

LANTIC FIELDS ) BRB Nos. 11-0876  
 ) and 11-0876A  
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 ) Claimant-Petitioner )  
 ) Cross-Respondent )  
 )  
 ) v. )  
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 ) FLUOR CORPORATION ) DATE ISSUED: 09/20/2012  
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 ) and )  
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 ) CONTINENTAL CASUALTY COMPANY, )  
 ) successor by merger to FIDELITY & )  
 ) CASUALTY COMPANY OF NEW YORK )  
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 ) Employer/Carrier- )  
 ) Respondents )  
 ) Cross-Petitioners )  
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 ) LANTIC FIELDS ) BRB No. 12-0361  
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 ) Claimant-Petitioner )  
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 ) v. )  
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 ) FLUOR CORPORATION )  
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 ) and )  
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 ) CONTINENTAL CASUALTY COMPANY, )  
 ) successor by merger to FIDELITY & )  
 ) CASUALTY COMPANY OF NEW YORK )  
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 ) Employer/Carrier- )  
 ) Respondents )  
 ) DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and the Supplemental Decision and Order Denying Attorney's Fee of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ronald A. Ferrebee (Ferrebee & Associates, P.L.L.C.), Livonia, Michigan, for claimant.

Michael W. Thomas and Shana L. Precht (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Granting Benefits, and claimant appeals the Supplemental Decision and Order Denying Attorney's Fee (2008-LDA-00374), of Administrative Law Judge Larry W. Price 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 2, 2004, claimant commenced employment for employer as a drywall finisher/carpenter in Tashkent, Uzbekistan. On September 28, 2004, claimant fell approximately 15 feet from a scaffold during the course of his employment. Claimant complained of right shoulder, low back and right leg difficulties and sought medical treatment locally. Claimant then returned to the United States; on November 30, 2004, he underwent surgery to repair a torn right rotator cuff. Claimant returned to Uzbekistan where, on December 27, 2004, he fell down a flight of stairs when his right leg locked up on him. Claimant returned to the United States for further treatment and, ultimately, he commenced self-employment as a carpenter. Employer voluntarily paid claimant disability and medical benefits until October 20, 2007. Claimant sought benefits under the Act for injuries to his right shoulder, low back and right knee.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant sustained work-related injuries to his right shoulder and low back. Finding claimant's credibility to be questionable, the administrative law judge determined that claimant failed to establish that he sustained a harm to his right knee which could have been caused by either his September 28 or December 27, 2004, work

accidents. Assuming, arguendo, that claimant was entitled to the benefit of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to his right knee condition, the administrative law judge further found that employer produced evidence sufficient to rebut the presumption and that, based on the record as a whole, claimant did not establish that this condition is related to his employment with employer. With regard to claimant's work-related right shoulder and back conditions, the administrative law judge found that claimant reached maximum medical improvement on May 19, 2005, and that claimant was capable of resuming his usual employment duties with employer as of May 26, 2005. The administrative law judge awarded claimant temporary total disability benefits from February 22 to May 19, 2005, and permanent total disability benefits from May 20 to May 26, 2005, based on a calculated average weekly wage of \$1,007.11, as well medical benefits for his right shoulder and back conditions. 33 U.S.C. §§908(a), (b); 907. In a Supplemental Decision and Order, the administrative law judge denied claimant's counsel's petition for an attorney's fee payable by employer.

On appeal, claimant contends the administrative law judge erred in finding that he failed to establish that his right knee condition is related to his employment with employer. Claimant additionally challenges the administrative law judge's decision to terminate his entitlement to compensation benefits on May 26, 2005, and the calculation of his average weekly wage. BRB No. 11-0876. In its cross-appeal, employer contends that the administrative law judge erred in permitting claimant to withdraw facts deemed admitted pursuant to 29 C.F.R. §18.20, and in awarding claimant medical benefits. BRB No. 11-0876A. Claimant has also filed an appeal of the administrative law judge's Supplemental Decision and Order averring that the administrative law judge erred in failing to award his counsel an attorney's fee payable by employer. BRB No. 12-0361.

We first address employer's contention that the administrative law judge erred in allowing claimant to withdraw admissions which, employer avers, establish the following facts:

- 1) Claimant's right knee condition is not related to his employment [with employer];
- 2) Claimant suffers no permanent disability to his back or to his right shoulder as a result of industrial injury sustained [while working for employer];
- 3) Claimant is capable of performing his pre-injury employment; and

- 4) Claimant's job requirements [with employer] did not exceed the physical limitations within the [functional capacity evaluation] of August 1, 2006.

We reject employer's contention of error and affirm the administrative law judge's decision to allow claimant to withdraw the deemed admissions.

In December 2008, employer served claimant with a request for admissions. At a hearing on March 10, 2009, the administrative law judge ordered claimant to respond and the administrative law judge continued the hearing. Claimant, who was then without counsel, did not respond until September 2009, when he submitted to the administrative law judge handwritten answers to employer's request. Pursuant to 29 C.F.R. §18.20 and Fed. R. Civ. P. 36, employer requested that, due to claimant's failure to respond timely, the administrative law judge accept the four statements as admitted by claimant and, consequently, as conclusively established.<sup>1</sup> In May 2011, claimant, now represented by

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<sup>1</sup>Section 18.20, 29 C.F.R. §18.20, states, in relevant part, that:

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party:

- (1) A written statement denying specifically the relevant matters of which an admission is requested;
- (2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or
- (3) Written objections on the grounds that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

\* \* \*

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

Fed. R.Civ. P. 36 states, in relevant part, that:

(a)(3) A matter is admitted unless, within thirty (30) days after being served, the party to whom the request is directed serves on the requesting

counsel, filed a motion with the administrative law judge seeking to set aside the deemed admissions.

In his decision, the administrative law judge stated that claimant presumably acted to the best of his ability, considering his difficulty in obtaining representation, and concluded that allowing claimant to withdraw the admissions would not prejudice employer's ability to defend the claim. He thus permitted claimant to withdraw the self-executing admissions. Decision and Order at 19. Although employer makes a lengthy argument that proper procedures were not followed in permitting claimant to withdraw the admissions, employer has neither alleged nor established that it was prejudiced by the decision to allow claimant to withdraw the admissions. Employer was able to fully develop its defense to claimant's claim and to submit a post-hearing brief to the administrative law judge. *See generally Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77, 80 n.3 (1988). We therefore affirm the administrative law judge's decision on this issue as employer has not shown an abuse of the administrative law judge's discretion in this regard.

We next address claimant's contention that the administrative law judge erred in finding that his right knee injury is not related to the work accidents. In determining whether his injury is work-related, claimant initially has the burden of proving the existence of an injury or harm and that a work-related accident occurred, or conditions existed at work which could have caused or aggravated that harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Claimant is not required to prove that the working conditions in fact caused the harm; rather, claimant must show that working conditions

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party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(b) A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

*See generally* 29 C.F.R. §18.1 (Federal Rules of Civil Procedure "apply in any situation not provided for or controlled by these rules, or by any statute, executive order or regulations").

existed which could have caused his harm. *Id.*; see generally *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes his prima facie case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his condition is causally related to his employment. See *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000). Upon invocation of the presumption, the burden shifts to employer to produce substantial evidence that claimant's condition is not related to his employment. See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), cert. denied, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. See *Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5<sup>th</sup> Cir. 2012); see also *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

In this case, claimant contends the administrative law judge erred in denying him the benefit of the Section 20(a) presumption since, he asserts, he established that he sustained a harm, specifically a right knee injury, and that work incidents occurred on September 28 and December 27, 2004, that could have caused that condition. The administrative law judge found that claimant testified only to right leg pain, as opposed to knee pain specifically, in relation to the work accidents. The administrative law judge therefore concluded that the Section 20(a) presumption does not apply to claimant's right knee claim.

The administrative law judge's finding that claimant failed to establish his prima facie case with regard to his right knee condition cannot be affirmed since the record unequivocally establishes that claimant sustained a harm, specifically a diagnosed right knee condition,<sup>2</sup> and two employment-related incidents which could have caused claimant's knee condition. Moreover, the knee is part of the leg and thus claimant's claim of knee pain is encompassed in his claim of injury to his leg. See generally *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS

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<sup>2</sup>The MRI performed on claimant's right knee on July 25, 2005, resulted in a diagnosis of the presence of joint fluid and chondromalacia as well as a sprain of the inferior aspect of the ACL. CX 14. Additionally, employer concedes that the MRI performed on claimant's right knee in July 2005 revealed an ACL sprain. See Emp. Br. at 20. It appears, however, as employer contends, Dr. Barnes's diagnosis of a torn meniscus did not regard claimant, but a similarly named patient. See EX 33 at 42-43. If necessary, the administrative law judge should address this discrepancy on remand.

251 (1998) (scheduled injury to knee compensated as impairment to the leg). Thus, as “something [has] unexpectedly [gone] wrong within the human frame,” *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(en banc), claimant has satisfied the harm element of his prima facie case. Moreover, the parties agree that claimant was in two accidents in the course of his employment with employer in Uzbekistan, specifically a fall from a scaffold on September 28, 2004, and a fall down a flight of stairs on December 27, 2004.

Given this evidence, the administrative law judge erred in failing to invoke the Section 20(a) presumption with regard to claimant’s knee condition. As the record contains substantial, uncontroverted evidence that claimant sustained a harm to his right knee and was involved in two work incidents which could have caused his right knee condition, claimant has established both elements of his prima facie case. *See Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). We, therefore, reverse the administrative law judge’s finding that claimant failed to establish the elements of his prima facie case, and hold that the Section 20(a) presumption applies to claimant’s right knee condition as a matter of law. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

Assuming, arguendo, that the Section 20(a) presumption applied with regard to claimant’s right knee condition, the administrative law judge made the alternative finding that employer presented evidence sufficient to rebut the presumption and that, on the record as a whole, claimant did not establish a causal relationship between his right knee condition and his employment with employer. Decision and Order at 21-22. We must remand the case for the administrative law judge to address rebuttal in terms of the aggravation rule. Dr. Barnes, on whom the administrative law judge relied to find the Section 20(a) presumption rebutted, opined that claimant’s knee condition is not related to the 2004 accidents, but is due to pre-existing, degenerative conditions. *See* EXs 33 at 24-26; 35 at 2. Employer is fully liable for any disability resulting from the work-related aggravation of a pre-existing condition, *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (en banc), and it is employer’s burden to produce substantial evidence that the work accidents did not aggravate a pre-existing condition. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009). As the administrative law judge, in his alternative findings, did not discuss the evidence in light of the aggravation rule, we remand the case for the administrative law judge to address whether employer rebutted the Section 20(a) presumption by producing substantial evidence that claimant’s right knee condition was neither caused nor aggravated by his employment injuries. *See Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). Should the administrative law judge find established a causal connection between claimant’s knee condition and his employment accidents, the administrative must address any remaining issues concerning this injury such as whether disability results from it.

Claimant next challenges the administrative law judge's denial of all disability benefits subsequent to May 26, 2005. Specifically, claimant contends he is entitled to ongoing permanent partial disability compensation for a loss of wage-earning capacity as demonstrated by jobs available on the open market.

We need not address this contention because the administrative law judge found that claimant failed to meet his threshold burden of establishing that the work injuries to his shoulder and back result in his inability to perform his usual work. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). It is only if claimant establishes his inability to perform his usual employment duties with employer that the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5<sup>th</sup> Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5<sup>th</sup> Cir. 1992); *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

In this case, the administrative law judge relied on the opinion of Dr. Jarolimek, the results of an August 1, 2006 Functional Capacity Evaluation, claimant's post-injury self-employment, and surveillance video of claimant, in concluding that claimant did not establish that his work-related shoulder and back injuries prevent him from resuming his usual employment duties with employer as of May 26, 2005. Decision and Order at 22-24. The administrative law judge's finding is supported by substantial evidence, and claimant has not raised any contentions of error with regard to this finding. Therefore, we affirm the denial of benefits subsequent to May 26, 2005. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Consequently, we need not address claimant's arguments regarding any loss of wage-earning capacity on the open market. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Claimant also contends that the administrative law judge erred in calculating his average weekly wage. Claimant avers that the administrative law judge erred by not relying on claimant's contract rate with employer, or alternatively, by not averaging the highest earnings claimant received while working overseas between 2000 and September 2004.

Section 10(c) of the Act, 33 U.S.C. §910(c), provides a general method for determining average weekly wage where Section 10(a) or (b), 33 U.S.C. §910(a), (b), cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of his injury.<sup>3</sup> The object of Section 10(c) is to arrive at a sum that reasonably

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<sup>3</sup>No party asserts that Section 10(a) or (b) is applicable.

represents the claimant's annual earning capacity at the time of his injury. *See James J. Flanagan Stevedore, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5<sup>th</sup> Cir. 1998). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5<sup>th</sup> Cir. 2000).

In this case, the administrative law judge found that in the years preceding his employment with employer, claimant continuously engaged in overseas work in the construction/carpentry industry, and that, immediately prior to the commencement of his employment with employer in August 2004, claimant performed substantially similar work for a different overseas employer. Decision and Order at 25-26. The administrative law judge determined that the fairest and most reasonable method of calculating claimant's average weekly wage was to divide claimant's total overseas earnings during the preceding year, \$52,369.80, by 52, with a resulting average weekly wage of \$1,007.11. *Id.* at 26. The administrative law judge concluded that he would not speculate as to whether claimant's employment with employer would have continued had he not been injured. The result reached by the administrative law judge accords with Section 10(c) as it constitutes a reasonable estimate of claimant's annual earning capacity at the time of injury, it is supported by substantial evidence, and is in accordance with law.<sup>4</sup> The calculation takes into account both claimant's earnings at the time of injury and similar work claimant performed within the preceding 52 weeks. *Staflex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5<sup>th</sup> Cir. 2000). We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage.

Employer contends on cross-appeal that the administrative law judge erred by failing to address its contention that claimant is not entitled to reimbursement for the medical charges incurred as a result of his treatment with Dr. Speller. Employer avers that it authorized the treatment of claimant by Dr. Jarolimek, an orthopedic surgeon, and that claimant failed to seek authorization for his subsequent treatment with Dr. Speller, who also is an orthopedic surgeon. Employer also asserts that the administrative law judge erred in awarding claimant ongoing medical care for his shoulder and back

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<sup>4</sup>Claimant's reliance on the Board's decision in *K.S. [Simons] v. Serv. Employee's Int'l, Inc.*, 43 BRBS 18, *aff'd on recon.*, 43 BRBS 136 (2009)(en banc), for the proposition that the administrative law judge erred by not calculating his average weekly wage based solely on his contract of employment with employer is misplaced. *Simons* involved overseas work in a dangerous environment under a long-term contract. There is no evidence here that claimant's work in Uzbekistan involved the type of dangerous conditions encountered in Iraq and Afghanistan.

conditions without addressing the opinion of Dr. Barnes who, on February 5, 2009, opined that these conditions required no further medical treatment. *See* EX 11 at 7.

Where, as in this case, claimant has established that his shoulder and back conditions are work-related, employer is liable for reasonable and necessary medical expenses related to those conditions. 33 U.S.C. §907(a); *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002). Pursuant to Section 7(b), (c)(2) of the Act, 33 U.S.C. §907(b), (c)(2), claimant must obtain the prior consent of employer or the district director to change physicians. *See Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Where a claimant's request for authorization is refused by employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 33 U.S.C. §907(d). Where claimant receives medical treatment from his initial choice of physician, and employer does not refuse further treatment from that authorized physician, employer is not required to consent to a change of physicians where the treatment sought is duplicative of the treatment he was already receiving. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4<sup>th</sup> Cir. 1995); *Senegal*, 21 BRBS 8.

In his decision, the administrative law judge discussed the issue of claimant's entitlement to medical benefits and concluded only that,

Having found Claimant suffered a compensable injury to his right shoulder and low back, he is entitled to, and Employer/Carrier are responsible for, reasonable and necessary medical care, which is a natural and unavoidable result of his work-related injury. Accordingly, Employer/Carrier are liable for Claimant's medical treatment to his right shoulder and low back.

Decision and Order at 26. We agree with employer that the administrative law judge did not discuss employer's evidence regarding treatment by Dr. Speller, which, if credited, could establish that Dr. Speller's treatment of claimant was not reimbursable pursuant to Section 7 of the Act, and that claimant's shoulder and back conditions require no ongoing medical care. Accordingly, as the administrative law judge did not address employer's specific arguments, the administrative law judge's award of medical benefits to claimant is vacated and the case remanded for further findings.

Claimant also appeals the administrative law judge's denial of an attorney's fee payable by employer. Following the issuance of the administrative law judge's decision, claimant's counsel submitted to the administrative law judge a petition for an attorney's

fee, requesting \$24,791 for work performed and expenses associated with this case. In a Supplemental Decision and Order Denying Attorney's Fee, the administrative law judge denied the petition under Section 28(a), (b), 33 U.S.C. §928(a), (b). He found Section 28(a) was inapplicable, and he denied the fee request under Section 28(b), finding that the criteria for employer liability had not been met because claimant was unsuccessful in obtaining compensation greater than the amount previously paid by employer.

Section 28(b) of the Act, 33 U.S.C. §928(b), applies where an employer pays or tenders payment of compensation without an award and thereafter a controversy arises over additional compensation.<sup>5</sup> 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 an employer to be held liable for an attorney's fee 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) the claimant's obtaining greater compensation than that paid or tendered by the employer. *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5<sup>th</sup> Cir. 2010); *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5<sup>th</sup> Cir. 2009).

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<sup>5</sup>Section 28(b) states in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, 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 to accept such written 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 based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b).

In this case, the district director held an informal conference on February 21, 2008, at which time claimant sought only the reinstatement of compensation benefits. In her memorandum of informal conference dated February 26, 2008, the district director stated that she did not believe claimant had established a loss of wage-earning capacity, and that if the parties did not either submit a Section 8(i) settlement application or a pre-hearing statement for referral of the case to the Office of Administrative Law Judges, the administrative file would be closed. Thus, this memorandum did not recommend that employer take any action at that time.

We reject claimant's contention that the administrative law judge erred in failing to hold employer liable for his attorney's fee. Employer did not reject the district director's written recommendation, which is one of the required elements for an award pursuant to Section 28(b).<sup>6</sup> *Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT). That the administrative law judge subsequently awarded claimant medical benefits cannot supercede the fact that employer did not reject the district director's recommendation. *Id.* Consequently, we affirm the administrative law judge's denial of an employer-paid attorney's fee pursuant to Section 28(b).<sup>7</sup>

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<sup>6</sup>Claimant does not challenge the administrative law judge's determination that, as employer voluntarily paid claimant disability benefits through October 20, 2007, Section 28(a) is inapplicable to this case. *See Andrepoint*, 566 F.3d 415, 43 BRBS 27(CRT).

<sup>7</sup>Although claimant was awarded medical benefits before the administrative law judge, the district director did not recommend that employer take any action on this issue.

Accordingly, we vacate the denial of benefits for claimant's knee condition and the award of medical benefits for claimant's back and shoulder injuries, and we remand the case for further findings in accordance with this decision. In all respects, the Decision and Order Granting Benefits and the Supplemental Decision and Order Denying Attorney's Fee are affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge