

TONY A. VERCHER)
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 Claimant-Respondent)
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 v.)
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 CERES MARINE TERMINALS) DATE ISSUED: MAR 17, 2004
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2003-LHC-0862) of Administrative Law Judge Ralph A. Romano 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on October 28, 2002, while working for employer. He was temporarily totally disabled from October 29 through December 2, 2002. Employer voluntarily paid temporary total disability benefits based on an average weekly wage of

\$512.01, but an issue arose concerning claimant's average weekly wage.¹ On December 3, 2002, claimant requested an informal conference to address the issue. In response, the district director stated that the information claimant submitted established that he was entitled to benefits based on an average weekly wage of \$35.62 less than that on which employer based its payments. Accordingly, the district director stated that an informal conference was not warranted but that claimant could submit evidence to establish otherwise. On December 19, 2002, the district director responded to claimant's additional letter of complaint about the calculation of average weekly wage, and he stated that claimant did not supply the requested information but that it was his prerogative to submit an LS-18 Pre-Hearing Statement and request the case be transferred to the Office of Administrative Law Judges (OALJ).

On January 9, 2003, claimant sent the district director his LS-18, requesting referral, as well as a work record for the 52 weeks preceding his injury. On January 14, 2003, employer responded, re-sending its wage calculations and stating that referral to the OALJ is premature, as it had not yet received the information on which claimant based his calculation of average weekly wage. The district director nonetheless transferred the case to the OALJ on January 16, 2003. On February 11, 2003, claimant and employer each sent the other letters including their respective wage calculations. On March 5, 2003, employer notified claimant that it finally received claimant's W2 forms, the attachments that had been omitted from claimant's February 11th letter, and it agreed with claimant's calculations. Therefore, employer included a check for the difference between the benefits paid and the benefits owed, \$80.90, and requested that the scheduled hearing be canceled. The administrative law judge canceled the hearing and remanded the case to the district director's office.

Thereafter, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge in the amount of \$953.25. Employer filed objections, arguing that counsel is not entitled to such a fee because the delay in resolving the average weekly wage issue was due to claimant's intransigence. In a one-sentence order, the administrative law judge stated: "Counsel for Claimant having submitted his petition therefor, and there being filed an opposition thereto, it is hereby ORDERED, that Employer shall pay counsel for Claimant the sum of \$953.25 for attorney fees." Employer appeals the fee award, arguing that claimant's counsel is not entitled to a fee because claimant's failure to provide the requested wage information to either it or the district director caused the delay in adjusting claimant's payments. Employer also argues that the administrative law judge's fee award violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Claimant's counsel responds, urging affirmance.

¹Claimant contended his average weekly wage was \$536.27.

Initially, in defense of the fee award, claimant's counsel asserts that employer has waived its right to object. Specifically, he argues that employer's objections to the fee petition are invalid because they were written by employer's claims manager and not by an attorney. We reject these assertions. Employer's claims manager has the authority to handle claims and did so throughout the course of these proceedings in accordance with 20 C.F.R. §702.131 (parties may be represented in any proceeding by an attorney or other person previously authorized in writing by such party to so act). When presented with a fee petition, it was not unreasonable for employer's claims manager to represent employer's interests by filing objections. Indeed, nothing in the Act requires the person writing objections to a fee petition to be an attorney. As employer filed objections, and the administrative law judge acknowledged those objections, it cannot be said that employer waived its right to object to the fee awarded. Accordingly, we shall now address employer's contentions on appeal.

Employer first argues that the fee award violates the APA as it lacks any consideration of the objections filed and any explanation of the reasons for the award; thus, the administrative law judge did not render adequate findings regarding employer's objections to the fee petition.² Section 557(c) of the APA requires that decisions shall include findings, conclusions, reasons therefor, on all material issues of fact, law or discretion. We agree with employer that the administrative law judge did not sufficiently address its contentions. The administrative law judge's award is set forth in one sentence and is completely devoid of any explanation as to the merits of employer's objections. Given its cursory nature, the administrative law judge's supplemental decision is vacated. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). On remand, the administrative law judge must adequately discuss employer's objections to the fee petition. In light of our decision to vacate the fee award and remand the case to the administrative law judge, we need not consider employer's remaining contentions.³

²The objections before the administrative law judge included the following arguments: 1) claimant did not cooperate with the attempts by the district director and employer to get the wage information, and once counsel provided the information, employer concurred; 2) employer did not controvert the claim; 3) no informal conference was held; 4) counsel's request for a total fee of \$1,983 (\$1,029.75 before the district director and \$953.25 before the administrative law judge) is unreasonable in light of claimant's limited success in the amount of \$80.90.

³Contrary to employer's assertion, however, as this case does not arise under the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the lack of an informal conference does not necessarily preclude employer's liability for an attorney's fee pursuant to Section 28(b) of the Act, if that section is otherwise applicable. 33 U.S.C. §928(b); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

109(CRT) (5th Cir. 2001) (no award under Section 28(b) because no informal conference held; employer liable under Section 28(a)); *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 409, 34 BRBS 105(CRT), 35 BRBS 26(CRT) (5th Cir. 2000).