

LARRY HANKTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS,	)	DATE ISSUED: <u>Apr. 16, 2014</u>
INCORPORATED/PASCAGOULA	)	
OPERATIONS	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, LTD), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PPLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2011-LHC-00638) of Administrative Law Judge Patrick M. Rosenow 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fell off a ladder and injured his back on October 2, 2008, during the course of his employment for employer as a painter/sand blaster. Claimant continued working for employer in a light-duty capacity until he was laid off due to a lack of work.

Employer voluntarily paid claimant compensation for temporary total disability commencing February 2, 2009, based upon an average weekly wage of \$1,021.62. CX 4. Claimant disputed employer's average weekly wage calculation. In a letter dated September 29, 2010, the district director noted, inter alia, that claimant was receiving temporary total disability benefits and he recommended that claimant's average weekly wage was \$1,089. CX 14 at 10. Employer filed a notice of controversion of the recommended average weekly wage. Claimant requested referral of the case to the Office of Administrative Law Judges (OALJ) for a hearing on the issues of average weekly wage and medical care. CX 15. Subsequent to the referral to the OALJ on December 30, 2010, employer terminated its voluntary payments of temporary total disability on June 19, 2011, when it offered claimant suitable alternate employment at its facility. CX 5. It filed another notice controverting the claim on the average weekly wage and nature/extent of disability issues. Claimant, therefore, raised before the administrative law judge his entitlement to total and partial disability compensation for his back injury, in addition to the average weekly wage issue.

In his decision, the administrative law judge awarded claimant compensation for: temporary total disability from January 5, 2009 to May 25, 2011; permanent total disability from May 25, 2011, when the parties stipulated that claimant's back condition reached maximum medical improvement, to July 13, 2011; permanent partial disability from July 14, 2011 to January 8, 2012, based on a post-injury wage-earning capacity of \$848.28; and continuing permanent partial disability from January 9, 2012, based on a post-injury wage-earning capacity of \$845.40.<sup>1</sup> Decision and Order at 26-27; *see* 33 U.S.C. §908(a), (b), (c)(21).

Claimant's counsel submitted to the administrative law judge a fee petition requesting an attorney's fee of \$33,644.57, representing 109.5 hours of attorney time at \$300 per hour, and \$794.57 in expenses. Employer objected, arguing, inter alia, that it could not be held liable for an attorney's fee for time expended on the disputed issues of the nature and extent of claimant's back disability and his loss of wage-earning capacity as they were not the subject of an informal conference before the district director.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge rejected employer's contention regarding its liability for claimant's attorney's fee. He found implicit in the informal conference recommendation

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<sup>1</sup> The administrative law judge accepted the parties' stipulation that claimant returned to work for employer in a different job on July 14, 2011, that this job constituted suitable alternate employment, and that claimant sustained a loss of wage-earning capacity due to the lack of available overtime in his post-injury job for employer. Decision and Order at 2, 24-26.

that employer should continue its compensation payments for temporary total disability, but at the higher average weekly wage. Supplemental Decision and Order at 5. Thus, the administrative law judge held employer liable for the awarded attorney's fee, pursuant to Section 28(b), 33 U.S.C. §928(b). The administrative law judge reduced the hourly rate requested to \$265, and he found that claimant was 97 percent successful on the issues decided before him. *Id.* at 5-6. The administrative law judge addressed at length employer's objections to specific entries in counsel's fee petition, and he reduced a total of 10.35 hours from 35 entries. *Id.* at 7-13. The administrative law judge awarded claimant's counsel a fee and costs of \$26,281.08 payable by employer. *Id.* at 13.

On appeal, employer contends it is not liable for claimant's counsel's fee pursuant to Section 28(b) for time expended on the issues relating to the nature and extent of claimant's back disability, because the district director's recommendation addressed only claimant's average weekly wage.<sup>2</sup> Employer concedes that counsel is entitled to a fee under Section 28(b) for time expended on the average weekly wage issue, but it submits that counsel's fee should be reduced by half or two-thirds to account for time expended on issues other than average weekly wage. Claimant filed a response brief urging affirmance of the fee award, to which employer replied.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, employer's liability for an attorney's fee pursuant to Section 28(b) must be addressed in view of that court's decisions in *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010) and in *StafTex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). In *Carey*, the Fifth Circuit reiterated the criteria for fee liability under Section 28(b):<sup>3</sup> (1) an informal conference; (2) a written

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<sup>2</sup> Employer appended to its brief objections to the fee petition it submitted to the administrative law judge and stated, "[T]he contents of the objections are fully incorporated herein." Brief at 1. These objections address counsel's fee petition and do not allege specific error in the administrative law judge's fee order. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); 20 C.F.R. §802.211(a), (b). Thus, we decline to address these objections.

<sup>3</sup> Section 28(b) of the Act states:

(b) 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 deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall

recommendation; (3) the employer's refusal to adopt the recommendation; and (4) the employee's procuring the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation. *Carey*, 627 F.3d at 982-983, 44 BRBS at 85(CRT) (quoting *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318, 39 BRBS 1, 4(CRT) (4th Cir.), cert. denied, 546 U.S. 960 (2005)); *Staftex Staffing*, 237 F.3d at 409, 34 BRBS at 47(CRT).

In this case, employer acknowledges there was the equivalent of an informal conference and a written recommendation, and that it refused to accept the recommendation with respect to the issue of average weekly wage. The September 29, 2010 recommendation letter states in pertinent part:

It is noted that your client continues to receive TTD based on an AWW of \$1,021.00 and has had lumbar spine surgery on July 6, 2010 done by his choice of physician Dr. Bazzonne.

Based on the wage information reviewed, [it] is recommended that the AWW weekly wage is \$1,089.00

Emp. Brief at ex. B. Employer contends, however, that because the district director did not issue a recommendation on the issue of disability compensation, it cannot be held liable for claimant's attorney's fee for time spent obtaining permanent total and ongoing permanent partial disability compensation. In his Supplemental Decision, the administrative law judge rejected this contention, stating:

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recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] 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. . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

Although the language is somewhat ambiguous, a fair reading of the document as a whole is that the claims examiner believed benefits should continue based on a higher average weekly wage. Implicitly included in that recommendation is any issue related to nature and extent. Accordingly, when Employer terminated benefits in 2011, it was no longer in compliance with the recommendation and became liable for Claimant's attorney fee.

Supplemental Decision and Order at 5. Claimant ultimately succeeded in obtaining a higher average weekly wage, as well as additional compensation for total disability and a continuing award for permanent partial disability. Thus, the administrative law judge held employer liable for claimant's entire compensable attorney's fee pursuant to Section 28(b). We affirm this finding as it accords with law.

In *Carey*, the employer argued that claimant's benefits should be based on a certain average weekly wage but continued to pay benefits based on the higher average weekly wage recommended by the district director pending a decision by the administrative law judge on the issue of the correct average weekly wage. The administrative law judge awarded benefits based on an average weekly wage greater than the amount employer believed was correct but lower than the average weekly wage recommended by the district director. Consistent with its decision in *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981), the Fifth Circuit held that employer is liable under Section 28(b) where claimant utilized the services of an attorney to obtain an award "greater than the amount" to which employer believed he was entitled. The court stated that the plain language of Section 28(b) makes clear that the phrase "the amount paid or tendered by the employer" means "the amount of additional compensation, if any, to which they [the employer] believe the employee is entitled." *Carey*, 627 F.3d at 985, 44 BRBS at 86(CRT).

*Staflex Staffing*, in which the employer was held liable for an attorney's fee pursuant to Section 28(b), also informs the result in this case. In that case, the employer voluntarily paid compensation for temporary total disability, there was an informal conference or its equivalent, and a written recommendation was issued for the employer to pay permanent total disability benefits. The average weekly wage was clear and the court held that the recommendation for permanent total disability incorporated the average weekly wage at which the employer was voluntarily paying temporary disability compensation. The employer did not accept the recommendation that it pay permanent total disability benefits, and it contended claimant's average weekly wage was lower. Claimant did not succeed before the administrative law judge on the issue of permanent disability benefits, but he successfully obtained a higher average weekly wage as a result of the proceedings before the administrative law judge. The Fifth Circuit held the

Section 28(b) requirements were met under these circumstances. *Staftex Staffing*, 223 F.3d 431, 34 BRBS 105(CRT).

In holding employer liable in this case for the entire attorney's fee pursuant to Section 28(b), the administrative law judge rationally found that the recommendation for a higher average weekly wage implicitly included the recommendation that employer continue to pay benefits to claimant. This finding accords with *Staftex Staffing* and *Carey*, as it is clear, as in those cases, that the continued payment of disability benefits at the higher average weekly wage was part and parcel of the written recommendation. Following the informal proceedings, employer at first continued to pay claimant benefits at an average weekly wage lower than that recommended, and then controverted the claim and stopped paying benefits altogether.<sup>4</sup> When employer failed to pay benefits at the higher rate and stopped paying benefits, it became liable for claimant's entire attorney's fee upon claimant's obtaining more than "the amount of additional compensation, if any, to which they [the employer] believe the employee is entitled" after the issuance of the written recommendation. *Carey*, 627 F.3d at 985, 44 BRBS at 86(CRT). Therefore, the administrative law judge's properly found the requirements of Section 28(b) are satisfied and we affirm the finding that employer is liable for the entire awarded attorney's fee. *Staftex Staffing*, 223 F.3d 431, 34 BRBS 105(CRT).

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<sup>4</sup> In *Staftex Staffing*, the average weekly wage issue was expressly raised for the first time before the administrative law judge and, in this case, entitlement to ongoing benefits was expressly raised for the first time before the administrative law judge. The Fifth Circuit did not find this fact to be an impediment to employer's liability pursuant to Section 28(b). Indeed, such is consistent with 20 C.F.R. §702.336, and, moreover, the Fifth Circuit has noted that needless remands to the district director are to be avoided. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46, 49 n.7 (2006).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge