

BRB No. 10-0662

BRIAN J. SPAULDING)
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 Claimant-Respondent)
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 v.)
)
 FLUOR CORPORATION) DATE ISSUED: 07/25/2011
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 and)
)
 CONTINENTAL INSURANCE)
 COMPANY/CNA INTERNATIONAL)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Aaron L. Walter (Herbert Chestnut & Associates), Marietta, Georgia, for
claimant.

John T. Bennett, Jr., and Lisa Wilson (Laughlin, Falbo, Levy & Moresi,
LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00099) of Administrative
Law Judge Joseph E. Kane 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 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 sought medical and disability benefits for a back injury he suffered on May 4, 2005, while working for employer in Tbilisi, Georgia. Claimant underwent multiple back surgeries but testified during his formal hearing on June 17, 2009, that he has not made a full recovery and remains unable to work. EX 23; Tr. at 25-26. Claimant continues to treat with a pain management physician and a clinical social worker and takes several medications. Tr. at 54-55. Employer paid claimant temporary total disability benefits from July 11, 2005 through January 27, 2007 and permanent partial disability benefits from January 28, 2007 through March 18, 2009, at which time employer discontinued payments.

The administrative law judge found that claimant is entitled to temporary total disability benefits from May 4, 2005, the date of claimant's injury, until June 13, 2006, the date of maximum medical improvement, and to ongoing permanent total disability benefits thereafter, as claimant established his inability to return to his usual work, and employer failed to establish the availability of suitable alternate employment. Decision and Order at 9-10. As he found claimant entitled to total, instead of partial, disability benefits, the administrative law judge rejected employer's request for a credit for an overpayment of disability benefits. *Id.* at 18.

On appeal, employer contends the administrative law judge erred in awarding claimant benefits from the date of injury, May 4, 2005. Employer avers that it continued to pay claimant his full salary until July 10, 2005, and thus, claimant received both salary and compensation benefits for two months. In response, claimant concedes that employer is not liable for disability benefits for the period between May 4 and July 10, 2005. However, claimant contends that there has been no double payment, as employer has not paid any disability benefits for that time period.

Claimant was injured on May 4, 2005 and apparently remained on the job until July 2005. EX 18. Claimant concedes he was paid his salary for this period and is not entitled to compensation. Therefore, we modify the administrative law judge's award to reflect that claimant's temporary total disability benefits are to commence as of July 11, 2005.¹ Nonetheless, we must remand the case to the administrative law judge for findings regarding whether the amount employer paid claimant as salary for that period between May 4 and July 10, 2005, exceeded the compensation awarded by the administrative law judge for that period thereby entitling employer to a credit. Both parties stated they attached a LS-208 Notice of Final Payment form to their appellate briefs to demonstrate whether employer had made disability payments for that period

¹We affirm as unchallenged on appeal the administrative law judge's findings that claimant is entitled to temporary total and permanent total disability benefits. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

pursuant to the administrative law judge's award. Contrary to the parties' statements, however, there were no attachments to the briefs, and, in any event, the Board may not consider new evidence. *See Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); 20 C.F.R. §802.301.

Consequently, as the parties are not in agreement on this issue, we must remand this case to the administrative law judge to determine whether employer paid claimant the awarded temporary total disability benefits for the period between May 4 and July 10, 2005, and thus whether employer is entitled to a credit for any benefits paid against compensation due. 33 U.S.C. §914(j).

Accordingly, we modify the administrative law judge's award of benefits to reflect that claimant's temporary total disability benefits are to commence as of July 11, 2005. The case is remanded for the administrative law judge to address employer's entitlement to a credit consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.²

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

²Claimant's counsel has filed a fee petition for work performed before the Board in this appeal. Counsel requests \$1,512.50 for services rendered between July 28 and November 17, 2010, representing 5.5 hours of attorney services at an hourly rate of \$275. Employer filed objections. As claimant's success on remand is a predicate to his attorney's entitlement to a fee for work performed before the Board, it is premature to award an attorney's fee at this time. *See Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980); *Whyte v. General Dynamics Corp.*, 8 BRBS 706 (1978); *see generally Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997). Therefore, the request for a fee is denied. Counsel may refile a fee petition upon achieving success on remand. 20 C.F.R. §802.203(c).