BRB No. 02-0673

KENNETH L. SKIDMORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCKHEED MISSILE AND SPACE COMPANY	)	DATE ISSUED: JUN 20, 2003
	)	
and	)	
	)	
ACE/USA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

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

John M. Schwartz (Blumenthal, Schwartz, & Garfinkel, P.A.), Titusville, Florida, for claimant.

Kimberly A. Wilson (Sharp & Gay, P.A.), Jacksonville, Florida, for employer and Wausau Insurance Company.

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

PER CURIAM:

Wausau Insurance Company (Wausau) appeals the Supplemental Decision and Order – Awarding Attorney Fees (2000-LHC-0786, 2000-LHC-3418) 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 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a herniated disc in his low back as a result of an accident, which occurred while he was working for employer on July 6, 1992. Wausau, the responsible carrier at the time of this injury, voluntarily paid temporary total disability benefits and medical benefits during claimant's absence from work. On March 7, 1996, claimant sustained work-related injuries to his left arm, left shoulder and cervical area. ACE/USA, the carrier at risk at the time of this accident, voluntarily paid periods of temporary total disability benefits and medical benefits related to these injuries. Claimant however sought additional disability compensation, as well as authorization for a physiatrist and a psychiatrist to treat injuries related to both accidents. Hearing Transcript (HT) at 34.

In his decision, the administrative law judge ordered Wausau to pay temporary total disability benefits "for those days or hours claimant was unable to work between July 6, 1992, and March 7, 1996," and medical benefits for treatment related to claimant's low back problems, and ordered ACE/USA to pay "any compensation benefits payable to claimant, as well as the medical bills," related to the cervical injury sustained on March 7, 1996. Decision and Order at 34. In addition, the administrative law judge ordered Wausau to pay all medical expenses related to the diagnosis and evaluation of, and treatment and counseling for, claimant's psychological condition between July 6, 1992, and March 6, 1996, and that thereafter ACE/USA is responsible for said expenses.

Subsequently, claimant's counsel submitted a petition requesting an attorney's fee of $29,707.13, representing 124 hours of attorney time at an hourly rate of $225, seven hours of paralegal time at an hourly rate of $85, and $1,212.13 in expenses.

[1] Both carriers submitted objections to the fee petition. In his Supplemental

[1]Claimant's counsel apportioned the requested fee between the two carriers as follows: 78.25 hours of attorney work for which ACE/USA is liable as the responsible carrier at the time of claimant's injury sustained on March 7, 1996; 40.5 hours of attorney work for which Wausau is liable as the responsible carrier at the time claimant sustained his back injury on July 6, 1992; and 5.25

Decision and Order Awarding Attorney Fees, the administrative law judge awarded the requested attorney's fee in its entirety. Specifically, he awarded an attorney's fee totaling $29,707.13, representing 68.75 hours of attorney work exclusive to ACE/USA; 50 hours of attorney work exclusive to Wausau; and 5.25 hours of attorney work, seven hours of paralegal work, and $1,212.13 in costs to be split evenly between the two carriers.

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hours of shared attorney work for work related to both injuries. He did not specifically allocate the paralegal hours or the costs between the two injuries.

On appeal, Wausau challenges only 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).[2] Wausau contends that as the issues decided by the administrative law judge with regard to the July 6, 1992, injury were not the subject of an informal conference before the district director, it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b), citing *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), in which the Fifth Circuit held that an informal conference is a prerequisite to fee liability under Section 28(b). Claimant responds, urging affirmance.[3]

In the instant case, the administrative law judge considered but rejected Wausau's contention that claimant's counsel is not entitled to an attorney's fee because claimant did not first seek resolution through an informal conference. Supplemental Decision and Order at 2. Specifically, the administrative law judge determined that contrary to Wausau's assertion, claimant's counsel is entitled to an attorney's fee award "as this matter was brought and handled in accordance

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[2] The administrative law judge did not delineate the statutory basis for his award of an attorney's fee, although Wausau assumes, based on its actions that it accepted liability for the July 6, 1992, accident at the outset and voluntarily paid benefits in this case, that Section 28(a) is inapplicable. 33 U.S.C. §928(a). Given the administrative law judge's consideration and rejection of Wausau's argument regarding the applicability of Section 28(b), the award of an attorney's fee was ordered pursuant that specific provision. Supplemental Decision and Order at 2.

[3] Claimant filed a motion to dismiss Wausau's appeal as untimely. Wausau responded to claimant's motion to dismiss in its brief in support of its appeal. The Board, by Order dated October 18, 2002, denied claimant's motion. *Skidmore v. Lockheed Missile & Space Co.*, BRB No. 02-0673 (Oct. 18, 2002) (unpub. Order).

with our usual procedures." *Id.* The administrative law judge observed that "[a]fter the informal conference, the matter remained unresolved and was transferred to the [Office of Administrative Law Judges] for a hearing." *Id.* at 2-3.

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.[4] *See James J.*

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[4]Section 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,

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). Initially, we observe that the Board, following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), has long held that a written recommendation by the district director following an informal conference is not a precondition to attorney's fee liability pursuant to Section 28(b), as the purpose of Section 28(b) is fulfilled if claimant succeeds in obtaining greater compensation through formal proceedings than employer voluntarily paid or tendered. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). Thus, we hold that the administrative law judge did not err in holding employer liable in accordance with the usual procedures for assessing liability for an attorney's fee under Section 28(b) of the Act. *Id.* Additionally, we note that the Fifth Circuit precedent relied on by employer does not lead to a different result based on the facts of this case.[5]

In *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001),

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> 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.

