BRB No. 08-0163

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| C. W. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/AVONDALE DIVISION | ) | DATE ISSUED: 09/22/2008 |
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| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Order Concerning Attorney Fees and the Order Denying Employer's Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Edward F. Bass, Lake Charles, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Concerning Attorney Fees and the Order Denying Employer's Motion for Reconsideration (2005-LHC-00076) of Administrative Law Judge Russell D. Pulver 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back on March 2, 1989, during the course of his employment for employer as a sandblaster. He has not returned to work for employer. Claimant served as an alderman for the town of Jeanerette, Louisiana, from July 1991 until he resigned in September 1993. Claimant was re-elected as an alderman in 1999, in which

position he continues to serve. JX 1. After claimant's injury, employer immediately instituted temporary total disability benefits based on an average weekly wage of $360.80. C-1.[1] On January 28, 1993, the district director recommended by letter that employer commence paying partial disability benefits for the period beginning May 6, 1992, based on an average weekly wage of $360.80. C-4. In a letter dated April 23, 1993, the district director rejected claimant's claim that he needed surgery, and the partial disability recommendation remained unchanged. C-5. Employer began paying permanent partial disability benefits of $84.84 weekly at this time based on an average weekly wage of $360.80. C-8, 12. Thereafter, the partial disability compensation rate rose to $151.20. On May 19, 1994, the district director instructed employer to authorize treatment with any physician recommended by Dr. Blanda. C-6. An informal conference was held on April 4, 1999, at which both parties were present. In a written recommendation, the district director wrote that employer should authorize a myelogram/CT scan in order to better diagnose claimant's condition and to ascertain whether surgery was necessary. C-7.

On June 11, 2002, the district director noted its receipt of a letter from claimant's counsel to the effect that Dr. Blanda had taken claimant off work. The district director wrote to the parties that "employer must adhere to the treating physicians (sic) recommendations and reinstate temporary total disability at the full rate of $240.53." C-8. A "full rate of $240.53" indicates that average weekly wage was calculated as $360.80, which is the average weekly wage on which all payments had been made. Employer instituted these payments on August 13, 2002. On August 11, 2004, after receipt of correspondence from claimant's counsel, claimant's doctor, and employer, the district director wrote that, as Dr. Hodges was claimant's primary treating physician and as he opined that the FCE [functional capacity examination] requested by employer would the detrimental to claimant, "this office is not inclined to issue an order requiring claimant to attend an FCE." The district director stated that Dr. Hodges believes claimant's disability is permanent and total, and that, if the parties agreed, the district director would issue an order to that effect. If not, the district director stated the next step would be referral to the Office of Administrative Law Judges (OALJ). C-9.

The parties did not agree to the issuance of a compensation order, and on August 3, 2004, claimant filed a pre-hearing statement indicating that the parties disagreed on the nature and extent of claimant's disability. *See* Employer's Motion for Summary Decision at Ex. 7. Employer filed a notice of controversion dated September 1, 2004, listing the disputed issues as "average weekly wage, 8f, Nature and extent of disability. The employer reserves the right to amend." C-10. Employer continued payments of

[1] The attachments to claimant's appellate brief also are part of the administrative file.

temporary total disability based on the average weekly wage of $360.80 stated in the previous recommendations.

The claim was referred to the OALJ on October 1, 2004. Employer's October 14, 2004 pre-hearing statement did not mention average weekly wage, but raised as issues "nature and extent" and whether claimant should be referred for an FCE. C-11. On March 24, 2006, claimant filed a motion with the administrative law judge to permit him to file an amended pre-hearing statement so that he could raise average weekly wage as an issue at the hearing scheduled for April 24, 2006.[2] The administrative law judge issued an April 4, 2006 "Order Granting Amendment of LS-18 and Denying Continuance" allowing claimant to raise the issue of average weekly wage at the hearing. On April 10, 2006, claimant obtained a subpoena from the administrative law judge for claimant's payroll records in employer's possession, and employer produced a summary of claimant's earnings. JX 13.

In his decision, the administrative law judge found that claimant's service as an alderman was not sheltered employment, and thus claimant was not permanently totally disabled. The administrative law judge found this job paid claimant $5,100 per year, or $98.08 weekly. The administrative law judge addressed claimant's contention that his average weekly wage is $584.50 and employer's contention that it is $503.04. The administrative law judge found that claimant had an average weekly wage of $570.31 pursuant to Section 10(c). 33 U.S.C. §910(c). Claimant was awarded compensation for temporary total disability from March 2, 1989 through December 31, 1991, temporary partial disability from January 1 through January 22, 1992, and ongoing permanent partial disability from January 23, 1992, based on the loss of wage-earning capacity resulting from the difference between his pre-injury average weekly wage of $570.31, and his post-injury wage-earning capacity of $98.08 subject to an adjustment for inflation. Decision and Order Awarding Benefits at 11-12.[3]

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[2] In a letter dated September 9, 1989, claimant's counsel wrote to employer to request payroll records because he thought that employer's voluntary payments were being made at an incorrect rate. Employer asked counsel to formally enroll as counsel of record. Counsel did so by letter to the district director and, in this letter, reiterated his request for the payroll records. C-3. Apparently, this request was not reiterated until claimant's March 2006 motion.

[3] The administrative law judge found that claimant's post-injury wage-earning capacity of $98.08 per week was subject to downward adjustment for inflation based on the percentage changes in the National Average Weekly Wage. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). The district director calculated this adjustment, finding claimant's wage-earning capacity was $89.25 per week. Thus,

Claimant's counsel thereafter submitted to the administrative law judge a fee petition requesting an attorney's fee of $77,228.75, representing 306.875 hours of attorney time at $250 per hour, and $510 in expenses. Employer objected, arguing, *inter alia*, that it could not be held liable for an attorney's fee because the average weekly wage issue on which claimant was successful was not the subject of an informal conference before the district director.

In his Order Concerning Attorney Fees, the administrative law judge rejected employer's contentions regarding its fee liability. He found that there were informal processes addressing average weekly wage at the district director level that are sufficient to meet the informal conference requirement. Thus, the administrative law judge held employer liable for an attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b). The administrative law judge reduced the hourly rate requested to $225, and rejected a fee for time expended prior to referral of the claim to the OALJ. Claimant's counsel was awarded a fee of $24,631.88 and expenses totaling $510, payable by employer. On reconsideration, the administrative law judge rejected employer's contention that the Board's decision in *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), demonstrated error in the fee award.

On appeal, employer contends that it is not liable for a fee pursuant to Section 28(b), asserting that as there was not an informal conference addressing average weekly wage, the administrative law judge erred by finding that "informal processes" at the district director level were the equivalent of an informal conference, and that, even if substantial evidence supports the administrative law judge's finding that an informal conference occurred, employer did not reject the average weekly wage recommendation as it voluntarily paid claimant compensation based on the recommended average weekly wage of $360.80 through the formal hearing in April 2006. Claimant responds, urging affirmance of the fee award. For the reasons that follow, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, employer's liability for an attorney's fee pursuant to Section 28(b) must be addressed in view of that court's decision in *Staftex Staffing v. Director, OWCP*, 237

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claimant was entitled to additional temporary total disability benefits from March 1989 through December 31, 1991, based on the higher average weekly wage, and temporary and permanent partial disability payments from January 1992 and continuing of $320.71 per week. This award greatly exceeds employer's temporary total disability payments of $240.53.

F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). In *Staftex Staffing*, the Fifth Circuit enumerated criteria for fee liability under Section 28(b):[4] (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; (3) the employer's refusal of the recommendation; and (4) claimant's success on the issue before the administrative law judge. *Staftex Staffing*, 237 F.2d at 409, 34 BRBS at 47(CRT); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In *Staftex Staffing*, the Fifth Circuit initially held that employer was not liable for the claimant's attorney's fee because claimant did not prevail on his claim for permanent total disability, instead obtaining temporary total disability which employer had voluntarily paid, and the issue on which claimant prevailed before the administrative law judge, average weekly wage, was not at issue at the informal conference before the district director. On rehearing, however, the court held that employer was liable for the fee because the claims examiner had recommended that the parties agree to an order awarding permanent total disability benefits and the compensation rate at which these benefits were to be paid was an essential part of the recommendation. Employer did not

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[4] Section 28(b) of the Act states:

> (b) 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. . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

accept the recommendation and, at the hearing before the administrative law judge, raised a lower average weekly wage, which the administrative law judge rejected. *Staftex Staffing*, 237 F.3d at 410, 34 BRBS at 105-106(CRT). Claimant thereafter succeeded in obtaining a higher average weekly wage. Under these circumstances the Fifth Circuit found that the requirements of Section 28(b) were met, finding it clear that employer did not accept the Department of Labor's recommendation and claimant then obtained a greater award before the administrative law judge.

We reject employer's contention that an informal conference was not held in this case. Although the Fifth Circuit has not addressed whether correspondence between the parties and the district director can serve as the functional equivalent of an informal conference, Section 702.311 of the regulations, 20 C.F.R. §702.311,[5] allows for this practice. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006); *see also* 20 C.F.R. §702.314. The administrative law judge found that the recommendations in the August 11, 2004, letter from the district director and other correspondence from the OWCP are "evidence that informal processes occurred in which average weekly wage was addressed" and that "these processes are an adequate equivalent of an informal conference before the district director on the matter of average weekly wage." Order at 3. The administrative law judge found that the August 2004 letter from the OWCP recommended that claimant be paid compensation for permanent total disability. Specifically, this letter stated that Dr. Hodge opined that claimant's disability is permanent and total and that claimant therefore would not be ordered to

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[5] Section 702.311 states:

> The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the district director's office. *Some cases will be handled by written correspondence*. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matter discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

20 C.F.R. §702.311 (emphasis added).

attend an FCE. Moreover, if the parties agreed, the district director stated he would issue an Order awarding permanent total disability benefits. Although average weekly wage was not explicitly mentioned in this letter, prior recommendations referenced the rate of $240.53 at which employer was paying compensation for temporary total disability; this rate is thus implicit in the recommendation. This correspondence fulfills the informal conference and recommendation criteria of Section 28(b). *See Hassell*, 477 F.3d at 127, 41 BRBS at 3-4(CRT); *Anderson*, 40 BRBS at 59-62. Accordingly, we reject employer's contention that there was no informal conference or written recommendation in this case.

Employer, moreover, did not accept the recommendation by agreeing to the entry of a permanent total disability award, but rather filed a notice of controversion specifically controverting average weekly wage as well as the nature and extent of claimant's disability. Under these circumstances, employer's contention that it did not reject the district director's recommendation is without merit. Employer's reliance on *Andrepont*, 41 BRBS 1, is misplaced. In *Andreport*, the Board addressed Fifth Circuit precedent, including *Staftex Staffing*, and held that there is no fee liability under Section 28(b) where employer accepts the district director's recommendation that no further compensation is due the claimant, notwithstanding the claimant's subsequent award of greater compensation. *Andrepont*, 41 BRBS at 4; *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). In this case, however, the district director recommended ongoing payments of permanent total disability. Employer declined to pay these benefits and continued its payments for temporary disability. At the same time, employer explicitly controverted average weekly wage as well as nature and extent of disability. Thus, *Andrepont* is not applicable in this case.

The facts of this case are similar to those in *Staftex Staffing* in which the employer was held liable for an attorney's fee pursuant to Section 28(b). In both cases, the employer voluntarily paid compensation for temporary total disability, there was an informal conference or its equivalent, and a written recommendation was issued for the employer to pay permanent total disability benefits. In both cases, the recommended average weekly wage was clear. In *Staftex Staffing*, the recommendation incorporated the average weekly wage at which the employer was voluntarily paying temporary disability compensation. The employer did not accept the recommendation that it pay permanent total disability and raised average weekly wage as an issue. Claimant thereafter did not succeed on the issue of permanent disability benefits, but he successfully obtained a higher average weekly wage as a result of the proceedings before the administrative law judge, and the court held the Section 28(b) requirements were met.

As in *Staftex Staffing*, employer in the present case did not accept the written recommendation that it agree to permanent total disability. Rather, employer continued payments of temporary total disability and controverted the claim, specifically raising

average weekly wage in its notice of controversion. C-10. Under Section 28(b), where employer rejects the recommendation, it must "pay or tender" to the employee the compensation to which it believes claimant is entitled. Employer's continued payments of compensation to claimant at a rate of $240.53, complied with this provision. Claimant ultimately succeeded in obtaining a higher average weekly wage based on wage information it belatedly received from employer, and he obtained a permanent disability award greater than the amount employer was voluntarily paying. Accordingly, pursuant to *Staftex Staffing*, the requirements of Section 28(b) are satisfied, and employer is liable for claimant's attorney's fee.[6]

In sum, the administrative law judge rationally found that the correspondence between the parties and the district director met the informal conference requirement. *See* 20 C.F.R. §702.311; *Hassell,* 477 F.3d 123, 41 BRBS 1(CRT). The district director recommended in writing that the parties agree to an award of permanent total disability benefits, implicitly incorporating the previously recommended average weekly wage at which employer was paying benefits. Employer rejected the recommendation and controverted the claim on the average weekly wage and disability issues, continuing to pay the temporary disability benefits to which it believed claimant was entitled. Claimant thereafter obtained a continuing permanent disability award greater than the amount tendered by employer as a result of proceedings before the administrative law judge. Under these facts, consistent with *Staftex Staffing*, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(b). As employer does not contest the amount of the awarded fee, it is affirmed.

[6] In both *Staftex Staffing* and this case, average weekly wage was expressly raised for the first time before the administrative law judge. The Fifth Circuit did not find this fact to be an impediment to fee liability. Indeed, such is consistent with 20 C.F.R. §702.336, and, moreover, the Fifth Circuit has noted that needless remands to the district director are to be avoided. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46, 49 n.7 (2006).

Accordingly, the administrative law judge's Order Concerning Attorney Fees and the Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge