BRB No. 08-0270

E.E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DANOS CUROLE MARINE CONTRACTOR	)	DATE ISSUED: 12/08/2008
	)	
	)	
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *E.E. v. Danos Curole Marine Contractor*, BRB No. 08-0270 (Sept. 22, 2008). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has not responded. Employer contends the Board erred in holding it liable for an attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b). Specifically, employer asserts that this case should follow the Board's recent holding in *K.C. v. Northrop Grumman Ship Systems, Inc.*, BRB No. 08-0210 (Sept. 10, 2008), as the facts are legally similar. We reject employer's contention, and we deny the motion for reconsideration.

In *K.C.*, the district director's memorandum following the informal conference stated that the parties were attempting to settle the claim and that "[c]urrent medical information should be provided to [the district director's] office" and that "[w]age information should be provided to this office and to Ms. Dulin prior to issuing recommendation with regard to average weekly wage." *Id.* at 5. Despite finding there was no written recommendation on the disputed matters, the administrative law judge nevertheless awarded counsel a fee payable by the employer under Section 28(b) reasoning that the employer failed to provide the requested wage records and, consequently, the employer did not have "clean hands," effectively sabotaging the district director's ability to render a written recommendation. *Id.* at 2, 4-5.

In this case, following the first informal conference, the district director stated:

> Mr. Mayes will revisit the wages earned by the EE for the six months worked for the ER prior to the injury. The parties will furnish the DOL with a copy of the wages to be place (sic) in the administrative file.
>
> ***
>
> If the parties are unable to resolve the disputed issues, enclosed are pre-hearing statements to be completed and returned within 21 days.

Cl's Brief at exh. C.[1] Following the second informal conference, the district director advised the parties to work together to resolve the average weekly wage and compensation rate issues by February 25, 2005.

Although, as employer asserts, the two cases are similar, there is a significant distinction: the memorandum in *K.C.* stated that no recommendation would be forthcoming until the requested information was provided. Here, although the second memorandum was more general and could be analogized to the memorandum in *K.C.*, in his first memorandum, the district director specifically directed employer to take certain action to resolve the average weekly wage issue and employer did not do so, despite its assurances that it would.[2] Moreover, even after the parties agreed to a higher average weekly wage, employer did not increase its payments. Significantly, in construing his own documentation in his fee award, the district director stated that he did, indeed, issue a recommendation which employer did not accept, and the Board did not err in stating that his findings on the matter are worthy of consideration. Because the facts of this case are distinguishable from those in *K.C.*, we will not disturb our prior decision.

[1]Mr. Mayes was employer/carrier's representative at the informal conference.

[2]Contrary to employer's contention, there was no error in rejecting the argument that the district director did not issue a "substantive" recommendation. The district director required specific, measurable, action by employer in his first memorandum, and that action was not taken.

Accordingly, employer's motion for reconsideration of the Board's decision in this case is denied. 20 C.F.R. §§801.301(c); 802.409.

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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