BRB No. 06-0673

H. T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KNIGHTS MARINE AND INDUSTRIAL SERVICES, INCORPORATED	)	DATE ISSUED: 05/22/2007
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Charles D. Lee, District Director, United States Department of Labor.

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

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 06-193024) of District Director Charles D. Lee 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant was injured during the course of his employment on January 28, 2004, and employer voluntarily began paying temporary total disability benefits as of February 3, 2004. Decision and Order at 2; Jt. Ex. 1; Tr. at 51-52. An informal conference was scheduled for July 9, 2004, and the claims examiner held a telephone call with claimant's counsel that day. On July 13, 2004, the claims examiner drafted a letter recommending the payment of benefits as claimant requested.[1] Cl. Ex. 23. The administrative law judge awarded claimant temporary total disability at a rate greater than that which employer had been paying, medical benefits, a Section 14(e), 33 U.S.C. §914(e), assessment and interest. In his decision awarding claimant's counsel an attorney's fee, the administrative law judge found that Section 28(b), 33 U.S.C. §928(b), applies because an informal conference had been held and a written recommendation had been made. Supp. Decision and Order at 4. Consequently, the administrative law judge held employer liable for claimant's attorney's fee pursuant to Section 28(b).

Following the administrative law judge's supplemental decision awarding claimant's counsel a fee, which was not appealed, claimant filed an application for an attorney's fee with the district director in the amount of $11,198.62, plus $200 expenses. The district director stated that he considered employer's objections, that claimant gained "substantially greater" compensation because of the attorney's services, and that employer's lack of participation in the informal conference "was a consequence of their own failures to make a good faith effort to do so, as noted in Judge Romero's order. . . ." Comp. Order at 1. Therefore, the district director awarded claimant's counsel the requested fee in the amount of $11,198.62, representing 52.5 hours of services at an hourly rate of $200, plus $698.62 in expenses. Comp. Order at 1-2. Employer appeals the district director's fee award, and claimant responds, urging affirmance.

Employer's argument is two-fold. First, employer argues that it is not liable for a fee under Section 28(b) because there was no informal conference. Alternatively, employer argues that the fee should be reduced pursuant to its objections, which the district director did not address specifically. In order for an employer to be liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), the United States Court of Appeals for the Fifth Circuit, wherein this case arises, has held that an informal conference must have been held, a written recommendation disposing of the controversy must have been made, employer must have rejected that recommendation, and claimant

[1]The letter recommended the payment of temporary total disability benefits at a rate of $731.91 per week based on an average weekly wage of $1,097.86, interest, and authorization and payment of costs for the proposed surgery. Cl. Ex. 23 at 4. The administrative law judge ultimately awarded benefits based on an average weekly wage of $1,081.08, resulting in a compensation rate of $720.72. Employer had paid benefits at rates of $257.70 and $716.63 per week.

must have used the services of an attorney to secure greater compensation than he was previously receiving. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997); *Andrepont v. Murphy Exploration & Production Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting).

Employer first contends that no informal conference was held in this case. Rather, employer argues that the claims examiner conducted an *ex parte* discussion on the telephone with claimant's counsel despite having been informed that employer's representative could not participate at the scheduled time. The claims examiner noted in his recommendation that the notice from employer/carrier that its representative could not participate in the conference as scheduled was untimely, and he declined to reschedule the conference. After conferring with claimant's counsel over the phone, and based on the written evidence submitted by the parties, the claims examiner drafted a letter recommending payment as claimant requested. Cl. Ex. 23. In his Order awarding an attorney's fee, the administrative law judge found that employer received notice of the informal conference and that it failed to provide evidence supporting its assertion that it did not receive this notice in a timely fashion or that it attempted in good faith to reschedule the conference. The administrative law judge found that the conversation between claimant's counsel and the claims examiner constituted an informal conference and that the claims examiner issued a recommendation by letter dated July 13, 2004. Supp. Decision and Order at 4. The district director relied on the administrative law judge's order in finding that an informal conference had been held. Comp. Order at 1.

Employer did not appeal the administrative law judge's fee award in which he found that an informal conference was held and a written recommendation was issued, and the district director did not err in relying on the administrative law judge's findings. Therefore, we affirm the district director's finding that employer is liable for claimant's attorney's fee. 33 U.S.C. §928(b); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); 20 C.F.R. §702.311.

Employer next argues that the district director erred in failing to reduce the fee according to its specific objections. Employer argues that it should not be held liable for over 50 hours of services which accrued prior to July 29, 2004, as it is liable only for a fee for services accruing 14 days after the district director's recommendations. Employer also disputes certain entries as being clerical and excessive, and it challenges the hourly rate as being excessive. We reject employer's assertion regarding its liability within 14 days of the issuance of the written recommendations. Its objection thereto need not occur

within 14 days; rather, if an employer objects to the written recommendations, it may, within 14 days, tender to the claimant what it believes is correct payment, giving the claimant the opportunity to accept the offer.[2] The 14-day requirement in Section 28(b) does not apply to the date an employer's liability for a fee commences. 33 U.S.C. §928(b); *see generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). We also reject employer's assertion that the fee should be reduced in accordance with its objections to the fee petition. Although the district director did not specifically address and reject each individual objection, his decision states that he took into account "the complexity of the case, the issues involved and the results obtained, [and] the actual necessary work performed" as well as the "objections filed[.]" Comp. Order at 1. The district director considered the objections and the applicable law and gave reasons for awarding the fee as requested. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); 20 C.F.R. §702.132. Employer has not shown the district director's award to be arbitrary, capricious or not in accordance with law. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Consequently, we reject employer's arguments and affirm the district director's fee award.

[2]Section 28(b) states in pertinent part:

> 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.

Accordingly, the district director's Compensation Order Award of Attorney's Fees is affirmed.

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