BRB No. 06-0393

ROBERT ANDREPONT Claimant-Respondent v. MURPHY EXPLORATION & PRODUCTION COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners	))))))))))))))))	DATE ISSUED: 02/12/2007 DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and the Order on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Douglas P. Matthews (Frilot, Partridge, Kohnke & Clements, L.C.), New Orleans, Louisiana, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees and the Order on Motion for Reconsideration (2004-LHC-00309) of Administrative Law Judge C. Richard Avery 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 injured his left knee on May 14, 1999, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability from April 22, 2000, to December 12, 2001, when claimant's injury reached maximum medical improvement. Employer then initiated payment of compensation for permanent partial disability, based on a 26 percent permanent impairment of the left leg. 33 U.S.C. §908(c)(2). On November 18, 2002, claimant filed a claim alleging entitlement to compensation for permanent total disability due to his work injury. The Office of the District Director held an informal conference on September 25, 2003, in which the claims examiner opined that employer had established the availability of suitable alternate employment and that employer did not owe further compensation. Employer accepted the recommendation. Claimant requested referral of the claim to the Office of Administrative Law Judges (OALJ).

In his decision, the administrative law judge found the parties agreed that claimant is unable to return to his usual employment as an offshore mechanic due to his work injury. The administrative law judge found that employer established the availability of suitable alternate employment based on a desk clerk position employer identified on February 17, 2003, and a desk clerk and gate guard position employer subsequently identified. Thus, claimant was awarded compensation for permanent total disability from December 13, 2001, to February 17, 2003, the date suitable alternate employment was established.

Claimant's counsel, Ed Barton, submitted a petition to the administrative law judge requesting an attorney's fee of $40,817.74, representing 108.75 hours of attorney time at $275 per hour, and expenses of $10,911.49. Claimant's co-counsel, Randall Hart, submitted a separate fee petition requesting a fee of $1,342.25, representing 6.6 hours of attorney time at $175 per hour, and expenses of $187.25. In his Supplemental Decision and Order, the administrative law judge addressed employer's objections to its liability for any fee pursuant to Section 28(b) and to the hourly rate and itemized services. The administrative law judge held employer liable for claimant's attorney's fee because claimant obtained greater compensation than employer agreed to pay. The administrative law judge reduced the hourly rate for Mr. Barton to $200, disallowed $9,597.12 for work performed by claimant's vocational expert, William Kramberg, due to a lack of supporting documentation, and reduced specific quarter-hour entries on Mr. Barton's fee petition to one-eighth of an hour. The administrative law judge disallowed 4.2 hours of attorney time requested by Mr. Hart and expenses of $85, which were incurred prior to referral of the claim to the OALJ, and he disallowed specific expenses as office overhead. Accordingly, Mr. Barton was awarded a fee of $21,475, plus expenses of $1,314.37. Mr.

Hart was awarded a fee totaling $723.45.[1] On reconsideration, the administrative law judge found that claimant subsequently provided a sufficiently itemized description of Mr. Kramberg's vocational services, and he allowed the requested expense of $9,597.12. Employer's motion for reconsideration was summarily denied.

Employer appeals the administrative law judge's fee award.[2] Claimant responds, urging affirmance. Employer contends that it is not liable for an attorney's fee under Section 28(a), (b) of the Act, 33 U.S.C. §928(a), (b). The administrative law judge addressed employer's assertion that it is not liable for an attorney's fee pursuant to Section 28(b) since it did not refuse the district director's recommendation that no additional benefits were due. The administrative law judge rejected employer's contention, finding that employer and claimant disagreed on the extent of his disability, the parties discussed the extent of claimant's injury at the informal conference, and claimant thereafter was awarded additional benefits for total disability by the administrative law judge, exceeding the benefits that employer voluntarily paid without an award. The administrative law judge concluded on this basis that claimant's counsel is entitled to an award of an attorney's fee payable by employer.

We agree with employer that it is not liable for a fee under Section 28(a) of the Act inasmuch as employer was voluntarily paying claimant compensation for permanent partial disability when he filed his claim on November 18, 2002. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001);[3] *see also Virginia Int'l Terminals, Inc. v. Edwards,* 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied,* 126 S.Ct. 478 (2005); *Richardson v. Continental Grain Co.,* 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

Employer further contends that the administrative law judge erred in holding it liable for a fee under Section 28(b), as it accepted the district director's recommendation

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[1] In the body of his decision, however, the administrative law judge found Mr. Hart entitled to a fee totaling $458.50 for 2.4 hours of attorney time at $175 per hour and costs of $38.50.

[2] Employer filed a supplemental brief on January 22, 2007. Employer's brief is accepted into the administrative record before the Board. 20 C.F.R. §802.215.

[3] In *Cooper*, the court held that employer was liable for a fee under Section 28(a) inasmuch as the claimant filed a claim for additional benefits after employer ceased paying benefits voluntarily, and employer did not pay benefits within 30 days of its receipt of the claim. *Cooper*, 274 F.3d at 186-187, 35 BRBS at 119(CRT). In this case, employer voluntarily commenced paying weekly compensation under the schedule for a 26 percent leg impairment and claimant was receiving ongoing compensation payments for permanent partial disability when he filed his claim on November 18, 2002. Employer's voluntary payments ended on May 13, 2003. CX 2 at 6.

after the informal conference that no further benefits were due claimant. Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] 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 . . . 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). The United States Court of Appeals for the Fourth Circuit held in *Edwards* that the following are prerequisites to employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to adopt the written recommendation; and (4) the employee's procuring of the services of an attorney 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); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253 (6th Cir. 2007) (where district director made no recommendation on the issue favorably decided by the administrative law judge, fee liability does not shift to employer). In *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006), a case arising within the jurisdiction of the Fourth Circuit, the Board thus affirmed the administrative law judge's finding that employer's acceptance of the district director's recommendation to pay nothing further precluded employer's liability for an attorney's fee under Section 28(b), notwithstanding the administrative law judge's award of greater benefits.

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has not expressed a definitive opinion on the issue presented in this case. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).[4] Nonetheless, this court has been at the forefront in strictly construing the language of Section 28(b). In *Staftex Staffing v. Director, OWCP*, 237 F.3d

[4] The Court expressly declined to render an opinion on this issue as there was no evidence in the record supporting the employer's contention that it did not refuse the recommendation. *Gallagher*, 219 F.3d at 435 n.18, 34 BRBS at 42 n.18(CRT).

404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000), the court enumerated three criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; and (3) the employer's refusal of the recommendation. *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT). On rehearing, the court held employer liable for a fee pursuant to Section 28(b) on the basis that all three criteria were met. *Id.*, 237 F.2d at 410, 34 BRBS at 105-106(CRT). *See also FMC Corp. v. Perez*, 128 F.3d 908, 909-911, 31 BRBS 162, 163(CRT) (5th Cir. 1997) (stating Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by "accepting the . . . Commissioner's recommendations"). In *Cooper*, 274 F.3d at 186, 35 BRBS at 119(CRT), the court emphasized that the absence of an informal conference is an "absolute bar" to employer's liability under Section 28(b). Thus, while the court has not addressed the specific issue raised in this case, the court's cases strictly construing the provisions of Section 28(b) suggest that an employer must refuse to accept the written recommendation in order to confer fee liability pursuant to Section 28(b). *See Pittsburgh & Conneaut Dock Co.,* 473 F.3d 253; *Edwards,* 398 F.3d 313, 39 BRBS 1(CRT).

In this case, it is undisputed that an informal conference was held and a recommendation was issued by the district director. The district director recommended that no further benefits were due claimant. Employer therefore accepted the district director's recommendation, and paid or tendered no further benefits. Accordingly, notwithstanding the administrative law judge's award of greater compensation, we hold that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). *Wilson*, 40 BRBS 46. The administrative law judge's award of an employer-paid attorney's fee is therefore reversed.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and the Order on Motion for Reconsideration finding employer liable for claimant's attorney's fee is reversed.

SO ORDERED

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent. I would affirm the administrative law judge's finding that employer is liable for an attorney's fee pursuant to Section 28(b).[5] The literal construction of Section 28(b) runs counter to the purpose of the Act's fee-shifting provisions in cases, such as this, where claimant obtains greater compensation by virtue of the proceedings before the administrative law judge.

In *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), the court affirmed an administrative law judge's award of an employer-paid fee. The court found that an informal conference had been held and that a recommendation had been issued. The court stated, however, that the "substance" of the recommendation was not in the record before it. Employer asserted that the recommendation was to reinstate temporary total disability benefits and that it complied with this recommendation. As in this case, the employer argued that there was no "rejection" of the recommendation as required by Section 28(b). The court stated that as the recommendation was not in evidence, it could not verify employer's contentions, and that, moreover, it was clear that, after the conference, issues existed regarding temporary partial disability benefits and average weekly wage which were adjudicated in claimant's favor. The court held that "under these particular circumstances, we find that employer has failed to demonstrate that the ALJ erred in finding the conditions of §928(b) satisfied." *Id.*, 219 F.3d at 435, 34 BRBS at 41-42(CRT). In a footnote, the court stated

[5] I agree with the majority that employer is not liable for a fee under Section 28(a), pursuant to *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

that while an initial reading of Section 28(b) supports the proposition that employer must reject the written recommendation, it was expressing no opinion on this subject or on the Ninth Circuit's opinion in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (holding otherwise, pursuant to *National Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979)), given the lack of evidence to support employer's contention regarding the content of the recommendation. *Gallagher*, 219 F.3d at 435 n.18, 34 BRBS at 42 n.18(CRT). As in *Gallagher*, following the informal conference in this case there were issues remaining regarding the extent of claimant's disability which were resolved, at least in part, in claimant's favor. Since the Fifth Circuit expressly declined to rule on whether employer must "reject" the recommendation, I would hold that on the facts presented, Fifth Circuit precedent does not compel the holding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b).

In a case arising in the Fourth Circuit, *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006), the Board addressed a case with facts identical to those herein. In *Wilson,* the Board reached the result reached by the majority herein based on controlling precedent in the Fourth Circuit. In *Wilson*, as in this case, an informal conference was held, a recommendation was issued, employer "accepted" the recommendation to pay nothing further, claimant sought a hearing on his entitlement to additional benefits, and the administrative law judge awarded additional benefits. As *Wilson* arose in the jurisdiction of the Fourth Circuit, the Board held that it was bound by that court's decision in *Virginia Int'l Terminals, Inc. v. Edwards*, 390 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied,* 126 S.Ct. 478 (2005). In *Edwards*, the court addressed a case where no informal conference was held or recommendation issued, and it held that employer was thus not liable for claimant's attorney's fee. In so holding the court stated that Section 28(b) requires all of the following: (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to adopt the written recommendation; and (4) the employee's procuring of the services of an attorney 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). Thus, in *Wilson,* the Board applied this test and concluded that as employer did not "refuse" the district director's recommendation, the administrative law judge's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b) must be affirmed.

Although the Board found that the result in *Wilson* was dictated by the *Edwards* decision, in the absence of any such controlling authority in the Fifth Circuit, I would agree with the administrative law judge that employer is liable for the fee on the facts presented. Claimant here satisfied every aspect of Section 28(b) except that since employer accepted the erroneous recommendation of the district director, it did not "refuse" the recommendation. *See* discussion, *infra.* Claimant thereafter was successful in litigating his claim for additional compensation. Where claimant successfully litigates his claim before the administrative law judge, the district director's recommendation should have no further bearing on the case; yet under the decision reached by the

majority, that recommendation becomes the determinative factor in assessing liability under Section 28(b).

In *Wilson,* after reaching the result mandated by binding precedent, the Board went on to discuss the legislative history of the Act's fee-shifting provisions, which emphasize the requirement that claimant succeed in obtaining a greater award by virtue of the proceedings before the administrative law judge than that paid or tendered by employer. *Wilson,* 40 BRBS at 50-51. The more literal interpretation of Section 28(b) is a recent development, following years of case precedent in which the primary factor in assessing fee liability pursuant to Section 28(b) involved the development of a controversy over claimant's entitlement followed by his success in obtaining greater compensation than employer paid or tendered. *See, e.g., Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *National Steel & Shipbuilding Co. v. U. S. Dep't of Labor,* 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).[6] In *Wilson*, the Board discussed these cases as well as the purpose of the fee-shifting provisions contained in the Act's 1972 Amendments, which is to assess attorney's fees against employer "in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals." *Wilson,* 40 BRBS at 51, *quoting* House Rept. No. 92-1441, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4706; *accord* Sen. Rept. No. 92-1125; *see Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 813, 5 BRBS 317, 318 (5th Cir. 1977); *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291, 1297 n.14 (2d Cir. 1974) (attorney's fee should not diminish claimant's recovery). In this case, the legislative history shows the literal interpretation of Section 28(b) employed by the majority herein would defeat Congressional intent to confer liability for an employer-paid fee where claimant succeeds in obtaining additional compensation over that paid by employer after an informal conference. A literal interpretation of a statute should not be adopted if it would produce an "unjust and unreasonable" result. *United States v. Mendoza*, 565 F.2d 1285, 1289-1290 (5th Cir. 1978), *modified on other grounds on reh'g en banc*, 581 F.2d 89 (5th Cir. 1978) ("we need not, indeed must not, slavishly follow the literal language of the rule when that language leads us through the looking glass to an unjust and unreasonable

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[6] The holdings in these cases represent the controlling interpretations during the time from the enactment of Section 28(a), (b) in the 1972 Amendments until the courts' recent re-examination of the language of the sections. As was discussed in *Wilson,* 40 BRBS at 50, the holding in *National Steel* that an employer's refusal of a recommendation was not required was the only specific precedent on this issue. Thus, that case and those focusing on claimant's success were applied for over 20 years, and this interpretation was in effect at the time of the 1984 Amendments. While Congress took action on many sections in adopting the 1984 Amendments, including overruling case precedent not to its liking, Section 28 was not altered in this regard. *See* 1984 U.S.S.C.A.N. 2734.

result"). Based on the legislative history to Section 28(b) and years of consistent construction, I would avoid the harsh result dictated by the majority's decision and construe Section 28(b) consistent with Congressional intent to provide for an employer-paid attorney fee in cases such as this where the claimant obtained greater compensation after a hearing before an administrative law judge than paid by employer after the informal conference.

In this regard, it is important to note, as the Board discussed in *Wilson,* the effect of employer's acceptance of a district director's recommendation of a denial of further benefits. Claimant can either do nothing and cut his losses, or have the case referred to an administrative law judge and if he succeeds in obtaining greater benefits than employer paid or tendered, have his benefits reduced by the amount of his attorney's fee. This is the result the statutory fee-shifting provisions are designed to prevent. *Wilson,* 40 BRBS at 51. Moreover, a focus on the district director's recommendation puts that official in the position of making final determinations as far as fee liability is concerned. Under the interpretation of Section 28(b) argued by employer in this case, the district director's favorable recommendation becomes critical; even if a recommended denial is legally incorrect, as it was in this case, it would control the fee liability issue.

On the facts in this case, for example, the recommendation issued by a claims examiner at the September 25, 2003, informal conference that employer did not owe additional compensation was based on his opinion that two desk clerk positions employer identified established the availability of suitable alternate employment. The first evidence of record in this case identifying a desk clerk position is employer's February 17, 2003, labor market survey. It is well settled that claimant is entitled to compensation for total disability until the date employer establishes the availability of suitable alternate employment. *See, e.g., Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). In his decision, the administrative law judge also credited this desk clerk position as establishing the availability of suitable alternate employment, but he properly found, based on this evidence, that claimant is entitled to compensation for permanent total disability from the date of maximum medical improvement on December 13, 2001, until the date the position was identified on February 17, 2003. *Id.* The recommendation issued by the claims examiner failed to apply this applicable law regarding claimant's entitlement to compensation for total disability until the date employer first established the availability of suitable alternate employment. Employer "accepted" his erroneous recommendation that no further compensation was owed claimant and therefore tendered no further benefits. It would be incongruous with the purpose of the statute to permit such an action to preclude the shifting of fee liability from the successful claimant. In view of these facts, and in the absence of binding authority from the Fifth Circuit on this issue, I would affirm the administrative law judge's award of an attorney's fee in this case, payable by employer pursuant to Section 28(b). Therefore, I dissent.

BETTY JEAN HALL
Administrative Appeals Judge