BRB No. 04-0332

KIRK D. STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEMM INDUSTRIES	)	DATE ISSUED: 12/20/04
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and the Decision and Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Charles S. Montagna (Montagna Breit Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly (Vandeventer Black L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees and the Decision and Order Denying Employer's Motion for Reconsideration (2002-LHC-2166) of Administrative Law Judge Richard K. Malamphy 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a laborer, suffered bruises to his right shoulder and back on November 29, 2001. Employer paid compensation from the date of injury to December 2, 2001, when it alleged suitable light-duty work was available for claimant. Claimant filed a claim for additional benefits on December 21, 2001, and, on January 24, 2002, requested an informal conference on the issue of his entitlement to temporary total disability benefits. Cl. Att. 4; Emp. Att. 5. On January 31, 2002, the claims examiner asked claimant to submit additional medical documentation supporting the claim of ongoing total disability and/or the inability to perform light-duty work at employer's facility. The claims examiner stated that no informal conference would be scheduled at that time. Cl. Att. 6. On February 12, 2002, claimant submitted additional medical documentation and an LS-18 pre-hearing statement requesting that the matter be referred to the administrative law judge, noting that employer's carrier stated that no benefits would be forthcoming. Cl. Att. 7. On February 14, 2002, however, employer paid claimant compensation for three days, December 2-4, 2001. Cl. Att. 8. Thereafter, on March 12, 2002, claimant's counsel acknowledged the payment, but stated he had requested ongoing compensation from November 29, 2001. Cl. Att. 9. Employer offered to settle the case for $1,000 on May 24, 2002. Emp. Att. 12. On June 17, 2002, claimant's counsel again requested an informal conference or that the case be transferred to the Office of Administrative Law Judges (OALJ). Cl. Att. 10. The case was transmitted to the OALJ on June 19, 2002.[1] Cl. Att. 12. Prior to the hearing, scheduled for November 13, 2002, claimant informed the administrative law judge that the parties had agreed to resolve the case by way of stipulations. On December 13, 2002, a Stipulation Agreement, signed by the parties, was submitted to the administrative law judge, who issued a decision and order awarding compensation pursuant to the agreement.[2]

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge requesting $2,297.50, representing 9.5 hours of attorney services at $225 per hour and two hours at $80 per hour for work performed by paralegals. Employer filed objections, arguing that it was not liable for counsel's fee under Section 28(b), 33 U.S.C. §928(b), because no informal conference had been held. Employer also objected to the

[1] Claimant's counsel also avers that on June 19, 2002, the claims examiner informed him that attempts to resolve the matter over the telephone had failed and that another LS-18 form should be filed This contention is not verified in the documents before the Board.

[2] The agreement stated, in part, that claimant was temporarily totally disabled from November 30, 2001, through February 6, 2002, entitling him to compensation for 9 and 6/7 weeks based on an average weekly wage of $320. Stip. Agreement.

fee petition, contending it did not conform to the regulatory requirements at 20 C.F.R. §702.132(a). Claimant's counsel replied and also submitted a petition for a fee for an additional four hours of work for defending his original petition.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge rejected employer's argument that it was not liable for an attorney's fee under Section 28(b), found the fee petition to be sufficiently specific, and awarded claimant's counsel a fee of $2,860, representing 12 hours of attorney services at $225 per hour and two hours of paralegal services at $80 per hour. The administrative law judge denied employer's motion for reconsideration and affirmed his award of a fee.

Employer appeals, contending that the administrative law judge erred in finding it liable for a fee under Section 28(b) and in finding that the fee petition satisfies the regulatory criteria. Claimant responds, urging affirmance.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a controversy arises over additional compensation due, the employer is liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.,* 16 BRBS 297 (1984).

In this case, claimant was successful in obtaining greater benefits before the administrative law judge than those tendered or paid by employer. Nonetheless, employer contends that because there was no informal conference before the district director, it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b), citing *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 403, 34 BRBS 105(CRT) (5th Cir. 2001); *James J. Flanagan Stevedores Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); and *FMC Corp. v. Perez,* 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997).

We reject employer's contention that it is not liable for claimant's attorney's fee under Section 28(b) due to the absence of an informal conference. The cases upon which employer relies arise within the jurisdiction of the Fifth Circuit; the Fourth Circuit, within whose jurisdiction this case arises, has not spoken on this issue. The administrative law judge properly found that, following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor,* 606

F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer's liability for a fee pursuant to Section 28(b) if claimant succeeds in obtaining greater compensation than employer voluntarily paid or tendered. *Caine v. Washington Area Metropolitan Transit Authority,* 19 BRBS 180 (1986).[3] In this regard, the administrative law judge observed that the Board has held that the holding of an informal conference is a discretionary act of the district director, *see, e.g., Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002), that claimant attempted to have an informal conference scheduled, and that the district director in the compensation district at issue "historically has not compelled parties to hold informal conferences." Supp. Decision and Order at 6. The administrative law judge therefore held that the lack of an informal conference was not an impediment to employer's liability for claimant's attorney's fee.

We affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee. The administrative law judge properly stated the Board's holdings on this issue and addressed appellate precedent. As the administrative law judge found, there is evidence that claimant's counsel attempted to resolve the claim at the district director level and to schedule an informal conference. Since holding an informal conference is discretionary, the district director's office can decline to schedule to it; a claims examiner's refusal to do so should not be determinative of fee liability. Under the circumstances presented, the administrative law judge properly found employer liable under Section 28(b) since claimant, after an informal process and proper referral to OALJ, obtained greater compensation before the administrative law judge than employer paid or tendered at the district director level. *See generally Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991) (in a Section 8(f)(3) case, court holds that district director may "consider" a claim in many ways short of an informal conference); 20 C.F.R. §702.311 (district director may try to resolve the claim through telephonic or written correspondence, as well as by holding an informal conference). Thus, as the administrative law judge's finding that employer is liable for claimant's attorney's fee is supported by the evidence and accords with law, it is affirmed.[4]

[3] The administrative law judge found that while *Caine* is factually distinguishable from this case, it nevertheless stands for the proposition that strict adherence to the procedural requirements concerning a recommendation by the district director as stated in Section 28(b) is not required for employer to be held liable for claimant's attorney's fee. Supp. Decision and Order at 4.

[4] We note that, arguably, employer also could be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act. Following employer's voluntary payment of benefits, claimant filed a claim for additional compensation on December 21, 2001. Cl. Att. 4. Employer had previously filed a notice of controversion. Emp. Att. 4.

Employer also argues that the administrative law judge erred in awarding a fee because the fee petition failed to comply with the requirements of 20 C.F.R. §702.132(a). The administrative law judge addressed employer's contention, finding that the itemized entries are sufficiently specific to establish that the tasks are reasonable and related to the claim. Supp. Decision and Order at 6. On reconsideration, employer averred that the administrative law judge misunderstood its objection, contending that claimant's counsel is required to justify the work performed, providing a rationale as to why the requested work was necessary and proportionate to the benefits awarded. The administrative law judge again stated that the description of the services provided allowed him to decipher which services were necessary to the litigation. Decision on Recon. at 3.

On appeal, employer again contends that claimant's counsel must justify why the work he performed was necessary to the success claimant obtained before the administrative law judge. We disagree.

Section 702.132(a) provides that the fee application must be supported by "a complete statement of the extent and character of the necessary work done[,]" and that the statement should be "described with particularity as to the professional status . . . of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work." 20 C.F.R. §702.132(a). Any fee awarded should be "reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded." 20 C.F.R. §702.132(a). Contrary to employer's contention, the administrative law judge fully addressed employer's concerns, finding the fee petition reasonably and sufficiently itemized and the fee appropriate under the circumstances despite the amount of compensation awarded. Supp. Decision and Order at 6; Decision on Recon. at 3. As counsel's fee petition satisfies the regulatory criteria, it became incumbent on employer to object to any specific entries, to identify any deficiencies or reasons why counsel should not be awarded a fee for the work performed, or to contend that the work performed was unnecessary. Employer did not make any such objections.

Employer did not pay claimant additional benefits until February 14, 2002, and claimant thereafter successfully prosecuted his claim before the administrative law judge. The Fifth and the Ninth Circuits have held that voluntary payments that precede employer's receipt of written notice of claimant's claim do not preclude employer's being held liable for claimant's attorney's fee pursuant to Section 28(a). *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *accord Richardson v. Continental Grain Co.,* 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). There is no indication in the file, however, as to when employer received notice of claimant's claim from the district director.

It is employer's burden on appeal to establish that the administrative law judge's fee award was arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982). Employer's mere assertion that the award is unreasonable is not sufficient to meet its burden of showing that the administrative law judge abused his discretion. As the administrative law judge addressed employer's objections to the requested fee and found the fee requested to be reasonable, and as employer has not established on appeal that the administrative law judge abused his discretion, we affirm the fee award.

Accordingly the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Decision and 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