

BRB No. 14-0015

WARREN SIMMONS (Deceased))
)
 Claimant-Petitioner)
)
 v.)
)
 HUNTINGTON INGALLS,) DATE ISSUED: July 25, 2014
 INCORPORATED (AVONDALE)
 OPERATIONS) f/k/a/ NORTHROP)
 GRUMMAN SHIPBUILDING,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Request to Hold Employer Personally Liable for Payment of Lien for Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

Pamela Noya Molnar, Richard S. Vale, and Frank J. Towers (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request to Hold Employer Personally Liable for Payment of Lien for Attorney Fees (2013-LHC-00881) of Administrative Law Judge Clement J. Kennington 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case has previously been before the Board. The current appeal relates solely to the awards of attorney's fees made by the district director and the administrative law judge pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). To summarize the facts and procedural history relevant to this appeal, claimant, who sustained a work-related injury on October 7, 2004, was awarded temporary total disability benefits in a Decision and Order issued by the administrative law judge on December 10, 2010. Thereafter, claimant's counsel filed fee petitions with both the district director and the administrative law judge, asserting he was entitled to employer-paid attorney's fees under Section 28(a) and (b) of the Act, 33 U.S.C. §928(a), (b). In an Order issued on January 20, 2011, the district director found that claimant's counsel was not entitled to an employer-paid fee under Section 28(a) or (b), and stated that counsel could pursue a fee payable by claimant pursuant to Section 28(c) if he wished to do so. Claimant agreed to pay his counsel an attorney's fee for work performed before the district director and, pursuant to this agreement, the district director, in an Order dated January 31, 2011, awarded claimant's counsel a fee of \$3,562.50, payable by claimant's counsel as "a lien on compensation." 33 U.S.C. §928(c). In a Decision and Order issued on April 12, 2011, the administrative law judge awarded claimant's counsel a fee of \$17,625, payable by employer pursuant to Section 28(a).

Claimant appealed the district director's denial of an employer-paid fee to the Board, BRB No. 11-0424, and employer appealed the administrative law judge's award of a fee under Section 28(a), BRB No. 11-0536. The Board held that the requirements of Section 28(a) and (b) were not met in this case and, thus, the Board affirmed the district director's denial of an employer-paid fee and reversed the administrative law judge's award of an employer-paid fee. *Simmons v. Northrop Grumman Ship Systems, Inc.*, BRB Nos. 11-0424, 11-0536 (Mar. 9, 2012) (unpub.).

Thereafter, in a Consent Order Awarding Attorney Fees issued on March 19, 2012, the administrative law judge acknowledged claimant's agreement to pay an attorney's fee of \$17,685.42 to his counsel. The administrative law judge accordingly awarded claimant's counsel a fee of \$17,685.42, pursuant to Section 28(c), stating that counsel was "entitled to recover those fees from the Claimant's future benefits." Notwithstanding the fee awards of the district director and the administrative law judge under Section 28(c), claimant timely petitioned the United States Court of Appeals for the Fifth Circuit for review of the Board's decision that claimant's counsel is not entitled to an employer-paid fee under either Section 28(a) or (b). While this appeal was pending before the Fifth Circuit, claimant died on December 18, 2012. In a decision issued on January 28, 2013, the United States Court of Appeals for the Fifth Circuit affirmed the Board's decision that claimant's counsel is not entitled to an employer-paid fee under Section 28(a) or (b). *Simmons v. Director, OWCP*, 509 F. App'x 337 (5th Cir. 2013).

During the pendency of the appeals before the Board and the Fifth Circuit, claimant's counsel was not paid any of the fees awarded by the district director and the

administrative law judge under Section 28(c). Following the issuance of the Fifth Circuit's decision, claimant's counsel sought to have employer held personally liable for the fees previously awarded by the district director and the administrative law judge under Section 28(c). In this regard, counsel asserted that employer continued to pay claimant the full amount of the disability benefits awarded without consideration of the liens for the awarded attorney's fees and, because of claimant's death, counsel was unable to collect his previously awarded fees as a lien against claimant's future benefits. Claimant's counsel argued that employer's failure to protect his liens rendered employer personally liable for the payment of the fees awarded to him. In a Decision and Order issued on September 23, 2013, the administrative law judge denied claimant's counsel's request to hold employer personally liable for payment of the fees awarded by the district director and the administrative law judge under Section 28(c).

On appeal, claimant assigns error to the administrative law judge's failure to find employer personally liable for the payment of the fees awarded by the district director and the administrative law judge under Section 28(c). Employer responds, urging affirmance.

In a case where the employer cannot be held liable for an attorney's fee under Section 28(a) or (b), but where claimant's counsel obtained compensation for claimant, an attorney's fee may be assessed against claimant as a lien on his compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). See *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). Section 28(c) provides, in pertinent part, that:

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 [district director], Board, or court shall fix in the award approving the fee, such lien and manner of payment.

33 U.S.C. §928(c). Consistent with the express terms of Section 28(c), a fee award entered under that subsection must "fix" both the lien upon the compensation due claimant and the "manner of payment" of such lien.

In this case, both the district director and the administrative law judge awarded claimant's counsel fees under Section 28(c), pursuant to claimant's agreement to pay such fees, without specifying the "manner of payment" of the fees.¹ It was the

¹ The fee awards under Section 28(c) of the district director and administrative law judge were entered in response to claimant's counsel's submission of proposed orders, signed by both claimant and counsel, awarding counsel fees under that subsection. Neither of the proposed orders submitted by claimant's attorney indicates the manner in which the approved fees, payable by claimant, were to be paid.

responsibility of claimant's counsel to have the district director and the administrative law judge "fix in the award approving the fee, such lien and manner of payment," in accordance with the requirements of Section 28(c). *See generally Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003) (claimant bears burden of showing entitlement to an attorney's fee). Here, claimant's attorney failed to ensure that the fee orders of the district director and the administrative law judge specified the "manner of payment" of the attorney's fee lien against claimant's compensation award. Without orders from the district director and the administrative law judge specifically setting out the manner of payment, employer cannot be viewed as having failed to secure counsel's liens. We therefore affirm the administrative law judge's denial of claimant's counsel's request to hold employer personally liable for payment of counsel's liens for attorney's fees.

Accordingly, the administrative law judge's Decision and Order Denying Request to Hold Employer Personally Liable for Payment of Lien for Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge