No. 05-61

In the Supreme Court of the United States

BENNY R. EDWARDS, PETITIONER

v.

VIRGINIA INTERNATIONAL TERMINALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct to hold that petitioner's counsel was not entitled to an attorney's fee under Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), because the district director did not hold an informal conference or issue a written recommendation on the supplemental claim.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Davis v. *United States*, 417 U.S. 333 (1974) 10

Everitt v. *Director, OWCP*, 107 Fed. Appx. 750 (9th Cir. 2004) 8

National Steel & Shipbuilding Co. v. *United States Dep't of Labor,* 606 F.2d 875 (9th Cir. 1979) 7, 8

Newport News Shipbuilding & Dry Dock Co. v. *Firth*, No. 96-2547, 1998 WL 29255 (4th Cir. Jan. 28, 1998) (134 F.3d 363) 10

Pool Co. v. *Cooper*, 274 F.3d 173 (5th Cir. 2001) 4

Todd Shipyards Corp. v. *Director, OWCP*, 950 F.2d 607 (9th Cir. 1991) 8, 9

Wisniewski v. *United States*, 353 U.S. 901 (1957) 10

Statutes, regulation and rule:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 2

§ 24(b)(3), 33 U.S.C. 921(b)(3) 4

§ 28, 33 U.S.C. 928. . . . . 2, 8

§ 28(a), 33 U.S.C. 928(a) 2, 4, 5, 6

§ 28(b), 33 U.S.C. 928(b) 2, 3, 4, 5, 6, 7, 8, 9

Statutes, regulation and rules—Continued: Page

20 C.F.R. 701.301(a)(7) 2

4th Cir. R.:

Rule 36(b) 10

Rule 36(c) 10

9th Cir. R. 36-3 8

Miscellaneous:

70 Fed. Reg. 43,233 (2005) 2

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 7, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-16) is reported at 398 F.3d 313. The Benefits Review Board's order on motion for reconsideration (Pet. App. 17-21) and initial decision (Pet. App. 22-30), as well as the initial decision of the administrative law judge (Pet. App. 31-34), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2005. A petition for rehearing was denied on April 14, 2005 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides for two situations in which a claimant may recover from the employer "a reasonable attorney's fee" following successful prosecution of his or her claim. 33 U.S.C. 928. First, a fee award is authorized when the employer declines to pay any compensation within 30 days of receiving written notice of the filing of a claim for compensation and the claimant successfully prosecutes the claim with the help of an attorney. 33 U.S.C. 928(a). Second, a fee award may be authorized in certain circumstances when the employer pays compensation without an award and a controversy develops over the amount, if any, of additional compensation due. 33 U.S.C. 928(b). In that situation, the LHWCA instructs the deputy commissioner to set the matter for an informal conference and to recommend in writing a disposition of the controversy.[1] If the employer refuses to accept the written recommendation, it must pay within 14 days any additional compensation to which it believes the claimant is entitled. If the claimant refuses to accept the payment and, with the help of an attorney, is awarded compensation in excess of the amount offered by the employer, the claimant is entitled to a reasonable attorney's fee based on the difference between the amount awarded and the amount tendered. 33 U.S.C. 928(b).

[1] Regulations promulgated by the Department of Labor use the term "[d]istrict [d]irector" in lieu of the statutory term "[d]eputy [c]ommissioner." See 20 C.F.R. 701.301(a)(7); 70 Fed. Reg. 43,233 (2005).

2. On February 22, 2002, petitioner Benny R. Edwards was injured while working as an employee of respondent Virginia International Terminals, Inc. (VIT). Pet. App. 4. On February 28, 2002, he filed a claim for benefits under the LHWCA. *Ibid.* VIT filed a "Payment of Compensation Without Award" form with the Office of Workers' Compensation Programs (OWCP) on March 18, 2002, and voluntarily paid temporary disability benefits to petitioner for the period from February 26, 2002, until March 31, 2002, when it terminated payments because petitioner had been cleared to work. *Id.* at 5.

On July 23, 2002, petitioner requested additional benefits for the period from February 23 through 25, 2002, and asked for an informal conference to resolve the request. Pet. App. 5, 24.[2] By letter dated August 1, 2002, the district director requested supporting medical evidence from petitioner. *Ibid.* Petitioner refused and asked for a formal adjudication. On August 22, 2002, the district director forwarded the case to the administrative law judge (ALJ) without a written recommendation. *Id.* at 6, 24-25. On August 27, 2002, however, VIT paid the claimant benefits for the three contested days. *Id.* at 6, 25. The ALJ subsequently terminated the proceeding because the dispute had been resolved. *Id.* at 25, 32.

3. Petitioner's counsel requested an attorney's fee in the amount of $117 for work performed between August 26, 2002, and September 23, 2002, before the ALJ. Pet. App. 6, 25, 32. VIT objected on the ground that the district director had not held an informal conference as required by 33 U.S.C. 928(b). Pet. App. 6, 25, 32. The

[2] Petitioner also requested reimbursement for some medical expenses, which VIT agreed to pay. Pet. App. 24.

ALJ agreed, finding that VIT was not liable for petitioner's attorney's fees under Section 28(b) of the Act, 33 U.S.C. 928(b), because no informal conference had been held and the district director had never made a written recommendation. Pet. App. 31-34.

4. The Benefits Review Board (BRB) reversed, finding VIT liable for attorney's fees under Section 28(a) without reaching the issue of Section 28(b) liability.[3] It based its decision on a Fifth Circuit decision holding that an employer's prior voluntary payment should not preclude liability for attorney's fees under Section 28(a). Pet. App. 27-29 (discussing *Pool Co.* v. *Cooper*, 274 F.3d 173 (5th Cir. 2001)).[4] Reciting the facts of this case, the BRB reasoned that "claimant successfully prosecuted his claim before the administrative law judge" and therefore was entitled to attorney's fees under Section 28(a). *Id.* at 29. The BRB remanded the case to the ALJ to determine the fees due. *Ibid.*

On VIT's request for reconsideration, the BRB vacated the portion of its decision remanding the case to the ALJ and awarded petitioner $117 in fees under Section 28(a) for counsel's work before the ALJ and, additionally, $1581 for counsel's work on the appeal. Pet. App. 17-21.

[3] The BRB consists of five members appointed by the Secretary who are "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U.S.C. 921(b)(3).

[4] In *Pool*, the employer voluntarily paid benefits before any claim was filed, but controverted a claim for additional benefits that was filed after the voluntary payments terminated. The case went before an ALJ who awarded the additional benefits. Pet. App. 28.

5. On February 16, 2005, the court of appeals reversed the BRB's decision on the ground that neither of the Act's fee-shifting provisions authorized an award of attorney's fees under the specific facts of this case. Pet. App. 3-16.

The court reasoned that Section 28(a) by its terms applies only when the employer has refused to pay "*any* compensation." Pet. App. 9 (quoting 33 U.S.C. 928(a)). According to the court, the phrase "filing a claim" in Section 28(a) "refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim," so that, here, the informal request for "modification of the benefits received for the same injury" did not meet the formal filing requirement of Section 28(a). *Id.* at 10-11. Further, the court explained, adjacent statutory subsections that refer to the same subject matter must be read *in pari materia*, but construing Section 28(a) as applicable to supplemental claims would render Section 28(b) superfluous. *Id.* at 11-12. Finally, the court distinguished the Fifth Circuit's decision in *Pool* on the ground that, although the employer in that case had voluntarily paid benefits, the employee had then filed a formal claim for benefits, after which the employer refused to pay any further compensation. This, the court said, "unambiguously fulfilled" Section 28(a)'s conditions for a formal claim followed by a refusal to pay within 30 days of the claim. In contrast, the court reasoned, in this case "VIT voluntarily paid benefits within 30 days *after* [petitioner's] formal claim, thereby rendering [Section 28(a)] inapplicable." *Id.* at 12-13.

Turning to the second fee-shifting provision, the court noted that under the plain language of Section

28(b), attorney's fees may be awarded only when there has been an informal conference followed by a written recommendation that is rejected by the employer, and the employee thereafter achieves a greater award with the help of an attorney. Pet. App. 13-14. The failure to hold an informal conference or to issue a written recommendation was therefore fatal to petitioner's claim for attorney's fees under Section 28(b). *Id.* at 14-16.

ARGUMENT

The court of appeals' decision regarding Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound claim is not warranted.[5]

1. At issue in this case is petitioner's entitlement to $117 in attorney's fees. Pet. 7; Pet. App. 32. The court of appeals correctly decided, however, that petitioner was not eligible for this fee award under Section 28(b).

Applying plain language analysis, the court of appeals correctly concluded that the four conditions set forth in Section 28(b)—including holding an informal conference and issuing a written recommendation—must be fulfilled before an attorney's fee may be awarded. Pet. App. 13-15. On the facts of this case, moreover, the court reasonably concluded that those conditions were not satisfied in full. *Id.* at 14-16. Accordingly, the court properly concluded that petitioner

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[5] The petition does not challenge the court of appeals' decision denying attorney's fees under 33 U.S.C. 928(a). Accordingly, the Director expresses no view on whether the court correctly decided to reverse the BRB's holding that petitioner was entitled to attorney's fees under that provision.

was not eligible for an award of attorney's fees under Section 28(b).

2. Contrary to petitioner's principal contention (Pet. 10-15), the decision below does not clearly conflict with the decisions of the Ninth Circuit with respect to the question whether an informal conference and written recommendations are mandatory prerequisites to the award of attorney's fees under Section 28(b).[6] In *National Steel & Shipbuilding Co.* v. *United States Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979), which is the primary basis for the claimed circuit conflict, the court affirmed an attorney's fee award when the district director held an informal conference but did not issue a written recommendation following the conference. Noting the congressional intent to limit attorney's fee awards to cases in which parties dispute the existence or extent of liability, the court stated, "[w]e do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees." *Id.* at 882 (discussing H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972)). Further, the court reasoned that even if the "written recommendation" prerequisite was necessary, it was met, in that it was "evident" that the parties would have rejected any explicit recommendation because they had failed to reach an agreement at the informal conference, so that instead "[t]he recommendation following the informal conference * * * was for the

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[6] In the question presented (Pet. i) and at various other points in the petition (at 8-9, 11, 18-20), petitioner frames the issue solely in terms of whether an informal conference is a prerequisite, but elsewhere (Pet. 10, 12, 14-17) he appears to give equal consideration to the decisions' treatment of whether a written recommendation is also a prerequisite.

matter to 'be referred'" for a formal ALJ hearing "'at the request of both parties.'" *Ibid*. (citation omitted). Under those circumstances, the court concluded that Section 28(b) provided the basis for an attorney's fee award.[7]

Unlike the parties in *National Steel*, petitioner and respondents did not participate in an informal conference, and thus the two cases do not squarely conflict. There is no way to predict how the Ninth Circuit would have decided *National Steel* had there not been an informal conference. If anything, the fact that the court relied on the conduct of the parties at the conference as evidence that a written recommendation would have been rejected suggests that the informal conference was critical to the disposition of that case.[8]

Moreover, in *Todd Shipyards Corp.* v. *Director, OWCP*, 950 F.2d 607 (1991), a case expressly relied upon by the court of appeals below (Pet. App. 14), the Ninth Circuit subsequently distinguished *National Steel* and clarified the congressional intent behind Section 28 in a manner consistent with the Fourth Circuit's decision here. In that case, the only disputed issue following the informal conference was the claimant's entitlement to an attorney's fee for services rendered before the conference ended; the parties had reached an agreement at the

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[7] Unlike in this case, *National Steel* proceeded to a formal hearing, after which the ALJ granted (and the BRB and appeals court affirmed) the higher compensation sought by the claimant. *National Steel*, 606 F.2d at 877-878.

[8] Petitioner errs in relying (Pet. 13-14) on a footnote in an unpublished decision, *Everitt* v. *Director, OWCP*, 107 Fed. Appx. 750, 753 n.4 (9th Cir. 2004) (citing *National Steel*, 606 F.2d at 882). An unpublished decision does not establish binding circuit precedent. See 9th Cir. R. 36-3.

informal conference on claimant's entitlement to disability benefits. 950 F.2d at 608. The court held that a fee award was not authorized in those circumstances, because Section 28(b) authorizes an attorney's fee only when the record shows that, following an informal conference, the employer refused to accept the written recommendation of the claims examiner. *Id.* at 610. The court distinguished the case from *National Steel*, in which the parties continued to dispute "liability on the amount of compensation to be paid *after the informal conference*." *Id.* at 611 (emphasis added). The court explained:

> While we believe that the intent of Congress is clear from a plain reading of the words used in [Section 28(b)], the legislative history explains unequivocally the very limited scope of attorneys' fees awards under the statute.
>
> "A new provision is added dealing 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.* The provision directs an award of a reasonable attorney's fee . . . *where the employer or carrier has refused to accept the recommendation.* . . ." In all cases other than those specified above, attorneys' fees may not be assessed against the employer.

Id. at 610 (quoting H.R. Rep. No. 1441, *supra*, at 3). Not only does this explanation call into question the continued viability of *National Steel's* holding regarding the dispensability of the written-recommendation requirement, but the Ninth Circuit's analysis is completely consistent with the reasoning of the Fourth Circuit below.

3. Petitioner's assertion (Pet. 15-16) that the decision below conflicts with the Fourth Circuit's prior unpublished decision in *Newport News Shipbuilding & Dry Dock Co.* v. *Firth*, No. 96-2547, 1998 WL 29255 (Jan. 28, 1998) (134 F.3d 363 (Table)), is incorrect and undeserving of this Court's review. Even if true, an intracircuit conflict, and particularly one in which a published decision purportedly conflicts with an earlier, unpublished decision, does not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); cf. 4th Cir. R. 36(b) and (c). In any event, the footnote in *Newport News* upon which petitioner relies is dicta, because the court ultimately held that Section 28(b) "is inapplicable and does not provide a basis for the ALJ's initial fee award." *Newport News*, 1998 WL 29255, at *3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2005SEPTEMBER 2005