No. 10-60075

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES CAREY,
Petitioner

v.

ORMET PRIMARY ALUMINUM CORPORATION and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.3, the Director, Office of Workers' Compensation Programs, United States Department of Labor ("the Director"), requests oral argument, which he believes would assist the Court.

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("the Longshore Act" or "the Act") by James Carey. On January 28, 2009, Administrative Law Judge Clement J. Kennington ("the ALJ") issued a Decision and Order Denying Attorney's Fees, which became effective when it was filed and served by the district director, an official of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), on January 29,

2009. 33 U.S.C. §§ 919(e), 921(a).[1] The ALJ had the authority to hear and decide the case under sections 19(c) and (d) of the Act.

On February 10, 2009, Carey timely moved for reconsideration of the ALJ's decision.[2] On February 26, 2009, the ALJ issued a Decision and Order Denying Reconsideration. The district director filed and served that decision on February 27, 2009. On March 16, 2009, Carey filed a timely appeal[3] of the ALJ's decision with the Benefits Review Board (the Board), which has the authority to hear such appeals under section 21(b)(3) of the Act. The Board affirmed the ALJ's decision on November 30, 2009. Carey filed a petition for review with this Court on January 29, 2010.

Carey's petition for review was filed within the sixty-day period provided by section 21(c). *See Dannko v. Director, OWCP*, 846 F.2d 366, 369 (3d Cir. 1988) ("The petition must be received by the clerk of this court on or before the sixtieth day to be timely."). Here, Carey's petition for review was filed within the sixty-day statutory time period. His injury took

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[1] Unless otherwise noted, all statutory references are to the Longshore Act, with "section xx," for example, referring to 33 U.S.C. § 9xx.

[2] A motion for reconsideration is timely if filed within ten days after the decision is filed in the office of the district director. 20 C.F.R. § 802.206(b)(1). Intervening weekends and holidays are excluded from that calculation. *Galle v. Director, OWCP*, 246 F.3d 440, 450 (5th Cir. 2001).

[3] A petition for review is timely when filed within thirty days after the decision is filed in the office of the district director. 33 U.S.C. § 921(a).

place in Louisiana, within the jurisdictional boundaries of this Court. The Board's order is final pursuant to section 21(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). Thus, this Court has jurisdiction over Carey's petition for review under section 21(c), 33 U.S.C. § 921(c).

STATEMENT OF THE ISSUE

Did the Benefits Review Board properly conclude that Carey is not entitled to an award of attorney's fees pursuant to 33 U.S.C. § 928(b)?

STATEMENT OF THE CASE

On September 25, 2004, Carey injured his back in the course of his employment with Ormet, which began paying Longshore Act compensation without an award. Record on Appeal ("R.") at 86. In July of 2007, Ormet contested the amount of benefits to which Carey was entitled. R. at 275. Following a September 11, 2007 informal conference, an OWCP district director issued a recommendation in Carey's favor. R. at 46-47. Ormet refused to accept the recommendation, and the case was referred to a hearing before the ALJ. R. at 193 – 195. On October 14, 2008, the ALJ issued a

decision rejecting Ormet's challenge. R. at 138-146. This decision was not appealed to the Board, and so became final.[4]

On November 17, 2008, Carey's counsel filed a fee petition for his work in connection with the ALJ proceedings that culminated in the October 14, 2008 decision. R. at 118-135. The ALJ denied the petition on January 28, 2009. R. at 66-70. On February 10, 2009, Carey's counsel moved for reconsideration, R. at 81-84, which the ALJ denied on February 26, 2009. R. at 60-61. Carey then filed a timely appeal with the Board, which affirmed the ALJ's decision on November 30, 2009. R. at 1-6. On January 29, 2010, Carey filed a timely petition for review of the Board's decision with this Court.

STATUTORY BACKGROUND

The central dispute in this case involves the interpretation of section 28(b) of the Longhsore Act which provides, in relevant part:

> **(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments**
>
> 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

[4] *See* 33 U.S.C. § 921(a).

> following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy.
>
> If the employer or carrier refuse 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.

33 U.S.C. § 928(b).

STATEMENT OF FACTS

1. The Dispute Regarding Carey's Benefits

After Carey injured his back on September 25, 2004, his employer, Ormet, voluntarily made advance payments of Longshore Act compensation for temporary total disability.[5] R. at 86. The amount of compensation paid

[5] "Advance payments of compensation" are compensation payments made prior to a formal compensation award. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 747 (5th Cir. 2002). Unlike payments made pursuant to an award (even a non-final award that is being challenged on appeal), an employer may recover advance payments of compensation by offsetting an overpayment against its future Longshore Act liability. *Id.* at 745; 33 U.S.C. § 914(j). The Act specifically contemplates that employers will pay benefits without a formal award. *See* 33 U.S.C. § 914(a) ("[c]ompensation under this Act shall be paid periodically, promptly, and

by Ormet was based on an average weekly wage ("AWW") of $1,423.92.[6] R. at 46, 86. This figure included the wages paid directly to Carey by Ormet, as well as holiday, vacation, and container royalty benefits (collectively, "premium pay") paid by the International Longshoremen's Association.[7] R. at 46, 86-87, 205-206. The record does not reveal the specific figures used or the calculations employed by Ormet to arrive at the $1,423.92 figure. *See infra* at 9.

