BRB No. 97-710

CLAUDE O. WEAVER	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order - Denial of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Traci Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order - Denial of Attorney's Fees (6-143287) of District Director Jeana F. Jackson 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

On February 4, 1992, claimant filed a claim under the Act for occupational hearing loss benefits. Employer filed a notice of controversion on February 11, 1992. On February 12, 1992, employer received formal notice of the claim from the district director. On September 3, 1992, employer voluntarily paid $154.11 in back compensation and initiated biweekly permanent partial disability compensation payments under Section 8(c)(23), 33 U.S.C.§908(c)(23)(1994), of $9.34 ($4.67 per week) for a two percent whole person impairment. In its LS-206 filed on September 17, 1992, employer memorialized that it had instituted the aforementioned voluntary payment of benefits, and, in addition, stated that

medical care had been provided by a physician of claimant's choosing. By letter dated October 6, 1992, employer offered claimant $1,200 to settle all issues, including medical benefits, plus $250 for an attorney's fee. This offer was refused by the claimant. On October 29, 1992, employer notified claimant's attorney that the claim had been accepted as compensable based on a two percent whole man impairment, that claimant would continue to receive $9.34 bi-weekly pursuant to Section 8(c)(23), and that employer would pay all of claimant's expenses related to the hearing loss.

On March 17, 1993, the case was referred to the Office of Administrative Law Judges for a formal hearing. Thereafter, on August 23, 1993, employer voluntarily paid claimant an additional $24.52 in disability compensation, bringing its total payment to $396.10 plus $1.51 in interest. On November 17, 1993, the administrative law judge issued a decision awarding claimant permanent partial disability compensation for a 5.01 percent binaural hearing impairment under Section 8(c)(13), 33 U.S.C.§908(c)(13), plus interest based upon an average weekly wage of $39.30, or a total of $396.10, the same amount of disability compensation employer previously paid.[1]

Subsequent to the issuance of the administrative law judge's decision, claimant's attorney submitted a fee petition for services rendered at the district director level between March 31, 1992 and March 22, 1993, requesting $1,140, representing 6.5 hours at $150 per hour, plus 1.5 hours at a rate of $110 per hour. In her Compensation Order, the district director denied the fee application in its entirety, finding that no basis existed for imposing fee liability on employer because employer had tendered a settlement offer of $1,200 which claimant had refused and claimant was ultimately only successful in obtaining an award of $396.10 which the employer had previously paid on August 13, 1993.

Claimant appeals the district director's denial of attorney's fees. Specifically, claimant alleges that employer is liable for all of the services requested by counsel for work performed before the district director because employer did not make an unconditional tender of compensation and medical benefits to claimant equal to or greater than the amount ultimately awarded by the administrative law judge, and did not complete payment

[1]In the administrative law judge's Decision and Order he rejected claimant's argument that interest should be awarded dating back to the date of his last injurious exposure and calculated his average weekly wage under 33 U.S.C.§910(c) based on his actual 1964 and 1965 earnings. On September 12, 1996, this case was administratively affirmed by the Board as it had been pending for more than one year on that date. Pub. L. No. 104-134.

of the compensation ultimately awarded until August 12, 1993, after the case had been referred to the Office of Administrative Law Judges. In the alternative, claimant contends that at a minimum his counsel is entitled to a fee for the time spent on this case commencing 30 days following formal notice from the district director until October 6, 1992, when the employer made the alleged settlement offer to the claimant. Employer, incorporating the objections it made below, responds, urging affirmance.

We hold that on the facts presented, the district director erred in not holding employer liable for a portion of claimant's attorney's fee. Initially, Section 28(a), 33 U.S.C. §928(a), governs the issue of fee liability for those services claimed by counsel prior to September 3, 1992, because up until that time employer had declined to pay claimant any compensation. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. In the present case, claimant's counsel sought a fee for services provided before the district director beginning on March 31, 1992, shortly after claimant filed his claim for benefits and employer filed its controversion. Inasmuch as it is undisputed that employer did not voluntarily pay any benefits to claimant prior to September 3, 1992, more than 30 days after employer received formal notice of the claim from the district director, and claimant's counsel was ultimately successful in establishing employer's liability for disability and medical benefits which employer had initially refused to pay, employer is liable for a reasonable attorney's fees for those services performed before the district director prior to September 2, 1992, pursuant to Section 28(a). *See generally Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

Inasmuch as employer initiated voluntary payment of compensation as of September 3, 1992, the issue of employer's liability for the remainder of the claimed fee is governed by Section 28(b), 33 U.S.C.§928(b). Under Section 28(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 which employer agreed to pay. *See Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, while the case was before the district director employer initiated voluntary payment of compensation based on a two percent whole person impairment under Section 8(c)(23) on September 3, 1992, and thereafter on October 6, 1992, tendered a settlement offer of $1,200 plus $250 in attorney's fees to settle all issues including medical benefits in the case. Contrary to the district director's determination, the tender offer does not exceed the benefits awarded as the amount offered included both compensation and medical benefits, thus putting a limit on employer's liability. As employer ultimately agreed to pay all expenses related to claimant's hearing loss, claimant obtained a right greater than the amount tendered. *See generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co*., 21 BRBS 204 (1988).

When its October 6, 1992, tender was refused, employer reinstated its prior payment of compensation under Section 8(c)(23) , and also agreed on October 29, 1992 to accept liability for "any and all expenses as provided in the Longshore and Harbor Workers' Act which pertain to Mr. Weaver's hearing loss."[2] Claimant thereafter continued to assert his right to compensation for a 5.01 percent binaural hearing loss under Section 8(c)(13). Employer agreed to pay claimant pursuant to this section after the case had been referred to the Office of Administrative Law Judges on August 13, 1993, paying an additional $24.52. Although claimant thus did obtain an additional amount after referral, since the administrative law judge's award, which equaled employer's voluntary payment, was based on a much reduced average weekly wage than that on which the voluntary weekly benefits were based, in this case, claimant received less compensation than if employer had continued its voluntary payments under Section 8(c)(23). On these facts, claimant did not obtain greater benefits than the medical benefits and compensation employer voluntarily agreed to pay. Employer is thus not liable for a fee under Section 28(b) for work performed after September 3, 1992.

Accordingly, the district director 's Compensation Order-Denial of Attorney's Fees is vacated insofar as it concerns work performed prior to September 3, 1992, and the case is remanded for the district director to enter a reasonable fee for this work. In all other respects, the Order denying a fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[2]In its Form LS-206 dated September 17, 1992, employer checked "yes" to the question as to whether medical care had been provided. Although none had been provided, or requested, at that time, this document supports the assertion that employer was no longer controverting this aspect of the claim.