

W.J.) BRB No. 08-0848
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 Claimant-Petitioner)
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 v.)
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 NORTHROP GRUMMAN SHIP) DATE ISSUED: 06/29/2009
 SYSTEMS, INCORPORATED)
)
 Self-Insured)
 Employer-Respondent)
)

W.J.) BRB No. 09-0116
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 Claimant-Respondent)
)
 v.)
)
 NORTHROP GRUMMAN SHIP)
 SYSTEMS, INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeals of the Decision and Order, the Supplemental Decision and Order Ruling on Motion for Reconsideration, and the Supplemental Decision and Order Denying Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, and the Compensation Order – Award of Attorney’s Fees of David A. Duhon, District Director, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Supplemental Decision and Order Ruling on Motion for Reconsideration, and the Supplemental Decision and Order Denying Attorney Fees (2007-LHC-1256) of Administrative Law Judge Patrick M. Rosenow, and employer appeals the Compensation Order – Award of Attorney’s Fees of District Director David A. Duhon (No. 07-168382) 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).¹ 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). 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); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back while working for employer in September 2003 and has been unable to return to his usual job. Employer voluntarily paid temporary total disability benefits until January 4, 2006, when it began paying temporary partial disability benefits, which it paid until August 20, 2006, based on an average weekly wage of \$992.65. Employer did not pay benefits after August 20, 2006, because it offered claimant, and he declined, alternate employment at his pre-injury pay level. Jt. Ex. 1; Cl. Ex. 20; Emp. Ex. 18.

The administrative law judge found that claimant’s average weekly wage was \$1,118.70 and, thus, that employer had underpaid benefits. Additionally, the administrative law judge found that employer established the availability of suitable alternate employment paying \$7 per hour, retroactive to the date of maximum medical improvement, September 15, 2005, and he awarded claimant permanent partial disability benefits from that date with benefits decreasing as of August 21, 2006, when employer offered suitable alternate employment at its facility at a rate slightly lower than claimant’s pre-injury earnings. Decision and Order at 27-29. The administrative law judge denied claimant’s motion for reconsideration. Claimant appeals, challenging the finding that employer established the availability of suitable alternate employment. Alternatively, claimant contends the administrative law judge did not properly adjust the alternate employment wages for comparison with claimant’s pre-injury earnings and that

¹In an Order dated May 4, 2009, the Board granted claimant’s motion to consolidate these appeals for a decision.

he erred in finding suitable alternate employment retroactively available. Employer responds, urging affirmance. BRB No. 08-0848.

Subsequently, claimant filed fee petitions with both the district director and the administrative law judge. Before the district director, claimant sought an attorney's fee of \$12,164, representing 53.5 hours at a rate of \$225 per hour. Employer filed objections to the hours and hourly rate, and to its liability for a fee. The district director found that Section 28(b) of the Act, 33 U.S.C. §928(b), applies and that there was a recommendation made with which employer did not comply. He denied all time requested before September 1, 2006, reduced other items pursuant to employer's objections, and awarded a total fee of \$8,367.43, representing 36.625 hours at a rate of \$225 per hour, plus \$126.80 in expenses. Comp. Order at 5. Employer challenges the fee award. Claimant responds, urging affirmance. BRB No. 09-0116.

Before the administrative law judge, claimant sought an attorney's fee of \$33,639.21, representing 136 hours at an hourly rate of \$225, plus \$3,039.21 in expenses. Employer filed numerous objections including challenges to the hours, the hourly rate and its liability for a fee. The administrative law judge determined that Section 28(b) applies and that the requirements for employer liability were not satisfied. Therefore, the administrative law judge denied the request for a fee. Claimant appeals the denial of a fee, and employer responds, urging affirmance. BRB No. 08-848S.

Suitable Alternate Employment

Claimant first contends the administrative law judge erred in finding suitable alternate employment established because he failed to consider claimant's educational deficits and to compare the jobs duties of the identified jobs with claimant's physical and mental abilities. Alternatively, claimant contends the administrative law judge erred in failing to adjust his post-injury wage-earning capacity downward by the percentage change in the national average weekly wage since the date of injury, and he erred in finding suitable alternate employment retroactively available on the date of maximum medical improvement.

In this case, claimant's condition reached maximum medical improvement on September 15, 2005, and his treating physician, Dr. Graham, concluded that claimant can return to light-duty work. Pursuant to the July 18, 2005, functional capacity evaluation, Dr. Graham stated that claimant is limited to lifting, carrying and pushing up to 20 pounds occasionally and ten pounds frequently, and he may sit and stand as needed. Cl. Ex. 11; Emp. Ex. 14. In September 2006, Dr. Graham amended the restrictions to include permission to take breaks as needed, change sitting and standing positions every 15 minutes, use lumbar support when sitting, and walk no more than 200 feet

continuously. Cl. Exs. 8, 10-11; Emp. Ex. 14. The administrative law judge found that these are claimant's physical limitations.² Decision and Order at 27-28.

As it is undisputed that claimant cannot return to his usual work, employer presented evidence of alternate employment for claimant. Mr. Sanders, employer's vocational expert, reported on December 19, 2005, that he found three types of positions he believed were suitable for claimant: a sandwich route salesman, a cashier at a gas station, and a security guard. On December 20, 2005, he reported that there were two positions that were open as of September 21, 2005, that claimant could have performed: a car wash cashier and a security guard. Mr. Sanders stated that claimant was at an age where he was considering retirement and it was questionable whether he would pursue entry-level employment. Emp. Ex. 17. In addition to these jobs, employer offered claimant a temporary job and then a permanent job at its facility in August 2006, paying at or near the level of his pre-injury wages. Emp. Ex. 18. Claimant initially reported to employer's facility and engaged in temporary employment for approximately two weeks. Thereafter, employer offered claimant permanent employment, which claimant said he would consider while he took vacation.³ After extending his vacation, claimant decided he could not perform the duties of the job, and he retired from employment. Tr. at 191-193. Both Mr. Sanders and Mr. Walker, a DOL-appointed vocational expert, concluded that the positions offered by employer were within claimant's restrictions. Emp. Exs. 17, 19. Mr. Walker further stated that it could not be determined whether claimant was able to sustain the activity necessary to perform the work because he never reported to the job. Emp. Ex. 19 at 16. Claimant's expert, Ms. Hutchins, concluded that, in light of his limited education, physical restrictions, and age, claimant is incapable of returning to any employment. Cl. Ex. 18. Claimant opted for retirement in October 2006. The administrative law judge credited the opinions of Dr. Graham, Mr. Sanders, and Mr. Walker over that of Ms. Hutchins. He concluded that the security guard and cashier positions available in 2005, as well as the positions employer offered in 2006, were suitable for claimant and that claimant was not diligent in seeking post-injury

²Claimant argues that he also needs to lie down frequently during the day due to pain and that his medications make him unable to work. The administrative law judge rationally rejected these complaints of pain, fatigue and medication side effects in his decision on reconsideration because there is no medical evidence to support them. Decision and Order on Recon. at 3; *see* Decision and Order at 27-28.

³Employer provided claimant temporary light-duty work as the supervisor of the retention/maintenance crew and permanent sedentary work as the second shift general foreman in the sheet metal shop. Both positions had minimal lifting requirements with the ability to alternately sit, stand or walk. Emp. Exs. 18-19.

employment. Accordingly, the administrative law judge found that claimant was only partially disabled. Decision and Order at 22-26, 28.

In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, as here, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether work is realistically available to and suitable for the claimant. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The employer need not establish the precise nature of specific jobs, but there must be sufficient information to determine whether the job is within the claimant's capabilities. *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT). Although the administrative law judge must compare the duties of the positions with the claimant's restrictions, *LaRosa v. King & Co.*, 40 BRBS 29 (2006); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986), he may rely on a vocational consultant's opinion that jobs are within the claimant's credited restrictions. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

We reject claimant's contention that the administrative law judge erred in finding suitable alternate employment available. There is substantial evidence of record establishing that employer presented jobs within claimant's physical restrictions – security guard jobs, cashier positions, and the supervisory jobs at its facility – and it was rational for the administrative law judge to credit the opinions of Mr. Sanders and Mr. Walker that these jobs were suitable. Additionally, the administrative law judge rejected claimant's assertions that his lack of educational or mental skills prevents him from performing these jobs. The administrative law judge acknowledged that claimant stopped school after ninth grade and that he has a lower level of reading, math and spelling skills; however, he also noted that claimant worked for employer for nearly 30 years in both labor and supervisory capacities and proved capable of learning employer's paperwork requirements while working on the job. Decision and Order at 8-9; Decision and Order on Recon. at 3. Consequently, the administrative law judge concluded that claimant is not incapable of learning the duties of any of the jobs identified. Decision and Order at 27 n.65. Therefore, we affirm the administrative law judge's determination that employer has presented substantial evidence of suitable alternate employment. *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT).

As we have affirmed the finding that employer presented evidence of suitable alternate employment, we now address claimant's alternative arguments. Claimant contends the administrative law judge erred in failing to adjust wages from the alternate employment downward to allow for a comparison with claimant's average weekly wage at the time of his injury. Claimant also contends the administrative law judge erred in finding suitable alternate employment available retroactively to the date his condition reached maximum medical improvement. We agree.