On October 6, 2006, Ormet informed Carey that it now believed that the premium pay should have been excluded from Carey's AWW. R. at 49. Ormet announced its "inten[t] to commence the necessary steps with the

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directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.").

[6] There is a minor discrepancy in the record regarding this figure. According to Carey's brief and Ormet's notices of payment without an award prior to the informal conference, Carey's AWW was $1,423.94. Petitioner's Brief ("Pet. br.") at 3. The district director's recommendation and the ALJ and Board decisions report this figure as $1,423.92. *See* R. at 46, 24, 2. This discrepancy is not relevant to the outcome of this case. *See* n. 9, *infra*.

[7] A Longshore Act claimant's compensation amount is derived directly from his AWW. Compensation for total disability is two-thirds of his AWW; compensation for partial disability is two-thirds of his AWW minus his residual earning capacity (i.e. the amount he is currently capable of earning); and compensation for injuries to scheduled parts of the body is his AWW multiplied by a statutorily-proscribed number of weeks. 33 U.S.C. § 908(a)-(c). Carey was both totally and partially disabled at different periods relevant to this case. R. at 24, 207-208.

DOL to lower the benefits to the correct level" and explained that it would "take into account any credit Ormet is due for the overpayment of benefits for the last two years." R. at 49.

In July 2007, Ormet filed a Notice of Controversion with the OWCP district director disputing the amount of compensation that was due Carey. R. at 139, 275. In a letter dated August 2, 2007, Ormet informed the district director that it believed Carey's premium pay had been mistakenly included in its calculation of the AWW, and that Ormet sought an informal conference. R. at 44-45.

Informal conference proceedings

The informal conference was held on September 11, 2007. R. at 46-47. Ormet contended that the premium pay should be excluded from Carey's AWW, resulting in an AWW of $1,169.33. R. at 46. Carey disagreed. R. at 46. The district director rejected Ormet's argument, concluding that the premium pay should be included in the calculation of Carey's AWW. R. at 47. Accordingly, the district director recommended that Ormet continue to pay benefits based on Carey's AWW of $1,423.92. R. at 47.

Ormet did not accept the district director's recommendation. R. at 195. Instead, it requested an ALJ hearing, seeking an order permitting it to

exclude premium pay from Carey's AWW. However, it continued to make advance compensation payments based on an AWW of $1,423.92 through the time of the hearing.[8] R. at 207-208.

The ALJ's award of benefits

In an October 14, 2008, Decision and Order Awarding Benefits, the ALJ rejected Ormet's argument that Carey's premium pay should not be

[8] Ormet apparently continued to pay compensation based on the higher figure because it believed that it would recover all of its advance payments of compensation as a lien against any settlement or award Carey received in his negligence suit against the owner of the ship he was mooring at the time he was injured. R. at 44, 49, 244-245 ("we would resolve any potential overpayment issues once the legal determination was made as to the benefits that were actually owed as well as the outcome from the litigation"). On December 21, 2007, Carey was awarded $608,660.82 in damages in that suit, subject to Ormet's lien, under section 33, for the full amount of medical benefits and advance compensation it had paid. *Carey v. Hercules Ocean Corp.*, No. 2:05-cv-06057 (E.D. La. Dec. 21, 2007). That award was later affirmed by this Court. *Carey v. Hercules Ocean Corp.*, No. 08-30073, 321 Fed. Appx. 405 (5th Cir. 2009). On June 30, 2009, that judgment was satisfied after the shipowner paid $322,057.51 to Ormet and the remainder to Carey. *Carey v. Hercules Ocean Corp.*, No. 2:05-cv-06057 (E.D. La. June 30, 2009). Thus, Ormet has been reimbursed for all of the advance compensation it has paid in this case, and is entitled to an ongoing credit for the remainder of the award that was paid to Carey. *See generally*, *Bourgeois v. Avondale Shipyards, Inc.*, 121 F.3d 219, 221 (5th Cir. 1997) ("The LHWCA provides that an employer who has paid benefits to an employee who later recovers for his injuries from a third party shall receive a credit for the 'net amount' recovered against that third party."); *Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 332 (5th Cir. 1991) (employer's obligation to pay compensation resumes only when "the total amount of workers' compensation benefits [the employee] would have received but for the tort recovery exceeds the recovery amount.").

included in the calculation of his AWW. R. at 146. Accordingly, the ALJ rejected Ormet's proposed AWW of $1,169.33. R. at 195. However, the ALJ determined that the appropriate AWW was $1,369.15, finding that Carey's

> earning capacity consists of his annual wages for the previous 52 weeks before his injury ($60,805.70) plus vacation, holiday and container royalty benefits of $10,390.30 for a total of $71,196.00 resulting in an average weekly wage of $1,369.15.

R. at 196.

The ALJ did not explain how he arrived at those figures. The private parties stipulated that Carey earned $12,003 in premium pay during the 2003-04 fiscal year, which ended only five days after his September 25, 2004 injury. R. at 139-140, 205-206, 275-276. Adding the $60,805.70 in direct wages to that figure and then dividing by 52 results in an AWW of $1,400.17. Given these stipulations, the basis for the Ormet's earlier determination that Carey's AWW was $1,423.92 is equally unclear. This confusion is magnified by the ALJ's observation that Ormet had been paying advance compensation based on an AWW of $1,369.15, R. at 142, when all other indications are that Ormet's advance compensation payments were based on an AWW of either $1,423.92 or $1,423.94. *See* n. 6, *supra*.[9]

[9] While these discrepancies created some confusion below, they are ultimately irrelevant. The Board ruled that Carey was not entitled to fees

The decision also gave Carey's counsel 30 days to file an application for attorney's fees. R. at 146. Ormet did not appeal that decision, which therefore became final.

2. Carey's Petition for Attorney's Fees

Carey subsequently filed a petition seeking to shift liability for attorney's fees incurred during the ALJ proceeding to Ormet under section 28 of the Act. R. at 118-135.

The ALJ's denial of the fee petition

In a January 28, 2009 decision, the ALJ analyzed the fee petition under section 28(b), which, according to the ALJ, "provides when the employer voluntarily tenders payment without an award and thereafter a conflict arises over additional compensation, the employer will be liable for attorney's fees if the claimant is successful in obtaining greater compensation than that originally agreed upon by the employer." R. at 68. The ALJ denied the fee application because "[a]t the hearing . . . the undersigned determined that Claimant had an average weekly wage [$1,369.15] less than Employer was using to calculate benefits [$1,423.92]." R. at 69. Carey timely requested reconsideration, which the ALJ denied.

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under section 28(b) because the ALJ's compensation award (based on an AWW of $1,369.15), was not greater than Ormet's advance payments of compensation. R. at 4-5; *see infra* at 11.

R. at 60-61.

The Board's decision affirming the ALJ

Carey appealed the decision to the Board, and the Director filed a letter brief arguing that the decision should be reversed. R. at 9-15. The Board affirmed the ALJ's denial of attorney's fees, reasoning that 28(b) was not satisfied because Ormet had voluntarily paid benefits based on an AWW of $1,423.92 prior to the award, which established his AWW at $1,369.15. R. at 4. The fact that Ormet had unsuccessfully sought to lower Carey's AWW to $1,169.32 was not, in the Board's view, relevant. R. at 4-5.

The Board rejected the Director's argument, based on *Savannah Machine & Shipyard Co. v. Director, OWCP* 642 F.2d 887, 890 (5th Cir. 1981), that Carey is entitled to attorney's fees because he was forced to retain counsel to prevent Ormet from reducing his benefits by excluding premium pay from his AWW. R. at 4. The Board suggested that *Savannah Machine* was inconsistent with this Court's more recent decision in *Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415 (5th Cir. 2009). R. at 4. This appeal followed.

SUMMARY OF ARGUMENT

Under section 28(b), a claimant is entitled to shift liability for his attorney's fees to his employer if he utilizes the services of an attorney to

obtain a compensation award greater than his employer was unconditionally willing to pay or tender without an order. Here, Ormet contended that Carey was entitled to compensation based on an AWW of $1,169.33, which excluded his premium pay. The ALJ awarded Carey compensation based on an AWW of $1,369.15, which included that premium pay. Carey is therefore entitled to an award of attorney's fees pursuant to section 28(b). The Board's contrary decision, which allows an employer to evade liability for fees if it makes recoverable advance payments of compensation prior to an award, is contrary to the text of section 28(b), the caselaw interpreting it, and the policies underlying it. It should be reversed.

STANDARD OF REVIEW

The interpretation of whether Carey is entitled to an award of attorney's fees under section 28(b) is a question of law subject to this Court's *de novo* review. The Court gives deference to the Director's interpretation of the Act. *New Orleans Stevedores v. Ibos,* 317 F.3d 480, 483 (5th Cir. 2003). It gives no deference to the Board's views because the Board is not a policy-making agency. *Id.*

ARGUMENT

Carey is entitled to an award of attorney's fees under section 28(b) because he was awarded a greater amount of compensation than Ormet believed he was entitled to or was willing to pay.

To shift attorney fee liability to an employer under section 28(b), a claimant must satisfy the following requirements: a) the district director must hold an informal conference; b) the district director must issue a written recommendation resolving the controversy; c) the employer must refuse to accept the recommendation; and d) the claimant must utilize the services of an attorney to obtain a greater award than that which the employer was willing to pay after the written recommendation. *Va. Terminals Inc., v. Edwards,* 398 F.3d 313, 318 (4th Cir. 2005), *quoted in Andrepont v. Murphy Explor. & Prod. Co.*, 566 F.3d 415, 421 (5th Cir. 2009). It is undisputed that Carey has satisfied the first three requirements.

Contrary to the Board's view, Carey also satisfied the fourth. After the written recommendation, Ormet was willing to pay compensation based on an AWW of $1,169.32. After employing the services of an attorney, Carey successfully fended off Ormet's attempt to secure an order setting his AWW at that amount. Instead, he obtained an award of compensation based on an AWW of $1,369.15. This is all the statute requires. The Board's decision to the contrary is inconsistent with the text of section 28(b), the law of this Circuit, and the policies underlying the Act.

1. The Board's decision is inconsistent with the text of section 28(b).

The Board's decision is simply inconsistent with the text of the statute. Section 28(b) shifts liability for attorney's fees to an employer if a claimant utilizes the services of an attorney to obtain a compensation award that is "greater than the amount paid or tendered by the employer or carrier." If this were all there were to section 28(b), the Board's decision to compare the ALJ's award to Ormet's advance compensation payments might be defensible. But the preceding sentence in 28(b) makes clear that "greater than the amount paid or tendered by the employer or carrier" means greater than "the additional compensation, if any, to which they believe the employee is entitled." 33 U.S.C. § 928(b) (emphasis added).

Although Ormet made advance compensation payments based on an AWW of $1,423.92, it did not do so based on any belief that Carey was entitled to that amount. Ormet quite clearly believed that Carey was entitled to compensation based on an AWW of only $1,169.32, which excluded the premium pay, as evidenced by the fact that it instituted litigation to reduce Carey's AWW to that amount. Thus, the determinative question under section 28(b) is whether Carey utilized an attorney to secure an award greater than the $1,169.32. The answer is yes, and Carey is therefore entitled to an award of attorney's fees. The fact that Ormet continued to

make advance compensation payments at a higher rate is simply not relevant to the 28(b) inquiry.[10]

The Board cited no authority for the proposition that a claimant's entitlement to attorney's fees under section 28(b) should turn on whether he obtains an award greater than the employer's advance compensation payments – particularly where the employer actively seeks an order that the employee is entitled to substantially lower compensation. To the contrary, courts considering section 28(b) have explained that it is focused on whether or not the claimant obtains greater compensation than the employer admits is owed to the employee. *See*, *e.g.*, *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 813 (5th Cir. 1977) ("Subsection (b) relates to the situation where the employer and claimant agree that some compensation is due but disagree as

[10] While these advance compensation payments did not grant Ormet a safe harbor from attorney's fee liability, they did confer other benefits. Had Ormet prevailed in reducing Carey's AWW to $1,169.32, it would have the right to offset its prior overpayments against its ongoing liability for permanent partial disability. 33 U.S.C. § 914(j); *see supra* at n.5. These payments also insulated Ormet from liability for interest. *See Wilkerson v. Ingalls Shipbuilding*, 125 F.3d 904, 906-907 (5th Cir. 1997) (Longshore Act claimants are entitled to prejudgment interest on delayed compensation payments). Of course, these advantages are dwarfed in this case by the fact that Ormet recovered all of the payments it made to Carey in the past (and a substantial credit against its future obligations) by virtue of its lien on Carey's damages award in his negligence suit against the shipowner. *See supra* at n. 8.

to what amount. If the claimant is eventually granted a greater amount than the employer acknowledged as owing, a reasonable attorney's fee for the claimant's counsel may be awarded against the employer.") (emphasis added); *Va. Terminals Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005), *quoted in Andrepont*, 566 F.3d at 421 ("the claimant must . . . obtain a greater award than that which the employer was willing to pay after the written recommendation.") (emphasis added); *Pool Co. v. Cooper*, 274 F.3d 173, 184 (5th Cir. 2001) (award of fees under section 28(b) inappropriate because, *inter alia*, claimant "did not obtain a compensation award in excess of what Pool was willing to pay.") (emphasis added); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889 (5th Cir. 1981) ("Mr. Floyd was ultimately awarded compensation exceeding that which the Shipyard admitted was due. Hence, even though the Shipyard was not liable for the additional payments that were due Mr. Floyd, the requirements of Section 28(b) were met[.]") (emphasis added); *Day v. James Marine, Inc.*, 518 F.3d 411, 415 (6th Cir. 2008) ("This subsection [28(b)], in excruciating detail, requires four things to happen before fees may shift . . . [including] the claimant's use of an attorney to obtain more compensation than the employer was willing to pay.") (emphasis added).

Neither did Ormet "tender" compensation to Carey based on an AWW of $1,423.92. As the courts interpreting the meaning of "tender" in section 28(b) have recognized, only an unconditional offer to pay benefits is a valid tender. *See Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 477 F.3d 123, 128 (4th Cir. 2007) (employer's offer of compensation not an acceptable 28(b) tender because it was conditioned on claimant agreeing to a stipulation that he was aware of no other outstanding compensation issues); *Richardson v. Continental Grain Co.,* 336 F.3d 1103, 1107 (9th Cir. 2003) (employer's 28(b) tender was acceptable because it was not contingent on anything other than employee dropping his claim in exchange for payment). *See generally* Black's Law Dictionary (8th ed. 2004) (defining "tender" as "an unconditional offer of money or performance to satisfy a debt or obligation.").

Ormet never unconditionally offered to pay benefits based on an AWW of $1,423.92 (or $1,369.32, for that matter). It brought litigation to reduce Carey's AWW to $1,169.32. Moreover, it acknowledged that it intended to recover its alleged prior overpayments either as a credit against Carey's future Longshore Act compensation or as part of a settlement of that claim and his suit against the shipowner. R. at 44, 49; *see* 33 U.S.C. §§ 914(j), 908(i), 933. This is not an unconditional offer to pay benefits based

on an AWW of $1,423.92 and therefore does not suffice to insulate Ormet from fee liability.

In sum, while it paid lip service to the importance of adhering to statutory text, the Board did not analyze the actual text of section 28(b). As a result, it reached a decision that is flatly inconsistent with that provision. The Board's decision should therefore be reversed.

2. The Board's decision is inconsistent with this Court's decision in *Savannah Machine*.

The Board's interpretation of section 28(b) also flies in the face of this Court's decision in *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887 (5th Cir. 1981), which held that attorney's fees should be awarded where a claimant successfully utilizes counsel to retain benefits that his employer seeks to reduce or eliminate. Like Ormet, the employer in *Savannah Machine* voluntarily made advance compensation payments after the claimant, Floyd, was injured. *Id.* at 888. The employer subsequently requested a hearing, arguing that Floyd's "purported injury" was not "total, permanent, or disabling." As Ormet did here, the employer continued to pay compensation to Floyd while the dispute went to a hearing.

The ALJ ultimately ruled in Floyd's favor, finding that he was permanently and totally disabled. *Id.* However, the ALJ also ruled that the employer was only liable for 104 weeks of Floyd's compensation, because

his injury was caused, in part, by an earlier disability. *See* 33 U.S.C. § 908(f). The remainder of Floyd's compensation was to be paid by the Special Fund created by 33 U.S.C. § 944. Because the employer had already paid Floyd more than 104 weeks of compensation prior to the ALJ's ruling, "it was not liable for payments of any additional compensation and was in fact due a reimbursement from the Special Fund." 642 F.2d at 890.

Floyd subsequently filed a petition for attorney's fees, which was granted by the ALJ and affirmed by the Board. The employer then appealed to the Court, arguing that it was not liable for Floyd's attorney's fees. The employer contended that it should not bear fee liability under section 28(b) because it was not found liable for any greater amount of compensation than it had already paid due to the application of section 8(f). The Court rejected this argument, finding that it had no basis in either the language or the remedial purpose of the Act. The Court found that the employer had "disputed the existence as well as the extent of Floyd's disability[,]" that Floyd was "forced to retain counsel to protect his interest[,]" and that he was "ultimately awarded compensation exceeding that which the [employer] admitted was due," *i.e.*, no compensation whatsoever. Accordingly, the requirements of § 28(b) were met. *Id.*

Like Floyd, Carey was required to retain legal counsel to defend against his employer's challenge, and was successful in obtaining a compensation award that was greater than the amount his employer admitted was due. Indeed, the case for an attorney's fee award is stronger in this case, because Carey's ongoing benefits are payable by Ormet itself, not the Special Fund. Under the reasoning of *Savannah Machine*, Carey is entitled to attorney's fees.

The Board dealt with *Savannah Machine* by summarily determining that it is no longer good law. According to the Board, *Savannah Machine* is irrelevant because this Court "recently recognized" in *Andrepont v. Murphy Exploration & Production Co.*, 566 F.3d 415, 421 (5th Cir. 2009), that "it is not free 'to elevate the purposes of the statute above the plain text reading' of the statute." R. at 4.

This analysis is deeply flawed. *Andrepont* did not address the issue considered by this Court in *Savannah Machine* and raised in this appeal – the meaning of 28(b)'s "greater than the amount paid or tendered" requirement.[11] Moreover, the implication that the *Savannah Machine* panel

[11] *Andrepont* addressed section 28(b)'s requirement that an employer must "refuse to accept [the district director's] written recommendation." In *Andrepont*, the district director recommended that no compensation was due, but the employee went on to secure a compensation award. 566 F.3d at 421. The Court held that the employee was not entitled to an attorney's fee award

ignored the plain text of 28(b) is unsupported by the text of their opinion, which closely analyzes those sections of the text relevant to the dispute before it. *See, e.g.*, 642 F.2d at 890 n.7. Finally, *Andrepont* did not purport to overturn *Savannah Machine*; to the contrary, it cited *Savannah Machine* as applicable precedent. 566 F.3d at 418-19. Nor could *Andrepont* have overturned *Savannah Machine*, because "it is well-established that one panel of [the Fifth circuit] will not overturn another absent an intervening precedent by our court sitting en banc or a Supreme Court precedent." *F.D.I.C. v. Dawson*, 4 F.3d 1303, 1307 (5th Cir. 1993).[12]

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because the employer had accepted the district director's recommendation to pay nothing. *Id.* The "refuse to accept" requirement was not raised by the employer/petitioner in *Savannah Machine* and consequently was not discussed by the Court. 642 F.2d at 889 ("The Shipyard contends that it cannot be held liable under Section 28(b) of the Act because, first, Mr. Floyd accepted payment from the Shipyard and, second, the Shipyard was not found to be liable for any greater compensation than it had already paid."). Nor is it relevant here, because Ormet clearly rejected the district director's recommendation.

[12] The Board's reliance on *Barker v. U.S. Department of Labor*, 138 F.3d 431 (1st Cir. 1998) is similarly misplaced. The claimant in *Barker* sought a scheduled compensation award, which was denied by the ALJ, the Board, and the First Circuit. Thus, he failed to obtain any compensation as a result of the litigation. In contrast, Carey obtained an award obligating Ormet to make ongoing compensation payments at a substantially higher rate than it was willing to pay voluntarily.

The Board's decision is also contrary to the Fourth Circuit's recent decision in *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*¸ 477 F.3d 123 (4th Cir. 2007). In that case, the Fourth Circuit upheld an award of attorney's fees to a claimant, Hassel, who defended his right to compensation against his employer's challenge, even though he did not obtain a greater amount of monetary compensation than his employer was willing to pay. Hassel claimed that he had suffered a 19% permanent partial disability. His employer was willing to pay the full amount of that claim, but only if Hassell also signed a stipulation "that the parties are aware of no other outstanding compensation issues as of the date of execution" of the stipulations. Hassell refused to agree. A hearing was held, during which the employer agreed to pay the full amount without insisting on the stipulation. The ALJ subsequently awarded attorney's fees under section 28(b). *Id.* at 125-126.

On appeal, the employer challenged the award of attorney's fees, arguing that it had tendered a payment for a 19% permanent partial disability, which was the same amount that Hassell was ultimately awarded. The court held that Hassell "obtained a greater award than he was able to achieve prior to litigating this case" because "after litigating the issue, Hassell obtained compensation at a nineteen percent rating, but without the

inclusion of the challenged stipulation." *Id.* at 128. If Hassell was entitled to a fee award, Carey – who obtained a more concrete benefit by fending off Ormet's attempt to reduce his AWW to $1,169.32 – certainly is.

3. The Board's interpretation of section 28(b) is contrary to the policies underlying that provision.

In addition to the statutory text and prior authority, the Board's decision conflicts with the policies underlying Section 28. This Court has recognized that section 28's comprehensive scheme evinces

> a Congressional intent that when an employer contests its liability for compensation in whole or in part and the claimant is ultimately successful, the employer and not the claimant must pay the claimant's attorney's fees for services necessary to that success regardless of how close a case might be which is litigated but finally lost by the employer (internal quotations omitted).

Hole v. Miami Shipyards Corp., 640 F.2d 769, 774 (5th Cir. 1981), *quoted in Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1007 (5th Cir. 1995). Sections 28(a) and (b) work together to "urge the employer and claimant to resolve their disputes through the [district director] or Board and, if not, to make the employer pay for legal services thereafter incurred if the employee manages to win." *Day*, 518 F.3d at 419.

Section 28(b) encourages both claimants and employers to resolve disputes voluntarily rather than through litigation. An employer that rejects a district director's recommendation is liable for attorney's fees unless it

tenders an offer of payment that is at least as high as the employee is ultimately awarded. A claimant who rejects such a tender will be forced to pay attorney's fees out of his compensation payments if he does not secure greater compensation. Both parties are therefore discouraged from instituting formal litigation.

The Board's interpretation of section 28(b) upsets this statutory balance by allowing an employer to immunize itself from a fee award simply by making advance compensation payments. Pursuing litigation rather than informal resolution becomes a more attractive option when the counterbalance of fee liability is removed. This is particularly so where, as here, the employer will be able to recover some or all of those advance payments pursuant to sections 14(j) or 33. *See* nn. 5, 8 *supra*.

By reducing the incentive to resolve disputes informally, the Board's view threatens to undermine the central purposes of section 28, which are "ensure[ing] that attorneys receive fees without diminishing the compensation obtained by the claimant" and "providing incentive to attorneys to represent injured workers seeking to pursue claims under the Act." *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 487-488 (5th Cir. 1990). Future employees in Carey's situation may well choose to settle for far less compensation than they are entitled to when the only other options are to pay

an attorney out-of-pocket or to defend their right to compensation without the assistance of counsel. The Court should not countenance this result. *Cf. Oceanic Butler Inc. v. Nordahl,* 842 F.2d 773, 781 (5th Cir. 1988) (purpose of allowing claimants, and not employers, to withdraw from submitted but unapproved section 8(i) settlement agreements is to protect the "unskilled and untutored" from entering into agreements that may not be in their long-term interests).

CONCLUSION

In sum, the Board's interpretation of section 28(b) is at odds with the statutory text, prior precedent of this Court and the Fourth Circuit, and the central purposes of that section. For these reasons, the Director requests that the Court reverse the Board's decision and remand for an award of attorney's fees to the Claimant.

Respectfully submitted,

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COMBINED CERTIFICATES

I hereby certify with regard to the Director's Brief for the Federal Respondent that:

1) required privacy redactions have been made to the brief;

2) the electronic brief is an exact copy of the paper document;

3) the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses;

4) pursuant to Fed. R. App. Proc. 32(a)(7)(B) and (C), the brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 5,671 words; and

5) on June 9, 2010, a copy was served through the Court's electronic filing system on the following registered users:

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ADDENDUM

Unpublished Authorities

1. *Carey v. Hercules Ocean Corp.*, No. 2:05-cv-06057 (E.D. La. Dec. 21, 2007).

2. *Carey v. Hercules Ocean Corp.*, No. 08-30073, 321 Fed. Appx. 405 (5th Cir. 2009).

3. *Carey v. Hercules Ocean Corp.*, No. 2:05-cv-06057 (E.D. La. June 30, 2009).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES CAREY	**CIVIL ACTION**
VERSUS	**NO: 05-6057**
HERCULES OCEAN CORPORATION AND BELSHIPS MANAGEMENT SINGAPORE PTE, LTD.	**SECTION "B" (1)**

JUDGMENT

This matter came for trial on the merits before the Court, the Honorable Ivan L. R. Lemelle presiding, on November 28, 29, and 30, and December 6, 2007, and the issues having been duly tried, and a decision having been duly rendered,

IT IS ORDERED and ADJUDGED that

1. Defendants, Hercules Ocean Corporation and Belships Management Singapore PTE. LTD**.,** are found to be liable jointly to plaintiff and their fault is found to have contributed 40% to the accident;

2. Plaintiff James Carey is found to be negligent and his fault is found to have contributed 60% to the accident;

3. Plaintiff's damages, before reduction for his contributory negligence, are found to be as follows:

a. Past Lost Wages $152,251.18; Past Medical Expenses $ 76,462.92; Past General Damages (including physical and mental pain and suffering, emotional distress,

loss of enjoyment of life and permanent disability and disfigurement) $187,500; interest on past damages at Louisiana judicial rate $100,952.95;

b. Future Loss of Wage Earning Capacity $497,800.00; Loss of Future Fringe Benefits $119,106.00; Future Medical Expenses $200,079.00; and Future General Damages (including physical and mental pain and suffering, emotional distress, loss of enjoyment of life and permanent disability and disfigurement) $187,500.

4. The above damages total $1,521,652.05, and reduced by 60% for contributory negligence results in an award of $608,660.82.

In accordance with the above,

IT IS ORDERED AND ADJUDGED that plaintiff recover of defendants Hercules Ocean Corporation and Belships Management Singapore PTE. LTD.**,** the TOTAL AMOUNT of **$608,660.82**, with interest to run from December 6, 2007, at the rate provided by law, such recovery to be the *in solido* obligation of defendants; and that all costs of the actions are to be borne by defendants; and

IT IS FURTHER ORDERED and ADJUDGED that Ormet Primary Aluminum Corporation, a plaintiff in intervention as a result of being the employer of James Carey, is entitled to recover by preference and priority its lien in the full amount of **$233,500.95** from the above judgment, as a result of medical benefits and compensation paid out under the Longshoremen and Harborworkers' Compensation Act ("LHWCA") through time of trial.

This 21st day of December, 2007, in New Orleans, Louisiana.

IVAN L.R. LEMELLE, U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 15, 2009

Charles R. Fulbruge III
Clerk

No. 08-30007

JAMES CAREY

Plaintiff - Appellee - Cross-Appellant

v.

HERCULES OCEAN CORP; BELSHIPS MANAGEMENT SINGAPORE PTE, LTD

Defendants - Appellant - Cross-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:05-CV-6057

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:[*]

James Carey filed suit in the district court under the Longshore and Harbor Workers' Compensation Act, alleging that he was injured while serving as a member of a longshoremen's crew securing the mooring lines of a large oceangoing vessel. The district court conducted a bench trial and apportioned 60% fault to Carey and 40% to Hercules.

We AFFIRM.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

After a bench trial, the validity of findings "of fault, including determinations of negligence and causation, are factual issues, and may not be set aside on appeal unless clearly erroneous." *In re Omega Protein, Inc.*, 548 F.3d 361, 367 (5th Cir. 2008). The district court's conclusions must stand "unless we are left with the definite and firm conviction that a mistake has been committed." *Jaunch v. Nautical Servs., Inc.*, 470 F.3d 207, 213 (5th Cir. 2006).

James Carey was injured in September 2004 while working as one of five longshoremen mooring the M/V *Stove Transport* at a terminal on the Mississippi River between New Orleans and Baton Rouge. Carey's theory of negligence is as follows. His crew, standing on a platform extending from the shore, had just stopped pulling on their end of a mooring line. A few seconds after Carey's crew created some slack in the line, and only as a result of the crew on the ship releasing their end, the portion of the line between the two crews fell into the water. The forces generated by the falling line hitting the water jerked Carey towards the ship and into a handrail, severely injuring his back.

The ship's operator, Hercules Ocean Corporation, argues that "the cause of [Carey] being pulled into the rail was his crew slacking off the heaving line." Hercules's point is that once Carey's own crew released the heaving line, the mooring line – which was draped across Carey – pulled Carey towards the rail. Hercules further contends that letting out additional line by the ship could only have caused Carey to fall away from the ship, not towards the rail.

On appeal, Hercules argues that Carey's theory of causation is not only unsupported by the evidence, but the theory in essence violates the laws of physics. The physical forces exerted by the line as it fell, the timing of the line's fall compared to Carey's fall, and the impact of the longshoremen's releasing their end of the line, are all less than definitively shown. The question now is whether there was too little proof to support allocating fault to Hercules at all.

This case required the district court, and now this one, to focus on the rule that proximate cause may not be established by speculation or conjecture, but instead must be based on evidence that provides some probative force. *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 289 (5th Cir. 2007). Even so, proximate cause can be based on inferences arising from the factual circumstances presented. *Id.* We find evidence of causation in the testimony of Carey's crew about the line hitting the water and Carey's simultaneous fall or pull towards the railing.

Hercules argues that the accident could not have occurred in this way. It posits that the physical laws involved are completely demonstrated by understanding the game of tug-of-war. There, after a line begins to be pulled in opposite directions by two different teams, the release by one team of its line must cause the other team to fall away from, not towards, the releasing team. The problem with this simple analogy is that Carey's theory, supported by some evidence, is that Carey's crew ended their part of the tug-of-war at some point prior to the injury. At about the same time, the ship's crew released their end of the line. That release caused slack in the long line initially to increase as the portion between ship and shore fell towards the water. The line's falling into the water, while Carey stood adjacent to but well above the water holding one end of the line over his shoulder, created the physical force that pulled Carey down. The collision of his back with the railing both stopped and injured him. Rather than a simple tug-of-war, the events of this case reveal many variables.

Hercules leaves us with the sense that it believes any competent physicist would know that a downward force from the level at which Carey was standing would not be caused when the line hit the water. For purposes of this lawsuit, the operation of such physical laws had to be proven satisfactorily in a court of law. The credibility and persuasiveness of experts are to be weighed by fact-finders as would be the testimony of any other witness. *Gebr. Bellmer Kg. v.*

Terminal Serv. Houston, Inc., 711 F.2d 622, 626 (5th Cir. 1983). The expert for Hercules had not directly addressed the precise theory of causation in his calculations. The court did not find the expert's evidence persuasive. No clear error exists in that decision.

Hercules is correct that regardless of whether it proved the events could not have happened as Carey alleged, the burden was on Carey to prove that the ship crew's negligence played some role in his injuries. There was evidence that, when the line hit the water, Carey fell against the railing. It could be found a plausible explanation that the line, falling downward but still stretching back up to Carey's shoulder, might at some point start to pull down on him.

Causation often is proven by lay testimony. Expert testimony is unnecessary when the trier of fact is "as capable of comprehending the primary facts and of drawing correct conclusions from them as are" expert witnesses. *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962). It is true that the testimony of an alleged eyewitness can be rejected when it is "unsupported by other evidence and [is] in the teeth of universal experience." *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 729 (5th Cir. 1977). Perhaps Hercules's point is that a lay fact-finder would not know enough to realize what it did not know, that "universal experience" is inadequate here. Of course, evidence that Carey fell immediately after the line hit the water does not require a finding of a causal connection between the two. However, absent persuasive expert testimony to disabuse a fact-finder from a conclusion that otherwise would reasonably be drawn, there is nothing to prevent the conclusion. The expert evidence offered here was unpersuasive.

There was also evidence that the release of the line by the ship's crew was negligent. Both parties' experts agreed that, if Carey provided a clear signal, a failure on the part of the ship's crew to maintain control of their end of the mooring line would be negligence. Carey testified that he provided a clear signal

to stop paying out the mooring line, and the crew on the ship ignored it. No clear error exists on finding some negligence by the ship's crew.

We find enough to sustain the assignment of some fault to Hercules. Carey invites us to proceed even further than did the district court, and reallocate fault on appeal such that Hercules bears a higher percentage of the responsibility. The evidence supports the district court's finding that there was substantial fault that could be assigned to Carey and his crew. There is no reason for us to alter the percentage allocation.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES CAREY	CIVIL ACTION
VERSUS	NO: 05-6057
HERCULES OCEAN CORPORATION AND BELSHIPS MANAGEMENT SINGAPORE PTE, LTD.	SECTION "B" (1)

SATISFACTION OF JUDGMENT

A judgment having been entered in this action on December 21, 2007, in this Court, in favor of James Carey and against Hercules Ocean Corporation and Belships Management Singapore PTE, Ltd. in the amount of $608,660.82; and a judgment in intervention in favor of intervenor Ormet Primary Aluminum Corporation, entitling intervenor to receive from the above judgment the amount of $233,500.95 in preference and priority as a result of medical and benefits paid under the LHWCA, and

Hercules Ocean Corporation and Belships Management Singapore PTE, Ltd., now having fully paid such judgment in principal, interest and costs, said total being $643,323.18, from which Ormet Primary Aluminum Corporation has received $322,057.51, and the remainder of the funds having been received by plaintiff, James Carey,

THEREFORE, full satisfaction of the judgment is hereby acknowledged by James Carey and Ormet Primary Aluminum Corporation, and the clerk of this court is authorized and directed to make an entry of the satisfaction of the judgment on the docket.

New Orleans, Louisiana, this 30 day of June, 2009.

Respectfully submitted,

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/s/Paul C. Miniclier
PAUL C. MINICLIER
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