BRB Nos. 14-0085
and 14-0133

LIONEL GROWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (AVONDALE OPERATIONS)	)	DATE ISSUED: Oct. 24, 2014
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Order Denying Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor, and the Compensation Orders Award of Attorney's Fees and the Compensation Orders Denial of Attorney's Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Ryan A. Jurkovic and Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Claimant appeals the Order Denying Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration (2011-LHC-01839, 2012-LHC-01199) of Administrative Law Judge Clement J. Kennington, BRB No. 14-0085, and the Compensation Orders Denying Attorney's Fees and the Compensation Orders Denial of Attorney's Fees on Reconsideration (Case Nos. 07-187222, 07-192631) of District

Director David A. Duhon, BRB No. 14-0133, 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. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

It is necessary to relate the proceedings in this case at some length. Claimant sustained a work-related hearing loss during the course of his employment for employer as a rigger and leaderman. Claimant last worked for employer on May 24, 2010. Claimant underwent audiometric testing on November 25, 2009, which revealed a 30.9 percent binaural impairment. CX 11 at 3. Employer filed a first report of injury and a notice of controversion on December 2, 2009. EXs 2, 3. Employer had claimant evaluated by Dr. Seidemann on February 19, 2010 and his testing reflected a 41.9 percent binaural impairment. EX 27. On April 19, 2010, employer commenced voluntary payments of compensation for a 30.9 percent binaural impairment based on an average weekly wage of $1,084.85. 33 U.S.C. §908(c)(13); CX 2; EX 4. On April 27, 2010, employer also accepted liability and paid for hearing aids. EXs 5, 10. Employer made its last payment of compensation on January 6, 2011. EX 6.

Claimant filed a claim on March 2, 2011, asserting he sustained a 41.9 percent binaural impairment. CX 1; EX 8. The district director notified employer of the claim on March 10, 2011. *Id*. On March 28, 2011, employer paid claimant an additional lump sum of compensation equal to the average of the 41.9 and 30.9 percent impairments, at an average weekly wage of $1,084.85.[1] EX 9. Claimant's counsel wrote to the district director, seeking an informal conference. The claims examiner replied by letter to the parties on May 3, 2011, that the two audiograms constituted the only valid evidence of the extent of claimant's disability, and that claimant would have to file another claim if he was claiming additional hearing loss due to exposure after February 2010. CX 3; EX 11. The claims examiner also recommended that the parties agree to an average weekly wage by averaging their calculations.[2] A teleconference was held among the claims examiner and the parties on May 4, 2011; a letter from claimant's counsel to the claims examiner memorializing this teleconference states that the May 3, 2011 letter constitutes the district director's written recommendation and that an "actual" informal conference is unnecessary. CX 3 at 2. On May 10, 2011, employer wrote to the claims examiner,

[1] That is, employer's two sets of payments were for a 36.4 percent impairment. EX 9.

[2] Claimant asserted an average weekly wage of $1,088.40 and employer asserted an average weekly wage of $1,084.85. CX 3; EX 11.

questioning the basis for claimant's assertion of an average weekly wage of $1,088.40. CX 16 at 10. On July 13, 2011, the district director referred this claim, Case No. 07-187222, to the Office of Administrative Law Judges (OALJ) at claimant's request. CX 4; EX 12. In his LS-18 Pre-hearing Statement dated July 7, 2011, claimant, inter alia, raised the issues of average weekly wage and the extent of claimant's impairment. CX 4.

Based on claimant's continued exposure to noise until his retirement and additional audiometric examinations, claimant filed a second claim for compensation on July 7, 2011, which was assigned a new OWCP number, 07-192631. CX 5; EX 14. The district director notified employer of this claim on July 13, 2011. CX 4; EX 15. On July 22, 2011, employer controverted this claim. CX 6; EX 16. However, on July 27, 2011, employer voluntarily paid claimant additional benefits, such that employer's total payments were for the 41.9 percent impairment demonstrated on Dr. Seidemann's audiogram, at an average weekly wage of $1,084.85. CX 6; EX 17. On August 2, 2011, employer adjusted claimant's average weekly wage to $1,112.18, and paid claimant additional compensation such that benefits for the 41.9 percent impairment were paid at the higher average weekly wage. CXs 6, 16 at 11-12; EXs 18, 19.