[5]We note that this case does not arise within the jurisdiction of the Fifth Circuit, but rather within the jurisdiction of the Eleventh Circuit, which has not spoken on this issue. The Board therefore is not, as argued by Wausau, constrained to follow the line of precedent set by *Staftex* and *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Nevertheless, as discussed herein, the instant case is factually distinguished from *Staftex*, and is analogous to the Fifth Circuit's decision in *Gallagher*.

and *Staftex*, 237 F.3d 409, 34 BRBS 105(CRT), the United States Court of Appeals for the Fifth Circuit held that an informal conference is an absolute prerequisite to fee liability under Section 28(b). Specifically, in *Staftex*, the Fifth Circuit stated that Section 28(b)

> permits claimants to obtain attorney's fees only where: (1) the [district director] has held an informal conference on the disputed issue; (2) the [district director] issues a written recommendation on that issue; and (3) the employer refuses to accept the recommendation.

Staftex, 237 F.3d at 409, 34 BRBS at 47(CRT). The Fifth Circuit further stated in *Cooper*, that "[u]nder the law of our Circuit, [the lack of an informal conference] poses an absolute bar to an award of attorney's fees under ' 28(b)." *Cooper*, 274 F.3d at 186, 35 BRBS at 119(CRT).

In contrast to *Cooper*, an informal conference was, in fact, held in this case on March 20, 1995, as the administrative law judge noted. *See* Supplemental Decision and Order at 2. Wausau, however, maintains that the sole issue in controversy at that time involved the selection of claimant's first choice of physicians and that it acceded to the district director's recommendation. While the district director's recommendation, "that Dr. Newman be authorized as the claimant's initial free choice of physicians," Wausau Exhibit (WX) 9, is included in the record, and it appears as though employer did, in fact, accept this recommendation, it is apparent that issues remained in controversy as the case was forwarded to the administrative law judge for a hearing.[6] Claimant's pre-hearing statement, dated October 26, 1998, notified employer and Wausau of his intent to raise issues regarding "claimant's entitlement to medical care, permanent total disability benefits and/or vocational retraining; attorney's fees, costs, interest & penalties, loss of earning and lost earnings capacity," related to the July 6, 1992, work accident. ALJX 14. A formal hearing in this matter was initially set for April 16, 1999, but Administrative Law Judge Linda S. Chapman issued an order of continuance on April 12, 1999, pending receipt of settlement paperwork, based on notification from claimant, employer, and Wausau that they had reached an agreement with regard to the outstanding issues related to the July 6, 1992, injury. ALJX 6. The parties, however, never submitted this documentation and so Judge Chapman reinstated the case for a hearing by order dated June 16, 1999. ALJX 7. By order dated December 15, 1999, Judge Chapman remanded the case to the district director, based on claimant's request,

[6]Wausau Exhibit 9 consists of only one page on which the recommendation of the district director is included. Absent from this page is any statement of the issues brought before the district director, and/or the identification or signature of the presiding district director.

"for consolidation of the two outstanding claims, and further proceedings as appropriate." ALJX 11. There is no evidence in the record regarding whether a second informal conference was held before the district director or what procedures occurred before him following remand. The case was, however, returned to the Office of Administrative Law Judges on or around April 12, 2000. *See* ALJX 15. Following several additional continuances, a formal hearing was held on March 8, 2001. ALJX 19-25.

At the formal hearing, claimant's counsel stated that he continued to seek authorization, from both carriers, for a psychiatrist and a physiatrist, as well as certain disability benefits related to both work-related accidents. HT at 34-35. Wausau's counsel stated that it refused to authorize a psychiatrist for claimant as it believed that claimant's psychiatric condition is entirely related to the second accident, at which time Wausau was no longer the responsible carrier. HT at 36. In short, Wausau's controversion was based on its position that it had completely fulfilled its obligation for disability and medical benefits related to the July 6, 1992, accident. HT at 40. The administrative law judge held Wausau liable for additional disability and medical benefits.

The instant case is akin to *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). In *Gallagher*, the employer, as in the instant case, conceded that an informal conference was held, but contended that the issues on which claimant prevailed before the administrative law judge were not addressed at the informal conference. As employer did not offer any evidence of the substance of the district director's recommendation, and claimant obtained greater compensation than employer paid by virtue of the administrative law judge's decision, the Fifth Circuit held that employer is liable for claimant's attorney's fee pursuant to Section 28(b). Employer has put forth some evidence of the district director's initial recommendation. However, as that document is incomplete, it cannot be discerned as to what, if any, other issues were raised at that time. *See* n.6, *supra*. Thus, as in *Gallagher*, the record is not clear as to the recommendations made by the district director pursuant to the informal conference. It is, however, clear from the record that following the informal conference a number of issues, most importantly claimant's entitlement to additional disability and medical benefits related to the July 6, 1992, accident, remained in dispute requiring resolution before an administrative law judge, *see* HT at 34-40; Decision and Order at 2, and that the administrative law judge awarded additional benefits over those which were voluntarily paid by employer and Wausau. Thus, following an informal conference, claimant used the services of an attorney to successfully recover an award of additional compensation.[7] We therefore reject Wausau's

[7] We note, moreover, that employer and Wausau had ample opportunity for additional informal proceedings both prior to the case's initial referral and during the period of time that the case was pending before the district director as a result of

contention that the requirements of Section 28(b) were not met. *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). As the administrative law judge properly held Wausau liable for claimant's attorney's fee, *see id.; Caine,* 19 BRBS 180, and as Wausau does not contest the amount of the fee award, the administrative law judge's fee award is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order – Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Judge Chapman's remand order dated December 15, 1999. The record conclusively establishes that these issues could not be resolved informally and required findings by an administrative law judge. Employer and Wausau have thus waived their right to rely on the absence of an informal conference on specific issues in an attempt to absolve them of fee liability when they unsuccessfully contested claimant's claim at the administrative law judge level.