upon employer's suspension of benefits and requested instead referral for a formal hearing. On these facts, employer is not liable for claimant's attorney's fee. Thus, we reverse the administrative law judge's award of an employer-paid attorney's fee.

Accordingly, the Order of the administrative law judge awarding an attorney's fee payable by employer is reversed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge