BRB No. 10-0633

BRYAN AVALOS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. JOINER, L.L.C.	)	DATE ISSUED: 07/27/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and the Supplemental Decision and Order Denying Reconsideration and Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher R. Schwartz (Law Office of Christopher R. Schwartz), Metairie, Louisiana, for claimant.

Edward S. Johnson and Gavin H. Guillot (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Supplemental Decision and Order Denying Reconsideration and Awarding Attorney's Fees (2009-LHC-0566) of Administrative Law Judge C. Richard Avery 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33

U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a yard hand, injured his back on March 30, 2005, while bending over to pick up tools. Employer commenced voluntary payments of temporary total disability and medical benefits to claimant. Claimant returned to full-time, albeit light-duty, work with employer on May 23, 2005, with no loss of wages, and employer, at that time, ceased its payments of temporary total disability benefits. On April 25, 2006, claimant underwent a discectomy. Employer paid for this procedure and reinstated payment of temporary total disability benefits during claimant's period of recovery. In May 2007, claimant returned to work. Employer ceased its payments of temporary total disability benefits, but authorized claimant's treatment with Dr. Hubble, a pain specialist. Claimant subsequently sought treatment with a number of pain management specialists.

On November 10, 2008, claimant requested an informal conference regarding his medical treatment. Following a January 15, 2009, informal conference, the district director issued a written memorandum wherein it was recommended that Dr. Steck be recognized as claimant's treating physician and Dr. Schlosser be recognized as claimant's pain management care provider. On January 26, 2009, claimant filed an LS-18, Pre-Hearing Statement, form requesting that a formal hearing be scheduled and listing the issue to be presented as "medical treatment." Claimant continued to seek pain management treatment with Dr. Schlosser; however, claimant then apparently transferred his care to respectively, Dr. Toomer, Dr. Richter, Dr. Schlosser and, finally, Dr. Sudderth. On May 3, 2010, the administrative law judge issued an Order remanding the case to the district director for implementation of the stipulations agreed to by the parties concerning employer's liability for various medical treatment.

On August 20, 2009, claimant's counsel submitted a petition to the administrative law judge requesting an attorney's fee of $4,637.50, representing 18.55 hours at $250 per hour, plus costs of $300. Employer filed objections to the fee petition, arguing that because it complied with the district director's written recommendations following the informal conference, it is not liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an attorney's fee of $2,790, representing 13.95 hours at $200 per hour, plus the requested costs of $300, payable by employer. The administrative law judge rejected employer's contention that it is not liable for an attorney's fee since, he found, employer did not stipulate to the recommendations made by the district director until after the case was transferred to the Office of Administrative Law Judges.

Employer sought reconsideration of the administrative law judge's Order, and claimant's counsel sought an additional fee of $2,960, representing 14.8 hours of services rendered at an hourly rate of $200. In a Supplemental Decision and Order Denying Reconsideration, the administrative law judge denied employer's motion for reconsideration and awarded claimant's attorney an additional fee of $600, representing 3 hours of services at an hourly rate of $200.

On appeal, employer challenges the administrative law judge's determination that it is liable for an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. Claimant responds, urging affirmance.

Pursuant to Section 28(b), 33 U.S.C. §928(b), when an employer timely and voluntarily pays or tenders benefits as here, and thereafter a controversy arises over additional compensation due claimant, 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.[1] *See Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has enumerated three criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; and (3) the employer's refusal of the

[1]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, 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.

recommendation.[2] *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), *see also Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *FMC Corp. v. Perez*, 128 F.3d 908, 909-911, 31 BRBS 162, 163(CRT) (5th Cir. 1997) (stating Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by "accepting the . . . Commissioner's recommendations"). Thus, if employer timely pays all benefits due without resort to formal proceedings, it may not be held liable for claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164(CRT).

In this case, employer asserted, in the objections to claimant's counsel's fee petition that it filed with the administrative law judge, that since it had accepted the district director's recommendations after the informal conference, it could not be held liable for a fee under Section 28(b). In support of its position, employer attached to its objections and its Motion for Reconsideration documents which, it averred, establish that no disputes remained between the parties following the informal conference. Therefore, employer contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, as it accepted the recommendations of the district director regarding the medical treatment due claimant for his work-related injury. Claimant, in response, argues that the administrative law judge properly held employer liable for a fee since employer did not timely provide his requested treatment or authorize claimant's treatment with Dr. Schlosser.

We agree with employer that the administrative law judge's finding that employer is liable for claimant's counsel's fee cannot be affirmed since the administrative law judge applied an incorrect standard when addressing the issue of whether employer timely accepted the recommendations of the district director following the informal conference. In this regard, the administrative law judge held employer liable for claimant's counsel's fee because "Employer/Carrier did not stipulate to the [district director's] recommendations until the claim had been brought before this office and several months of discovery had elapsed." Supp. Decision and Order at 3. On employer's motion for reconsideration, the administrative law judge reiterated this finding, stating that employer is liable for counsel's fee "due to Employer/Carrier's counsel's considerable delay in agreeing in writing to the recommendations resulting from the Informal Conference held on January 15, 2009." Supp. Decision and Order Denying Recon. at 2.

[2]In addition, claimant must obtain an award of benefits greater than that paid or tendered by employer. *See, e.g., Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001).

The administrative law judge's rationale is not supported by the statute.[3] Section 28(b) of the Act does not contain any requirement that an employer or carrier stipulate, or agree in writing, to the recommendations issued following an informal conference. 33 U.S.C. §928(b); *see* 20 C.F.R. §702.134(b). Rather, Section 28(b) states that an employer or carrier will be liable for a fee if it refuses to accept the written recommendation and claimant thereafter obtains greater compensation. *See Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT). Accordingly, as the Act does not require written acceptance of the recommendations following an informal conference, we vacate the administrative law judge's determination that employer is liable for claimant's counsel's fee, since that determination is predicated solely upon the date employer accepted in writing the recommendations of the district director.

Employer contends that it provided documentation that establishes it timely accepted the recommendations of the district director following the informal conference. Specifically, employer asserts that following the issuance of the district director's recommendations it promptly paid claimant's outstanding medical charges and timely authorized claimant's continuing pain management treatment. Consequently, employer asserts that its actions establish that it timely accepted all of the district director's recommendations and that, therefore, it cannot be held liable for counsel's fee since there were no disputes in existence between the parties following the informal conference. *Cf. Carey v. Ornet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997). Claimant, in response, disputes employer's recitation of its actions following the informal conference. The administrative law judge did not address the documentation presented by employer or make findings of fact but, rather, based his decision solely on the date employer stipulated to its liability for medical benefits. On remand therefore, the administrative law judge must address the evidence in order to determine if, following the informal conference, employer, in fact, refused the written recommendations, and whether claimant thereafter obtained greater compensation than employer paid or tendered.[4] *See id.; Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001). If these two

[3]Nor is there any support in case law for this proposition.

[4]Employer asserts that any delay in the authorization of medical care or the payment of outstanding medical charges was the result of claimant's failure to keep it informed of his ongoing medical treatment, or to request a change in physician from his authorized provider. Employer's liability for an attorney's fee in this case cannot be predicated on medical treatment by physicians other than Dr. Steck and Dr. Schlosser, as the district director's recommendation was limited to these two physicians. *See 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); *see also R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

criteria are not satisfied, employer cannot be held liable for claimant's fee pursuant to Section 28(b).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Supplemental Decision and Order Denying Reconsideration and Awarding Attorney's Fees are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge