U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0627

LARRY BROOKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STEVEDORES OF AMERICA, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 9/27/2022
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Orders Approving Attorney Fee of David A. Duhon, District Director, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe (Brewster Law Firm, LLC), Metairie, Louisiana, for Claimant.

Christopher J. Field (Field & Kawczynski, LLC), Jamesburg, New Jersey, for Employer/Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals District Director David A. Duhon's February 2, 2021, and September 23, 2021, Orders Approving Attorney Fee (OWCP No. 07-07317443) on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.* (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, based on 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); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim seeking benefits for a work-related hearing loss on February 17, 2020. On March 9, 2020, Employer filed an LS-207 Form controverting Claimant's claim, as well as an LS-208 Form documenting a total payment to Claimant of $756.22. Exhs. A-C. Employer calculated the payment based on a one percent binaural hearing loss and an average weekly wage (AWW) of $567.17 (two-thirds of $567.17, or $378.11, times two weeks). Exh. C.

On August 27, 2020, Claimant sent a letter to the Department of Labor requesting an informal conference. In the letter, Claimant argued his hearing loss should be considered 5.15 percent, the weekly wage should be $776.77, and Employer should pay an additional $3,821.38.[1] *See* Exh. G at 2. Following an informal conference on October 5, 2020, the district director adopted the hearing loss and AWW sought in Claimant's letter and recommended Employer pay Claimant compensation for a 5.15 percent permanent binaural hearing loss based on an agreed-upon AWW of $776.77, as well as medical benefits. Exh. D.

[1] The letter stated in relevant part, "The Employer owes PPD benefits of $4,577.60. The Employer is entitled to a credit for a previous payment of $756.22. As such, the Employer has an outstanding liability of $ $3,821.38." Exh. G at 2. The calculated amount was in error based on the AWW Claimant sought.

On October 16, 2020, Employer issued another LS-208 Form reflecting its payment to Claimant of an additional $3,821.38 -- the precise number Claimant requested in his demand letter -- in benefits based on the recommended 5.15 percent binaural hearing loss (October Form). Exh. E. Although the payment responded to the amount Claimant demanded in his letter to the district director, it was erroneous because it was based on the original AWW of $567.17 rather than on the later agreed-upon AWW of $776.77.

When advised of the mistake on November 3, 2020, Employer did not protest or otherwise reject the corrected amount. Instead, it immediately conceded the error and, *on the next day*, filed a corrected LS-208 Form (November Form), reflecting "AMENDED" total payments of compensation to Claimant of $5,333.86 as of that date, an amount which accords with the district director's written recommendation. Exh. D.

On November 6, 2020, Claimant's counsel filed an itemized fee petition with the district director seeking an attorney's fee under 33 U.S.C. §928(b) totaling $3,231.25 for correcting the $756.26 shortfall between the two payments.[2] Despite the fact Employer paid the amount Claimant had originally demanded and immediately corrected the total when contacted regarding the mistake, counsel alleged Employer's initial payment following the informal conference constituted a "refusal to accept" the district director's recommendation, thereby triggering his entitlement to an attorney's fee in this case. Employer responded, denying liability for an attorney's fee under Section 28(b) because it timely accepted the informal conference recommendation.

On February 2, 2021, the district director issued his Order Approving Attorney Fee (February Order), wherein he concluded "no fees are payable by [E]mployer under Section 28(b)" because Employer timely paid Claimant compensation in accordance with the written recommendation. On the same day, Claimant's counsel requested reconsideration of the order, which the district director summarily denied in a letter. Exhs. H-I.

Claimant's counsel thereafter appealed the district director's actions to the Benefits Review Board. The Board dismissed the appeal as premature and for lack of jurisdiction and returned the case to the district director for issuance of an order to "properly dispose of the motion for reconsideration." *Brooks v. United Stevedores of America, Inc.*, BRB No. 21-0263 (Sep. 15, 2021) (unpub.). On September 23, 2021, the district director issued a second "Order Approving Attorney Fee" (September Order), in which he reiterated his earlier findings and denied Claimant's counsel's request for reconsideration of his February Order denying attorney's fees under Section 28(b).

[2] Counsel's requested fee represents 12.55 hours of attorney time at an hourly rate of $250 and .75 hours of law clerk time at an hourly rate of $125.

On appeal, Claimant's counsel challenges the district director's February and September Orders, both of which resulted in the denial of an employer-paid attorney's fee under Section 28(b). Employer and the Director, Office of Workers' Compensation Programs (Director), each respond urging affirmance.

Claimant's counsel contends Employer "expressly rejected" the district director's written recommendation on October 16, 2020, when it tendered only some of the additional benefits to which Claimant was deemed entitled. He contends this rejection, coupled with the fact Claimant ultimately obtained additional benefits on November 4, 2020, satisfied all the elements for counsel's entitlement to an employer-paid attorney's fee under Section 28(b). Counsel further contends whether Employer's initial post-recommendation underpayment of benefits was a mistake is irrelevant to a determination of Employer's liability for an attorney's fee under Section 28(b) because there is no intent element contained in that provision. Moreover, citing *Rivera v. Director, OWCP*, 22 F.4th 460, 55 BRBS 59(CRT) (5th Cir. 2021), counsel states Employer's "mere assertion" that it accepted the written recommendation is insufficient for it to avoid liability for an attorney's fee under Section 28(b); rather, Employer must actually "adopt" the recommendation in practice.

Employer avers it accepted the district director's written recommendation and paid the amount set forth in Claimant's informal conference request in a timely fashion. It admits it committed "an obvious and inadvertent mistake" by paying Claimant $3,821.38, the amount initially demanded by Claimant, rather than the amount due based on the agreed-upon AWW, but once advised of this administrative error, it immediately paid the amount due in full to Claimant. Employer further maintains it did not, at any point during or after the informal conference, protest or otherwise take any action suggesting it rejected the district director's written recommendation.

The Director submits the district director's ultimate finding is supported by substantial evidence because Employer accepted the written recommendation following an informal conference, mistakenly paid most of the amount due within fourteen days, and then paid the remaining amount as soon as it was alerted to its error. He also asserts there is no evidence to support counsel's position that his assistance was required to achieve the difference between Employer's first and second post-recommendation payments to comply with the district director's written recommendation. The Director further asserts counsel's reliance on the result in *Rivera* is misplaced because the facts here are distinguishable, as Employer accepted the district director's first and only written recommendation within fourteen days of its receipt.

Section 28(b) applies where the employer has paid compensation without an award and a controversy then develops over the amount of additional compensation due.[3] 33 U.S.C. §928(b);[4] *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held the following requirements must be met before an employer may be liable for an attorney's fee under Section 28(b): "(1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee procures a lawyer's services to achieve a greater award than what the employer was willing to pay after the written recommendation." *Rivera*, 22 F.4th at 465, 55 BRBS at 62(CRT); *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010); *Andrepont v. Murphy Exploration &*

[3] It is undisputed Section 28(b) applies in this case because Employer initially paid Claimant benefits and a controversy thereafter arose regarding Claimant's entitlement to additional benefits. *See* 33 U.S.C. §928(b); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007). As Claimant contends, the district director's multiple references to a thirty-day time frame within which Employer must pay additional compensation to avoid liability under Section 28(b) is, as a matter of law, erroneous. As noted above, under Section 28(b), the deadline for accepting/refusing the recommendation and paying or tendering benefits is fourteen days. *See* 33 U.S.C. §928(b). Nevertheless, under the circumstances of this case, we hold the district director's error is harmless.

[4] Section 28(b) states:

> 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 [district director] shall set the matter for an informal conference and following such conference . . . 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[.]

Prod. Co., 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, *modified on reh'g on other grounds*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

The relevant facts in this case establish two of the four criteria have been satisfied: there was an informal conference on October 5, 2020, culminating with the district director's written recommendation that Employer "pay an additional 8.3 weeks of compensation at the agreed higher compensation rate of $517.85 per week." Exh. B. The dispute is whether the third and fourth criteria have been met: whether Employer refused to accept the written recommendation and whether Claimant obtained a greater award than what the employer was willing to pay after the written recommendation. We agree with the position set forth by Employer and the Director that they have not.

The informal conference memorandum clearly and repeatedly stated Employer accepted the recommendation. Exh. D. Employer also clearly indicated on its LS-208 Form that it had accepted the recommendation and paid Claimant the additional $3,821.38 in benefits Claimant requested within fourteen days of receiving the recommendation. Exh. E. Employer, upon being advised that its post-recommendation payment did not reflect the district director's recommended 5.15 percent impairment rating, quickly remedied its mathematical error and shortfall with an amended LS-208 Form and payment. Exh. F. Those facts categorically do not amount to a rejection of the district director's written recommendation.

Indeed, such a rejection typically occurs where the employer subsequently files a notice of controversion, refuses to pay the recommended amount of compensation, terminates payment of all voluntary benefits, or merely declines to act. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Anderson v. Associated Naval Architects*, 40 BRBS 57, 60-61 (2006); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991). In this case, Employer, through its post-recommendation written representations that it "accepts informal conference recommendations" and actual payment of compensation, plainly conveyed the requisite acceptance contemplated by Section 28(b).

The facts following the informal conference, as the district director found, further underscore that clear acceptance. First, the conference memorandum repeatedly noted Employer explicitly agreed to $776.77 as Claimant's AWW for purposes of determining his compensation rate. Exh. B. Second, as the district director observed, Employer's October Form and November Form both reflected Employer's acceptance of and agreement with the district director's written recommendations. Exhs. C, D. Employer's October Form unequivocally stated it "accepts [the] informal conference

recommendations"[5] and reflected payment of what it believed, at that time, was the total compensation owed Claimant pursuant to that recommendation.[6] *Id.* Its "AMENDED" November Form reiterated its acceptance of the district director's written recommendations, reflected a correction of the compensation computation error in the October Form, and documented its final payment of compensation owed Claimant, $5,333.86, which is in complete compliance with the written recommendations.[7] Exh. D.

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[5] Claimant's reliance on *Rivera* is misplaced. In that case, the district director issued two written recommendations, one on August 24, 2016, and the second on September 7, 2016. *Rivera*, 22 F.4th at 460, 55 BRBS at 61(CRT). The employer accepted the second recommendation and, on September 16, paid the claimant the recommended benefits. *Id.* The Fifth Circuit held the Section 28(b) criteria were satisfied when the district director issued a written recommendation on August 24, 2016, which the employer rejected by not paying Claimant benefits within fourteen days. *Id.* 22 F.4th at 465, 55 BRBS at 62(CRT). In reaching this conclusion, the Fifth Circuit disagreed with the Board's determination that the September 7 recommendation rendered the August 24 one moot. *Id.* In this case, however, the district director issued only one written recommendation, dated October 5, 2020, which, as the record establishes, Employer accepted through the issuance of its October Form and payment.

[6] Indeed, Employer's October 16, 2020, payment of benefits was likely derived from the aforementioned calculations Claimant's counsel submitted in his August 27, 2020 letter requesting the informal hearing. Exh. G. As previously noted, counsel, in that letter, incorrectly stated:

> ***The Employer owes PPD benefits of $4,577.60.*** The Employer is entitled to a credit for previous payment of $756.22. As such, the ***Employer has an outstanding liability of $3,821.38.***

Exh. G at 2 (emphasis added).

[7] Moreover, as the Director notes, review of counsel's fee petition reveals he made no effort to contact Employer between the initial payment and the expiration of the Section 28(b) fourteen-day time frame to avoid fee liability. It, however, does reflect his "receipt and review" of Employer's October Form documenting its payment and a phone call with Claimant "regarding payment of additional compensation." Presumably, counsel's "review" of the October Form should have revealed, at that time, any error in Employer's computation and payment of benefits. Nevertheless, counsel did not contact Employer until November 3, 2020, with a "settlement offer" that Employer pay Claimant an additional "$756.26 (the difference between the $4,577.60 paid and the recommended $5,333.86)," which prompted Employer's "AMENDED" November Form. From this, the

In this case, therefore, Employer accepted the district director's October 5, 2020 recommendation and, within fourteen days of receipt of the recommendation, paid Claimant benefits on October 16, 2020. As the district director acted within his discretion in finding Employer did not refuse the October 5, 2020 recommendation and paid Claimant all the compensation due in accordance with the written recommendation, two of the criteria for fee liability under Section 28(b) have not been satisfied.[8] *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *see also Andrepont*, 566 F.3d 415, 43 BRBS 27(CRT) (precluding fee liability if employer accepts a mistaken recommendation and claimant obtains a greater award). Consequently, we affirm the district director's denial of an employer-paid attorney's fee for Claimant's counsel under Section 28(b), as well as his subsequent denial of counsel's motion for reconsideration.

Our dissenting colleague goes beyond Claimant's argument that Employer intentionally "expressly rejected" the district director's recommendation and argues the language of the statute, the memorandum of informal conference in this claim, and the caselaw establish that an explicit refusal to accept a district director's recommendation is not a necessary element to shift attorney fees. In his view, a fee is strictly required even in cases where an employer accepts the district director's recommendation but mistakenly pays less because of an obvious clerical error. We disagree.

First, had Congress intended such strict liability, it would have simply said so in the statute; our colleague's inflexible interpretation of the language impermissibly reads any "refusal" to accept the district director's recommendation out of text of Section 28(b) and the caselaw interpreting it. *See, e.g., Asadi v. G.E. Energy, LLC*, 720 F.3d 620, 622 (5th Cir. 2013) ("In construing a statute, a court should give effect, if possible, to every word and every provision Congress used." (citation omitted)).

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district director could rationally conclude, through an exercise of his broad discretion, that Employer made an unintended computation error, which it immediately corrected upon receiving notification. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

[8] Under the circumstances in this case, Employer sufficiently articulated its acceptance of the district director's written recommendation within the appropriate fourteen-day window delineated in Section 28(b); therefore, counsel's contention that the undisputed facts conclusively establish the pre-requisites for an Employer-paid attorney's fee under Section 28(b) is unpersuasive.

Second, contrary to our colleague's assertion, the memorandum of informal conference in this case unequivocally demonstrates that the parties had agreed to the AWW, that Employer did not refuse the district director's recommendation on that issue by instituting the process established by the regulations for disagreements remaining after the informal conference, and that it instead complied with what it mistakenly understood to be the amount reached at the conference within 14 days (and immediately corrected its reasonable mistake thereafter). *See* Exh. B (repeatedly indicating agreement on the AWW issue and directing the parties to request transfer to the Office of Administrative Law Judges ("OALJ") for any remaining disagreements); 20 C.F.R. §702.316 (directing the district director to schedule additional conferences or transfer the case to the OALJ for remaining disagreements).

Finally, the caselaw relied on by our colleague does not establish the strict liability he suggests but instead unambiguously demonstrates that the actions taken following the informal conference establish whether a party refuses a district director's recommendation -- and that Employer's actions plainly do not establish such a refusal here. In *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010), the employer contended it complied with the district director's memorandum even though it intentionally paid less than recommended and concurrently requested transfer to the OALJ to further litigate the issue. The court found the act of litigating belied its claims and that its subsequent actions made "frivolous" its suggestion it did not reject the district director's recommendations. *Id.*, at 983. Here, Employer's subsequent behavior establishes the opposite is true: while Employer mistakenly paid less than the district director's recommendation, it promptly corrected the error and did not further litigate. Contrary to our dissenting colleague's assertions, there thus is nothing in the statute, regulations, or caselaw that requires the district director to award an attorney's fee in these circumstances. *Id.* As the third element has not been satisfied and Claimant has further not established he obtained a greater award than what Employer was willing to pay after the written recommendation, we need look no further to affirm the district director and do not reach the issue of whether an attorney was necessary to correct Employer's error.

Accordingly, we affirm the district director's February 2, 2021, and September 23, 2021, Orders Approving Attorney Fee and resulting denial of an Employer-paid attorney's fee under Section 28(b).

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's holding that Claimant is not entitled to an Employer-paid attorney fee. The district director issued a written recommendation regarding the disposition of this claim; Employer failed to pay Claimant the recommended amount within fourteen days; Claimant secured additional compensation from Employer with the assistance of his attorney; and, therefore, Employer is liable for a reasonable attorney fee. 33 U.S.C. §928(b).

The statute at issue in this appeal, Section 28(b) of the Longshore Act, states:

> 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 [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. If the employer or carrier refuse[s] 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.
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> 33 U.S.C. §928(b).

Under the plain language of the statute, an employer must pay an injured employee's attorney fees when four conditions are met: "(1) an informal conference is held; (2) the [district director] issues a written recommendation; (3) the employer refuses to adopt the recommendation within fourteen days; and (4) the employee procures a lawyer's services to achieve an award greater than that which the employer was willing to pay after the written recommendation was issued." *Rivera v. Director, OWCP*, 22 F.4th 460, 465 (5th Cir. 2021).

There is no dispute the first two conditions are met. Employer initially paid Claimant a total of $756.22 without an award, based on its assessment that he had a one percent hearing loss and an average weekly wage (AWW) of $567.17. Exhibit D. On August 27, 2020, Claimant, contending he actually suffered a 10.3 percent hearing loss and had an AWW of $776.77; he requested an informal conference with the district director and proposed an award based on a 5.15 percent impairment, which was the average of his audiogram (10.3 percent) and Employer's (zero percent). Exhibit G. During the informal conference, the parties agreed that Claimant's AWW is $776.77 but continued to dispute his level of impairment. Exhibit B. Claimant reiterated his position that his audiogram revealed a 10.3 percent impairment, while Employer alleged Claimant's audiogram was unreliable and he has no measurable impairment. *Id*. Following the October 5, 2020 informal conference, the district director issued a written recommendation matching Claimant's initial proposal that Employer pay compensation based on a 5.15 percent hearing loss and an average weekly wage of $776.77. *Id*.

The dispute in this appeal hinges predominantly on the third condition: whether Employer refused to adopt the district director's recommendations within fourteen days, thus necessitating Claimant's procurement of an attorney to recoup additional compensation in satisfaction of the fourth condition. The relevant, uncontested facts are as follows.

On October 16, 2020, within fourteen days of the district director's recommendation, Employer responded that it "accepts [the district director's] informal conference recommendations." Exhibit D. It also filed Form LS-208, Notice of Payment, confirming that it had made a final payment to Claimant of $3,821.38 that, when added to the $756.22 it had already paid, resulted in total compensation to Claimant of $4,577.60. *Id*. While seemingly consistent with the district director's recommendation, Employer's payment to Claimant was flawed. Rather than basing his compensation on the $776.77

AWW agreed upon by the parties and recommended by the district director, Employer relied upon its own initial proposal of a $567.17 AWW, resulting in an underpayment of $756.22. Exhibits B, C, D. Through counsel, Claimant identified the problem and notified Employer that its payment was inconsistent with the district director's recommendation. Employer agreed and made its final payment to Claimant on November 4, 2020, outside the fourteen-day window for accepting the district director's recommendation. Exhibits E, F.

In concluding that Employer is not liable for Claimant's counsel's attorney fees, the majority holds that Employer's stated agreement with the district director's recommendations fully satisfies its obligation to "accept" those recommendations within fourteen days under Section 28(b). To the contrary, accepting the district director's recommendations requires more than just an agreement to be bound by those recommendations; it requires *actual compliance*, i.e., full payment to the claimant under the terms identified by the district director, within the fourteen-day time period.

First, the statute itself explains that a "refus[al] to accept" the district director's recommendation during the fourteen-day compliance period occurs when the employer "pay[s] or tender[s]" to the injured employee an amount "which [the employer] believe[s] the employee is entitled," but which is less than the recommendation. 33 U.S.C. §928(b); *see Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 985 (5th Cir. 2010) ("[A] plain text reading of [Section 28(b)] makes it clear that 'the amount paid or tendered by the employer' is 'the additional compensation, if any, to which they [the employer] believe the employee is entitled[.]'").[9] The amount of attorney fees for which an employer is liable, in turn, is based on the difference between "the amount tendered or paid" by the employer during the fourteen-day window and "the amount [subsequently] awarded" to the claimant with his attorney's assistance. 33 U.S.C. §928(b); *see Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 890 n.7 (5th Cir. 1981) ("Section 28(b) speaks of a controversy developing over the amount of additional compensation to which the employee may be entitled."). To hold that Employer in this case is relieved of fee liability where it paid Claimant less than the district director's recommended amount within fourteen days,

[9] The majority's attempt to distinguish *Carey* on the facts says little of the reason for which I cite it – the simple, irrefutable concept that the statutory text plainly states "the amount paid or tendered by the employer" within fourteen days is, for fee-shifting purposes, "the additional compensation" to which the employer believes the claimant is entitled. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 985 (5th Cir. 2010). Only by ignoring this language (and the other case law, statutory text, and regulations I cite) can the majority hold that the amount Employer paid Claimant *during* the fourteen-day compliance period is less relevant than its actions *after* the fourteen-day period.

and Claimant's counsel thereafter assisted him in obtaining an award greater than that which the employer paid, contravenes the plain language of the statute.

Second, the requirement to timely comply with the district director's recommendations – achieved by paying the claimant the recommended amount – is confirmed by the statute's implementing regulations. If an "agreement on all issues cannot be reached" during the informal conference, the district director "shall prepare a memorandum . . . setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues." 20 C.F.R. §702.316. Each party then has fourteen days "within which to signify in writing . . . whether they agree or disagree" with the recommendations. *Id*. While the majority appears to end the inquiry there, the regulations (like the statute) go on. If the parties agree with the written recommendations, the district director "shall proceed as in [20 C.F.R.] §702.315(a)" which, in turn, states that "when the employer or carrier has agreed to pay . . . monetary compensation benefits . . . such action must be commenced immediately . . . ." *Id*.; 20 C.F.R. §702.315(a).

Consistent with the statute and regulations, the district director's memorandum noted that the parties understood and agreed at the informal conference that they would have "[fourteen] days to consider *and follow* the recommendations" or otherwise contest them. Exhibit B (emphasis added). Thus, the district director specifically instructed Employer to identify whether it "accept[s] or reject[s] this recommendation" and, if accepting it, to "submit Form LS-208 [Notice of Payment], *showing compliance* with the above recommendation." *Id*. (emphasis added). As previously discussed, Employer's LS-208, filed within fourteen days of the district director's memorandum, purported to accept the recommendations but failed to demonstrate compliance, as the amount Employer paid was less than the recommendation. Exhibit D. Compliance was not achieved until November 4, 2020, outside the statutory fourteen-day period, and only after Claimant's counsel advised Employer of the underpayment. Exhibit E, F.

Third, requiring actual compliance with the district director's recommendation within fourteen days is also consistent with prevailing circuit law. In *Rivera*, for example, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this claim arises, strictly applied the statute to hold an employer liable for attorney fees where it refused to pay the compensation amount recommended by the district director within fourteen days and conditioned its acceptance on the claimant declining to pursue other rights under the Longshore Act.[10] *Rivera*, 22 F.4th at 466 n.2. The court made clear that

[10] Contrary to the majority's and the Director's assessments, *Rivera* cannot be meaningfully distinguished on the basis that it involved two separate recommendations by the district director. The court held that the district director's issuance of a second

an employer will not avoid fee liability by simply stating an intent to accept the district director's recommendations. Rather, as happened in this case, an employer exposes itself to fee liability if it "refuses to *follow* the recommendation," prompting the claimant to hire an attorney who assists him in "ultimately obtain[ing] an award greater than the employer's post-recommendation offer." *Id*. at 466 (emphasis added).

The district director's issuance of recommendations is not simply an academic endeavor; the explicit purpose of holding an informal conference and making a recommendation is to promote the "disposition of the controversy." 33 U.S.C. §928(b); *Rivera*, 22 F.4th at 469 ("So, we may interpret 'disposition of the controversy' to apply to situations in which the [district director] recommends a manner in which a dispute between parties could be resolved."). Thus, "as a matter of statutory interpretation," an employer insulates itself from fee liability only if it abides by the district director's recommended "disposition" within fourteen days. *Id*. And while it may be tempting to hold an employer harmless where its failure to comply with a district director's recommendation is purportedly the result of an inadvertent mathematical error, such an exception to fee liability is not supported by the statutory text. *Id*. at 467 (Section 28(b) identifies only one exception, not applicable here, relating to requests for independent medical examinations). The fact remains that Employer miscalculated Claimant's award, paid him less than the district director's recommendation, and Claimant's counsel identified the error and secured additional compensation beyond that which Employer paid.[11]

Having identified the recommended percent of hearing loss and Claimant's AWW, the district director provided Employer with "everything necessary to determine the total compensation owed," thus enabling Employer to timely pay Claimant "the specific compensation amount due."[12] *Rivera*, 22 F.4th at 469. Shifting the litigation costs of an

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recommendation during the initial fourteen-day compliance period did not relieve the employer of fee liability for failing to comply with the first recommendation. Thus, the court's assessment that an employer can avoid fee liability only by strictly adhering to the fourteen-day window, as well as its analysis of what constitutes acceptance of a recommendation, remains valid and applicable to this case.

[11] This is exactly the type of situation where participation of an attorney is necessary and appropriate. If Employer and its experienced counsel miscalculated Claimant's award, surely the majority does not expect that Claimant himself, without an attorney, should have identified the error and persuaded Employer to pay him additional compensation.

[12] For the same reason, the Employer's argument that its miscalculation can be attributed Claimant's August 27, 2020 letter, sent more than a month before the district director issued his recommendation, is unavailing. Whether Claimant "made the mistake

employer's noncompliance to a claimant plainly contravenes both the text and purpose of the statute. *See Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 1257 (5th Cir. 1980) (Section 28(b) "ensures that an employee will not have to reach into the statutory benefits to pay for legal services, thus diminishing the ultimate recovery.").

The "flexible" interpretation of Section 28(b) advocated by the majority – one that creates an extra-statutory exception for what it deems "clerical error," and which emphasizes an employer's actions *after* the statutory fourteen-day window for accepting the district director's recommendations – is without foundation in the statute, regulations, or case law. In an attempt to undermine my strict application of the statute, the majority sets forth an assertion that is both meritless and confusing – that I go "beyond" Claimant's arguments by basing my opinion on "the language of the statute, the memorandum of informal conference in this claim, and the caselaw." Yet, consistent with my opinion, Claimant specifically argues that Employer's alleged "mistake" does not "vitiate its liability under Section 928(b) for failing to timely adopt the [district director's] recommendation." The majority's criticism simply begs the question: If not the law, evidence, and parties' arguments, on what authority should the Board base its decision?

As is clear from the law and facts, the proper outcome of this appeal is for the Board to remand the claim with instructions for the district director to award Claimant's counsel a "reasonable" Employer-paid attorney fee "based solely upon the difference between the amount awarded and the amount tendered or paid" by Employer during the fourteen-day period following the district director's written recommendation. 33 U.S.C. §928(b).

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge

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first" as Employer alleges, a month before the district director's recommendation, is irrelevant to whether the district director's recommended disposition provided Employer with all the information it needed to comply and whether it actually complied.