BRB No. 99-1162

| | | |
|---|---|---|
| WILLIAM LINCOLN, JR. | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| STEVENS SHIPPING AND TERMINAL | ) | DATE ISSUED: |
| | ) | |
| Self-Insured Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order - Awarding Benefits, Decision and Order Denying Reconsideration, and Order Awarding Attorney's Fees of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.C.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits, Decision and Order Denying Reconsideration, and Order Awarding Attorney's Fees (98-LHC-1058) of Administrative Law Judge Stuart A. Levin 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 findings of fact and conclusions of law of the

administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, while working for employer as a longshoreman on July 22, 1996, sustained injuries to his right knee, lower back, neck and right wrist. Claimant was diagnosed with a re-tear of the residual medial meniscus tissue of the right knee, a disc bulge or disc protrusion at L4-5, and a right wrist hyperextension injury. He eventually reached maximum medical improvement and was assigned permanent impairment ratings with regard to his right knee, back and neck injuries. At the time of the hearing, surgery was recommended for claimant's right wrist. Employer voluntarily paid temporary total disability benefits from July 23, 1996, until January 27, 1997. 33 U.S.C. §908(b). Claimant did not return to work as a longshoreman, or any other employment until he procured, through his own efforts, a job as a sales clerk at Office Depot.

In his decision, the administrative law judge initially determined that the injuries to claimant's back, neck, right knee and right wrist are work-related. The administrative law judge then determined that claimant cannot return to his usual employment as a longshoreman and that the availability of suitable alternate employment was not established until claimant procured the job at Office Depot. Accordingly, the administrative law judge found claimant entitled to benefits for periods of temporary total disability, permanent total disability and permanent partial disability,[1] and relevant medical expenses under Section 7 of the Act, 33 U.S.C. §907. In addition, the administrative law judge denied employer's request for Section 8(f) relief. 33 U.S.C. §908(f). The administrative law judge subsequently denied employer's motion for reconsideration, and he awarded claimant's attorney an attorney's fee totaling $9,628.05, representing 16.2 hours at an hourly rate of $300, and 29.8 hours at an hourly rate of $150, plus $298.05 in expenses.[2]

[1]Specifically, the administrative law judge found claimant entitled to benefits for temporary total disability from July 23, 1996, through October 20, 1997, permanent total disability from October 21, 1997, through February 15, 1998, and permanent partial disability thereafter based on the difference between claimant's average weekly wage of $556.96 and post-injury wage-earning capacity of $352.82. In addition, the administrative law judge found claimant entitled to a scheduled award for his permanent partial disability of the right leg pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2).

[2]The administrative law judge denied, without prejudice, 11.25 hours of work

On appeal, employer challenges the administrative law judge's inclusion of container royalty payments in calculating claimant's average weekly wage, as well as his award of an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in concluding that claimant's average weekly wage should include container royalty payments. Specifically, employer asserts that the administrative law judge's finding is contrary to the decision of the United States Court of Appeals for the Fourth Circuit in *Univeral Maritime Service Corp. v Wright*, 155 F.3d 311, 33 BRBS 15 (CRT)(4th Cir. 1998). In considering claimant's average weekly wage in this case, the administrative law judge initially discussed the Fourth Circuit's decision in *Wright*, and purportedly applied the underlying principles discussed therein to conclude that under Section 10(c) of the Act, 33 U.S.C. §910(c), claimant's average weekly wage is $556.96, based upon his actual wages of $15,923.38 in the 52-week period prior to the injury, plus the container royalty payment of $13,038.44 he received for fiscal year 1996. Upon reconsideration, the administrative law judge further discussed *Wright*, as well as the decision of the United States Court of Appeals for the Eleventh Circuit in *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56 (CRT) (11th Cir. 1998).[3] The administrative law judge thereafter rejected the *Wright* methodology as it would not fairly and accurately represent claimant's pre-injury average weekly wage under Section 10(c). Instead, based on the ILA contract, the trustees' historical criteria, the decision of the Eleventh Circuit in *SEACO*, and the specific facts of this case, the administrative law judge reiterated his finding

---

performed by two paralegals and $746.25 in related expenses for lack of adequate documentation. He did, however, determine that the requested hourly rates of $65 and $75 for paralegal work were reasonable.

[3]In *Seaco*, the Eleventh Circuit held that a claimant's post-injury receipt of vacation, holiday and container royalty payments does not establish that a claimant has a post-injury wage-earning capacity such that an award of total disability benefits is mitigated to an award of partial disability. The court further held that an employer is not entitled to a credit for these payments pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j).

that the container royalty payment made to claimant for fiscal year 1996 should be included in the calculation of claimant's average weekly wage as of the date of his injury in July 1996.

As the instant claim arises within the jurisdiction of the Fourth Circuit, that court's holding in *Wright* is dispositive of the issue raised by employer on appeal. In *Wright*, the Fourth Circuit held that vacation, holiday, and container royalty payments are considered "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13), only when they are earned with the requisite number of hours of actual work. *Wright*, 155 F.3d at 326, 33 BRBS at 27 (CRT). Thus, in cases where the claimant was already entitled to receive such payments due to the number of hours actually worked prior to his work-related injury, and thus had no pre-injury capacity to earn any additional vacation, holiday or container royalty pay until the start of the next contract year, the court determined that the calculation of claimant's pre-injury average weekly wage must exclude the value of these payments for that contract year in order to ensure that claimant's average weekly wage will reasonably represent his pre-injury capacity to earn additional vacation, holiday or container royalty pay from work. When, as in the instant case, vacation, holiday, and container royalty pay are earned only because of disability credit, the court held that such moneys are not paid for "services" and therefore are not "wages." *Id.* These funds, therefore, cannot be included in the calculation of a claimant's average weekly wage during the contract year for which the funds are paid. The court concluded, however, that once the next contract year begins, a claimant's average weekly wage may be readjusted if it can be demonstrated that the claimant had the pre-injury capability to earn these payments during the new contract year. *See Wright*, 155 F.3d at 329, 33 BRBS at 30 (CRT).

In the instant case, it is undisputed that at the time of his injury claimant did not have the requisite number of actual hours of work necessary to entitle him to container royalty payments for fiscal year 1996. Nevertheless, claimant subsequently became entitled to these payments based upon a combination of actual hours worked and workers' compensation disability credit hours. *See* Claimant's Exhibits 20, 21, 30. As such, following the mandate of the Fourth Circuit in *Wright*, the container royalty payments received by claimant for fiscal year 1996 are not "wages," and thus cannot be included in claimant's average weekly wage. *Wright*, 155 F.3d at 311, 33 BRBS at 27-28 (CRT). Consequently, the administrative law judge's inclusion of the container royalty payments in calculating claimant's average weekly wage under Section 10(c) is contrary to the Fourth Circuit's decision in *Wright*, and is therefore reversed. Accordingly, the administrative law judge's determination of claimant's average weekly wage, and consequent award of benefits is vacated. On remand, the administrative law judge must reconsider and recalculate claimant's average weekly wage pursuant to Section 10 of the Act,[4] and thereafter determine claimant's entitlement to

[4]On remand, the administrative law judge must consider the applicability of Section 10(a), 33 U.S.C. §910(a), as claimant worked in the same or comparable employment for

benefits.

Employer also appeals the fee award, arguing that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300 as there is no evidence or discussion as to the prevailing rates in the relevant geographical area. Additionally, employer asserts that the attorney's fees awarded by the administrative law judge are excessive in light of the ultimate recovery obtained by claimant in this case.

---

substantially the whole of the year immediately preceding the injury and the record contains sufficient evidence to enable a calculation of the requisite average daily wage. *See* Employer's Exhibit 21.

We reject employer's assertion that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300. The administrative law judge fully considered the regulatory criteria of 20 C.F.R. §702.132(a),[5] and determined that this hourly rate is warranted given counsel's level of efficiency and expertise. Employer has not shown that the administrative law judge abused his discretion in this regard. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Nonetheless, in light of our decision to vacate the award of benefits and remand the case for further consideration, we shall also vacate the fee award and permit the administrative law judge to reconsider the attorney's fee in light of the benefits awarded on remand. *See Hensley v. Eckhardt*, 461 U.S. 424 (1983); *see generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Accordingly, the administrative law judge's calculation of claimant's pre-injury average weekly wage and resulting award of benefits and an attorney's fee are vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[5]This regulation states that the fee award should take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. The regulation does not specifically require that the awarded rate comport with the prevailing rate in the relevant geographic area. *Cf.* 20 C.F.R. §802.203(a)(4).