BRB No. 13-0400

STAN OLESKA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CSX TRANSPORTATION, INCORPORATED	)	DATE ISSUED: Feb. 18, 2014
	)	
and	)	
	)	
BROADSPIRE	)	
	)	
Self-Insured Employer/ Administrator-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney's Fees and Costs and the Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Steven G. Warm (Hoffman & Hoffman, P.A.), Baltimore, Maryland, for claimant.

Joanna Noriega Pino and Frank J. Sioli (Brown Sims, P.C.), Miami, Florida, for self-insured employer/administrator.

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

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney's Fees and Costs and the Order Denying Motion for Reconsideration (2011-LHC-01516, 01517) of Administrative Law Judge Paul C. Johnson, Jr., 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his hands and wrists on December 1, 2005 and February 25, 2007, during the course of his employment for employer as an electrician. Employer voluntarily paid claimant compensation for temporary total disability from December 1, 2005 to January 17, 2006, and from September 18, 2008 to October 29, 2009. 33 U.S.C. §908(b). The parties disputed the extent of claimant's bilateral permanent partial disability. After an informal conference, the district director issued a Memorandum of Informal Conference on December 22, 2010, in which she recommended that employer pay claimant permanent partial disability compensation for a 30 percent right hand impairment and a 15 percent left hand impairment, pursuant to the opinion of Dr. Macht. EX 8. Employer controverted the recommendation by requesting that the Office of Workers' Compensation Programs (OWCP) appoint a physician to conduct an independent medical examination, pursuant to Section 7(e) of the Act, 33 U.S.C. §907(e). EX 11. The OWCP appointed Dr. Halikman, who opined that claimant had a five percent permanent impairment to each hand and wrist. EXs 21, 22. Pursuant to Dr. Halikman's opinion, the district director issued a written recommendation that employer pay claimant permanent partial disability compensation for a five percent impairment of each hand, pursuant to Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3). EX 9. Pursuant to this modified written recommendation, employer paid claimant 12.2 weeks of compensation for each hand impairment. ALJX 3; EX 12.

Thereafter, the claim was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. Administrative Law Judge Robert Rae credited Dr. Halikman's opinion and found claimant entitled to compensation under Section 8(c)(3) for 12.2 weeks of compensation for each injury, which employer had already paid. Order on Recon. at 2.

Claimant's counsel subsequently sought an attorney's fee of $11,937.40, representing 46.15 hours of attorney time at a rate of $225 per hour, plus $1,153.15 in costs, for work before the OALJ. Since Administrative Law Judge Rae was no longer with the Department of Labor, the case was re-assigned to Administrative Law Judge Johnson (the administrative law judge). In his Supplemental Order Awarding Attorney's Fees and Costs, the administrative law judge found counsel entitled to an employer-paid attorney's fee of $7,365.15 for 31.08 hours of attorney time at $225 per hour and costs of $372.15, pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). On reconsideration, the administrative law judge rejected employer's contention that claimant's counsel is not entitled to a fee pursuant to Section 28(b) for the reasons given in his prior order. Order Denying Motion for Reconsideration at 2-3.

Employer appeals the administrative law judge's finding that claimant's counsel is entitled to an employer-paid fee pursuant to Section 28(b). Claimant filed a response brief, urging affirmance, to which employer replied.

Section 28(b) of the Act states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award . . . 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 (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 employer or carrier, a reasonable attorney's fee . . . 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).[1] Thus, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, in order for employer to be held liable for an attorney's fee under Section 28(b), the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer paid or tendered after the written recommendation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hassell*], 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Moody*], 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

Employer contends the administrative law judge erred in awarding an attorney's fee under Section 28(b) since claimant did not receive a greater award than it paid him pursuant to the district director's written recommendation. In his Supplemental Order, the administrative law judge found that employer attempted to reduce its liability by introducing evidence at the formal hearing "tending to show that claimant had no impairment and other evidence tending to show that claimant had an impairment of less

[1]There is no contention on appeal that Section 28(a) of the Act, 33 U.S.C. §928(a), governs the liability for an attorney's fee in this case.

than five percent but claimant was successful in defending the recommendation of a five percent impairment rating." Supplemental Order at 5. On reconsideration, the administrative law judge again rejected employer's contention that claimant was unsuccessful; claimant attempted to obtain benefits based on a higher impairment rating after referral to the OALJ than employer had paid while the case was before the district director. Order on Reconsideration at 3. The administrative law judge reiterated that claimant successfully defended employer's attempt to base the awards on impairment ratings of less than five percent. *Id*. We agree with employer that the administrative law judge erred in holding employer liable for claimant's counsel's fee award, and for the reasons that follow, the award is reversed.

Employer presented at the informal conference, and submitted as exhibits to the administrative law judge, the March 27, 2008 report of Dr. Collins and the June 18, 2008 and August 25, 2010 reports of Dr. Van Giesen.[2] EXs 17, 18, 20. The administrative law judge concluded from these reports that employer had attempted to limit claimant's impairment ratings to less than the five percent impairments recommended by the district director and paid by employer. This finding cannot be affirmed. Claimant sought an award based on Dr. Macht's opinion that claimant has a 30 percent right hand impairment and 15 percent left hand impairment. *See* Cl. Post-Hearing Br. at 9-10. Claimant's brief to the administrative law judge addressed Dr. Halikman's report, but not the opinions of Drs. Collins and Van Giesen. *Id*. Employer argued at the formal hearing and in its post-hearing brief only that claimant was entitled to an award based on the five percent impairment ratings of Dr. Halikman; employer's post-hearing brief does not mention the reports of Drs. Collins and Van Giesen.[3] Tr. at 15-19, 43-45; Emp. Post-Hearing Br. at 20-23. The administrative law judge's inference that merely by the submission of medical reports employer attempted to reduce claimant's award below the amount it had paid after the district director issued her recommendation is not supported by the totality of the record.

[2]Dr. Van Giesen restricted claimant from "heavy lifting, pushing, pulling, particularly weights beyond 30 pounds," and he stated he was unable to render an impairment rating since claimant's bilateral hand and wrist conditions had resolved. EX 18 at 2-3. Dr. Collins opined that claimant has no impairment in his left hand and wrist and a three percent impairment of the right arm and wrist. EX 20 at 1-2.

[3]Moreover, Administrative Law Judge Rae's decision summarizes the reports of Drs. Collins and Van Giesen; however, under the subheading of "Medical Opinions Considered for Impairment Rating," he addressed only Dr. Halikman's report and the opinion of Dr. Macht. Decision and Order Awarding Benefits at 6-9.

This case, therefore, is distinguishable from *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010), in that employer did not seek a lower award than it paid after the informal conference and claimant did not obtain an award greater than employer paid or believed claimant was entitled to.[4] Employer paid claimant benefits for a five percent impairment to each hand after the district director issued her written recommendation. Employer did not seek a lesser award before Administrative Law Judge Rae, who awarded claimant benefits for a five percent impairment to each hand. Under these circumstances, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) because claimant did not obtain greater compensation as a result of the proceedings before the administrative law judge. *See, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *R.S.* [*Simons*] *v. Virginia Int'l Terminals*, 42 BRBS 11 (2008). Therefore, we reverse the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(b).

[4]*Carey* is not controlling precedent in this case, which arises within the jurisdiction of the Fourth Circuit. Nonetheless, it is distinguishable from this case. In *Carey*, the employer argued that the 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. 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. The Fifth Circuit held the employer liable for claimant's attorney's fee under Section 28(b) because the claimant obtained 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." 627 F.3d at 983, 44 BRBS at 85(CRT).

Accordingly, the administrative law judge's Supplemental Order Awarding Attorney's Fees and Costs and the Order Denying Motion for Reconsideration of Supplemental Order Awarding Attorney's Fees and Costs awarding claimant's counsel an attorney's fee under Section 28(b) are reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge