

WILLIS P. GOBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOSS MARITIME	)	DATE ISSUED: <u>April 6, 1999</u>
	)	
and	)	
	)	
ALASKA PACIFIC ASSURANCE	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Denying Attorney's Fees and Order Denying Motion for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Denying Attorney's Fees and Order Denying Motion for Reconsideration ( 95-LHC-0714, 96-LHC-0299) of Administrative Law Judge Edward C. Burch 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered two injuries during the course of his employment: a back injury on

March 16, 1993, and an industrial hearing loss, based on an audiogram showing a 9.38 percent binaural work-related hearing loss in 1995. At employer's request and with claimant's consent, these two claims for compensation under the Act were consolidated. *See* Order dated December 7, 1995. On August 6, 1996, claimant refused employer's offer to settle these consolidated claims for \$25,000. Thereafter, in a Decision and Order dated November 29, 1997, the administrative law judge awarded claimant \$5,908.84 in compensation for his hearing loss, but denied benefits for his back injury. Subsequently, claimant's attorney filed a fee petition seeking a fee of \$526.50, representing 3.2 hours of attorney services at \$175 per hour and 1.5 hours of legal intern work at \$90 per hour; additionally counsel sought \$168.50 for time spent defending his fee petition.<sup>1</sup> The administrative law judge denied counsel's fee request in its entirety, finding that employer was not liable for any attorney's fee to claimant's counsel since employer's offer of settlement, which was refused by claimant, greatly exceeded claimant's award of benefits. Claimant's motion for reconsideration was thereafter denied.

Claimant now appeals, arguing that the administrative law judge erred in concluding that employer is not liable for claimant's counsel's fee. Employer responds, urging affirmance.

We reject claimant's assertion that the administrative law judge erred in failing to

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<sup>1</sup>We note that while claimant's counsel is requesting a fee award of \$855 for work performed before the administrative law judge, Appeal Brief at 10, the administrative law judge addressed a fee request of \$695 (fee of \$526.50 plus \$168.50 for time spent defending the fee petition). Order Denying Attorney's Fees at 1. Based on the hours specified and the hourly rate requested, the correct fee would be \$863.50. Given our disposition of this case, however, any mathematical errors are harmless.

hold employer liable for his attorney's fees. Under Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. See *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In this regard, the Board has held that a valid offer to settle a case can constitute a "tender" for purposes of Section 28(b). See *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986).<sup>2</sup>

In the instant case, it is uncontroverted that claimant did not object to the consolidation of his claims, that employer offered to settle the combined claims for the sum of \$25,000, and that this offer was refused by claimant, who elected to resort to the adjudicative process. Moreover, it is uncontested that claimant was awarded \$5,908.84, plus interest and penalties, arising out of his work-related hearing loss as a result of his consolidated claim. Additionally, the record reflects that claimant's award of compensation for his hearing loss was based upon the sole audiogram administered and that claimant's contention that employer denied a causal relationship between his work and his hearing loss is belied by claimant's own concession in his letter requesting reconsideration, dated February 10, 1998, that there was never any dispute as to the causal relationship or extent of his hearing loss. Lastly, although claimant's average weekly wage may have been in dispute, it is apparent that claimant did not receive more in compensation for his combined claims than the amount tendered by employer in its settlement offer.

In addressing employer's potential liability under the Act for claimant's attorney's fees, the administrative law judge determined that a definitive offer to settle claimant's claim against employer had been made. Moreover, the administrative law judge specifically noted

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<sup>2</sup>In *Armor*, the employer made two offers, the second documented by a letter, to settle the case before the case was referred to the Office of the Administrative Law Judges. Claimant rejected both offers and was subsequently granted a smaller award. The Board held that employer's offer to settle the claim constituted a "tender of compensation" pursuant to Section 28(b). See *Armor*, 19 BRBS at 122. Thus, under *Armor*, a valid "offer to settle" can constitute a "tender" if it is made to the claimant in writing. See *Kaczmarck v. I.T.O. Corp. of Baltimore*, 23 BRBS 376 (1990).

that employer documented this offer in a August 2, 1996 letter to claimant's counsel, that claimant's counsel conceded that such an offer to settle had been made, and that it was rejected by claimant. We agree with the administrative law judge that this offer constituted a tender of compensation pursuant to Section 28(b) of the Act, as it established a readiness, willingness, and ability on employer's part to make payment to claimant. *See Armor*, 19 BRBS at 119. Accordingly, as the administrative law judge properly found that employer's offer to settle constituted a tender of compensation under Section 28(b), and claimant's counsel failed to succeed in establishing claimant's entitlement to greater compensation while the case was pending before the administrative law judge, we affirm his determination that employer is not liable for claimant's attorney's fees.

Accordingly, the administrative law judge's Order Denying Attorney's Fees and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM A. NELSON, Acting  
Administrative Appeals Judge