The district director sent claimant for an independent audiometric evaluation, which Dr. Irwin provided on March 2, 2012. Dr. Irwin stated that claimant's audiogram indicated a 37.8 percent binaural impairment. CX 13; EX 32. On March 8, 2012, the claims examiner sent a letter to the parties stating that the district director was recommending permanent partial disability benefits for a 37.8 percent impairment, as found by Dr. Irwin. The letter stated that, "This letter should be considered our Informal Conference Recommendations based upon the medical information contained in our administrative file. . . ." It also stated that the parties should file LS-18 pre-hearing statements within 90 days if they wished to pursue formal proceedings. CX 7; EX 20. Claimant's counsel filed an LS-18 form on March 20, 2012, and the district director referred the claim to the OALJ on April 16, 2012, noting it was related to the prior referred claim. EX 21. The administrative law judge consolidated claimant's two claims, finding that claimant's "date of injury" is his date of last exposure to injurious noise, which was his last day of employment on May 24, 2010. Claimant sought benefits for a 70.3 percent binaural impairment, based on the audiogram administered by Mr. Bode on August 23, 2011. CX 14. The administrative law judge averaged the results of four audiograms administered between May 7, 2010 and March 21, 2012, and found that claimant has a 43.3 percent binaural impairment. Decision and Order at 10. The administrative law judge determined claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $1,099.92, based on claimant's earnings during the 52-week period prior to May 24, 2010. Based on employer's entitlement to a credit for its prior compensation payments, the administrative law judge concluded claimant is entitled to $1,368.54 in additional compensation, as well as to interest to be calculated by the district director.

Claimant appealed the administrative law judge's decision to the Board, which affirmed the findings regarding the extent of claimant's impairment and the average weekly wage calculation. *Grows v. Huntington Ingalls, Inc./Avondale Operations*, BRB No. 13-0550 (July 17, 2014). However, the Board remanded this case to the administrative law judge to make findings regarding claimant's entitlement to interest, consistent with *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997) and *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (recon. en banc) and for the district director to calculate any interest due based upon those findings. *Grows*, slip op. at 7-8.

Meanwhile, claimant's counsel filed petitions for an attorney's fee for work performed before the district director and the administrative law judge.[3] Employer filed objections to counsel's fee petitions, contending, inter alia, that it cannot be held liable for any attorney's fee under either Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b).

The administrative law judge found that counsel is not entitled to an employer-paid attorney's fee. The administrative law judge found Section 28(a) inapplicable because employer paid claimant benefits within 30 days of its receipt of each claim. The administrative law judge found Section 28(b) inapplicable because the parties stipulated that no informal conferences were held and because employer did not refuse to accept the district director's written recommendations. The administrative law judge summarily denied claimant's motion for reconsideration.

With respect to the fee petition filed with the district director on claimant's first claim, No. 07-187222, the district director found that employer cannot be held liable under Section 28(a) because it paid benefits to claimant within 30 days of its receipt of the claim from the district director. The district director found that employer cannot be held liable under Section 28(b) because, although employer refused to accept the district director's average weekly wage recommendation, claimant did not obtain any additional benefits on this claim; the administrative law judge awarded claimant additional benefits on his second claim. Thus, the district director denied claimant's counsel an attorney's fee on this claim. *See* Compensation Order Denial of Attorney's Fees on Reconsideration (Jan. 14, 2014).

With regard to fee liability on the second claim, No. 07-192631, the district director found that employer cannot be held liable for counsel's fee under Section 28(a) because employer paid claimant compensation within 30 days of its receipt of the claim from the district director. The district director also found that employer is not liable for

[3] The district director informed claimant's counsel that he must file two fee petitions for work performed before his office, one for each OWCP number.

the fee under Section 28(b). Although the district director held an informal conference and issued a written recommendation, employer did not refuse to accept the recommendation. Thus, the district director denied claimant's counsel an attorney's fee on this claim as well. *See* Compensation Order Denial of Attorney's Fees on Reconsideration (Jan. 15, 2014).

Claimant appeals both the administrative law judge's and district director's denial of his attorney's fee petitions. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant first argues that the administrative law judge and district director erred in finding that counsel is not entitled to employer-paid attorney's fees under Section 28(a). Claimant does not dispute that employer voluntarily paid compensation within thirty days of its receipt of written notice of each claim. Rather, claimant argues that, pursuant to *Weaver v. Director, OWCP*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002), mere voluntary payments are insufficient to prevent fee shifting; claimant contends that, in addition, employer must admit liability. Claimant avers that employer did not do so here, because it controverted each claim. We reject this contention.

Section 28(a) of the Act states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held in *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), that if employer pays "any" or "some" compensation to claimant within the 30 days after it receives notice of the claim from the district director, employer cannot be held liable for an attorney's fee pursuant to Section 28(a). The plain language of Section 28(a) shifts fee liability to employer only if "declines to pay *any* compensation" within 30 days of receiving written notice of the claim from the district director. *Id.*; *see also Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

Contrary to claimant's contention, *Weaver* is inapplicable to the instant case, as the issue addressed in that case was not the same as that presented here. In *Weaver*, the claimant filed a claim on February 4, 1992. The employer controverted the claim on February 11, 1992, and on February 12, the employer received formal notice of the claim from the district director. The employer did not commence voluntary payment of benefits until September 1992. Thus, fee liability had clearly shifted to the employer. The issue addressed was whether the employer could be held liable for claimant's attorney's fees for the period prior to employer's receipt of the claim, as well as for the 30-day period after its receipt of the claim. Citing its earlier precedent in *Watkins v. Ingalls Shipbuilding, Inc*., 12 F.3d 209, No. 93-4367 (5th Cir. Dec. 9, 1993),[4] the court held the statute required that employer receive notice of the claim before liability for an attorney's fee can shift to employer. *Weaver*, 282 F.3d at 359, 36 BRBS at 13-14(CRT); *see Day*, 518 F.3d 411, 42 BRBS 15(CRT); *contra Dyer v. Cenex Harvest States Coop*., 563 F.3d 1044, 43 BRBS 32(CRT) (9th Cir. 2008) (holding that where fee liability shifts to employer, it can be held liable for fees before it received notice of the claim). The court further held, however, that the employer was liable for fees incurred within the 30-day period after it received notice of the claim because the other requirements for fee-shifting had been met, i.e., "(1) formal notice, (2) employer controversion of the claim, (3) successful prosecution by the claimant, and (4) use of an attorney to prosecute the claim." *Weaver*, 282 F.3d at 360, 36 BRBS at 14(CRT); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

We reject claimant's contention that the *Weaver* court's use of the term "controversion" results in employer's liability for an attorney's fee in the present case because employer filed two notices of controversion, in addition to paying compensation voluntarily within the 30-day period after its receipt of the claims. The court's statement that "the employer's act of declining to pay the claim may be triggered, either on the thirtieth day or at any time before that day, by a controversion of the claim," *Weaver*, 282 F.3d at 360, 36 BRBS at 14(CRT), demonstrates one way that an employer can decline to pay any compensation, i.e., by filing a notice of controversion. If, however, as here, the employer actually pays any compensation to claimant within the 30-day period, the plain language of Section 28(a) precludes fee liability from shifting to employer. *See Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *see also Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). This issue was discussed recently by the United States Court of Appeals for the Fourth Circuit. In *Lincoln v. Director, OWCP*, 744 F.3d 911, 48 BRBS 17(CRT) (4th Cir. 2014), the employer filed a notice of controversion prior to receiving the claim from the district

[4] Although *Watkins* was not a published decision, Fifth Circuit rules provide that unpublished cases issued before January 1, 1996 "are precedent." U.S.Ct. of App. 5th Cir. R. 47.5.3.

director. Within 30 days of receiving the claim, the employer paid some compensation to claimant. One of the claimant's contentions was that the notice of controversion "irrevocably triggered § 928(a)." *Id.*, 744 F.3d at 917, 48 BRBS at 20(CRT). The court noted that this issue had not been raised before the Board, but that the contention was legally incorrect in any event. The court stated that Section 28(a) does not incorporate the references to notices of controversion contained in Section 14 of the Act; "[r]ather, § 928(a) contains only one explicit trigger: the payment of 'any compensation' within 30 days of the employer's receipt of official notice of the claim." *Id*. As the employer paid the claimant some compensation within 30 days of its receipt of the claim, the court affirmed the denial of an employer-paid attorney's fee under Section 28(a).

In this case, it is uncontroverted that employer paid claimant some compensation within thirty days of its receipt of each of the two claims from the district director, notwithstanding its notices of controversion. Under these circumstances, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(a). Consequently, we affirm the administrative law judge's and district director's denials of a fee award under Section 28(a) as they accord with law. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT).

Claimant also challenges the denial of an employer-paid fee pursuant to Section 28(b). Section 28(b) of the Act 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 is greater than the amount paid or tendered by 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. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the

> independent medical report at such time as an evaluation of disability can be made. . . .

33 U.S.C. §928(b). Thus, there are four criteria for fee liability under Section 28(b): (1) an informal conference addressing the disputed additional compensation; (2) a written recommendation suggesting a disposition of the controversy; (3) the employer's rejection of the recommendation; and (4) the claimant's use of an attorney to secure an award of compensation greater than the amount the employer paid or tendered after its rejection of the recommendation.[5] *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT); *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 Cooper*, 274 F.3d 173, 35 BRBS 109(CRT).

Claimant asserts the administrative law judge erroneously concluded that an informal conference had not been held, noting that the district director correctly found that conferences had been held by written correspondence. Claimant further contends that the district director erred in finding that his first claim was not successful, as he obtained a higher average weekly wage after employer refused to agree to the district director's May 3, 2011 recommendation on this issue. Finally, claimant contends that the clause in Section 28(b) concerning independent medical examinations pursuant to Section 7(e) authorizes an employer-paid attorney's fee on the facts in this case, irrespective of whether employer did or did not refuse to pay benefits in accordance with the district director's written recommendations.

We agree with claimant that the administrative law judge erred in finding that an informal conference had not been held in this case. The parties did stipulate before the administrative law judge that no informal conferences were held. Claimant avers this stipulation was to the absence of an "in person" conference. The regulation at 20 C.F.R. §702.311 permits informal conferences by way of telephone calls and correspondence among the parties and the district director. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hassell*], 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007) (correspondence); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007) (telephone). The district director, who is in the better position to state whether the legal criteria for an informal conference have been met, expressly found in Case No. 07-192631 that an informal conference was held. CX 7; EX 20. In Case No. 07-187222, claimant's counsel wrote a letter to the claims examiner on May 4, 2011, to confirm the occurrence of an

[5] As described above, this last criterion is modified if the dispute relates to the degree or length of disability and the employer offers to submit the case for evaluation by a physician selected by the Secretary and to tender compensation based on independent medical report findings as to the degree or length of disability.

earlier teleconference on that date wherein the parties discussed the written recommendation based on the claims examiner's review of the parties' written submissions. CX 3 at 2. Counsel confirmed that "an actual informal conference," i.e., an "in person" conference, was not necessary.[6] *Id.* Under these circumstances, the legal criteria for an informal conference have been satisfied, and the administrative law judge cannot interpret the parties' stipulation in a manner that is contrary to law.[7] *See generally California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949); *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982).

