

JAMES CAREY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ORMET PRIMARY ALUMINUM)	DATE ISSUED: 11/30/2009
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Attorney's Fees and Decision and Order Denying Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Charles J. Bourque, Jr. (St. Martin & Borque), Houma, Louisiana, for claimant.

Paul C. Miniclier (Law Office of Paul C. Miniclier), New Orleans, Louisiana, for self-insured employer.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Attorney's Fees and Decision and Order Denying Reconsideration (2008-LHC-00036) of Administrative Law Judge Clement J. Kennington 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury to his back on September 25, 2004. Employer voluntarily paid claimant medical benefits and disability compensation based on an average weekly wage of \$1,423.92. Claimant reached maximum medical improvement on October 16, 2006, and benefits were reduced based on claimant's return to work, but employer continued to pay some benefits to claimant. Employer filed a notice of controversion in July 2007. At employer's request, an informal conference was held on September 11, 2007, in which the claims examiner recommended that claimant's benefits were to be based on an average weekly wage of \$1,423.92, the same rate on which employer had based its payments. Employer did not agree with the written recommendation and the case was transferred to an administrative law judge for a hearing at employer's request. Nonetheless, employer continued to pay claimant at the average weekly wage of \$1,423.92. The administrative law judge calculated claimant's average weekly wage as \$1,369.15, although he rejected employer's contention that vacation, holiday and container royalty pay should not be included in average weekly wage. This average weekly wage finding was not appealed.

Claimant's counsel subsequently submitted a petition requesting an attorney's fee of \$14,059.18, representing 63.5 hours of attorney time by Charles Borque, Jr. at \$200 per hour, 2 hours of attorney time by Melanie Legarde at \$150 per hour, and \$1,059.18 in expenses. Employer filed objections, arguing that claimant is not entitled to an employer-paid attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Alternatively, employer argued that \$7,600 of fees and expenses requested were incurred before the case was transferred to the Office of Administrative Law Judges (OALJ).

In his Decision and Order Denying Attorney's Fees, the administrative law judge initially struck 42.1 hours of services requested by counsel because the services were not performed at the administrative law judge level. Fee Order at 2. The administrative law judge also agreed with employer that it is not liable for claimant's attorney's fee pursuant to Section 28(b) because claimant did not obtain greater compensation than employer paid voluntarily after the informal conference. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the denial of an employer-paid attorney's fee. Employer responds, urging affirmance of the administrative law judge's denial. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant's position that employer is liable for an attorney's fee pursuant to Section 28(b).¹

Claimant contends employer is liable for an attorney's fee under Section 28(b) because claimant successfully defended employer's attempt to further reduce his average weekly wage by excluding vacation, holiday and container royalty pay. Section 28(b) the Act provides that:

If the employer or carrier pays or tenders payment of compensation without an award...and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such 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...shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit has enumerated the following criteria for fee liability under Section 28(b): (1) an informal conference on the disputed issue; (2) a written recommendation on that issue; (3) the employer's refusal of the recommendation; and (4) claimant's receipt of an award greater than employer paid or tendered after the informal conference. *Andrepoint 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).

¹ Claimant has not contended that Section 28(a) of the Act, 33 U.S.C. §928(a), applies.

We reject the contention of claimant and the Director that the administrative law judge erred in applying Section 28(b) in this case. Employer voluntarily paid claimant benefits without an award based on an average weekly wage of \$1,423.92. Employer, however, subsequently controverted this amount and argued for a lower average weekly wage at the informal conference before the district director. The district director recommended that employer continue to pay benefits at the rate of \$1,423.92. Employer did not agree with this recommendation and sought a formal hearing before an administrative law judge, but nonetheless continued to pay claimant disability benefits based on the recommended weekly wage of \$1,423.92. The administrative law judge found claimant's average weekly wage to be \$1,369.15, resulting in an overpayment of approximately \$8,544.12. Thus, claimant did not obtain an award greater than that paid by employer after the informal conference, and employer, therefore cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); see also *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). That employer did not accept the district director's recommendation is not controlling here in view of the subsequent sentence in Section 28(b) which permits employer to avoid fee liability if it nonetheless pays or tenders compensation to claimant in an amount greater than claimant ultimately receives.

The cases cited by claimant and the Director do not demonstrate error in the administrative law judge's finding that Section 28(b) is not applicable to shift fee liability to employer. The Director's citation to *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 295 (5th Cir. 1981), fails to account for more recent pronouncements of the Fifth Circuit that strictly construe the attorney's fee provisions of Section 28(a), (b).² See *Andrepoint*, 566 F.3d at 421, 43 BRBS at 31(CRT). Indeed, the court has recently recognized that it is not free "to elevate the purposes of the statute above the plain text reading" of the statute. *Id.* The decisions in *Boland Maine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), and *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981) also do not support a finding of fee liability pursuant to Section 28(b). In *Rihner* and *Hole*, the employers ceased payment of all benefits and contested liability for any compensation. The claimants successfully obtained additional benefits. In this case, however, claimant did not succeed in retaining the rate recommended by the district director and continuously paid by employer. Rather, he obtained a lower award, albeit not as low as employer sought. As

² In *Savannah Machine*, the employer paid temporary total benefits through the date of the hearing but contested claimant's entitlement to any benefits. Claimant was awarded permanent total benefits. The court affirmed the employer's liability for an attorney's fee under Section 28(b), stating that "an employee who accepts partial compensation, but who claims additional compensation, may receive attorney's fees."

employer continued to pay benefits at the rate of \$1,423.92 and claimant did not successfully defend this rate and received a lower award, employer cannot be held liable for claimant's fee pursuant to the plain language of Section 28(b).

Similarly, this case is distinguishable from *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g*, 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000). In *Staftex*, employer began paying benefits based on an average weekly wage of \$438.47. Employer reduced its payments upon the belief that it had overcompensated the claimant. Claimant then filed a claim for compensation based on an average weekly wage of \$490.24. Employer agreed to pay benefits at this rate. At the informal conference, the nature and extent of claimant's disability were at issue. Following the conference, the district director recommended that employer pay permanent total disability benefits at an average weekly wage of \$490.24. At the hearing employer agreed that claimant was totally disabled, but contended that his average weekly wage was \$108.02. The administrative law judge found that claimant's average weekly wage was \$504.32. The Fifth Circuit ultimately held that employer is liable for claimant's attorney's fee pursuant to Section 28(b) because, in view of its raising an average weekly wage of \$108.02, it was clear that employer did not accept the recommendation to pay total disability benefits at the average weekly wage of \$490.24. As the claimant succeeded in obtaining a larger award of compensation, employer was held liable for claimant's fee pursuant to Section 28(b). In this case, however, claimant was awarded a lower average weekly wage than that which employer paid after the informal conference. As the requirement that claimant be awarded compensation greater than employer paid or tendered has not been met in this case, we affirm the finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). *See Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Attorney's Fees and Decision and Order Denying Reconsideration.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge