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Robert Andrepont v. Murphy Exploration and Production Co. United States Court of Appeals, Fifth Circuit 566 F.3d 415 (Decided March 17, 2009)

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RECOVERABILITY OF ATTORNEYS' FEES UNDER 33 U.S.C. §928 (b).

Claimants may not recover attorneys' fees, consistent with 33 U.S.C. §928 (b), if their employer accepts the recommendations of the Benefits Review Board regardless of determinations reached in subsequent reevaluations of the case.

Robert Andrepont v. Murphy Exploration and Production Co.
United States Court of Appeals, Fifth Circuit
566 F.3d 415
(Decided March 17, 2009)

This case arises from a claim filed in connection to the Longshore and Harbor Workers' Compensation Act ("LHWCA") in which the claimant, following a judgment, requested attorneys' fees.[12] The claimant-petitioner Robert Andrepont ("Andrepont") was an employee of Murphy Exploration and Production Co. ("Murphy"). On May 14, 1999, Andrepont injured his left knee while employed by Murphy. Andrepont attempted to continue working on a bi-weekly schedule until April 21, 2000, when this became no longer possible. Andrepont became temporarily totally disabled following five surgeries on his knee and reached a "maximum medical improvement as of December 13, 2001. Between April 22, 2000 through December 12, 2001 Murphy paid compensation for temporary total disability. After December 12, 2001 Murphy voluntarily provided compensation for "permanent partial disability bases on a twenty-six percent permanent impairment of the left leg."[13]

Andrepont filed a compensation claim under LHWCA for permanent total disability on November 18, 2002. Despite the claim, Murphy continued providing voluntary compensation. The initial decision of the Office of Workers Compensation Programs concluded that since Murphy had established the availability of satisfactory alternative employment, there was no requirement for additional compensation. Murphy accepted this decision, to which Andrepont requested review by an administrative judge. The administrative judge concurred with the initial decision, noting that Murphy owed no compensation past February 17, 2003, the date when alternative employment was secured, though he did increase the awarded compensation. Andrepont then presented a claim for attorneys' fees pursuant to LHWCA under 33 U.SC. §928 (a) – (b) because greater compensation was secured from Murphy contrasted from what he was initially willing to provide. Murphy appealed the decision to the Benefits Review Board ("BRB"), who overturned the initial decision to award attorneys' fees. The decision rested on two grounds: first, Murphy voluntarily provided compensation when the claim was filed; second, Murphy accepted the original decision rendered on the claim. Consequently, Andrepont appealed the BRB decision to the United States Court of Appeals for the Fifth Circuit.

In a *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit found in favor of Murphy, finding that the awarding of attorneys' fees was not available because of the plain language of the statute. The court stated the two grounds for the awarding of attorneys' fees under 33 U.SC. §928 (a) – (b). One, if the employer refused to pay any compensation asserting no liability and thereafter the claimant is indeed awarded compensation. Two, if the employer does provide compensation, but the amount is disputed and the employer refused to accept the recommendations for compensation provided by the BRB. Determining whether §928 (a) or §928 (b) applied, the Court noted that (a) may only be invoked if the employer insisted in not being liable for any compensation at any amount. This is contrasted with (b) where the employer agreed to provide compensation though the amount to be yielded is disputed.[14] Hence, because Murphy willingly admitted to liability and paid some compensation, §928

[12] *Longshoreman and Harbor Workers Act,* 33 U.S.C. 18 (2000).
[13] *Id.* at 416.
[14] *Ayers S.S. Co. v. Bran,* 544 F.2d 812 (5th Cir.1977).

(a) was inapplicable and Andrepont's claim fell under §928 (b). Andrepont had received compensation for his injury at 26% disability benefits, though still sought further compensation.

Having determined that the case was to be analyzed under §928 (b), the Court ruled against allowing Andrepont to recover attorneys' fees because Murphy had accepted the BRB recommendation. The court emphasized, owing to the plain statutory text, that the only avenue for recovery of attorneys' fees under §928 (b) was if after a conference with the BRB the employer refused to accept the rendered recommendations for compensation. Additionally, the Court acknowledged that the Sixth and Fourth Circuit agreed with the Court's application of §928 (b), having specifically cited *Staftex Staffing v. Office of Workers' Comp. Programs*, a previous Fifth Circuit case.[15] Here, because Murphy accepted the recommendations, based on a literal reading of the statute it prevents the claimant from recovering attorneys' fees. Moreover, the Court acknowledged the oddity of deciding whether a claimant can recover attorneys' fees based upon an employer having accepted a threshold recommendation that was favorable to its position. Even so, the Court emphasized that refusal was a perquisite element, necessary for attorneys' fees to be awarded. Finally, the Court stated the options available to claimants who are given unfavorable recommendations: either accept the results or pursue further compensation at personal expense of attorneys' fees.

For the aforementioned reasons, the United States Court of Appeals for the Fifth Circuit held that a claimant was not able to recover attorneys' fees under LHWCA if it had accepted the recommendations of the BRB. Therefore, it accepted as correct the BRB decision and denied the petition for review.

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[15] *Staftex Staffing v. Office of Workers' Comp. Programs*, 237 F.3d 409 (5th Cir. 2000).