



BRB No. 16-0164

THOMAS C. FANNON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CERES CORPORATION/CERES)	
TERMINALS)	DATE ISSUED: <u>Nov. 14, 2016</u>
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Partially Awarding Attorney’s Fees of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Partially Awarding Attorney’s Fees (2012-LHC-01354, 01355, 01356) of Administrative Law Judge Stephen R. Henley 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). 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 law. *Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013).

Claimant sustained injuries in a series of accidents while working as a driver for employer which, he alleged, aggravated a pre-existing arthritic condition, accelerated his degenerative joint disease, and led to his stopping work on September 28, 2011.¹

Claimant sought authorization for left shoulder replacement surgery, 33 U.S.C. §907, and additional temporary total and partial disability benefits, 33 U.S.C. §908(b), (e). Employer controverted the claim. In his decision issued October 21, 2013, Administrative Law Judge Richard T. Stansell-Gamm found claimant entitled to continuing temporary total disability benefits from September 28, 2011, 33 U.S.C. §908(b), based on an average weekly wage of \$1,252.14, which reflected the wages claimant earned prior to the September 17, 2009 work injury, 33 U.S.C. §910(c), and to medical benefits for claimant's work-related injuries, including all treatment related to left shoulder replacement surgery, 33 U.S.C. §907. On reconsideration, Judge Stansell-Gamm modified his initial order to provide that claimant's temporary total disability compensation arose from the natural consequences of only the September 5, 2006 and April 28, 2007 work injuries because the September 17, 2009 claim is time-barred. Supp. Decision and Order at 5.

Both parties appealed Judge Stansell-Gamm's decisions. In its decision dated June 7, 2016, the Board vacated Judge Stansell-Gamm's average weekly wage finding and remanded the case for him to determine claimant's average weekly wage at the time of claimant's April 28, 2007 work injury. *Fannon v. Ceres Corp.*, BRB Nos. 14-0186/A (June 7, 2016). In all other respects, Judge Stansell-Gamm's decisions were affirmed. *Id.*

While the appeals on the merits were pending before the Board,² claimant's counsel filed a petition with Judge Stansell-Gamm for an attorney's fee for work performed before the Office of Administrative Law Judges. In his Supplemental Decision and Order, Judge Stansell-Gamm awarded counsel a fee totaling \$12,259.75 and expenses in the amount of \$971.09, payable by employer. 33 U.S.C. §928; 20 C.F.R. §702.132. On reconsideration, Judge Stansell-Gamm modified his prior decision to reflect an approved hourly rate of \$350 rather than \$250. He thus awarded counsel \$18,134.74, representing an attorney's fee of \$17,163.65 and expenses of \$971.09, payable by employer. Employer appealed Judge Stansell-Gamm's attorney's fee award. The Board affirmed Judge Stansell-Gamm's attorney's fee award. *Fannon v. Ceres Corp.*, BRB No. 14-0389 (May 26, 2015) (unpub.), *aff'd on recon.* (Aug. 14, 2015)

¹Specifically, claimant was involved in work accidents on September 5, 2006, April 28, 2007, December 2, 2007, and September 17, 2009.

²The Board did not receive the complete record and thus remanded the case to the district director for reconstruction of the record. The case was not reinstated on the Board's docket until January 14, 2016, resulting in a delay between the time the appeals were filed in March/April 2014 and the Board's issuance of its decision on the merits in June 2016.

(unpub.). At that time, the Board, noting the parties' pending appeals on the merits, stated that the "enforceability of this award is contingent upon claimant's continued success." *Id.*, slip op. at 4 n. 6.

Claimant's counsel, on May 27, 2015, filed with the administrative law judge a supplemental petition seeking an attorney's fee totaling \$8,890, representing 25.40 hours at an hourly rate of \$350, for work performed in defending his initial fee petition. The case was reassigned to Administrative Law Judge Stephen R. Henley (the administrative law judge). Employer filed objections to the fee petition. In his Supplemental Decision and Order Partially Awarding Attorney's Fees dated December 16, 2015, which serves as the subject of this appeal, the administrative law judge awarded counsel a fee totaling \$4,445, representing 12.70 hours at an hourly rate of \$350, payable by employer.

On appeal, employer challenges the administrative law judge's additional award of an attorney's fee. Claimant has not filed a response.

Employer contends that the administrative law judge's attorney's fee award should be vacated. Employer's sole argument, put forth in its one-page brief, is as follows:

The Employer, Ceres Terminals, Inc., respectfully presents this brief in support of its petition that the Administrative Law Judge made several errors in his attorney fee award. The Employer has already filed its petition for review and brief on the merits of [Judge Stansell-Gamm's] decision, BRB No. 2014-0186. If that appeal is successful, the attorney fee award must be vacated.

Employer's Brief in Support of its Petition for Review at 1.

In its appeal of the merits, BRB No. 14-0186, employer challenged Judge Stansell-Gamm's award of disability benefits³ and calculation of claimant's average weekly wage. The Board rejected all of employer's contentions relating to claimant's entitlement to disability benefits, but agreed with employer's contention that Judge Stansell-Gamm erroneously based claimant's average weekly wage on his earnings prior to the September 17, 2009 work injury, because the claim relating to that injury was not timely

³Specifically, employer maintained that Judge Stansell-Gamm erred in finding that claimant's disability is compensable: 1) because the time-barred 2009 work injury is an intervening cause of claimant's disability that terminated its compensation liability; and/or 2) because claimant's disability is due to the natural progression of the September 2006 and April 2007 injuries. Employer also asserted that Judge Stansell-Gamm erroneously found that claimant could not return to his usual work with employer as a van driver.

filed and thus could not form the basis of claimant's compensable claim. *Fannon v. Ceres Corp.*, BRB Nos. 14-0186/A (June 7, 2016). The Board thus vacated Judge Stansell-Gamm's temporary total disability award based on claimant's average weekly wage at the time of the 2009 work injury and remanded the case for him to re-determine claimant's average weekly wage at the time of the April 28, 2007 work injury. *Id.* Consequently, while employer was successful on appeal on the average weekly wage issue, the Board's affirmance of Judge Stansell-Gamm's finding that claimant sustained a work-related injury entitling him to temporary total disability benefits commencing September 28, 2011, as well as to medical benefits for the treatment of claimant's shoulder condition, is sufficient to support the original attorney's fee award in this case. *See* 33 U.S.C. §928; *see generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). Moreover, because the original fee award of Judge Stansell-Gamm was supported by claimant's success, claimant's counsel's request for a supplemental fee for work defending his fee application is also supported. *See Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001). Consequently, as employer raises no other contentions concerning the administrative law judge's supplemental decision, we affirm the award of an attorney's fee totaling \$4,445, payable by employer.

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

SO ORDERED.

GREG BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge