**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 24-0249

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| KATHY GRAHAM<br><br>Claimant-Petitioner<br><br>v.<br><br>DYNCORP INTERNATIONAL<br><br>and<br><br>ALLIED WORLD NATIONAL ASSURANCE COMPANY<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Respondent | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 04/24/2026<br><br>DECISION and ORDER |

Appeal of the Supplemental Decision Denying Attorney Fees of Patrick M. Rosenow, District Chief Administrative Law Judge, and the Order Denial of Attorney Fee Application of David Duhon, District Director, United States Department of Labor.

Brian E. Gillette and Jason Gillette (The Gillette Law Firm), Sugar Land, Texas, for Claimant.

John R. Walker (Schouest, Bamdas, Soshea, Ben Maier & Eastham, PLLC), Houston, Texas, for Employer and its Carrier.

Amanda Torres (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, JONES, and ULMER, Administrative Appeals Judges.

JONES and ULMER, Administrative Appeals Judges:

Claimant appeals District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Supplemental Decision Denying Attorney Fees (2018-LDA-1081) and District Director David A. Duhon's Order Denial of Attorney Fee Application (OWCP No. 08-314351), rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA). 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, based on an abuse of discretion, or not in accordance with law.[1] *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955-956 (9th Cir. 2007); *Roach v. N.Y. Protective Covering Co.*, 16 BRBS 114, 115 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272, 273 (1980).

Claimant sustained three work-related injuries while working with different employers. She settled claims for the first two injuries and was awarded benefits for the third. For the first work-related injury, Claimant entered into a Section 8(i) settlement agreement with AECOM on March 1, 2016, for a total of $55,000, $35,000 of which was allocated to her medical costs and $20,000 to her disability compensation.[2] Joint Exhibits

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the office of the district director who filed the ALJ's decision is located in Houston, Texas. 33 U.S.C. §921(c); *Glob. Linguist Sols., L.L.C. v. Abdelmeged*, 913 F.3d 921,922 (9th Cir. 2019); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47 (2011).

[2] On February 25, 2013, while working for AECOM, Claimant twisted her back when walking and falling on uneven gravel and rocks. Hearing Transcript (TR) at 23. On March 8, 2013, she filed a claim for compensation, OWCP No. 02-239986, against AECOM for injuries sustained to her lower back, legs, bilateral feet, bilateral ankles, and bilateral hips. Employer's Exhibit (EX 1) at 115-116. AECOM voluntarily paid Claimant temporary total disability (TTD) benefits from the end of March 2013 through September

(JXs) 5, 6; Employer's Exhibit (EX) 1 at 90. On January 31, 2017, Claimant settled her claim against Lockheed Martin for the second work-related injury in the amount of $100,000, $25,000 of which was allocated to her medical costs and $75,000 to her disability compensation.[3] JX 7 at 9; EX 2 at 1, 8, 10-23. Both settlement agreements also provided for Claimant's attorneys' fees and costs. JXs 5 at 8-9, 7 at 9; EX 1 at 90-91.

Claimant commenced work for Employer on February 23, 2018. Claimant's Exhibit (CX) 1 at 1. On March 8, 2018, while training for her position, she rolled her ankles while walking on rocks, and she sustained injuries to her knees, back, and body, experienced shortness of breath, and aggravated her pre-existing orthopedic conditions. JXs 1, 22. Employer voluntarily instituted temporary total disability (TTD) benefits on March 8, 2018, based on an average weekly wage (AWW) of $484.82. ALJ Decision and Order on the Merits (D&O) at 3; JX 4.

The parties stipulate that Claimant timely filed her claim for benefits under the Act. Decision and Order (D&O) at 2; TR at 9-10; *see* JX 1. However, a dispute arose regarding Claimant's medical treatment, so she requested an informal conference which was held on August 3, 2018. Emp.'s Resp. in Opp. to Award of Any Fees (Emp.'s Fee Pet. Resp.), EX D at 1-3 (unpaginated). At the informal conference, Claimant contended she was entitled to medical benefits for treatment of her back, as that treatment is causally related to her injury. *Id.* at 1-2 (unpaginated). Employer also sought a recommendation from the district director that it was entitled a credit pursuant to *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 520-521 (5th Cir. 1986), for compensation Claimant previously received, pursuant to Section 8(i) settlements with previous employers, for permanent partial disability to her knees and lower back.[4] *Id.* In an informal conference memorandum dated August 27,

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2013, based on an average weekly wage (AWW) of $1,365.66. Joint Exhibit (JX) 5 at 2; EX 1 at 119.

[3] On December 8, 2015, after Claimant was hired by Lockheed Martin, she was unloading her duffle bag at the airport in Bagram, and she sustained knee and back injuries when she fell off a pallet. JX 7 at 2; EX 2 at 11; TR at 28. On September 28, 2016, she filed a claim against Lockheed Martin for those injuries, OWCP No. 08-306980 and OALJ No. 2016-LDA-961, and she underwent bilateral knee arthroscopies on June 1, 2016, and lower back surgery in January 2017. JX 21 at 3, 9; EX 2 at 41; TR at 33-35. Lockheed Martin paid Claimant TTD benefits from January 2016 to January 2017, based on a minimum compensation rate of $351.50. EX 2 at 1.

[4] In *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986), the claimant sought compensation for successive, aggravating injuries to his leg, and the court accepted the Board's equitable credit doctrine, which was created to prevent claimants from

2018, the claims examiner recommended Employer pay Claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, which included treatment and physical therapy for Claimant's back. *Id.* at 3 (unpaginated). As for Employer's credit request, while noting Claimant received $75,000 in permanent disability compensation through settlement, and also acknowledging Employer "always has the right to claim credit for any amounts previously paid toward a specific scheduled injury," the claims examiner was "unable" to recommend a *Nash* credit at that time as the settlement contained no evidence of a previous impairment rating assigned to Claimant's knees and lower back or any indication as to what portion of the settlement funds were allocated for the scheduled injuries. *Id.* at 2 (unpaginated). Employer rejected the claims examiner's recommendations, and it did not authorize the requested medical benefits for Claimant's back treatment. Emp.'s Resp. Br. at 3.

Shortly thereafter, on September 21, 2018, the case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. D&O at 2. On November 12, 2018, Employer terminated its payment of TTD benefits on the grounds that Claimant's work-related conditions had reached maximum medical improvement (MMI), and she had been released to return to regular duty work. JX 4. In all, Employer voluntarily paid a total of $11,543.21 in TTD benefits from March 8, 2018, through November 12, 2018. *Id.*

At the OALJ hearing held on August 15, 2019, Claimant sought additional TTD benefits beyond the date they were terminated as well as medical benefits, and Employer again argued its entitlement to a *Nash* credit. Hearing Transcript (TR) at 11; D&O at 3. In his February 27, 2020 Decision and Order, the ALJ found Claimant was temporarily totally disabled as of March 3, 2018,[5] due to work-related injuries to her lower back and knees and her AWW at that time was $1,197. D&O at 24-25. However, as he found Claimant's back and bilateral knee conditions reached MMI without any permanent impairment or

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obtaining double recovery in situations involving aggravations of disabilities under the schedule, 33 U.S.C. §908(c)(1) – (19). Thus, in those situations, the *Nash* credit doctrine allows the employer to take a credit for the dollar amount paid to the claimant for a prior scheduled award against its liability for permanent partial disability benefits resulting from another injury to the same scheduled member. *Nash*, 782 F.2d at 520-521.

[5] The date of Claimant's injury is identified as March 8, 2018, on Employer's First Report of Injury or Illness (JX 2) as well as Claimant's Claim for Compensation (JX 1). However, at the formal hearing, Claimant's counsel indicated the actual date of injury was March 3, 2018 (TR at 8) and included this date as the stipulated date of injury in his Post-Hearing Brief (although Employer identified the date of injury as March 8 in its Post-Hearing Brief). The ALJ accepted the March 3 date of injury as a stipulation. D&O at 2.

residual disability on November 12, 2018, he concluded Employer's liability for both disability compensation and medical benefits ended as of that date. *Id.* at 24-25. While the ALJ awarded Employer a credit for any compensation benefits it had already paid pursuant to this claim, he determined "Employer is not entitled to any credit for amounts Claimant received by way of her two previous settlements." *Id.* at 25 n.52.

Claimant's attorneys submitted itemized fee petitions to the district director and the ALJ requesting an attorney's fee and costs under Section 28 of the Act, 33 U.S.C. §928.[6] On March 11, 2024, the ALJ denied Counsels' petitions for attorneys' fees. He found Section 28(a) of the Act, 33 U.S.C. §928(a), does not apply to this case, as Employer did not refuse to pay any benefits within thirty days of its receipt of the claim. ALJ Fee Order at 6. He also determined Section 28(b) of the Act, 33 U.S.C. §928(b), does not shift fees to Employer in this instance because the issues on which Claimant was successful were not discussed at the August 2018 informal conference and were not the subject of a written recommendation. *Id.* at 7. Accordingly, the ALJ denied both fee requests. *Id.*

On March 27, 2024, the district director also denied both fee requests, finding Claimant failed to meet the requirements of Section 28(a) or (b) of the Act. DD Fee Order at 2. He determined an attorney's fee may be assessed against an Employer pursuant to Section 28(a) or (b) only when the employer has controverted some aspect of the claim and the claimant successfully acquired an award that the employer contested, which was not the case here, as Claimant's attorneys were not successful in obtaining any benefits on behalf of Claimant after the controversion. *Id.*

On appeal, Claimant's counsel Gillette (Counsel) contends the ALJ and the district director erred in denying his fee petition.[7] Specifically, Counsel contends the ALJ and the

[6] Claimant initially engaged Attorney Gary Pitts from the firm of Pitts, Mills & Ratcliff to represent her. Shortly before the OALJ hearing, Attorney Pitts withdrew from representation, and on April 10, 2019, Attorney Jason Gillette of the Gillette Law Firm substituted in as Claimant's counsel. On March 9, 2020, Attorney Pitts filed a fee petition requesting fees and costs totaling $14,085.64. On March 10, 2020, Attorney Gillette filed a fee petition requesting fees and expenses of $59,931.50. On May 4, 2020, Employer filed oppositions to both fee petitions individually and an additional opposition to the award of any shifted fees.

[7] While Attorney Pitts filed a Notice of Appeal before the Board, he did not submit his own petition for review and brief. Our ultimate holding and the absence of an Employer challenge nullifies any question as to whether Attorney Gillette properly filed a fee before

district director erred in finding Section 28(b) of the Act does not apply in this case and asserts that all its criteria have been met. Counsel argues the district director issued a recommendation rejecting Employer's claim for a *Nash* credit, Claimant obtained a benefit related to this recommendation when the ALJ denied the credit, and Counsel-procured service on that issue resulted in a greater award of benefits than what Employer was willing to pay. Cl.'s Br. at 5-10 (unpaginated).[8]

The Director, Office of Workers' Compensation Programs (Director) responds, urging the Board to vacate the fee denials and remand the case with instructions to award a fee. The Director reasons that: 1) Claimant received a favorable recommendation regarding the *Nash* credit after the district director's informal conference; 2) Employer declined the recommendation and asserted the same point before the ALJ who also rejected this position; and 3) Claimant successfully persuaded the ALJ that Employer was not entitled to the credit it sought for the prior 8(i) settlement. Dir.'s Resp. Br. at 2. Employer responded to Counsel and the Director, urging affirmance of the fee orders.[9]

We agree with the conclusion, albeit on grounds different than those espoused by the ALJ, that Employer is not liable for an attorney's fee under Section 28(b). ALJ Fee Order at 7; DD Fee Order at 2. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(b) of the Act, 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

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the district director or whether we should address any of Attorney Pitts' concerns, despite his not filing a brief before the Board.

[8] As the parties do not challenge the findings of the ALJ and the district director that Section 28(a) of the Act is inapplicable in this case, we affirm them. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007); ALJ Fee Order at 6; DD Fee Order at 2.

