BRB No. 07-1015

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| K. C. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED | ) | DATE ISSUED: 06/27/2008 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Compensation Order and the Order Denying in Part and Approving in Part Claimant's Motion for Reconsideration of Order Denying Attorney Fee Assessed to Employer of David A. Duhon, District Director, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order and the Order Denying in Part and Approving in Part Claimant's Motion for Reconsideration of Order Denying Attorney Fee Assessed to Employer (Case No. 07-171470) of District Director David A. Duhon 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 must be affirmed unless the challenging party shows it 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 back on July 23, 2004, during the course of his employment for employer. Employer voluntarily paid claimant compensation for temporary total disability during four days in August 2004 and continuously from October 18, 2004,

through March 14, 2005. EX 6 at 2. Employer then voluntarily paid claimant compensation for partial disability. EXs 6 at 3; 7. Claimant filed a claim on April 6, 2005, alleging that claimant was entitled to compensation for temporary total disability and that employer was paying compensation based on an inaccurate average weekly wage. CX 1. On May 26, 2005, employer revised its calculation of claimant's average weekly wage from $892.50 to $911.54. EX 6 at 4. The district director held an informal conference on August 25, 2005, to address the issues of average weekly wage, the permanency and extent of claimant's disability, and whether claimant's cervical condition is related to the work injury. No recommendation was issued addressing the disputed issues. The parties were directed to file medical and wage information in order that a recommendation could be rendered on the disputed issues of average weekly wage and the cause of claimant's neck condition. EX 11. On March 17, 2006, claimant requested referral of the claim to the Office of Administrative Law Judges. Employer's Resp. Br. at EX C. Claimant underwent surgery on October 6, 2006, to implant a spinal cord stimulator, and employer voluntarily commenced paying compensation for temporary total disability.

The parties stipulated prior to the hearing that claimant's average weekly wage is $911.54. The sole issue before the administrative law judge was the nature and extent of claimant's disability from January 25, 2005, to October 5, 2006. In his decision, the administrative law judge found that claimant's back condition had not reached maximum medical improvement. The administrative law judge found that there was no dispute that claimant is unable to return to his usual employment in the paint department, and that the evidence established that claimant was unable to perform any work during the disputed period. Accordingly, the administrative law judge found claimant entitled to compensation for temporary total disability from January 25, 2005, through October 5, 2006. Decision and Order at 16.

Claimant's counsel submitted a fee petition to the district director requesting an attorney's fee of $9,451, representing 45.7 hours of attorney time at $200 per hour, and expenses of $311. In his Compensation Order, the district director addressed employer's objections to its liability for any fee pursuant to Section 28(b), 33 U.S.C. §928(b). The district director agreed that Section 28(b) governs the issue of fee liability in this case. The district director stated that employer effectively refused the informal conference recommendation by failing to provide the requested wage information; however, no increased benefits were obtained by claimant on the basis of the average weekly wage dispute since employer had voluntarily raised the average weekly wage on May 26, 2005, prior to the informal conference, to the amount stipulated by the parties before the administrative law judge, $911.54. The district director also stated that the administrative law judge awarded claimant additional compensation for temporary total disability, but no recommendation was made at the conference on this issue. The district director concluded that employer, therefore, is not liable for claimant's attorney's fee pursuant to Section 28(b). In his order on reconsideration, the district director rejected claimant's

contentions that employer is liable for a fee under Section 28(b) for the reasons stated in his initial order. The district director agreed with claimant's counsel that a fee may be assessed against claimant as a lien on benefits received, pursuant to Section 28(c), 33 U.S.C. §928(c). The district director allowed claimant's counsel 30 days to come to an agreement with claimant on the amount of a fee and lien rate to be paid from claimant's benefits.

On appeal, claimant challenges the district director's denial of an employer-paid attorney fee. Employer responds, urging affirmance.

Claimant first contends that, after filing his claim in April 2005, he subsequently established employer's liability for a period of temporary total disability, employer authorized surgery to implant a spinal cord stimulator, and he obtained his wage records from employer in order to determine the applicable average weekly wage. Therefore, claimant contends employer is liable for an attorney's fee pursuant to Section 28(a).

Section 28(a) provides for an employer-paid fee if employer refuses to pay any compensation within 30 days of the date it receives notice of the claim from the district director.[1] *See Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *see generally W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Section 28(a) states that employer will be liable for claimant's attorney's fee if "it declines to pay *any* compensation" within 30 days of its receipt of the claim from the district director. In this case, employer was voluntarily paying claimant compensation for partial disability at the time claimant filed his claim. This precludes employer's liability for a fee pursuant to Section 28(a) notwithstanding claimant's eventual recovery of compensation greater than employer paid. *Andrepont v. Murphy Exploration & Prod.*

[1] Section 28(a) states, in relevant part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a).

*Co.*, 41 BRBS 73 (Hall, J., concurring), *aff'g on recon.*, 41 BRBS 1 (2007) (Hall, J., dissenting); *see also Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Accordingly, we reject claimant's contention that employer is liable for a fee pursuant to Section 28(a).

Claimant next challenges the district director's denial of an employer-paid fee pursuant to Section 28(b). Claimant argues that the district director erred in finding that a written recommendation on the issue(s) on which he prevailed is necessary to confer fee liability on employer. We disagree. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. In *Staftex Staffing v. Director, OWCP*, 237 F.3d 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.[2] *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(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 this case, there was an informal conference on August 25, 2005. The LS-280, Memorandum of Informal Conference, states that the issues discussed were average weekly wage, medical-causation, nature and extent, and permanency. EX 11. The memorandum states under "Summary of the Informal Conference and Recommendation:"

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[2] 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).

> Parties have attempted to settle this claim. Current medical information should be provided to this office. Wage information should be provided to this office and to Ms. Dulin prior to issuing recommendation with regard to average weekly wage. The employer/carrier is required to submitted (sic) an 8(f) (33 U.S.C. 908(f)) application to this office within 30 days from the date of maximum medical improvement. If maximum medical improvement has not been attained then the issue of 8(f) is premature.

*Id*. In his order denying an attorney's fee, the district director stated that the recommendation was that the parties submit current wage and medical records in order that a definitive recommendation could be made on the disputed issues actually discussed at the informal conference of average weekly wage and whether claimant's neck condition was related to his work-related back injury. Order at 2. The district director stated that there was no recommendation made at the conference on the issue of additional temporary total disability, which is the sole issue on which claimant prevailed before the administrative law judge. *Id*. As a written recommendation on the issues in dispute after an informal conference is necessary to confer fee liability on employer pursuant to Section 28(b), and as no such recommendation was issued in this case addressing the nature and extent of claimant's disability, employer is not liable for a fee based on claimant obtaining greater compensation than it voluntarily paid while the case was before the district director.[3] *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 37(CRT) (6th Cir. 2007); *Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Therefore, we reject claimant's assertion that employer is liable for an attorney's fee pursuant to Section 28(b), and we affirm the district director's denial of an employer-paid attorney's fee.

[3] We also reject claimant's argument that employer is liable for an attorney's fee based on the issue raised at the informal conference of maximum medical improvement as no recommendation was made on this issue. Claimant also relies on employer's authorizing surgery to implant a spinal cord stimulator as a basis for an employer-paid fee; however, there is no evidence that this issue was discussed at the conference. Finally, we need not address claimant's contention that employer's rejection of the written recommendation is not necessary to confer liability under Section 28(b), as that issue is not presented by the facts of this case. *But see Andrepont*, 41 BRBS 1.

Accordingly, the district director's Compensation Order and Order Denying in Part and Approving in Part Claimant's Motion for Reconsideration of Order Denying Attorney Fee Assessed to Employer are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge