No. 09-60361

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH E. CRAVEN,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

DEBORAH GREENFIELD
Acting Deputy Solicitor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

SEAN BAJKOWSKI
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

While the Director does not object to the petitioner's request for oral argument, he does not believe that oral argument is necessary in this case. If the Court believes that oral argument would be helpful, however, the Director is willing to present argument.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50, filed by Kenneth E. Craven. On September 26, 2008, a Department of Labor (DOL) district director issued an informal recommendation that Northrop Grumman Ship Systems, Incorporated—Mr. Craven's

employer—pay him permanent partial disability benefits, rather than the permanent total disability compensation he had sought.

Mr. Craven filed a notice of appeal with the Benefits Review Board on September 29, 2008.[1] The Board dismissed his appeal on November 21, 2008, for lack of jurisdiction. Mr. Craven filed a timely reconsideration motion on December 19, 2008. *See* 20 C.F.R. § 802.407 (30-day period to seek reconsideration of Board decision). The Board denied his motion on March 17, 2009.

Mr. Craven filed a petition for review with this Court on May 11, 2009. Since his petition was timely filed and since his injury occurred in Mississippi, this Court has jurisdiction to review the final decision of the Board. *See* 33 U.S.C. § 921(c) (60-day period to seek review of Board decisions); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 219 (7th Cir. 1986) (where reconsideration timely requested, sixty-day appeal period runs from decision on reconsideration). Whether the Board had jurisdiction to review the district director's recommendation is the primary issue in this case. *See* 33 U.S.C. § 921(a), (b).

[1] Mr. Craven filed an amended notice of appeal on October 3, 2008.

STATEMENT OF THE ISSUES

1. The Board has jurisdiction to review compensation orders. A district director's recommendation following an informal conference is not a compensation order. Did the Board properly dismiss Mr. Craven's appeal of such a recommendation for lack of jurisdiction?

2. The Board cannot hold informal conferences in cases where it does not have jurisdiction, and is not required to hold such a conference when the district director has already held one. Here, the Board did not have jurisdiction, and the district director had already held an informal conference. Was the Board required to hold an informal conference?

STATEMENT OF THE CASE

Mr. Craven injured his back while employed by Northrop Grumman. The company initially paid him temporary total disability compensation. Once his condition became permanent, a dispute arose between Mr. Craven and Northrop Grumman regarding the extent of his residual disability. Northrop Grumman began paying him benefits

for permanent *partial* disability. Mr. Craven, however, sought benefits for permanent *total* disability.[2]

A DOL district director attempted to informally resolve this dispute. After holding two informal conferences, the district director ultimately recommended that Northrop Grumman pay Mr. Craven compensation for permanent partial disability, and the company

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[2] Under the LHWCA, a compensable disability may be either temporary or permanent, and may be either partial or total. *See* 33 U.S.C. § 908(a)-(c), (e); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125-27 (5th Cir. 1994) (discussing types of disability). An employee's disability becomes permanent once he reaches the point of maximum medical improvement—*i.e.*, his condition has healed to the extent possible, and no further medical treatment will be efficacious. 40 F.3d at 126.

The distinction between total and partial disability is generally viewed in economic terms—*i.e.*, the extent of disability is measured by its impact on the employee's wage-earning capacity. *Id.* If an employee's injury precludes him or her from performing his prior job, then he or she has made a *prima facie* showing of total disability. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The burden then falls on the employer to show the availability of suitable alternative employment—*i.e.*, jobs within the employee's physical and vocational abilities and reasonably available in the employee's community. 661 F.2d at 1042. If the employer demonstrates the availability of suitable alternative employment, the employee may still receive total disability benefits if he or she diligently sought work but was unable to obtain it. 661 F.2d at 1043. Otherwise, the employee will be entitled to partial disability compensation based on his or her residual wage-earning capacity. *See* 33 U.S.C. § 908(c).

accepted that recommendation. Mr. Craven disagreed. Rather than seek a hearing before a DOL administrative law judge (ALJ), however, he filed an appeal with the Board. The Board dismissed his appeal for lack of jurisdiction. Mr. Craven moved for reconsideration, but the Board denied his motion. Mr. Craven now seeks review of the Board's decision by this Court.

STATEMENT OF THE FACTS

1. Legal Background

A. Case Processing and Adjudication

Mr. Craven's appeal presents the question of whether a district director's recommendation on the merits of a claim can be appealed to the Board. The LHWCA and DOL's implementing regulations establish a three-tier process for adjudicating claims: 1) informal mediation before the district director; 2) formal hearings and fact-findings by an administrative law judge; and 3) appellate review by the Benefits Review Board and circuit courts.

Claims are initially administered by the district director. *See* 33 U.S.C. § 919(a), (b). The statute empowers the district director "to make or cause to be made such investigations as he considers necessary

in respect of the claim, and upon application of any interested party shall order a hearing thereon."[3] 33 U.S.C. § 919(c).

In implementing this provision, DOL's regulations establish an informal dispute resolution process at the district-director level. 20 C.F.R. §§ 702.301-.316. The regulations note that

> [i]n the vast majority of cases, the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law. Such problems seldom require resolution through formal hearings . . . . Accordingly, . . . the district directors are empowered to amicably and promptly resolve such problems by informal procedures. Where there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures[.]

20 C.F.R. § 702.301.

Resolution of claims by a district director "will generally be accomplished by informal discussions by telephone or by conferences at the district director's office . . . . [or] by written correspondence." 20 C.F.R § 702.311. Although the parties may submit documents supporting their positions to the district director, no formal

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[3] The statute refers to the officials who perform the day-to-day administration of the Act as "deputy commissioners," a vestige of earlier versions of the LHWCA. 33 U.S.C. § 919. These officials are now known as "district directors." 20 C.F.R § 702.105.

stenographic record of the conference is made, and no witness testimony is allowed. 20 C.F.R. § 702.314(a). The district director is charged with "recommending courses of action where there are disputed issues, and giving the parties the benefit of his experience and specialized knowledge in the field of workmen's compensation." *Id.*

Where the parties reach agreement on all issues at the end of the conference, the district director is empowered to issue a compensation order embodying their agreement. 20 C.F.R. § 702.315(a). Where, as in this case, the parties do not reach an agreement, the district director "shall evaluate all evidence available to him or her, and . . . prepare a memorandum of conference setting forth all outstanding issues, . . . and his or her recommendations and rationale for resolution of such issues." 20 C.F.R. § 702.316. If the recommendation is not accepted by either party, and a hearing is requested, then the district director must prepare the case for a hearing before an ALJ. *Id.* The district director has no authority to issue a compensation order in this situation, and his recommendation is not even transmitted to the ALJ. 20 C.F.R. § 702.317(c).

The second tier of adjudication involves hearings conducted by ALJs in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* 33 U.S.C. § 919(d). DOL has promulgated detailed regulations for the conduct of hearings and resolution of claims by ALJs. *See* 20 C.F.R. §§ 702.331-.351. A formal record is created, and the ALJ must set forth his factual findings and conclusions on disputed issues in a written decision, which is filed by the district director. 20 C.F.R. §§ 702.344, .348, .349; 33 U.S.C. § 919(e).

The final tier of adjudication is appellate review. Initial appellate review is by the Benefits Review Board, an administrative appeals tribunal created by the 1972 Amendments to the LHWCA. 33 U.S.C. § 921(b)(1). The Board "hear[s] and determine[s] appeals raising a substantial question of law or fact taken . . . from decisions with respect to claims of employees . . . ." 33 U.S.C. § 921(b)(3). Its decisions must be based on the "hearing record" created below, and "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence . . . ." *Id.*

The regulations specify that "appeals may be taken from *compensation orders* when they have been filed as provided for in §

702.349." 20 C.F.R. § 702.392 (emphasis added). The Board's own regulations contain substantively identical provisions. 20 C.F.R. §§ 801.102(a) (Board hears appeals "from decisions or orders with respect to claims for compensation or benefits"), 802.301(a) (Board cannot "engage in a *de novo* proceeding or unrestricted review of a case brought before it[];" it is only "authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based."). Further appellate review is available in the appropriate circuit court. 33 U.S.C. § 921(c).

B. Attorney-Fee Liability

Mr. Craven's primary contention on appeal is that because of the district director's recommendation, which Northrop Grumman accepted, the company will not be liable to pay his attorney's fee. Section 28(b) of the LHWCA, 33 U.S.C. § 928(b), governs liability for attorney fees where, as here, an employer has paid compensation within thirty days after receiving written notice of a claim for additional benefits.[4] The statute provides that where

[4] *See* note 5, *infra*.

> a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation . . . and [the claimant] thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid . . . by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount . . . paid shall be awarded . . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. § 928(b).

In *Andrepont v. Murphy Exploration and Production Co.*, 566 F.3d 415 (5th Cir. 2009), this Court held that Section 28(b) precludes shifting attorney-fee liability to an employer unless the employer rejects the district director's recommendation. 566 F.3d at 421. Thus, where the employer accepts the district director's recommendation, it will not bear fee liability even if the employee subsequently obtains greater compensation. *Id.*

2. Factual and Procedural Background

Mr. Craven was employed by Northrop Grumman as a thermocoater, which involved sandblasting and painting metal parts. *See* Record Excerpts (R) at 3. On July 23, 2004, he injured his back while working. *See* R at 2. Northrop Grumman subsequently paid him temporary total disability compensation for the period between his injury and February 27, 2007, the date on which he reached maximum medical improvement.[5] *See* R at 2, 18; 33 U.S.C. § 908(b).

After he reached maximum medical improvement, Northrop Grumman developed vocational evidence indicating that suitable alternative employment was available that Mr. Craven could perform. *See* R at 19, 24, 30. As a result, the company reduced his compensation

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[5] Northrop Grumman initially reduced Mr. Craven's payments to partial disability compensation for the period between January 25, 2005, and October 5, 2006, contending that Mr. Craven was not entitled to total disability benefits because the company had identified suitable alternative employment that he could perform. *See* R at 2. Mr. Craven sought temporary total disability benefits for this period, and a DOL ALJ found that he was entitled to such benefits from January 25, 2005 through October 5, 2006. R at 1. After complying with this order, Northrop Grumman again reduced Mr. Craven's compensation from total disability to partial disability benefits on February 27, 2007. *See* R at 18.

to that for permanent partial disability. *See* 33 U.S.C. § 908(c)(21) (permanent partial disability benefits for non-scheduled injuries). Mr. Craven, however, contended that he was permanently totally disabled, and requested an informal conference. *See* R at 29.

Pursuant to that request, the district director's office ultimately held two informal conferences. After the first conference on July 9, 2007, the district director did not make a recommendation, but allowed the parties additional time to develop vocational evidence.[6] R at 18, 20. Following the development of such evidence, a second conference was held on October 15, 2007. R at 22. After the conference, a claims examiner in the district director's office recommended that Northrop Grumman pay permanent total disability benefits for the period between February 27, 2007, (the date of maximum medical improvement) and May 30, 2007. R at 24-25. Beginning May 30, 2007, however, the claims examiner recommended that Northrop Grumman

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[6] Northrop Grumman did not contest that Mr. Craven was unable to return to his prior work as a thermocoater. *See* R at 23-24, 30. Thus, the remaining questions were whether Northrop Grumman had established the existence of suitable alternative employment and, if so, whether Mr. Craven had diligently sought to obtain such alternative work. *See* R at 23-25, 29-31.

pay only permanent partial disability compensation, as the company had established the availability of suitable alternative employment as of that date, and Mr. Craven had not diligently sought any of the available alternative jobs. R at 25.

Recognizing that, absent a recommendation that Northrop Grumman pay compensation beyond what it had agreed to, he would be unable to shift liability for his counsel's attorney fee to the company under 33 U.S.C. § 928(b), Mr. Craven sought reconsideration of the claims examiner's recommendation.[7] After considering Mr. Craven's contentions, however, the district director agreed with the claims examiner's recommendation in a letter dated April 4, 2008. R at 26. Mr. Craven filed various motions, again seeking reconsideration of the recommendation. The district director issued another recommendation on September 26, 2008. R at 29. He again accepted Northrop Grumman's evidence of suitable alternative employment. R at 30-31.

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[7] At that time, this Court had not issued its decision in *Andrepont*, where it held that an employer will not have any attorney-fee liability under 33 U.S.C. § 928(b) unless it rejects the district director's recommendation. 566 F.3d at 421. The Fourth and Sixth Circuits, however, had already reached the same result. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 265-66 (6th Cir. 2007); *Virginia Int'l Terms. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005).

Since Mr. Craven had not sought to obtain any of the alternative jobs identified, the district director again recommended that the company pay only permanent partial disability compensation for the period after May 30, 2007. R at 31. Northrop Grumman accepted this recommendation.

Mr. Craven did not agree with the recommendation. However, he did not request a hearing before an ALJ to determine the extent of his disability. Instead, he appealed the district director's recommendation to the Board, again specifically noting the effect of that recommendation on Northrop Grumman's attorney-fee liability. R at 33-35. Northrop Grumman moved to dismiss the appeal, contending that the district director's recommendation was not an appealable order.

The Board granted the company's motion on November 21, 2008. R at 35. The Board dismissed the appeal on the ground that the district director's recommendation was not a final action subject to appeal. R at 36-37. Mr. Craven moved for reconsideration or, alternatively, requested that the Board hold an informal conference on the case, but the Board denied his motion on March 17, 2009. R at 38. The Board denied his motion because the district director's recommendation was

neither a compensation order nor an appealable interlocutory order, even if—as a consequence of the recommendation—attorney-fee liability could not shift to Northrop Grumman. R at 39-40. The Board did not address Mr. Craven's alternative request for an informal conference. Mr. Craven then petitioned this Court for review.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's order dismissing Mr. Craven's appeal of the district director's recommendation for lack of jurisdiction. The Board generally can hear only appeals of compensation orders. The district director's recommendation is not a compensation order. Thus, the Board did not have jurisdiction over Mr. Craven's appeal of that recommendation.

The underlying dispute between Mr. Craven and Northrop Grumman concerns whether he is totally or partially disabled—*i.e.*, whether the company established the existence of suitable alternative employment. This dispute should be resolved through a hearing by an ALJ (with later appeal to the Board and this Court, if necessary), not by an end-run around the LHWCA's adjudicatory procedure via a direct appeal of the district director's recommendation to the Board.

Mr. Craven's real complaint in this appeal is that since Northrop Grumman accepted the district director's recommendation (which Mr. Craven alleges was incorrect), attorney-fee liability will not shift to the company. While true, this result flows from Section 28(b), as interpreted by this Court in *Andrepont*, not from the recommendation itself. The propriety of *Andrepont*, however, is not before the Court in this appeal.

None of Mr. Craven's specific jurisdictional arguments has merit. The district director's recommendation is not directly appealable as a purely legal or discretionary matter. It does not fall within the collateral-order doctrine. And the Board was not required to take jurisdiction to direct the course of adjudication. The question of whether Mr. Craven is totally or partially disabled is an ordinary factual dispute, which should be resolved through a formal hearing before an ALJ.

Finally, the Board was not required to hold an informal conference. It could not hold such a conference because it lacked jurisdiction over the case. Even if had jurisdiction, it was not required to hold a conference because the district director had already held one.

ARGUMENT

1. The Board properly dismissed Mr. Craven's appeal for lack of jurisdiction.

A. Standard of Review

This issue of whether the Board had jurisdiction over an appeal of a district director recommendation is a question of law. This Court exercises de novo review over such questions. *Grant v. Director, OWCP*, 502 F.3d 361, 363 (5th Cir. 2007).

B. The district director's recommendation is not an appealable compensation order.

Mr. Craven contends that the Board erred in dismissing his appeal of the district director's September 26, 2008, recommendation. The Board, however, correctly determined that it did not have jurisdiction over that appeal. Thus, the Court should affirm the Board's order dismissing the appeal.

Neither the LHWCA nor DOL's regulations permit the Board to consider an appeal from a district director's recommendation on the merits of a claim.[8] The statute prescribes the Board's jurisdiction: it is

[8] Certain district director orders with respect to ancillary matters may be appealed to the Board. *See* section D, *infra*.

empowered to consider "appeals raising a substantial question of law or fact taken . . . from *decisions with respect to claims* of employees . . . ." 33 U.S.C. § 921(b)(3) (emphasis added). Moreover, the Board must base its decision in a case on the "hearing record" created below. *Id.* DOL's regulations further specify that "appeals may be taken from *compensation orders* when they have been filed as provided for in § 702.349." 20 C.F.R. § 702.392 (emphasis added); *see also* 20 C.F.R. §§ 801.102(a), 802.301 (Board's own regulations regarding its jurisdiction).

The Act explicitly defines "compensation order" as "[t]he order rejecting the claim or making the award[.]" 33 U.S.C. § 919(e). As the Supreme Court has explained, "[t]he term 'compensation order' in the LHWCA refers to an administrative award of compensation following proceedings with respect to a claim." *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 534 (1983) (citation and footnote omitted). In other words, a compensation order is "the formal document filed by the [district director] at the conclusion of administrative proceedings." *Pallas Shipping*, 461 U.S. at 529 (citation omitted); *see* 20 C.F.R. § 702.349 (district director to file compensation order after issuance of

order by ALJ). It does not include a district director's non-binding recommendation.

Proceedings before the district director are informal in nature and will only result in the issuance of a compensation order when the parties reach agreement on all material issues. 20 C.F.R. §§ 702.301, .315. Where, as here, the parties cannot reach agreement on all issues at an informal conference, the district director is limited to preparing a memorandum of conference identifying the issues in dispute and recommending a resolution of those issues to the parties. 20 C.F.R. § 702.316. These recommendations are not binding. *Id.* Since the district director's memorandum here is not an award or denial of compensation filed following the conclusion of proceedings on Mr. Craven's claim, that memorandum is not a "compensation order." *Costa v. Danais Shipping Co.*, 714 F.2d 1, 3-4 (3d Cir. 1983). As a result, it is not reviewable by the Board. *Id.* (district director's memorandum of informal conference is not administratively reviewable).

Furthermore, the Board had no basis on which to review the district director's recommendation. The Board must base its decision on the hearing record created below. 33 U.S.C. § 921(b)(3). It cannot

"engage in a *de novo* proceeding or unrestricted review of a case;" rather, it can only "review the findings of fact and conclusions of law [made below]." 20 C.F.R. § 802.301; *see Gulf Best Electric v. Methe*, 396 F.3d 601, 604 (5th Cir. 2004) (Board's "proper scope of review" is to determine "whether the ALJ's findings of fact are supported by substantial evidence and are consistent with the law") (citation omitted). There is no hearing record created when a claim is before the district director.[9] Such a record is only created when a claim is heard by an ALJ. 20 C.F.R. § 702.344. Thus, there is no hearing record here, and the Board would have no basis on which to review the district director's recommendation.[10]

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[9] District director orders with regard to ancillary matters that are appealable directly to the Board, *see* note 8, *supra*, typically involve questions of law or discretionary acts, *see* section D, *infra*, making factual findings unnecessary. Accordingly, such district director orders are capable of being reviewed by the Board even though a formal record is not created. Here, by contrast, the Board could not review the district director's recommendation absent a formal record.

[10] Mr. Craven made several motions with respect to the record on appeal that have been carried with this case. One such motion asks the Court to order the Board or the Director to produce a formal record of the proceedings before the district director. There is no such record, however, because Mr. Craven appealed to the Board rather than requesting an ALJ hearing. This motion itself illustrates why a district (cont'd . . .)

The LHWCA contemplates that the dispute between Mr. Craven and his employer would be resolved by an ALJ following a formal hearing conducted in accordance with the APA. *See* 33 U.S.C. § 919(d). An ALJ's decision would result in a "compensation order" either rejecting the claim or making an award. 33 U.S.C. § 919(e). Such an order would be appealable to the Board.[11] 33 U.S.C. § 921(a); 20 C.F.R. § 702.392; *see also Costa*, 714 F.2d at 4 ("'a compensation order is reviewable by the Benefits Review Board,' and that step does not occur until after the formal hearing") (quoting *Pallas*, 461 U.S. at 533).

Mr. Craven seeks to short-circuit the three-tier review process established by the LHWCA and the regulations. Rather than go before an ALJ to resolve the disputed factual issue of whether Northrop Grumman established the existence of suitable alternative employment—and, thus, whether he is entitled to compensation for permanent partial disability instead of permanent total disability—Mr.

(. . . cont'd)
director's recommendation on the merits of a case should not be subject to direct appellate review.

[11] In his brief, Mr. Craven asserts that the district director's recommendation was a final order. Petitioner's Brief at 14-15. That assertion is plainly wrong for the reasons stated in the text.

Craven appealed directly to the Board. This he cannot do. *See Ceres Marine Term. v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001) (existence of suitable alternative employment is factual matter for ALJ, whose determination will be upheld if supported by substantial evidence). The Board correctly dismissed Mr. Craven's appeal for lack of jurisdiction.

C. Mr. Craven's disagreement with the decision in Andrepont is not a basis for reviewing the district director's recommendation.

Mr. Craven nonetheless contends that the Board should have heard his appeal. His brief before this Court and his pleadings below make clear that the real gravamen of his appeal is that, as a result of Northrop Grumman's acceptance of the district director's recommendation, attorney-fee liability cannot be shifted to the company. As such, Mr. Craven's complaint is really with this Court's decision in *Andrepont*, rather than with the district director's recommendation. *See* Petitioner's Brief at 29-32.

As noted above, the Court held in *Andrepont* that LHWCA Section 28(b) precludes shifting attorney-fee liability to an employer unless the employer rejects the district director's recommendation. 566 F.3d at 421; *accord Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 265-66 (6th Cir. 2007); *Virginia Int'l Terms. v. Edwards*, 398

F.3d 313, 318 (4th Cir. 2005). Under *Andrepont*, attorney-fee liability in this case cannot shift to Northrop Grumman—even if Mr. Craven ultimately establishes his entitlement to permanent total disability benefits—because the company accepted the district director's September 26, 2008, recommendation.

Mr. Craven believes that *Andrepont* was wrongly decided.[12] Unless *Andrepont* is overruled by this Court sitting *en banc* or by the Supreme Court, however, it is binding precedent. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision."). Moreover, whether *Andrepont* was correctly decided is not before the Court in this appeal. Instead, the issued presented by Mr. Craven's appeal is

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[12] Mr. Craven misconstrues the central holding of *Andrepont*. It is not a district director's recommendation *per se* that determines whether attorney-fee liability shifts to an employer under Section 28(b). Rather, whether liability shifts is governed by the employer's response to that recommendation. "[A]n employer must refuse to accept the informal recommendation before attorneys' fees are shifted." 566 F.3d at 421. Regardless of what the district director recommends, the employer has the opportunity to avoid fee liability by accepting the recommendation. 566 F.3d at 419.

whether the Board had jurisdiction to review the district director's recommendation.

If Mr. Craven wants the Court to reconsider *Andrepont*, he must follow a different path. He must properly invoke the Board's jurisdiction and then seek review in this Court. When his appeal reaches this Court, he can seek an *en banc* hearing, and request that *Andrepont* be overruled. *See* FED. R. APP. P. 35. It is, however, the district director's recommendation which Mr. Craven has now appealed, and we will now address his arguments as to why the Board had jurisdiction over that appeal.

D. Mr. Craven's arguments as to why the Board should have accepted his appeal have no merit.

Mr. Craven raises several arguments as to why the Board should have accepted jurisdiction of his appeal, none of which has merit. Mr. Craven suggests that the Board had jurisdiction because his appeal of the district director's action involved only "legal issues or discretionary acts." Pet. Br. at 14. It is true that district director determinations which implicate purely legal issues and do not require fact-finding, or which involve matters committed to the district director's discretion, can be appealed directly to the Board. *See Oceanic Butler, Inc., v.*

Nordahl, 842 F.2d 773, 784 (5th Cir. 1988) (no need to refer matter to ALJ where only legal issue involved and no fact-finding required); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1222 (5th Cir. 1985) (same).

Thus, certain ancillary determinations of a district director can be appealed directly to the Board, including a determination that an employee is entitled to vocational rehabilitation services, *Gen'l Constr. Co. v. Castro*, 401 F.3d 963, 977-78 (9th Cir. 2005); an attorney fee award for work performed before the district director, *Healy Tibbitts Builders, Inc., v. Cabral*, 201 F.3d 1090, 1096 (9th Cir. 1999);[13] an order approving a settlement under 33 U.S.C. § 908(i), *Oceanic Butler*, 842 F.2d at 784; the imposition of additional compensation under 33 U.S.C. § 914(f), *Lauzon*, 782 F.2d at 1222; an order changing an employee's

[13] *Healy Tibbitts* involved a fee request for work performed before the district director. Separate fee applications must be made to each adjudicator before whom services were performed. 20 C.F.R. § 702.132(a). Fee awards are based on "qualitative, subjective factors that are uniquely within the knowledge of the body before which the attorney appeared." 201 F.3d at 1096. In other words, such awards are within the adjudicator's discretion. *Healy Tibbitts* is thus distinguishable from the present case, where the extent of Mr. Craven's disability—the subject of the recommendation—is not a matter within the district director's sole discretion.

treating physician under 33 U.S.C. § 907(b), *Jackson v. Universal Maritime Serv. Corp.*, 31 Ben. Rev. Bd. Serv. (MB) 103, 106-08 (1997); and a determination of whether a physician had good cause for failing to timely file a report of first treatment under 33 U.S.C. § 907(d)(2), *Toyer v. Bethlehem Steel Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 347, 353-55 (1994).

The district director's recommendation in this case, however—that Northrop Grumman pay partial as opposed to total disability compensation because it had established the availability of suitable alternative employment—addresses the merits of Mr. Craven's claim. Resolving a claim on the merits is not within the exclusive discretion of the district director. Moreover, additional fact-finding is clearly required. Mr. Craven and his employer submitted conflicting reports with regard to his vocational status. While the district director made a recommendation on how that conflict should be resolved, only an ALJ can make a factual finding as to which evidence is more credible. *See Anweiler v. Avondale Shipyards, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 271, 272 (1988) (case must be heard by ALJ when factual determination

required). Thus, the district director's recommendation was not directly appealable as a legal or discretionary determination.

Mr. Craven further asserts that the Board should have reviewed the district director's recommendation under the collateral-order doctrine because it conclusively determined whether fee-liability would shift to Northrop Grumman. Pet. Br. at 16. Like the federal courts, "the Board does not ordinarily accept interlocutory appeals, since entertaining such appeals encourages piecemeal litigation which is contrary to the policy that bifurcated hearings should be avoided." *Arjona v. Interport Maintenance*, 24 Ben. Rev. Bd. Serv. (MB) 222, 223 (1991). *Accord Holmes & Narver v. Christian*, 1 Ben. Rev. Bd. Serv. (MB) 85, 87-88 (1974); *Green v. Ingalls Shipbuilding, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 81, 83 (1995). The collateral-order doctrine is an exception to this general rule, allowing interlocutory review of certain non-final orders that conclusively resolve ancillary issues. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The Board applies the collateral-order exception to permit interlocutory review of an order where "(1) the order conclusively determines the disputed question; (2) the order must resolve an

important issue that is completely separate from the merits of action; and (3) the order must be effectively unreviewable on appeal from a final judgment." *Green*, 29 Ben. Rev. Bd. Serv. (MB) at 83 n. 3 (citation omitted); *see also Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 171 (5th Cir. 2009). The district director's recommendation does not fall within the collateral-order exception. Initially, as argued above, a non-binding recommendation is not an order. Further, even if it were an order, it clearly does not meet either the first or second requirement—conclusive determination of an issue and separability from the merits—of the doctrine.

The recommendation was not a conclusive determination on attorney fees. While Northrop Grumman's acceptance of the recommendation precludes shifting fee liability to the company, whether Mr. Craven's attorney is entitled to a fee at all, and the amount of that fee, are open questions. There will be no fee (from any source, including Mr. Craven) unless he successfully obtains additional compensation. 33 U.S.C. § 928(b). Even if he were to obtain additional compensation, the appropriate adjudicator would then have to determine the amount of the fee. 33 U.S.C. § 928(c); 20 C.F.R. §

702.132(a). Thus, the district director's recommendation is not conclusive of whether Mr. Craven's attorney can receive a fee or the amount of any such fee. It is therefore not a conclusive determination of that issue. *Cf. Newpark Shipbuilding & Repair, Inc., v. Roundtree*, 723 F.2d 399, 404 (5th Cir. 1984) (Board decision holding employer liable for employee's benefits, but remanding for ALJ to determine amount of compensation owed, not appealable).

As to separability, the district director's recommendation is not only inseparable from the merits, it addresses *only the merits* of Mr. Craven's claim, in particular the extent of his disability. Under *Andrepont*, Northrop Grumman's acceptance of the recommendation has a legal consequence, but this consequence, like the recommendation itself, flows directly from, and is inextricably linked to, the merits of the claim. The collateral-order doctrine does not apply where, as here, "the issues raised in an interlocutory appeal involve[ ] considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Henry*, 566 F.3d at 174 (internal quotation marks and citations omitted).

Lastly, Mr. Craven contends that the Board should have reviewed the district director's recommendation in order to "direct the course of the adjudicatory process." Pet. Br. at 17. This contention also lacks merit. The Board has long held that it will take interlocutory appeals of certain non-final orders when necessary to "direct the course of the adjudicatory process." *Murphy v. Honeywell, Inc.*, 8 Ben. Rev. Bd. Serv. (MB) 178, 180 (1978). While the Board has never explicitly defined the parameters of this exception to the rule against interlocutory appeals, it has suggested that it is simply a variation of the collateral-order doctrine. *See Green*, 29 Ben. Rev. Bd. Serv. (MB) at 83; *Niazy v. The Capital Hilton Hotel*, 19 Ben. Rev. Bd. Serv. (MB) 266, 269 (1987). The Board has also indicated that application of the exception is a matter within the Board's discretion. *Hardgrove v. Coast Guard Exch. Sys.*, 37 Ben. Rev. Bd. Serv. 21, 22 (2003) (appeal accepted); *Green*, 29 Ben. Rev. Bd. Serv. at 83 (appeal dismissed). Under this exception, the Board has accepted appeals of various non-final orders—*e.g.*, an order denying summary judgment (*Hardgrove*, 37 Ben. Rev. Bd. Serv. at 22), a discovery order (*Niazy*, 19 Ben. Rev. Bd. Serv. at 269), and an order

remanding a claim from the ALJ to the district director (*Murphy*, 8 Ben. Rev. Bd. Serv. at 180).

Assuming that this exception is broader than the collateral-order doctrine, the Board's case law nonetheless teaches that it applies only to orders. Mr. Craven points to no cases, and we are aware of none, where the Board has accepted an appeal of a non-binding recommendation. Moreover, the Board has only used this exception to review ancillary or collateral matters. Even if the recommendation in this case were an order, it goes directly to the merits of Mr. Craven's claim. A district director's recommendation on the merits of a case is not subject to administrative review. *Costa*, 714 F.2d at 3-4. Thus, the Court should reject Mr. Craven's argument that the Board was required to accept his appeal under its direct-the-course-of-the-adjudicatory-process exception.

In sum, Mr. Craven has not identified any basis on which the Board could have heard his appeal. Hence, the Court should affirm the Board's order dismissing his appeal for lack of jurisdiction.[14]

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[14] Mr. Craven also raises various contentions with respect to the "merits" of the district director's recommendation. While the Director believes that the recommendation is not subject to appellate review, Mr. Craven's two principal contentions of error lack merit. First, he asserts (cont'd . . .)

2. The Board was not required to hold an informal conference in this case.

A. Standard of Review

Whether the Board was obligated to hold an informal conference under Section 28(b) is a question of law, over which the Court exercises plenary review. *Grant*, 502 F.3d at 363.

(. . . cont'd)
that, because it was uncontested that Mr. Craven could not return to his prior job (*i.e.*, that he had established a *prima facie* case of total disability), the district director was required to recommend payment of total disability compensation, and could not address the conflicting reports regarding the existence of suitable alternative employment. Pet. Br. at 22. This assertion is flatly wrong. The regulations specifically require the district director to identify all issues in dispute (such as the existence of suitable alternative employment), and to make a recommendation as to how each issue should be resolved. 20 C.F.R. § 702.316. Mr. Craven's citation of *Voris v. Eikel*, 346 U.S. 328, 333 (1953), is inapposite. That case involved a review of formal fact-finding by a deputy commissioner (before this responsibility was transferred to ALJs by the 1972 amendments to the LHWCA), not of an informal recommendation by a district director. And its instruction that the LHWCA should be construed liberally plainly cannot require that disputed issues be ignored.

Second, Mr. Craven contends that the district director's recommendation did not comply with the APA. Pet. Br. at 26. Although this argument is somewhat difficult to parse, we read it as arguing that the recommendation does not comply with the APA because the district director did not adequately explain how he evaluated the vocational evidence. It is hearings and fact-findings by ALJs that are subject to the APA, however, not the informal proceedings before the district director. *See* 33 U.S.C. § 919(d).

B. The Board could not hold an informal conference because it lacked jurisdiction over Mr. Craven's appeal. Even if the Board had jurisdiction, it was not required to hold an informal conference because the district director had already held one.

At the end of his brief to this Court, Mr. Craven asserts that the Board erred in not granting his request that it hold an informal conference on his claim pursuant to 33 U.S.C. § 928(b).[15] He provides no analysis to support this assertion. Although the Board did not address the issue, the Court should reject Mr. Craven's argument for two reasons.

First, the Board could not hold an informal conference in this case. As argued above, the Board properly determined that it did not have jurisdiction. Thus, assuming that the Board generally is empowered to

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[15] There is a potential conflict between Section 21(b) of the LHWCA, 33 U.S.C. § 921(b)—which establishes the Board as an appellate tribunal to decide appeals from ALJ decisions—and Section 28(b), 33 U.S.C. § 928(b), which indicates that when there is a dispute over whether an employee is entitled to additional compensation, "the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy." The Court need not address whether there is a conflict between these provisions, or resolve any conflict that does exist. Even assuming that Section 28(b) empowers the Board to hold informal conferences and issue written recommendations generally, Mr. Craven has failed to show that it was required to hold a conference in this case.

hold informal conferences on LHWCA claims, it could not do so in this case because it had no jurisdiction over Mr. Craven's appeal.

Second, even if the Board had jurisdiction over this appeal, it was not required to hold a conference because the district director had already held a conference. Section 28(b) states that when there is a dispute over whether additional compensation is due to an employee, "the deputy commissioner *or* Board" is to hold an informal conference and recommend a resolution to this dispute.[16] 33 U.S.C. § 928(b) (emphasis added). The use of the disjunctive "or" in a statute generally indicates that alternatives were intended. *Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876, 878 (5th Cir. 1973). Thus, the plain language of Section 28(b) indicates that an informal conference should be held either by the district director or by the Board, but not by both. Since the district director held an informal conference in this case and issued a recommendation, the Board was not required to do so. Hence, the Court should reject Mr. Craven's argument that the Board was required to hold an informal conference.

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[16] DOL's implementing regulation indicates that an ALJ could also hold an informal conference. 20 C.F.R. § 702.134(b).

CONCLUSION

The Court should affirm the Board's decision dismissing Mr. Craven's appeal for lack of jurisdiction.

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

SEAN BAJKOWSKI
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Suite N-2117
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF SERVICE

I certify that on November 18, 2009, two paper copies and one electronic copy (on CD-ROM) of this brief were served by mail, postage prepaid, on the following:

Sue Esther Dulin, Esq.
Dulin and Dulin, Ltd.
P.O. Box 820
Gulfport, Mississippi 39502

Paul B. Howell, Esq.
Franke & Salloum, PLLC
P.O. Drawer 460
Gulfport, Mississippi 39501

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 7,024 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Century font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor