BRB No. 09-0778

LEONARD GAUTREAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TESCO CORPORATION	)	DATE ISSUED: 05/26/2010
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order – Award of Attorney's Fees and the Compensation Order – Award of Attorney's Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Patrick E. O'Keefe and Alexis M. Parrish (Montgomery, Barnett, Brown, Read, Hammond & Mintz, LLP), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order – Award of Attorney's Fees and the Compensation Order – Award of Attorney's Fees on Reconsideration (Case No. 07-181662) of District Director David A. Duhon 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 district director's fee award must be affirmed unless the challenging party shows that it is not in accordance with law and/or that the amount awarded is arbitrary, capricious or based on an abuse of discretion. *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant filed a claim in December 2007, alleging he sustained a neck and back injury at work on May 31, 2007. Employer had instituted compensation payments in September 2007. EX 9 at 11. Claimant's physician, Dr. Juneau, performed a discogram and recommended that claimant undergo neck and back surgery. EX 4. Employer disputed this recommendation and refused to pay medical benefits, including those associated with the discogram. Employer filed notices of controversion on February 25, 2008, and March 14, 2008. An informal conference was held on March 20, 2008. EX 9 at 4-5. The district director's written recommendation, dated March 20, stated that as Dr. Juneau recommended surgery, employer should pay for the discogram. *Id.* The recommendation further states that employer should either "approve surgery now or schedule a 2nd neurological evaluation ASAP." *Id.*

Employer subsequently averred that it had already paid for the discogram and provided evidence of payment. On March 24, 2008, it arranged for a second opinion; this examination was held on April 22, 2008. Employer's physician, Dr. Leoni, recommended cervical surgery but not lumbar surgery. EX 8. In the meantime, on March 28, 2008, claimant sought referral of the claim to the Office of Administrative Law Judges (OALJ). EX 9 at 3. The claim was referred on March 31, 2008.

On May 22, 2008, following the second opinion, claimant's counsel wrote to the district director contending that employer had not approved surgery. On June 3, 2008, employer specifically approved cervical surgery. Claimant subsequently underwent both cervical and lumbar surgery. When employer discovered that claimant was to have lumbar surgery as well as the approved cervical surgery, it filed a notice of controversion on this issue only. EX 9 at 1. The parties agreed after the fact to have claimant examined by an independent physician for purposes of determining the necessity of the lumbar surgery.

A formal hearing was held on February 5, 2009. However, on March 12, 2009, claimant settled a third-party tort suit without employer's prior written approval. The administrative law judge subsequently granted an unopposed motion to dismiss the claim pursuant to Section 33(g), 33 U.S.C. §933(g).

Claimant's counsel filed petitions for an attorney's fee with both the administrative law judge and district director. The administrative law judge denied an employer-paid attorney's fee. He found Section 28(a) inapplicable because employer was paying compensation to claimant when he filed his claim. 33 U.S.C. §928(a). He found Section 28(b) inapplicable because employer complied with the recommendation of the district director. 33 U.S.C. §928(b). Specifically, he found that employer paid for the discogram, scheduled a second neurological examination, and approved cervical surgery as recommended by Dr. Leoni.

The district director found Section 28(a) inapplicable because employer was paying benefits at the time claimant filed his claim for benefits. He found, however, that employer is liable for a fee pursuant to Section 28(b) because it did not pay for the discogram or schedule a second medical examination until one month after the informal conference, and did not approve the cervical surgery until June 2008, well after the case was referred to the OALJ. The district director held employer liable for a fee of $4,591.35.

Employer filed a motion for reconsideration, which the district director denied. The district director stated that within one week after the written recommendation, employer filed another notice of controversion of the medical benefits at issue. The district director acknowledged that employer, on March 24, 2008, contacted a doctor to schedule a second opinion, but nonetheless filed a notice of controversion on March 27, 2008. The district director also noted that after employer's physician stated on April 22, 2008, that claimant needed cervical surgery, employer did not authorize it until after it was contacted by claimant's counsel on May 22, 2008. The district director rejected employer's contention that his recommendation did not include authorizing surgery if the second opinion so recommended. The district director stated that authorization was implicit in the recommendation to immediately approve surgery or to get second opinion as soon as possible.

Employer appeals the district director's finding that it is liable for claimant's attorney's fee. Claimant has not responded to this appeal.

Employer contends that the district director erred in finding that it is liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, as it complied with the district director's written recommendation. Employer avers that the district director erred in relying on a March 27, 2008, notice of controversion to find that employer did not comply with the written recommendation, as such a document does not exist. In addition, employer contends the district director erred in finding that it rejected "implicit" recommendations.

An employer will be liable for a claimant's attorney's fee pursuant to Section 28(b) of the Act if all the following elements are satisfied: (1) an informal conference is held; (2) the district director issues a written recommendation; (3) employer rejects the written recommendation; and (4) claimant obtains greater compensation than that paid or

tendered by employer after its rejection of the written recommendation.[1] *Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *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). In this case, the first two requirements were satisfied. Employer contends that the district director erred in finding that it rejected the written recommendation.[2] We agree that the district director's imposition of fee liability in this case was in error.

Prior to the informal conference on March 20, 2008, employer filed notices of controversion on February 25, 2008 and March 14, 2008. The former notice controverted its liability for a discogram and Dr. Juneau's recommendation for surgery, on the grounds that this test is unreliable. *See* EX 4 at 13. Employer stated it would authorize a myelogram and CT scan, with a follow-up examination by a physician of its choosing. EX 9 at 8. In the latter notice, employer controverted unauthorized treatment by Dr. McAllister and restated its objection from its previous notice of controversion. *Id.* at 6.

In finding that employer rejected his written recommendation, the district director stated that employer filed a notice of controversion again on March 27, 2008, one week after the informal conference. The district director stated that employer controverted the claim for medical benefits on the grounds that Dr. McAllister was not authorized and that a discogram was not a reliable test. Comp. Order on Recon. at 1, 2. We cannot affirm the finding that employer controverted the claim on March 27, after the informal conference. The documents introduced into the record at the formal hearing do not contain a notice of controversion dated after the informal conference, nor is such a document attached to claimant's counsel's fee petitions or employer's responses thereto. The only notices of controversion in the record are dated February 25 and March 14, 2008. EX 9 at 6, 8. Moreover, the stated contents of the alleged March 27 notice are identical to the contents of the March 14, 2008, notice. Thus, there is no basis in the record for the conclusion that employer controverted the claim after the informal conference. Therefore, imposition of fee liability on this ground cannot stand.

[1] The district director correctly found that employer is not liable for an attorney's fee pursuant to Section 28(a) as employer was paying benefits to claimant at the time he filed his claim for benefits. *Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

[2] For purposes of this decision only, we assume that the cervical surgery claimant obtained for which employer paid constitutes "greater compensation" for purposes of element four.

In addition, we cannot affirm the district director's conclusion that employer failed to comply with the written recommendation. The written recommendation dated March 20 stated that employer should either "approve surgery now or schedule a 2nd neurological evaluation ASAP." EX 9 at 4-5. On March 24, 2008, only four days later, employer arranged for a second opinion; this examination was held on April 22, 2008. Thus, by the plain terms of the written recommendation, employer promptly complied. Assuming, *arguendo*, as the district director did, that the recommendation implicitly required employer to authorize surgery if its physician so recommended, then employer also complied with that recommendation by authorizing cervical surgery on June 3, 2008. While the Act does not contain a provision stating in what time frame employer must act in order to "accept" a district director's written recommendation, on the facts of this case employer's action in accepting the "implicit" recommendation that it approve surgery was sufficiently timely to prevent the imposition of fee liability. Therefore, as employer did not refuse the district director's written recommendation, it cannot be held liable for claimant's attorney's fee in this case. *Andrepont*, 566 F.3d at 421-422, 43 BRBS at 30-31(CRT); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). Therefore, the district director's finding that employer is liable for claimant's attorney's fee is reversed.

Accordingly, the district director's Compensation Order – Award of Attorney's Fees and the Compensation Order – Award of Attorney's Fees on Reconsideration are reversed.

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