[9] Employer also submitted, and the Director replied to, an additional brief citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), and *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999), to claim that the Director's position as contained in its brief is not entitled to agency deference. Fed. R. Civ. P 28(j). The Director asserts, and we agree, *Chevron U.S.A., Inc. v. Nat. Def. Council, Inc.*, 467 U.S. 837 (1984), as overturned by *Loper Bright*, is not implicated in this case as the Director did not ask for deference to his interpretation, and it was not the basis for his position in his response brief. Rather, the issue here is the proper interpretation of Section 28(b).

> which the employee may be entitled, the [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. 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.

33 U.S.C. §928(b). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this claim arises, has held the following are strict prerequisites to an employer's liability for an attorney's fee under Section 28(b): (1) the parties attend an informal conference; (2) the district director makes a written recommendation; (3) the employer refuses to accept the written recommendation; and (4) the claimant procures the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Rivera v. Dir., OWCP*, 22 F.4th 460, 465 (5th Cir. 2021); *Andrepont v. Murphy Expl. & Prod. Co*., 566 F.3d 415, 421 (5th Cir. 2009); *Pool Co. v. Cooper*, 274 F.3d 173, 186 (5th Cir. 2001); *Staftex Staffing v. Dir., OWCP* [*Loredo*], 237 F.3d 404, 409, *modified on reh'g on other grounds*, 237 F.3d 409 (5th Cir. 2000). Specifically, "[s]ection 928(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*." *Andrepont,* 566 F.3d at 419 (quoting *Staftex*, 237 F.3d at 409) (emphasis added); *FMC Corp. v. Perez*, 128 F.3d 908, 910 (5th Cir. 1997) ("an award of attorney's fees under section 928(b) is appropriate only if the dispute has been the subject of an informal conference with the Department of Labor."); *see* 33 U.S.C. §928(b); 20 C.F.R. §702.134(b). Additionally, the disputed issue must be resolved in the claimant's favor such that he obtained "greater than the amount" the employer believed he was entitled to. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 984-985 (5th Cir. 2010); *Savannah Mach. & Shipyard Co. v. Dir., OWCP*, 642 F.2d 887, 889-890 (5th Cir. 1981).

The facts of this case establish the first three criteria for fee-shifting under Section 28(b) have been met with respect to the *Nash* credit issue, leaving the sole question as whether Claimant met the fourth criterion. D&O at 2-3; Emp.'s Fee Pet. Resp. at 7; JX 3; Emp.'s Resp. Br. at 8; Emp.'s Post-Hearing Br. at 19-20; *see Anderson v. Associated Naval Architects,* 40 BRBS 57, 60-61 (2006); Cl.'s Br. at 9 (unpaginated); Dir.'s Resp. Br. at 2. That is, did Counsel's services with respect to the disputed issue achieve a greater award than what Employer was willing to pay after the written recommendation? *Rivera*, 22 F.4th

at 465; *Andrepont,* 566 F.3d at 421. We hold Claimant did not satisfy the fourth Section 28(b) criterion.[10]

Claimant asserts Counsel's entitlement to a Section 28(b) employer-paid fee rests on her purported success defeating Employer's entitlement to a credit under *Nash*. Cl.'s Br. at 9-10 (unpaginated). Claimant argues that if she had not prevailed on the *Nash* credit issue at the formal hearing before the ALJ, her award would have been reduced by the credit amount. Cl.'s Br. at 10 (unpaginated). We are not persuaded by her assertion. The *Nash* credit, which applies only to previously-awarded permanent partial disability (PPD) benefits for the same scheduled injury, cannot apply to the "greater award" Claimant actually received in this case, which was limited to the difference between TTD benefits paid from March 8 to November 12, 2018, based on an AWW of $484.82 and TTD benefits awarded from March 3 to November 12, 2018, based on an AWW of $1,197. 33 U.S.C. §28(b); D&O at 25; JX 4; *see Rivera,* 22 F.4th at 465; *Nash*, 782 F.2d at 520-521; *Myshka v. Elec. Boat Corp.*, 48 BRBS 79, 82 (2015). In fact, the very reason the *Nash* credit does not apply in this instance is not due to any efforts on Counsel's part but, rather, because Claimant did not obtain PPD benefits for her work-related knee injury. D&O at 25; Cl.'s Post-Hearing Br. at 15-18 (unpaginated); Cl.'s Post-Hearing Reply Br. at 12 (unpaginated). Stated differently, Employer is not entitled to a *Nash* credit because the ALJ's finding that Claimant's work-related aggravation injury to her knees reached MMI with no increased permanent impairment or residual disability rendered the application of such credit moot. Thus, Counsel has failed to explain how his Counsel's "work" on the credit issue resulted in a greater award than Employer sought to pay. *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 439 (1st Cir. 1998); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 908 (5th Cir. 1997); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65, 71 (1994); *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant may not just identify an alleged error without explaining how the "error to which [it] points could have made any difference").

In rendering our decision, we reject the Director's assertion that the three cases he cites support his argument that Claimant met all the criteria. Those decisions are distinguishable from the instant case and are not persuasive. Specifically, in *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985), the claimant succeeded in obtaining a

[10] Although the ALJ ultimately identified an earlier date of injury and calculated an increased AWW– thereby requiring Employer to pay additional benefits beyond what it voluntarily paid – there is no dispute that Claimant's success on these two issues is insufficient to satisfy Section 28(b)'s fourth prong because neither was the subject of an informal conference. *See Andrepont,* 566 F.3d at 419. There is also no dispute that Claimant did not acquire a greater benefit for further medical treatment for her back. D&O at 25.

continuing award of PPD benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).[11] *Kinness v. General Dynamics Corp.*, 25 BRBS 311 (1992), differs because it is not a Section 28(b) case.[12] Finally, in *E.P. Paup Co. v. Dir., OWCP* [*McDougall*], 999 F.2d 1341 (9th Cir. 1993), the claimant obtained additional compensation in the amount of the Section 3(e) credit improperly awarded to the employer.[13] In all three cases, the claimants were awarded continuing benefits. As the decisions the Director relies on are distinguishable from this case, we reject the Director's position that Claimant satisfied all elements of Section 28(b). Here, Claimant did not achieve a greater award due to any attorney services preventing a reduction of benefits via rejection of a *Nash* credit. Rather, the issue became moot when the ALJ denied PPD benefits, making the unique fact pattern for the Section 28(b) issue in this case entirely distinct from the Director's cited cases.

Based on the record, it is evident Claimant's attorney's services did not achieve a greater award than what Employer was willing to pay after rejection of the recommendation on the *Nash* credit issue. Consequently, Claimant did not meet the fourth criterion for application of Section 28(b) of the Act, and as the ALJ and the district director concluded, Counsel is not entitled to an employer-paid attorney's fee.

[11] In *Turney*, 17 BRBS at 238, the Board affirmed the fee award under Section 28(b) because, although the claimant would not receive the awarded benefits for several years due to the employer's overpayment of TTD benefits, the issue was in dispute, and the ALJ resolved the dispute in the claimant's favor. *Id.*

[12] In *Kinness*, 25 BRBS at 315-316, the employer was entitled to a Section 3(e) credit, 33 U.S.C. §903(e), but was held liable for an attorney's fee because the claimant obtained an inchoate right to greater compensation under the Act, and that constitutes a "successful prosecution" for purposes of Section 28(a). *Id.*

[13] In *E.P. Paup Co.*, 999 F.2d at 1354, the court held the employer was liable for an attorney's fee under Section 28(b) because, "by virtue of the modification proceedings, [the] claimant successfully obtained an inchoate right to additional compensation equivalent to the amount of the Section 3(e) credit [improperly] awarded to employer." *Id.*

Accordingly, we affirm the ALJ's Supplemental Decision Denying Attorney Fees and the district director's Order Denial of Attorney Fee Application.[14]

SO ORDERED.

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur in result only.

JONATHAN ROLFE
Administrative Appeals Judge

[14] In the event a party appeals the Board's decision in this case, which arises in the Fifth Circuit which requires appeals of the Board's Defense Base Act decisions be filed first with the appropriate United States District Court, the Board requests notification from the petitioners of any appeal filed, as the district courts often do not provide such notice to the Board.