Nonetheless, we affirm the denial of an attorney's fee for work performed before the OALJ. The administrative law judge correctly stated that the mere fact that claimant's award following the formal hearing was greater than the district director's recommendation is not dispositive of counsel's entitlement to an employer-paid fee. Order Denying Attorney Fees at 2-3.[8] Employer voluntarily paid claimant for a greater hearing impairment than that recommended in each of the district director's recommendations.[9] Thus, the criterion of employer refusal was not satisfied on this issue. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). In addition, in August 2011, employer paid claimant benefits at an average weekly wage ($1,112.18) higher than that recommended in the district director's first recommendation ($1086.63), and higher than that awarded by the administrative law judge ($1,099.92). Thus, claimant was not successful in obtaining a higher average weekly wage by virtue of the formal proceedings. *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT).

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[6] In his Orders in Case No. 07-187222, the district director did not deny a fee based on the absence of an informal conference, but on the employer's refusal to accept the written recommendation. *See* discussion, *infra.* Inferentially, therefore, it can be assumed that the district director believed he held an informal conference in this case as well.

[7] Thus, we disagree with our dissenting colleague's reliance on the parties' stipulation as a basis for affirming the denial of all attorney's fees in this case.

[8] By virtue of the formal proceedings, claimant was awarded additional benefits of $1,368.54.

[9] We reject employer's assertion that the district director's first recommendation was for benefits based on a 30.9 percent impairment. A fair reading of that recommendation was that the extent of claimant's impairment should be based on both the filing audiogram and the audiogram performed by Dr. Seidemann at employer's behest. Employer paid claimant for the average of these two audiograms; thus there was no "overpayment" at the time of the initial recommendation. *See* Emp. Resp. Br. at 8.

However, we cannot affirm the district director's denial of an employer-paid attorney's fee in Case No. 07-187222. On May 3, 2011, the claims examiner wrote that the November 2009 and February 2010 audiograms constituted the only valid evidence of the extent of claimant's disability on the initial claim and he recommended that the parties agree to an average weekly wage by averaging the parties' calculations. CX 3; EX 11; *see* n. 7, *supra*. On May 10, 2011, employer wrote to the claims examiner, questioning the basis for claimant's assertion of an average weekly wage of $1,088.40 and thus to the average of $1,086.63. CX 16 at 10. It was not until August 2, 2011, that employer adjusted claimant's average weekly wage to an amount greater than that recommended by the claims examiner. CXs 6, 16 at 11-12; EXs 18, 19. The district director properly acknowledged that employer refused to accept the initial average weekly wage recommendation, but erroneously concluded that claimant's success on this issue occurred by virtue of the administrative law judge's adjudication of only claimant's second claim. Employer paid the higher average weekly wage on the entire claim more than 14 days after the May 3, 2011 written recommendation and before the administrative law judge held the formal hearing; the administrative law judge merged the two claims and similarly awarded a higher average weekly wage than that recommended. The fact that employer's payment occurred after the second claim was filed does not negate claimant's success on an issue on which employer had refused the recommendation. Claimant thus was successful in obtaining benefits at a higher average weekly wage than employer was willing to pay after the May 3, 2011 recommendation, and employer therefore is liable for an attorney's fee under Section 28(b). *See Wilson v. Service Employees Int'l, Inc.*, 44 BRBS 81 (2010), *aff'd on recon.*, 45 BRBS 1 (2011). The district director's denial of an attorney's fee in Case No. 07-187222 thus is reversed, and the case is remanded for the district director to determine the amount of a fee for which employer is liable in consideration of counsel's fee petition and employer's objections. *See Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003).

We affirm the district director's denial of an attorney's fee in Case No. 07-192631 as it accords with the law. Employer did not refuse to pay benefits in accordance with the district director's written recommendation. *Andrepont*, 566 F.3d at 422, 43 BRBS at 31(CRT). Moreover, we reject claimant's contention that the independent medical examination clause of Section 28(b) authorizes an attorney's fee award against employer. Claimant avers that if an award is based on the recommendation of an independent medical examiner, employer's liability for an attorney's fee is not predicated on employer's refusal of a written recommendation and claimant's obtaining greater compensation. Rather, claimant contends that whenever employer pays in accordance with the recommendation of an independent medical examiner, it is liable for claimant's attorney's fee.

This interpretation is not supported by case precedent, which has held that the statutory phrase at issue is a fee-avoidance mechanism. In *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 612, 9 BRBS 326, 330-331 (3d Cir. 1978), the Third Circuit stated that Section 28(b) "offers an employer the opportunity to escape assessment of claimant's counsel fee by agreeing in advance to accept the findings of an impartial medical examiner." *See also Hadel v. I.T.O. Corp. of Baltimore*, 6 BRBS 519 (1977). Thus, if employer otherwise would be liable for an attorney's fee under Section 28(b), it can avoid such liability if it agrees in advance to be bound by the degree of impairment found by the Secretary's independent medical examiner. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). It is not a mechanism by which to hold employer liable for an attorney's fee merely because employer agrees to pay benefits in accordance with the examiner's findings, where the other criteria for fee shifting have not been satisfied. *See generally Baird v. W. Jones & Son, Inc.*, 6 BRBS 727 (1977). Therefore, as all the criteria for shifting fee liability to employer were not met in Case No. 07-192631, we affirm the district director's denial of an attorney's fee. *Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT).

Accordingly, we affirm the administrative law judge's Order Denying Attorney's Fees and Order Denying Claimant's Motion for Reconsideration. We reverse the district director's denial of an attorney's fee in Case No. 07-187222 and remand the case for the district director to address the amount of the fee for which employer is liable. The district director's Compensation Order Award of Attorney's Fees and Compensation Order Denial of Attorney's Fees on Reconsideration in Case No. 07-192631 is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decision to affirm the denial of an employer-paid attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). I respectfully dissent from my colleagues' decision as to their Section 28(b) analysis and holding, as I would affirm the denial of all attorney's fees in this case on the basis of the parties' stipulation before the administrative law judge that no informal conferences were held. JX 1.

Stipulations of fact are offered in lieu of evidence and are binding upon those who freely enter into them.[10] *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014); *see Schlemmer v. Provident Life & Acc. Ins. Co.*, 349 F.2d 682 (9th Cir. 1965). "A stipulation is '[a]n express waiver . . . conceding for the purposes of trial the truth of some alleged fact . . . so that the one party need offer no evidence to prove it and the other is not allowed to disprove it . . . .'" *Mitri*, 48 BRBS at 44 n.9 (quoting *Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999) (internal citations omitted)). There is no suggestion that claimant was fraudulently induced to enter into this stipulation, nor did claimant ask the administrative law judge to set it aside. The administrative law judge accepted the parties' stipulation that no informal conferences were held. Decision and Order at 2. An informal conference is an absolute prerequisite to an employer's liability for an attorney's fee pursuant to Section 28(b) in a case arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). The parties' stipulation of fact to the absence of any informal conferences thus precludes employer's liability for any attorney's fee in this case.

[10] I disagree with my colleagues' determination that the parties' stipulation that no informal conference was held is not a binding stipulation of fact. The cases cited for the proposition that the administrative law judge erred in interpreting the parties' stipulation are inapposite. *See* p. 9, *supra.* In *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949) and *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982), the parties' stipulations were, themselves, contrary to law. In *California Ship Service,* the stipulated average weekly wage was calculated in a manner not sanctioned by the Act. In *McDevitt*, the stipulation that a shoulder injury is compensable under the Act's schedule was contrary to law. In contrast, the declaration that "No informal conference held" is a statement of fact which does not contravene the law. Consequently, the administrative law judge permissibly accepted it and the parties are bound by it.

Therefore, I would affirm the three orders denying an employer-paid attorney's fee.

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JUDITH S. BOGGS
Administrative Appeals Judge