In order to determine a claimant's post-injury wage-earning capacity, post-injury wages must be adjusted to reflect their value at the time of the claimant's injury for comparison with his average weekly wage. *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). The percentage change in the national average weekly wage should be applied to adjust post-injury wages downward when the actual wages paid for the alternate work at that time are unknown. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). In this case, the administrative law judge stated that employer should pay claimant benefits based on his average weekly wage of \$1,118.70 and his post-injury wage-earning capacities of \$280 and \$1,025.56, respectively, "(adjusted for the percentage increase in the national average weekly wage)." Decision and Order at 29. In his decision on reconsideration, the administrative law judge stated that the percentage of change of the national average weekly wage was taken into consideration and that the district director can make the calculations. Order on Recon. at 3. Because the administrative law judge must render a decision involving a specific dollar amount for employer to pay claimant, see *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), we remand the case for him to make these calculations. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

Additionally, it is well-settled that a claimant is permanently disabled as of the date of maximum medical improvement and partially disabled as of the date suitable alternate employment is shown to be available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.). An employer may establish retroactively that suitable alternate employment was available as of the date of maximum medical improvement. *Rinaldi*, 25 BRBS 128. In this case, the administrative law judge concluded that suitable alternate employment was available as of the date of maximum medical improvement because he found that employer demonstrated that the security guard and car wash cashier positions were "available on or around" September 15, 2005. Decision and Order on Recon. at 2; Decision and Order at 28; Emp. Ex. 17. Contrary to the administrative law judge's finding, the record reveals that employer's expert presented evidence of alternate employment available as of December 19, 2005, and retroactive to September 21, 2005. Emp. Ex. 17. No evidence established that suitable

alternate employment was available as of September 15, 2005. Accordingly, on remand, the administrative law judge must determine when alternate employment, demonstrably within claimant's restrictions, became available to claimant; he is entitled to total disability benefits until that date and partial disability benefits thereafter. *La Rosa*, 40 BRBS 29; *Stratton*, 35 BRBS 1; *Rinaldi*, 25 BRBS 128.

Attorney's Fee

Next, claimant challenges the administrative law judge's denial of an employer-paid attorney's fee; employer appeals the district director's order holding it liable for an attorney's fee, and it challenges the amount of the fee awarded. Claimant argues that the administrative law judge erred in denying a fee payable by employer because he obtained additional benefits following employer's refusal to comply with the district director's recommendation. Employer argues that the district director did not make a written recommendation and that, if he did, it did not refuse the recommendation.

Section 28(b) states:

If the employer or carrier pays or tenders payment of compensation without an award ... and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] 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 ... shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b) (emphasis added).⁴ Section 702.316 of the regulations provides that, at the conclusion of an informal conference, the district director:

⁴Employer voluntarily paid benefits from January 29, 2004, through August 20, 2006. Cl. Exs. 3-4; Emp. Exs. 2-3; Jt. Ex. 1. Claimant filed a claim for benefits on

shall evaluate all evidence available to him or her, and after such evaluation *shall prepare a memorandum of conference setting forth* all outstanding issues, such facts or allegation as appear material and *his or her recommendations and rationale for resolution of such issues.*

20 C.F.R. §702.316 (emphasis added).

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit enumerated the following 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 recommendation. *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); *Andrepont v. Murphy Exploration & Production Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, ___ F.3d ___ (5th Cir. Mar. 17, 2009) 2009 WL 1124246. Pursuant to the Act, a claimant must also have obtained greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b); *see also Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT). The parties' appeals raise the issues of whether the district director issued a recommendation and whether employer refused the recommendation.

In this case, an informal conference was held in March 2007. The memorandum identified the disputed issues as average weekly wage and the nature and extent of claimant's disability. The district director then stated:

The employer has advised that daily wage records may not be available. It (sic) they do not become available, it is recommended that average weekly wage be calculated based on gross earning of \$51,617.80.

August 4, 2006, and the district director sent notification to employer on August 9, 2006. Cl. Exs. 1-2; Emp. Exs. 4-5. Prior to receiving notification of the claim, employer offered claimant a job at its facility on August 8, 2006. When claimant failed to report by August 21, 2006, employer terminated benefits. Cl. Exs. 4, 20; Emp. Exs. 3, 6, 18. Thus, employer was paying benefits at the time claimant filed his claim, and for a short period thereafter, and Section 28(b) rather than Section 28(a) potentially applies in this case. *Andrepont v. Murphy Exploration & Production Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'd*, ___ F.3d ___ (5th Cir. Mar. 17, 2009) 2009 WL 1124246.

Cl. Ex. 15; Emp. Ex. 8. He also recommended that the parties attempt an amicable resolution. *Id.* The case was transferred to the Office of Administrative Law Judges in April 2007, and employer submitted the aforementioned wage records in November 2007. Based on those records, the administrative law judge found an increased average weekly wage and awarded claimant additional as well as continuing benefits. Decision and Order at 29.

Based on these facts, the district director awarded claimant an employer-paid attorney's fee, stating:

[C]learly the Memorandum of Informal Conference shows that there *was* a recommendation to base the average weekly wage calculation on gross earnings of \$51,617.80 which was in large part due to the lack of wage information provided by the employer. Given the employer's refusal or inability to produce wage records required to properly calculate the average weekly wage in this case, I cannot find that the employer complied with the recommendation(s) of this office to shield it from further liability for attorney fees.

Comp. Order at 4 (emphasis in original). The administrative law judge, however, denied an employer-paid fee, stating:

The real question is whether Employer complied with a written recommendation of the hearing examiner. Implicit in her recommendation was that Employer provide Claimant with wage records, which it eventually did. However, there was no recommendation as to average weekly wage in light of those records, and Employer complied with the fallback recommended alternative figure of \$51,617.80.

The Board of Review recently faced this issue in a case with the same counsel. It noted that Employer's delay or failure in providing wage information was moot in the absence of a written recommendation addressing the nature and extent of Claimant's disability. While there was a restatement of the medical and vocational reports, there was no written recommendation specifically addressing the nature and extent of Claimant's disability in this case and setting forth the parties' obligations in light of that recommendation. Claimant's counsel has therefore failed to meet the pre-requisite for approval of her petition.

Supp. Decision and Order at 3-4 (citing *K.C. v. Northrop Grumman Ship Systems, Inc.*, BRB No. 08-0210 (Sept. 10, 2008) (unpubl.)).⁵

The district director is charged with making a recommendation aimed at resolving the disputed issues. 20 C.F.R. §702.316. On the facts of this case, the district director's finding that he issued a recommendation is entitled to greater consideration because he was construing his own documentation. Indeed, the administrative law judge agreed that providing the wage records was implicit in the district director's recommendation and that employer later provided those records, but not until after the case had been referred to the Office of Administrative Law Judges. The district director's recommendation, which required that employer take action to resolve the disputed issue, accords with the Act. *Staflex Staffing*, 237 F.3d at 410, 34 BRBS at 106(CRT). As the district director issued a written recommendation, and as employer rejected the recommendation by failing to provide the wage reports in a timely manner, requiring the case to proceed before the administrative law judge, the elements of Section 28(b) have been satisfied: there was an informal conference with average weekly wage as an issue, a recommendation to take action on the average weekly wage issue, failure to comply with the recommendation in a timely manner,⁶ and an award of additional benefits by the administrative law judge based on the higher average weekly wage. Thus, the district director properly found that claimant is entitled to an attorney's fee payable by employer pursuant to Section 28(b). *Staflex Staffing*, 237 F.2d at 410, 34 BRBS at 105-106(CRT). The administrative law judge's denial of an attorney's fee is reversed, and the case is remanded to him for the award of a reasonable attorney's fee payable by employer.⁷ 20 C.F.R. §702.132.

As we have affirmed the district director's finding that employer is liable for a fee, we must address employer's contention that the district director erred in not reducing the fee further due to claimant's limited success. In assessing the amount of the fee, the district director disapproved over 16 hours of the time requested, reducing the fee from \$12,164 to \$8,367. The district director considered, and rationally rejected, employer's

⁵*K.C.* is distinguishable, however, because in that case the district director did not issue a written recommendation.

⁶As claimant asserts, *Andrepoint*, 41 BRBS 73, is distinguishable. In *Andrepoint*, there was no rejection of the recommendation, as the district director recommended that the employer cease paying benefits, and the employer complied.

⁷In light of our decision, claimant's argument that he is entitled to an employer-paid fee pursuant to Rule 26 and/or Rule 37 of the Federal Rules of Civil Procedure is moot. See *R.S. v. Virginia Int'l Terminals*, 42 BRBS 11 (2008).

request for a further 70 percent reduction due to claimant's limited success. Contrary to employer's assertion, claimant was fully successful in obtaining an increased average weekly wage resulting in an award of additional, continuing, benefits. Therefore, we reject employer's argument that the district director's fee award should be further reduced due to claimant's limited success, and we hold that employer has not shown there was an abuse of discretion in this regard. The district director's fee award is affirmed. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is affirmed. The award of permanent partial disability benefits as of September 15, 2005, is vacated, and the case is remanded for further consideration of the onset date of partial disability and for a determination of claimant's adjusted wage-earning capacity. The administrative law judge's denial of an attorney's fee is reversed, and the case is remanded to him for findings on a reasonable fee consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed. The district director's order awarding an employer-paid attorney's fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge