BRB No. 05-1014

JAMES ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ASSOCIATED NAVAL ARCHITECTS	)	DATE ISSUED: 09/15/2006
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS & GILLETTE OF VIRGINIA, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fee of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein and Charlene Parker Brown (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Attorney's Fee (2004-LHC-1089) of Administrative Law Judge Daniel A. Sarno, Jr., 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 may be set aside only if the challenging party shows it 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 injured his lower back on September 13, 2000, during the course of his employment for employer as shipfitter/welder. Claimant was unable to return to his usual employment. In July 2001, claimant was referred by vocational counselors to an available position as a bulldozer/heavy equipment operator. Claimant injured his neck driving a bulldozer during the course of his job interview. On August 8, 2001, claimant obtained work as a gas station attendant, but underwent neck surgery on September 12, 2001. He returned to work at the gas station in the spring of 2002. A dispute arose over the compensability of claimant's neck condition and claimant's assertion that he had developed a work-related psychological injury.

In his initial decision issued in 2003, the administrative law judge found that claimant's neck condition was related to the original work injury, but that the psychological condition is not work-related. Claimant was awarded compensation for temporary total disability, 33 U.S.C. §908(b), from July 12 to August 7, 2001, and from August 21, 2001 to March 4, 2002. Subsequently, employer voluntarily paid claimant compensation for temporary partial disability, 33 U.S.C. §908(e), from October 2, 2002 to August 15, 2003, at the weekly rate of $437.34. On April 28, 2003, claimant requested an informal conference to address the extent of his loss of wage-earning capacity due to his work injuries. A conference was held on May 29, 2003. In the Memorandum of Informal Conference, the district director wrote, "[N]o documentation was presented in support of claimant's position, therefore a recommendation from this office cannot be made." Claimant's Petition for Review at Attachment 3.[1]

Claimant stopped working on July 8, 2003. On July 9, claimant's treating physician, Dr. Kerner, advised claimant not to work for three months based on his complaints of neck and back pain. Claimant was examined by Dr. Kirven at employer's request on August 15, 2003. Dr. Kirven opined that claimant has no neck or back disability that prevents him from returning to his usual work for employer. Employer, therefore, terminated its compensation payments. On September 4, 2003, claimant wrote to the district director and requested an informal conference to address his entitlement to compensation for temporary total disability from July 9, 2003, and/or for temporary partial disability from August 15, 2003, and to outstanding mileage costs and prescription reimbursement. A claims examiner responded the next day that claimant should instead attend an independent medical examination scheduled by the district director's office, and that employer should resume paying compensation for temporary total disability, which it refused to do. Dr. Barot conducted the examination. He opined that claimant could return to work full-time with a lifting restriction of no more than 10 pounds. Claimant also underwent a functional capacities evaluation (FCE) in November 2003, from which

[1] The attachments to claimant's appellate brief were attached to the parties' pleadings to the administrative law judge as well and are thus part of the record.

it was determined that claimant could not return to his usual work, but that he could function at a sedentary level. Based on this FCE, on January 30, 2004, a claims examiner issued what she labeled a "***supplemental recommendation,***" stating: "[I]t appears that Mr. Anderson is capable of functioning at a **sedentary** level of physical demand." Claimant's Petition for Review at Attachment 9 (emphasis in original). Thereafter, employer did not resume any compensation payments. Claimant requested transfer of the case to the Office of Administrative Law Judges on February 20, 2004. *Id*. at Attachment 10.

In his decision on modification, the administrative law judge rejected claimant's contention that employer had paid temporary partial disability benefits from August 2, 2002 to July 8, 2003 at an improper compensation rate. The administrative law judge also rejected claimant's contention that he is entitled to temporary total disability benefits commencing July 9, 2003. The administrative law judge found that claimant is unable to return to his usual employment as a shipfitter/welder, but that employer established the availability of suitable alternate employment as of that date, and that claimant did not establish that he diligently tried but was unable to obtain suitable work. He rejected claimant's contention that his post-injury wage-earning capacity after he stopped working should be based on his actual wages as a gas station attendant. The administrative law judge credited medical evidence that claimant could work full time in sedentary employment and vocational evidence that claimant could earn $7.00 per hour in such work. The administrative law judge therefore found that claimant's inflation-adjusted post-injury wage-earning capacity is $234.68 per week, entitling claimant to compensation for temporary partial disability at a weekly rate of $396.84. 33 U.S.C. §908(e), (h). Since employer had terminated claimant's compensation for temporary partial disability on August 15, 2003, claimant's counsel successfully prosecuted the claim before the administrative law judge. Claimant's counsel therefore filed an attorney's fee petition with the administrative law judge, requesting a fee of $6,117.50, representing 22.19 hours at $250 per hour, 6 hours of paralegal time at $95 per hour, and $79.71 in costs.

In his Decision and Order Awarding Attorney's Fee, which is the subject of this appeal, the administrative law judge found that employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), as employer voluntarily paid compensation before and after claimant filed a claim for modification on April 28, 2003.[2] The administrative law judge also found that employer is not liable for a fee under Section 28(b) of the Act, 33 U.S.C. §928(b), because there was no informal conference or written recommendation on the sole issue on which claimant prevailed, *i.e.*, compensation for temporary partial disability from July 8, 2003.

[2] This finding is not challenged on appeal.

Accordingly, the administrative law judge found claimant liable for his attorney's fee pursuant to Section 28(c), 33 U.S.C. §928(c). The administrative law judge found excessive the hourly rates requested of $250 and $95. He reduced to $225 per hour the rate for attorney services and to $80 per hour the rate for paralegal work. The administrative law judge found counsel entitled to a fee representing 50 percent of the hours requested given claimant's limited success, the amount of benefits awarded in contrast to those sought and the amount previously paid voluntarily by employer, and claimant's financial circumstances. Claimant's counsel was therefore awarded a fee of $2,736.38, and costs of $79.71, payable by claimant.

On appeal, claimant challenges the administrative law judge's finding that employer is not liable for his attorney's fee award pursuant to Section 28(b). Claimant also challenges the administrative law judge's reduction of the hourly rate for attorney work and the number of compensable hours. Employer responds, urging affirmance. Claimant has filed a reply brief.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge correctly stated that employer's liability for an attorney's fee pursuant to Section 28(b) must be addressed in view of that court's decision 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). Section 28(b) of the Act states:

> 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. . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). In *Edwards*, claimant requested an informal conference, and the district director instead wrote a letter to claimant stating he needed to supply additional medical evidence. Claimant declined to do so, and requested a formal hearing. Employer paid the benefits at issue before the administrative law judge held a hearing, and claimant requested an attorney's fee for work performed before the administrative law judge. The Fourth Circuit held, *inter alia*, that employer could not be held liable for claimant's attorney's fee pursuant to Section 28(b) as that section "requires *all* of the following: (1) an informal conference, (2) a written recommendation from the deputy 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 318, 39 BRBS at 4(CRT) (emphasis in original). The court stated that none of the preconditions was fulfilled in that case because the district director never held an informal conference or issued a written recommendation. *Id.; see Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, __F.3d__, 2006 WL 2135498 (6th Cir. Aug. 2, 2006); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *cf. Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979) (Ninth Circuit holds that written recommendation and/or refusal by employer is not absolute requirement for fee liability).

In his decision, the administrative law judge found that the informal conference requirement was not met with respect to the correspondence among the parties and the district director's office from September 4, 2003 to January 30, 2004, as claimant did not request an informal conference on the specific issue of entitlement to continuing temporary partial disability from July 8, 2003. In this regard, the administrative law judge first found that in order to give effect to the purpose of the informal conference procedure, the issues on which claimant succeeds before the administrative law judge must have been the subject of that informal conference and the written recommendation. Decision and Order Awarding Attorney's Fee at 6. In this case, the administrative law judge found that these criteria were not satisfied as claimant's September 4, 2003, letter to the district director requested an informal conference only to address his entitlement to compensation for temporary total disability and not his entitlement to benefits for temporary partial disability, the claim which he successfully prosecuted before the administrative law judge. As the evidence and case law do not support this limited view of the issues raised in the correspondence between the parties and before the district director, we hold that an informal conference was held and a written recommendation was issued on the issue on which claimant succeeded before the administrative law judge. Therefore, we hold that employer is liable for claimant's attorney's fee pursuant to Section 28(b).

In his letter dated September 4, 2003, claimant requested an informal conference to address his entitlement to compensation for temporary total disability from July 9, 2003, and/or for temporary partial disability from August 16, 2003, the date employer suspended its payments of compensation. Claimant's Petition for Review at Attachment 7. Contrary to the administrative law judge's finding that claimant did not request an informal conference on the issue on which he succeeded, entitlement to temporary partial disability benefits commencing July 9, 2003, claimant's letter indeed incorporates the compensation to which the administrative law judge ultimately found claimant entitled, as it is well established that a claim for total disability incorporates a claim for any lesser extent of disability. *See Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). Claimant requested a conference to address total disability benefits from July 9 and/or partial disability benefits from August 16. Therefore, the subject of claimant's correspondence to the district director included the temporary partial disability issue resolved in claimant's favor by the administrative law judge.[3]

We further hold that an informal conference was held and a written recommendation was made which addressed this issue. Section 702.311 of the regulations, 20 C.F.R. §702.311, describes several means to informally resolve disputes at the district director level "in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date." These include: 1) informal discussions by telephone; 2) conferences at the district director's

[3] Given this holding, it is not necessary for us to address whether the administrative law judge correctly found that the precise issue on which claimant succeeds must have been the subject of the informal conference and recommendation. We note, however, that the regulation at 20 C.F.R. §702.336 permits new issues to be raised before an administrative law judge.

office; and 3) written correspondence.[4] In this case, an initial conference was held on May 29, 2003, but no recommendation was made due to a lack of documentation. Claimant's request on September 4, 2003, for a second informal conference followed employer's controversion of his claim for additional compensation. *See* Claimant's Petition for Review at Attachments 4-6. The claims examiner responded, by letter dated September 5, 2003, that, "[I]m not sure a conference will solve much at this point. I read the report of Dr. Kirven and was not surprised [about his opinion]. Rather than delay this matter by some thirty (30) days just to hold a conference and tell the parties that we are going to obtain an evaluation, let's just cut to the chase." *Id*. at Attachment 8. The claims examiner instructed claimant to attend a medical evaluation to address his ability to work, and employer was instructed to resume compensation payments for temporary total disability. *Id*. Claimant was examined by Dr. Barot on September 26, 2003, and underwent an FCE on November 13 and 14, 2003. Employer did not resume paying claimant compensation for temporary total disability. On January 30, 2004, a claims examiner issued what she termed a "***supplemental recommendation***," based on the FCE, that, "[I]t appears that Mr. Anderson is capable of functioning at a **sedentary** level of physical demand." Claimant's Petition for Review at Attachment 9 (emphasis in original).

[4] Section 702.311 states:

> The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the district director's office. **Some cases will be handled by written correspondence**. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matter discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

20 C.F.R. §702.311 (emphasis added).

The claims examiner's letter of September 5, 2003, stating that an office conference would only delay matters, and recommending evaluations for claimant and the resumption of temporary total disability compensation constitutes an informal conference by written correspondence as contemplated by Section 702.311. She determined that it was in the best interests of the parties to forego an office conference in favor of the procedure she outlined. Moreover, the claims examiner's letter of January 30, 2004, is entitled a "supplemental recommendation," based on the results of claimant's FCE. She stated that the FCE indicates that claimant is capable of sedentary work,[5] and in context with the previous correspondence and the history of the claim, this letter must be viewed as a recommendation that employer, at least, resume paying claimant compensation for temporary partial disability.[6] Moreover, it is uncontested that employer refused this recommendation, as well as the previous recommendation to resume payment of temporary total disability benefits, as it did not resume any payments to claimant.

The administrative law judge's reasoning that the January 30, 2004, recommendation by the claims examiner was in response only to claimant's request for temporary total disability benefits, and not to his entitlement to temporary partial disability because it did not address the applicable wage-earning capacity, is not supported by the relevant documents. Decision and Order Awarding Attorney's Fee at 6 n.4. There is no basis for supposing that the January 30, 2004, "supplemental recommendation" addressed only the temporary total disability claim, as claimant had previously requested both types of benefits. The recommendation that claimant was

[5] In his decision on modification, the administrative law judge found that claimant cannot return to his usual work because claimant testified that the job required that he lift in excess of 10 pounds. Decision and Order at 13 (May 12, 2005).

[6] Thus, this case is distinguishable from *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, ___F.3d___, 2006 WL 2135498 (6th Cir. Aug. 2, 2006). In that case, the court held the employer was not liable for a fee under Section 28(b) because there was not a written recommendation regarding the disposition of the controversy that was resolved by the administrative law judge. Employer paid claimant temporary total disability benefits. At the informal conference, claimant asserted entitlement to permanent total disability benefits and employer disputed that claimant's condition was permanent. The administrative law judge awarded claimant permanent total disability benefits. The court held that employer is not liable for claimant's attorney's fee pursuant to Section 28(b) because the district director stated, following the informal conference, that he was not making a recommendation because the parties were discussing a settlement of the case. The court held that there must be a written recommendation on the issue decided in claimant's favor by the administrative law judge. *Pittsburgh & Conneaut Dock Co.*, 2006 WL 2135498 at *11.

capable of sedentary work supplemented the September 5 letter recommending that employer resume total disability payments, and essentially rejected both claimant's claim of total disability and employer's controversion based on Dr. Kirven's opinion that claimant could return to his usual work and was thus not disabled at all. In August 2003, when employer terminated all compensation, it was paying temporary partial benefits; in context, the recommendation supports a continuation of such payments. In view of employer's prior partial disability payments, it was not necessary for the district director to raise a wage-earning capacity issue in order to make an effective recommendation.

In sum, we hold, pursuant to Section 702.311, that the September 5, 2003, and January 30, 2004, letters from the claims examiners to claimant and employer addressing the issues raised by claimant in his September 4, 2003, letter to the district director fulfill the informal conference and written recommendation criteria for conferring fee liability on employer under Section 28(b), pursuant to *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT). Employer terminated claimant's compensation on August 15, 2003, and it did not accept the recommendations in these letters that it resume paying claimant compensation. The administrative law judge's decision awarding claimant temporary partial disability commencing July 8, 2003, establishes that claimant utilized an attorney to obtain a greater award than employer paid or tendered following the January 30, 2004, written recommendation. Employer is therefore liable for claimant's attorney's fee under Section 28(b), and we reverse the administrative law judge's finding to the contrary.

Claimant challenges the hourly rate awarded by the administrative law judge. Claimant's counsel requested $250 for his services and $95 per hour for paralegal services. The administrative law judge found that the hourly rates requested were excessive given the nature of the work, the complexity of the issues, and the typical billing rates in the Hampton Roads area. Claimant's assertions on appeal that he is entitled to $250 per hour for his services based on his expertise, the nature of the case, and cost-of-living increases are insufficient to show that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $225 per hour.[7] *See generally Story v. Navy Exch. Serv. Center*, 33 BRBS 11 (1999); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); 20 C.F.R. §702.132. Therefore, we affirm the hourly rates awarded by the administrative law judge.

[7] Claimant argues that the Board has awarded him a fee based on an hourly rate of $250. However, the hourly rate awarded by the Board for work on appeal is not determinative of the hourly rate counsel should receive in this case, as the administrative law judge is in the best position to ascertain the reasonableness of the fee request. *See generally Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

Finally, claimant argues that if the Board holds employer liable for his attorney's fee pursuant to Section 28(b), the Board must remand the case for the administrative law judge to address the 50 percent reduction he made in the number of compensable hours because the administrative law judge's finding in this regard relied, in part, on claimant's being liable for the fee, pursuant to Section 28(c).[8] Claimant also argues that the reduction was arbitrary and excessive inasmuch as claimant was not receiving any benefits prior to the award of compensation for temporary partial disability commencing July 8, 2003.

The administrative law judge found that claimant did not prevail on three of the four issues before him. The administrative law judge found that, while claimant's award was significant since employer had stopped paying all compensation, the compensation awarded was at a lower rate than employer voluntarily paid prior to terminating its payments on August 15, 2003. The administrative law judge found that given claimant's limited success, the amount of benefits awarded in contrast to those sought, and claimant's financial circumstances, claimant's counsel is entitled to a fee representing 50 percent of the hours requested. Decision and Order at 9.

We agree with claimant that the administrative law judge's 50 percent reduction in the number of hours requested must be vacated and the case remanded since the administrative law judge relied, in part, on claimant's financial circumstances in making this determination. In view of our holding that employer is liable for claimant's attorney fee, the administrative law judge must reconsider the number of compensable hours. On remand, claimant's counsel may again assert that greater weight should be given to the fact employer had terminated claimant's compensation and to the administrative law judge's rejection of employer's contention that claimant was not disabled at all and could return to his usual work.

[8] When claimant is liable for his attorney's fee, the regulation at 20 C.F.R. §702.132(a) requires that the financial circumstances of the claimant be taken into account in setting the amount of a reasonable fee.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney's Fee is reversed insofar as claimant was held liable for his counsel's attorney's fee under Section 28(c). We hold that employer is liable for counsel's attorney's fee pursuant to Section 28(b). The hourly rate awarded by the administrative law judge is affirmed. The number of hours for which a fee is awarded is vacated and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge