BRB No. 08-0270

E.E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DANOS CUROLE MARINE CONTRACTOR	)	DATE ISSUED: 09/22/2008
	)	
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jere Jay Bice (Bice, Palermo & Vernon, L.L.C.), Lake Charles, Louisiana, for claimant.

Henry H. LeBas and Barry J. Rozas (Law Offices of Henry H. LeBas, P.L.C.), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order (2005-LHC-1648) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured her back while working for employer on February 17, 2002. Employer voluntarily paid temporary total disability benefits from February 22, 2002, through August 23, 2004 based on an average weekly wage of $329.73. Emp. Ex. 2. From August 24, 2004, through February 2005, employer paid partial disability benefits at a rate of $146.30 per week, and from March 2005, employer paid partial disability benefits at the rate of $72.68 per week, based on its assertion that claimant was working in suitable alternate employment. Decision and Order at 3. Claimant filed a claim for benefits on January 17, 2003, asserting that employer's payments were based on an incorrect average weekly wage. Two informal conferences were held, one on April 15, 2004, and one on February 16, 2005, but this case could not be resolved before the district director. In February, March or April 2005, at least 18 months prior to the formal hearing in October 2006, the parties stipulated that claimant's average weekly wage is $483.61. Nevertheless, employer did not adjust its payments to claimant. The administrative law judge conducted a hearing on October 5, 2006, wherein the parties disputed the nature and extent of claimant's disability, particularly the availability of suitable alternate employment. The administrative law judge issued his decision on March 23, 2007. He found that claimant's condition reached maximum medical improvement on January 1, 2007, and he ordered the payment of temporary total, temporary partial, and permanent partial disability benefits based on the stipulated average weekly wage. Decision and Order at 29. The award was not appealed.

Subsequent to this award, claimant's counsel filed fee petitions with the district director and the administrative law judge. The district director awarded a fee payable by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), but the administrative law judge denied the fee request.[1] The administrative law judge relied on *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd on recon.*, 41 BRBS 73 (2007) (Hall, J., concurring), *appeal pending*, No. 08-60251 (5th Cir.), and *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), to deny the fee request, as he found that the district director did not issue a "substantive" recommendation on the issues. The administrative law judge stated that, absent the substantive recommendation, there was nothing employer could accept or reject; therefore, the statutory requirements for shifting fee liability to employer were not met. Supp. Decision and Order at 3-4. Claimant appeals the administrative law judge's denial of an attorney's fee payable by employer, and employer responds, urging affirmance.

[1]The district director awarded $2,925, representing 14.625 hours at $200 per hour. Cl. Brief at exh. A. Before the administrative law judge, counsel requested $29,980, and employer filed objections thereto.

Claimant contends the administrative law judge erred in denying a fee in this case because employer did not comply with the district director's written recommendation. She asserts that all the Section 28(b) elements have been met and that there is no requirement for a "substantive" recommendation. Employer argues that there was no recommendation because neither informal conference resulted in a "substantive" recommendation which required a particular action by employer. Rather, it asserts that there was only a suggestion that the parties work together to obtain more information and resolve their differences. It argues that such a suggestion does not provide an "objective standard upon which an employer can establish its willingness to comply and avoid future litigation costs[.]" Emp. Brief at 4. Therefore, employer argues that the administrative law judge correctly found that it is not liable for a fee.

Liability for attorney's fees under the Act is controlled by Section 28. Section 28(b), which applies in this case because employer was voluntarily paying benefits when claimant filed her claim, 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). Section 702.316 of the regulations provides that, at the conclusion of an informal conference, the district director:

> 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). Courts have construed the provisions of Section 28(b) strictly. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007) (no fee payable by the employer if the district director does not issue a written recommendation on the disputed issue); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318, 39 BRBS 1, 4(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 186, 35 BRBS 109, 119(CRT) (5th Cir. 2001) (absence of an informal conference is an "absolute bar" to employer's liability under Section 28(b)); *Staftex Staffing*, 237 F.3d at 409, 34 BRBS at 47(CRT); *see also Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Andrepont*, 41 BRBS 1; *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

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*, 237 F.3d at 409, 34 BRBS at 47(CRT).[2] 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); *FMC Corp. v. Perez*, 128 F.3d 908, 909-911, 31 BRBS 162, 163(CRT) (5th Cir. 1997) (Section 28(b) gives an employer an opportunity to avoid the payment of attorney's fees by "accepting the ... Commissioner's recommendations"). The question raised in this appeal is whether the district director issued a sufficient recommendation.

An informal conference was held on April 15, 2004. The district director addressed the issues of average weekly wage and compensation rate. He then made the following recommendation:

> Mr. Mayes will revisit the wages earned by the [employee] for the six months worked for the [employer] prior to the injury. The parties will

[2]In *Staftex Staffing*, although average weekly wage was not disputed before the district director, the recommendation to pay permanent total disability benefits referenced the compensation rate and average weekly wage. While claimant did not succeed in obtaining the recommended permanent total disability benefits, on reconsideration the Fifth Circuit held the employer liable for claimant's counsel's fee since employer thereafter sought a lower rate and claimant succeeded in obtaining a higher average weekly wage before the administrative law judge. The court held that under the circumstances, the requirements of Section 28(b) had been satisfied. *Staftex Staffing*, 237 F.3d at 410, 34 BRBS at 106(CRT).

> furnish the DOL with a copy of the wages to be place (sic) in the administrative file.
>
> ***
>
> If the parties are unable to resolve the disputed issues, enclosed are pre-hearing statements to be completed and returned within 21 days.

Cl. Brief at exh. C.[3] On August 27, 2004, the district director mailed correspondence to both parties asking whether the disputed issues of average weekly wage and compensation rate had been resolved. *Id.* at exh. D. On February 16, 2005, a second informal conference was held. Average weekly wage and compensation rate and claimant's ability to return to work continued to be in dispute, and according to claimant, the district director noted employer's assertion that it would be "no problem" to resolve the average weekly wage issue. Therefore, the district director recommended that the parties work together to resolve average weekly wage and compensation rate by February 25, 2005. Cl. Brief at 4-5. Claimant asserts that the parties stipulated to claimant's average weekly wage in April 2005, 18 months prior to the October 2006 hearing, but employer did not adjust its payments.

In awarding an attorney's fee for work performed before him, the district director stated that Section 28(b) applies, and he rejected employer's argument that the requirements were not satisfied. He stated:

> Unfortunately for the employer, in this case, *they did not accept the recommendation made at the informal conference*. Per [the informal conference memo], the employer/carrier's representative advised that he would get the wages and adjust the average weekly wage with 'no problem.' The claimant pointed out that the average weekly wage had been calculated on only 6 months of wages. The compensation rate being paid at that time was based on an average weekly wage of $329.73. Rather than making any adjustments, however, the employer continued to use that average weekly wage up until the date of trial, at which point they stipulated that the average weekly wage was $483.61. Therefore, *employer/carrier cannot state that they accepted the informal conference recommendations* in this case.

[3]Mr. Mayes was employer's representative at the informal conference.

Cl. Brief at exh. A (emphasis added).[4] To the contrary, the administrative law judge determined that the recommendations of the district director were not "substantive" and did not provide an objective standard by which to compare employer's actions. Thus, he held that the "written recommendation" requirement of Section 28(b) was not met because there was nothing for employer to reject. Specifically, the administrative law judge stated:

> Claimant's counsel argues that although the average weekly wage was resolved, the compensation rate was not increased and therefore Employer did not accept the district director's recommendation. That argument assumes that the hearing examiner actually issued a substantive recommendation. However, the hearing examiner really did no more than send the disputed issues back to the parties with a suggestion that they obtain more information and resolve their disagreements. That is not the type of substantive recommendation on the disputed issues envisioned by the regulations or the Act. It provides no objective standard upon which an employer can establish its willingness to comply and avoid future litigation costs.

Supp. Decision and Order at 4 (footnote omitted).

Contrary to the administrative law judge's decision, nowhere in the Act or its regulations does it state that the district director must issue a "substantive" written recommendation. Rather, the district director is charged with making recommendations aimed at resolving the disputed issues. *See* 20 C.F.R. §702.316. The district director here specifically recommended that employer review claimant's wage records, determine her appropriate average weekly wage and send a copy of the wage reports to the Department of Labor. The district director's recommendation, which required that employer take action which would resolve the average weekly wage issue, thus complied with the Section 28(b) requirement for a written recommendation. *See Staftex Staffing*, 237 F.3d at 410, 34 BRBS at 106(CRT). Moreover, we agree with claimant that, on the facts of this case, the district director's finding that he issued a recommendation is entitled to some consideration because the district director was construing his own documentation.

In any event, the district director issued a written recommendation which directed employer to take specific actions in order to resolve the dispute. Employer rejected the recommendation by failing to take action which would have resolved the issue at an

[4]Claimant states that employer paid the fee awarded by the district director without objection. Cl. Reply Brief at 4-5.

earlier date. Moreover, even after a new average weekly wage calculation was made and agreed to, employer did not adjust its payments. *See* 20 C.F.R. §702.315(a). Under these circumstances, 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,[5] and an award of additional benefits before the administrative law judge based on the higher average weekly wage. Thus, claimant is entitled to an attorney's fee payable by employer pursuant to Section 28(b). *Staftex Staffing*, 237 F.2d at 410, 34 BRBS at 105-106(CRT). The administrative law judge's denial of an attorney's fee is vacated, and the case is remanded to him for the award of a reasonable attorney's fee payable by employer. 20 C.F.R. §702.132.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5]As claimant asserts, *Andrepont*, 41 BRBS 73, is distinguishable. In *Andrepont*, there was no rejection of the recommendation, as the district director recommended that the employer cease paying benefits, and the employer accepted this recommendation.