BRB No. 99-0916

TODD MASON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATED ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton, Weiss & Gabree, P.A.), Bath, Maine, for claimant.

Carol G. McMannus (Monaghan, Leahy, Hochadel & Libby, LLP), Portland, Maine, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Attorney's Fees (98-LHC-790) of Administrative Law Judge James W. Kerr, Jr., 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 may be set aside only if the challenging party shows it 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 sustained an injury to his right shoulder on July 22, 1996, during the course of his employment with employer. Employer voluntarily paid temporary total disability compensation to claimant from November 25, 1996 to April 13, 1997, when claimant returned to work for employer. 33 U.S.C. §908(b). Subsequently, claimant sought additional

compensation for seven days during which he was allegedly out of work as a result of his work-related injury: April 16, 1997, April 28, 1997-May 1, 1997, May 23, 1997, and May 27, 1997. Employer controverted this claim for additional compensation on the basis that there was no medical documentation to support disability on those dates. Claimant requested an informal conference with the district director in an attempt to resolve the issue informally. By letter dated November 4, 1997, the claims examiner advised claimant that he needed additional materials in order to formulate a recommendation regarding claimant's entitlement to compensation for the dates in question, and, accordingly, requested that claimant submit medical documentation of disability for these dates. On November 14, 1997, claimant filed a request with the district director's office that the matter be referred to the Office of Administrative Law Judges for a formal hearing. The district director responded to claimant's hearing request by renewing his request for medical documentation of disability on the dates for which additional compensation was being sought. Following receipt of a letter from claimant reiterating his right to a hearing, the district director, on December 31, 1997, referred the matter to the Office of Administrative Law Judges. On July 7, 1998, the administrative law judge granted employer's motion for leave to question claimant's treating physician, Dr. Mancini, as to whether a causal relationship existed between claimant's work-related injury and his work absences between April 16, 1997 and May 27, 1997. Subsequent to its receipt of Dr. Mancini's written response indicating that such a causal relationship did in fact exist, employer, on July 27, 1998, paid compensation to claimant in the amount of $430.61 for the seven days claimant missed work between April 16, 1997 and May 27, 1997. Thereafter, a hearing before the administrative law judge was held on October 5, 1998, on the sole issue of claimant's attorney's entitlement to an attorney's fee payable by employer. At the hearing, claimant's attorney submitted a written fee petition requesting a fee of $2,681.25, representing 16.25 hours of services before the administrative law judge at an hourly rate of $165, plus $138.35 in costs. Claimant additionally filed a memorandum in support of his entitlement to an attorney's fee payable by employer for work performed before the administrative law judge. Thereafter, employer filed a memorandum in support of its position that claimant is not entitled to an attorney's fee.

In a Decision and Order Denying Attorney's Fees, the administrative law judge determined that the work performed by claimant's attorney before the administrative law judge was not reasonable and necessary, and, accordingly, concluded that claimant is not entitled to attorney's fees for this work. 33 U.S.C. §928(b).

On appeal, claimant challenges the administrative law judge's denial of an attorney's fee payable by employer. Employer responds, urging affirmance.

Initially, we reject claimant's contention on appeal that the administrative law judge erroneously applied the provisions of Section 28(b), 33 U.S.C. §928(b), rather than the

provisions of Section 28(a), 33 U.S.C. §928(a), to the instant case. Inasmuch as employer initiated the voluntary payment of compensation in this case and only thereafter did a controversy arise over additional compensation due, the issue of employer's liability for an attorney's fee is governed by Section 28(b). *See Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 438-439, 32 BRBS 171, 176-177 (CRT)(1st Cir. 1998). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that which employer agreed to pay. *Id.; see also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT)(9th Cir. 1998); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1987). Accordingly, we hold that the administrative law judge properly found Section 28(b) to be applicable to the case at bar.[1]

[1]Employer contends that it is not liable for a fee under Section 28(b) because the district director neither held an informal conference nor made a recommendation regarding the amount of compensation to which claimant is entitled. We disagree. While Section 28(b) states that employer should pay or tender payment within 14 days after its receipt of the district director's recommendation, the issuance of the district director's recommendation is not required to establish employer's liability as employer may be liable even if the district director did not issue a recommendation. *See National Steel & Shipbuilding Co. v. U.S.*

Dept. of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). *See also Matulic v. Director, OWCP*, 154 F.3d 1052, 1060-1061, 32 BRBS 148, 153-154 (CRT)(9th Cir. 1998). In light of the Ninth Circuit's decision in *National Steel & Shipbuilding Co.*, the Board has held that references in Section 28(b) to informal conferences and other procedures must be regarded as suggested guidelines rather than prerequisites. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180, 182 (1986).

Moreover, we reject employer's further argument that it is not liable for a fee under Section 28(b) because a formal hearing was never held; where an employer agrees to the additional compensation while the case is pending before the Office of Administrative Law Judges, employer is liable for any attorney's fee incurred prior to the agreement, notwithstanding that a formal hearing was not held. *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Claimant argues, in the alternative, that even if Section 28(b) were held to apply, the administrative law judge erred in denying a fee under the provisions of that subsection. The administrative law judge in the instant case denied an attorney's fee under Section 28(b) on the basis of his determination that employer was, in effect, compelled to controvert the claim for additional compensation by virtue of claimant's counsel's refusal to cooperate with employer's efforts to obtain Dr. Mancini's opinion as to the causal relationship between claimant's work injury and his work absences between April 16, 1997 and May 27, 1997, prior to issuance of the administrative law judge's order granting employer leave to obtain Dr. Mancini's opinion. Having found that claimant's attorney needlessly delayed resolution of the claim, the administrative law judge concluded that the work performed before the administrative law judge was not reasonable and necessary, and that, therefore, claimant is not entitled to an attorney's fee. We agree with claimant that the administrative law judge erred in denying an attorney's fee to claimant's counsel on this basis. As argued by claimant, both on appeal and below, the statute affords claimant the right to have his claim decided at a hearing before an administrative law judge. *See* 33 U.S.C. §919(c), (d); 20 C.F.R. §702.316; *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996).[2] Moreover, claimant was entitled, at a hearing, to rest on the medical evidence he had

[2]Employer's reliance on the fact that claimant failed to comply with the district director's request for additional medical documentation is misplaced. It is well-established that the informal process at the district director level is voluntary, and that the compulsory production of documents by the district director is not permitted. *See Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). If a claim cannot be informally resolved at the district director level on a voluntary basis, the claim must be transferred to the Office of Administrative Law Judges. *Id.* Once a party requests a hearing, the district director loses any authority to act on the claim and is obligated to transfer the claim to the Office of Administrative Law Judges. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996). Thus, claimant was fully within his rights in requesting that his claim for additional benefits be transferred to the Office of Administrative Law Judges for a formal hearing.

previously submitted and on claimant's hearing testimony. Employer ultimately obtained Dr. Mancini's opinion by seeking the administrative law judge's leave to conduct discovery in accordance with the statutory and regulatory scheme. *See* 33 U.S.C. §927(a); 20 C.F.R. §702.341; 29 C.F.R. §§18.1, 18.13-18.15, 18.22, 18.29; *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). Thus, we hold that because claimant, with the assistance of counsel, successfully obtained greater compensation than the amount originally agreed to by employer while the case was pending before the Office of Administrative Law Judges, employer is liable for a reasonable attorney's fee under Section 28(b). *See Barker*, 138 F.3d at 438-439, 32 BRBS at 176-177 (CRT). We therefore vacate the administrative law judge's denial of an attorney's fee, and remand the case to the administrative law judge for reconsideration of counsel's fee petition consistent with the applicable regulatory criteria. *See* 20 C.F.R. §702.132; *Matulic*, 154 F.3d at 1061, 32 BRBS at 154-155 (CRT); *National Steel & Shipbuilding Co.*, 606 F.2d at 882, 11 BRBS at 73.

Accordingly, the administrative law judge's denial of an attorney's fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge