

ALMA A. BOLTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HALTER MARINE, INCORPORATED)	DATE ISSUED: <u>October 2, 2001</u>
)	
and)	
)	
RELIANCE NATIONAL)	
INDEMNITY COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Collins C. Rossi (Tolar & Rossi), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fee (99-LHC-1524) of Administrative Law Judge David W. Di Nardi 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to her left knee, left wrist and left elbow while working for

employer on July 14, 1998. She subsequently performed light duty work for employer until October 22, 1998, at which time she was informed by employer that it no longer had any work available for her. Claimant later worked as a dietary aide at Sunplex Subacute Center from July 23, 1999, until August 5, 1999, and as a salesperson at Unique Fashions from November 24, 1999, through February 1, 2000.

Employer voluntarily paid temporary total disability benefits, based on an average weekly wage of \$231.89, from October 22, 1998, until September 10, 1999, when it learned of claimant's employment as a dietary aide. Claimant thereafter filed a timely claim for compensation, and following an informal conference by telephone on January 13, 1999, the case was transferred to the Office of Administrative Law Judges (OALJs) for a formal hearing.

In his Decision and Order - Awarding Benefits, the administrative law judge found claimant entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from October 23, 1998, through June 22, 1999, based on an average weekly wage of \$374, and a scheduled award for a five percent permanent partial impairment of the left leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).

Subsequently, claimant's counsel submitted a petition requesting an attorney's fee of \$14,974.50, representing 99.83 hours at \$150 per hour, plus costs of \$511.05. Employer filed objections to the fee petition. In his Supplemental Decision and Order Granting Attorney Fee, the administrative law judge awarded claimant's counsel an attorney's fee of \$11,400, representing 76 hours at \$150 per hour, plus the requested costs of \$511.05. The administrative law judge rejected employer's contention that it is not liable for an attorney's fee inasmuch as a telephonic conference was held in this case.

On appeal, employer challenges the administrative law judge's determination that it is liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b). Claimant responds, urging affirmance.

Employer argues that pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Staflex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), *modifying on reh'g*, 237 F.3d 407, 34 BRBS 44(CRT) (5th Cir. 2000), it cannot be liable for an attorney's fee in this case as the prerequisites for the applicability of Section 28(b) have not been met. Specifically, employer asserts that although an informal conference was held, there was never any recommendation made by the district director disposing of the disputed issues, and that even if there was, there is no evidence to show that employer did not comply with that recommendation.

Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the

employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer.¹ See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the present

¹Section 28(b) provides, in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, 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, 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 based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

case arises, has held that employer's liability under Section 28(b) is predicated on the existence of a remaining controversy following informal proceedings and on claimant's thereafter obtaining greater compensation than employer paid or tendered. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); see also *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). If employer pays all benefits due without resort to formal proceedings, it may not be held liable for claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164 (CRT); *Boe*, 34 BRBS at 110-111.

In *Staftex*, 237 F.3d 409, 34 BRBS 105(CRT), the employer voluntarily paid compensation based on an average weekly wage of \$438.47, and a few months later reduced the payments to the claimant explaining that it had over-calculated the claimant's wages by \$12,934.14. Claimant thereafter filed a claim requesting compensation based on an average weekly wage of \$490.24, and employer acceded to this demand without requiring an informal conference. The parties, however, could not agree as to the nature, extent, or permanency of the claimant's injury and thus an informal conference was held. Following this conference, the district director recommended that the parties agree to an award of permanent total disability benefits, subject to annual adjustment. The case was then transferred to the OALJs for a formal hearing. At the formal hearing, the parties agreed that claimant's disability was temporary and total, but could not agree upon an average weekly wage. The administrative law judge subsequently accepted claimant's method of calculating the average weekly wage and thus concluded that claimant was entitled to compensation based on a weekly wage of \$502.32. He also awarded an attorney's fee. The Fifth Circuit, on rehearing, held that the district director's recommendation included the issue of average weekly wage but that employer did not accept the recommendation when it argued before the administrative law judge that claimant's average weekly wage was \$108.82. The court therefore held that as the administrative law judge's decision resulted in a larger award of compensation, Section 28(b) was satisfied. The Fifth Circuit similarly held in *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT), that employer was liable for an attorney's fee under Section 28(b), as claimant, after an informal conference and recommendation, used the services of an attorney to successfully recover an award of additional compensation.² In that case,

²In *Gallagher*, the Fifth Circuit declined to render an opinion as to the issue raised by employer in the instant case, *i.e.*, whether a *written* recommendation and subsequent refusal by employer is required before an employer or carrier can be held liable for an attorney's fee under Section 28(b). Specifically, the Fifth Circuit stated:

Although acknowledging that an initial reading of the language of §928(b) supports the proposition that a written recommendation is required and that such recommendation be refused before an employer

employer asserted that although there was an informal conference, it was not held with respect to the issues that were ultimately tried before the administrative law judge. The Fifth Circuit rejected the employer's contention as it was unsupported and did not overcome "the force of the joint stipulation [that an informal conference had occurred] with its implicit yet obvious implication that the informal conference involved one or more of the disputed issues before the ALJ." *Gallagher*, 219 F.2d at 435, 34 BRBS at 41(CRT). Thus, contrary to employer's contention, the Fifth Circuit has not held that a written recommendation by the district director is required in order for an employer to be liable for an attorney's fee under Section 28(b). See n. 2, *supra*.

Employer herein terminated its voluntary payment of temporary total disability benefits to claimant on September 10, 1999. Claimant then obtained counsel, and it is undisputed that an informal conference was held by telephone as stated by the administrative law judge. Supplemental Decision and Order at 1. As in *Gallagher*, the record herein is not clear as to what, if any, recommendations were made by the district director pursuant to that conference. It is, however, clear from the record that following the informal conference a number of issues, most importantly the calculation of the appropriate average weekly wage, remained in dispute requiring resolution before an administrative law judge, *see* Decision and Order at 3, and that the administrative law judge awarded additional benefits based on a higher average weekly wage than that which was voluntarily paid by employer. Thus, following an informal conference, claimant used the services of an attorney to successfully

or carrier may be liable for attorney's fees, we note that the Ninth Circuit has indicated otherwise. *See National Steel & Shipbuilding Co. v. United States Dept. of Labor*, 606 F.2d 875, 882, [11 BRBS 68, 73] (9th Cir. 1979) (explaining that a claimant is entitled to attorney's fees if the extent of liability is controverted and the claimant successfully obtains additional compensation regardless whether the employer rejects the administrative recommendation); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1061 [32 BRBS 148(CRT), 154(CRT)] (9th Cir. 1998)(same). In the instant case, we express no opinion as to whether we agree with the Ninth Circuit's interpretation of the requirements of §928(b) inasmuch as the employer has failed to offer (and we to find) any record evidence supporting their allegations regarding the substance of the recommendation.

Gallagher, 219 F.3d at 435, n. 18, 34 BRBS at 42, n. 18(CRT). As in *Gallagher*, employer herein has not offered any record evidence supporting its allegation regarding the substance of the recommendations. Thus, the instant case does not turn on the issue of whether there was a written recommendation or not, but rather whether claimant obtained greater compensation following a formal hearing than that paid or tendered by the employer. *See also Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT).

recover an award of additional compensation. As such, the administrative law judge properly determined that the requirements of Section 28(b) were met. We therefore affirm the administrative law judge's award of an attorney's fee payable by employer under Section 28(b) as it accords with law.³ *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

³The amount of the attorney's fee award is affirmed as unchallenged on appeal.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge