



BRB No. 17-0438

RAMON RIVERA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
AMERI-FORCE)	DATE ISSUED: <u>Feb. 28, 2018</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney’s Fees of David A. Duhon, District Director United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Edward S. Johnson and Christopher L. Williams (Johnson Yacoubian & Paysse), New Orleans, Louisiana, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney’s Fees 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 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. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim for a hearing loss. Within 30 days of receipt of the notice of the claim, employer paid claimant \$292.90, representing two weeks of benefits based on an average weekly wage of \$212.17; it then filed a notice of controversion. Cl. B, C; Emp. C at J; Emp. D at exhs. B, C. Following an informal conference in July 2016,¹ the claims examiner, Mr. Jones, recommended in writing on July 28, 2016, that claimant established a prima facie case and employer is the responsible employer. Cl. G; Emp. C at exh. K. Additionally, Mr. Jones recommended that the parties “engage in open discussions to reach an agreement to resolve the issues[.]” *Id.* In response, on August 5, 2016, employer informed Mr. Jones it accepted its designation as the responsible employer and would discuss average weekly wage with claimant; if the parties were unable to stipulate to an average weekly wage, employer agreed to supply documentation to the district director’s office regarding its position on the matter. Employer also informed Mr. Jones that it had scheduled a medical examination for claimant on August 23, 2016, and asked him to wait until the results were received before issuing additional recommendations. Emp. E.

Mr. Albares, another claims examiner, issued a letter dated August 24, 2016, informing the parties he was now overseeing the claim. Cl. J; Emp. C at exh. L. In the letter, he recommended that employer is liable for claimant’s 35.31 percent hearing loss and that claimant’s average weekly wage should include his per diem payments. *Id.* Following additional communication with the parties regarding the August 23 medical examination results and claimant’s average weekly wage, Mr. Albares issued a supplemental recommendation on September 7, 2016, wherein he stated he would average the results of claimant’s and employer’s audiograms. Therefore, he recommended employer pay claimant \$24,755.46 in disability benefits for a 28.16 percent hearing loss based on an average weekly wage of \$659.33.² Cl. M; Emp. C at exh. O. On September 12, 2016, in an email to claimant’s counsel, employer offered to settle the claim for \$25,151.05 in disability benefits and \$5,000 for medical treatment, contingent upon counsel’s fee being paid via a lien against claimant’s benefits. Cl. N; Emp. C at exh. P. In a letter dated September 13, 2016, employer reiterated the offer, acknowledged that the correct impairment average is 28.61 percent, not 28.16 percent, and stated it would pay the \$24,755.46 per Mr. Albares’s recommendation if the fee

¹ The issues were identified as average weekly wage and responsible employer. Claimant asserted entitlement to permanent partial disability benefits for a work-related hearing loss of 35.31 percent and contended his average weekly wage was \$1,027.37 (which included per diem payments). Employer stated that discovery was not complete on the responsible employer issue and that claimant’s average weekly wage was \$212.17 (which excluded per diem payments and on which it based the initial compensation payment). Cl. G; Emp. C at exh. K.

² Mr. Albares based his average weekly wage calculation on claimant’s earnings during the 52 weeks prior to his last date of exposure, June 28, 2009. Emp. C at exh O.

contingency was rejected. Cl. O; Emp. C at exh. Q. In response, claimant asked Mr. Albares to issue a corrected written recommendation because of the impairment percentage error. Emp. C at exh. R. A Notice of Final Payment dated September 16, 2016, indicates employer paid claimant \$24,755.46. Cl. P; Emp. C at exh. T. On September 30, 2016, Mr. Albares issued a recommendation with the corrected percentage of hearing loss, and a Notice of Final Payment dated October 6, 2016, indicates employer paid claimant \$25,151.05 pursuant to the corrected recommendation. Emp. C at exhs. U-V.

On November 18, 2016, claimant's counsel filed a fee petition for work performed before the district director, requesting a total of \$8,153. Emp. D. Employer objected, arguing that neither Section 28(a) nor 28(b) is applicable and that counsel's fee must be obtained as a lien against claimant's benefits pursuant to Section 28(c). 33 U.S.C. §928(a), (b), (c); Emp. C. The district director found that Section 28(b) applies because Mr. Albares's letter dated August 24, 2016, was a recommendation for employer to pay claimant benefits based on an average weekly wage which included claimant's per diem payments. This letter, the district director stated, triggered employer's obligation to pay benefits because employer had the information it needed to calculate the benefits due. Because employer did not make a payment until September 16, 2016, which was not within 14 days after the August 24 recommendation, the district director found the Section 28(b) criteria were met. The district director awarded counsel the fee requested, payable by employer.

Employer appeals the district director's fee award, and claimant's counsel responds, urging affirmance. Employer filed a reply brief. Employer contends it did not reject the district director's written recommendation and that Section 28(b) is not satisfied. It asserts that the August 24 communication was not a "recommendation" sufficient to trigger its obligation to pay compensation, and, even if it was sufficient, the September 7 written recommendation, with which it timely complied, superseded the August 24 letter.

Section 28(b) states:

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, 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) (emphasis added); *see also* 20 C.F.R. §702.316. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the following are prerequisites to an employer's liability for an attorney's fee under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

We need not address employer's contention that the August 24 communication is insufficient to constitute a "written recommendation" under Section 28(b).³ Rather, we agree with employer that, in any event, the September 7 written recommendation superseded the August 24 communication. Pursuant to Section 28(b), if an employer refuses the written recommendation, it must pay or tender to claimant the amount it believes he is entitled to within 14 days of receipt of the written recommendation. If an employer accepts the recommendation, then it pays the amount set forth in the recommendation. 33 U.S.C. §928(b). Here, employer asserts, and there appears to be no dispute, that it received the August 24 letter on August 29. *See* 20 C.F.R. §§702.134(b), 702.316. Within the 14-day period after employer's receipt of the August 24 letter, on September 7, Mr. Albares issued a new recommendation which specified the average weekly wage, a different percentage of hearing loss than that specified in the August 24 letter, and the total payment (weekly or lump sum) for which employer is liable. Cl. M; Emp. C at exh. O. Because the more specific September 7 recommendation was issued prior to the expiration of the original 14-day period, it rendered the August 24 "recommendation" moot. A new 14-day period commenced upon employer's receipt of the September 7 recommendation. 20 C.F.R. §§702.134(b), 702.316.

Employer accepted the September 7 recommendation and, within 14 days of receipt of the recommendation, paid claimant benefits on September 16. Thereafter, employer also timely accepted Mr. Albares's September 30 corrected recommendation by

³ In this respect, employer contends the August 24 letter does not recommend that employer pay benefits based on a specific average weekly wage or compensation rate.

paying claimant the adjusted amount on October 6. Cl. P; Emp. C at exhs. T, U, V. As employer did not refuse the September 7 recommendation, one of the criteria for fee liability under Section 28(b) has not been satisfied. *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). Therefore, we reverse the district director's fee award payable by employer.

Accordingly, the district director's Compensation Order Award of Attorney's Fees is reversed.⁴

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ Because Section 28(a), (b) is inapplicable, claimant's counsel may be entitled to a fee payable by claimant pursuant to Section 28(c), 33 U.S.C. §928(c), if he files a fee petition so requesting. 20 C.F.R. §702.132(a).