BRB No. 03-0311

FREDERICK TRUSTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: Jan. 16, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Suzanne L. Posner (LeViness, Tolzman & Hamilton, P.A.), Baltimore, Maryland, for claimant.

Andrew M. Battista, Towson, Maryland, for self-insured employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Supplemental Decision and Order (01-LHC-1945) of Administrative Law Judge John C. Holmes 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his neck and back while unloading a car from a ship on May 25, 2000. Employer voluntarily paid for medical expenses and temporary total disability compensation from May 26, 2000, to June 14, 2000. 33 U.S.C. §§907, 908(b). Claimant returned to work on June 15, 2000, but continued to feel discomfort and numbness. On October 16, 2000, claimant stopped working when Dr. Tyson, claimant's family doctor, suggested claimant rest and seek further treatment. Claimant underwent neck fusion

surgery at a VA hospital on January 26, 2001. CX 5 at 59. Claimant was released to return to work on June 17, 2001, and remained employed through the date of the formal hearing. Claimant sought temporary total disability compensation from October 16, 2000, when he stopped working, until June 16, 2001, the date he was released for work following surgery, as well as medical care and treatment costs. On November 16, 2001, approximately two weeks prior to the formal hearing before the administrative law judge, employer submitted to claimant a written offer to pay Dr. Tyson's outstanding medical bills, as well as the sum of $25,000 to settle claimant's claim.[1] Claimant rejected this offer.

In his decision dated May 6, 2002, the administrative law judge found that claimant's neck condition is causally related to his May 25, 2000 work accident and he therefore awarded claimant $12,966.86, reflecting employer's liability for temporary total disability compensation from October 16, 2000, to June 16, 2001, at a stipulated average weekly wage of $558, as well as medical benefits. Following this decision, claimant's counsel submitted a fee petition for work performed between April 9, 2001, and May 13, 2002, reflecting 25.58 hours of services performed at an hourly rate of $225, plus expenses of $1,159.34, for a total fee of $6,914.84. Employer objected to the amount of the fee requested in relation to the amount of benefits awarded, to the hourly rate requested, to certain expenses, and to all charges for work performed on or after November 16, 2001. Claimant replied, alleging that as he was successful on all the issues presented to the administrative law judge, he is entitled to the full requested fee. In the alternative, claimant argued that he was entitled to an attorney's fee for work performed prior to employer's settlement offer.

In his supplemental decision, the administrative law judge initially determined that any fee payable by employer in this case must be awarded pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Next, the administrative law judge found that employer's November 16, 2001 offer to settle claimant's claim constituted a "tender" under Section 28(b), and, consequently, as claimant rejected this tender and failed to obtain additional benefits by proceeding to trial, employer is not liable for claimant's counsel's fee. Lastly, the administrative law judge concluded that employer is not liable for the work performed prior to the date of the employer's November 16, 2001 tender. Claimant now appeals the denial of his fee request, and employer responds, urging affirmance.

We affirm the administrative law judge's finding that employer's November 16, 2001 written offer to settle this claim constitutes a "tender" under the Act sufficient to relieve employer of subsequent liability for claimant's attorney's fee. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Section 28(b) of the Act, 33 U.S.C. §928(b), provides, in pertinent part:

[1] Employer stated that this amount would include claimant's attorney's fee.

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to Section 14(a) and (b) of this Act, 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 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 . . . shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b). In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), *decision after remand,* 22 BRBS 316 (1989), the Board held that a valid offer to settle a case can constitute a "tender" for purposes of Section 28(b). In *Armor,* employer made two such offers to claimant. Claimant rejected both offers and subsequently was 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 claimant in writing.

In the instant case, claimant concedes that employer tendered $25,000 to settle claimant's claim prior to the formal hearing, and that claimant's ultimate award of $12, 966.86, was less than the $25,000 offered by employer. *See* Claimant's brief at 6-7. Claimant argues, however, that employer's $25,000 settlement offer does not exceed the dollar amount of the combination of benefits awarded by the administrative law judge; specifically, claimant avers that the sum of $12,966.86 in compensation awarded by the administrative law judge, when added to the potential monetary amount needed for claimant's future ongoing treatment for claimant's neck and back conditions and claimant's potential loss of wage-earning capacity, will exceed the settlement offer of $25,000 tendered by employer on November 16, 2001.

We hold that on the facts of this case claimant's argument is without merit. In the instant case, claimant was not awarded ongoing disability benefits by the administrative law judge. Moreover, while future medical expenses may be considered in comparing the amount awarded by the administrative law judge to the amount employer tendered, *see Stokes v. George Hyman Constr. Co.*, 14 BRBS 698 (1981), the administrative law judge specifically stated in his supplemental decision that, when awarding claimant benefits in his initial decision, he did not indicate that future medical benefits would be

necessary.[2] *See* Supplemental Decision and Order at 3. Thus, as there is no basis in the record for determining the possible cost of future medical benefits to be incurred by claimant, any calculation of such an amount at the present time would be purely speculative. Accordingly, as claimant ultimately was awarded an amount, $12,966.86, less than the amount offered by employer on November 16, 2001, employer cannot be held liable for the services rendered by claimant's attorney after that date. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

We agree with claimant, however, that he may be entitled to an attorney's fee for services performed prior to employer's tender on November 16, 2001. The controversy in this case developed while the case was before the district director. Specifically, employer terminated its voluntary payment of temporary total disability benefits to claimant on June 15, 2000. Thereafter, when claimant's cervical condition worsened and claimant required surgery, employer denied that the surgery was necessitated by claimant's work-related accident and refused to pay claimant temporary total disability benefits for claimant's period of recuperation or for related medical expenses. Claimant at that point retained the services of an attorney. Moreover, before the administrative law judge, employer did not object to its liability for a fee for work performed prior to its

[2] Contrary to the administrative law judge's statement, a finding of maximum medical improvement does not presuppose that no future medical expenses are anticipated. *See* Supplemental Decision and Order at 3-4. Rather, it is well-established that medical treatment may be necessary even after the nature of an employee's condition has been found to have reached permanency. In this case, however, claimant submitted no evidence regarding the need for future medial services related to his work-related injury.

tender of November 16, 2001.[3] *See* Employer's Response to Fee Petition of Claimant's Attorney at 1-2; *Kleiner*, 16 BRBS 297; *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). We therefore modify the administrative law judge's Supplemental Decision and Order to reflect employer's liability for claimant's attorney's fees for services rendered up to the date of employer's tender of compensation on November 16, 2001, and we remand the case for the administrative law judge to award a fee payable by employer for the necessary services performed by claimant's counsel during that period of time.

[3] Before the administrative law judge, employer argued only that it was not liable for all attorney fees sought by claimant for services performed by his counsel subsequent to November 16, 2001. Employer did not, however, raise the issue of its liability for those services rendered by counsel on claimant's behalf prior to November 16, 2001; thus, the issue of employer's liability for those services was not presented for adjudication to the administrative law judge. Similarly, employer in its response brief herein does not challenge, or for that matter acknowledge, claimant's contention on appeal that it is liable for those services performed by his counsel prior to the date of employer's tender, November 16, 2001. Accordingly, contrary to the position taken by our dissenting colleague, as employer did not pursue the argument that it is not liable for the fees incurred prior to November 16, 2001 either before the administrative law judge or this tribunal, employer has effectively conceded its liability during that period of time and that issue is not properly before us. *See, e.g., Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 46 F.3d 66 (5th Cir. 1995)(table)(court rejects the position advocated by our dissenting colleague and declines to address fee issues including liability not raised in prior administrative proceeding). Moreover, employer, although voluntarily paying temporary total disability benefits from May 26, 2000 to June 14, 2000, controverted claimant's claim for additional benefits for the period of October 16, 2000 through June 16, 2001. As a result of employer's actions in this regard, claimant was required to utilize the services of counsel in furtherance of his claim for benefits under the Act. Ultimately, counsel's advocacy resulted in a tender of benefits on November 16, 2001, approximately two weeks before the scheduled formal hearing before the administrative law judge. As claimant's counsel was thus successful during this period, employer's acknowledged liability for a fee during this period of time is in accordance with the statute.

Accordingly, the administrative law judge's Supplemental Decision and Order is modified to reflect employer's liability for claimant's attorney's fees incurred prior to employer's tender of compensation, and the case is remanded for entry of an attorney's fee award consistent with this decision. In all other respects, the administrative law judge's supplemental decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's determination that employer is liable for an attorney fee pursuant to 33 U.S.C. §928(b), because the statute does not authorize an attorney fee award against employer where claimant is awarded less than the amount employer offered to settle the claim.

There is general agreement about both the law and the facts. The applicable law is to be found at Section 28(b), 33 U.S.C. §928(b). The relevant facts are: employer voluntarily paid compensation without an award and later terminated payments; claimant filed a claim for additional benefits; employer controverted the claim; they went to an informal hearing but received no recommendation. Prior to the formal hearing, claimant rejected employer's offer of $25,000 to settle his claim. The administrative law judge ultimately awarded compensation in the amount of $12,966.86. Although the majority recognizes that Section 28(b) is the applicable statutory provision and that claimant's award was significantly less than the amount offered, the majority holds that employer is liable for an attorney fee for work performed prior to employer's tender of November 16, 2001. The majority purports to quote the statute "in pertinent part" but omits the most pertinent parts, emphasized below:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to Section 14(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 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. . . . *In all other cases any claim for legal services shall not be assessed against the employer or carrier.*

33 U.S.C. §928(b) (emphasis added.) The law is clear that where, as here, there is a dispute over additional compensation and claimant rejects employer's offer, claimant is entitled to an attorney fee only "if compensation thereafter awarded is greater than the amount paid or tendered. . . ." When the amount awarded is less than the amount tendered, claimant is not entitled to an attorney fee pursuant to Section 28(b). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1107, 37 BRBS 80, 82(CRT) (9th Cir. 2003) (attorney fee properly denied under Section 28(b) where claimant rejected employer's offer of $5,000 and thereafter was awarded $932 in compensation).

Section 28(b) plainly prohibits an award of attorney fees against employer where the amount awarded is less than the amount tendered, and the statute has been consistently construed in that regard, *see, e.g., Avondale Industries Inc. v. Davis*, 348 F.3d 487, 490-91, ___ BRBS ___, ___(CRT) (5th Cir. 2003); *Richardson*, 336 F.3d 1103, 1107, 37 BRBS 80, 82(CRT); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1536, 25 BRBS 161, 165(CRT) (D.C. Cir. 1992); yet the majority today holds that claimant is entitled to an attorney fee for work performed prior to employer's tender offer. The majority cites no relevant authority. When claimant requested a fee for those services, the administrative law judge observed that claimant cited no legal authority in support. *See* Supplemental Decision and Order at 4. All legal authority is to the contrary. Both the Fifth and Ninth Circuits have held that Section 28(b) does not authorize an attorney fee where claimant did not obtain additional compensation through formal proceedings. *See FMC Corp. v. Perez*, 128 F.3d 908, 910, 31 BRBS 162, 163(CRT) (5th Cir 1997)(attorney fee award reversed where the requirements of Section 28(a) and 28(b) were not satisfied); *Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 611, 25 BRBS 65, 70(CRT) (9th Cir. 1991) (Section 28(b) cannot support an award of attorney fees where that was the only issue which was left unresolved after the informal conference).

The majority can find no support for its attorney fee award by reference to the words of the statute or caselaw; the majority attempts to rely upon employer's failure below to object in principle to a fee award for services performed prior to its tender offer.[4] This, too, is unavailing because Section 28(b) explicitly prohibits an attorney fee award in all circumstances except those in which a fee is specifically authorized: "In all other cases any claim for legal services shall not be assessed against the employer or carrier." 33 U.S.C. §928(b). The courts construe these words to mean exactly what they say. *See FMC Corp.*, 128 F.3d 908, 910, 31 BRBS 162, 163(CRT); *Todd Shipyards Corp.*, 950 F.2d at 610, 25 BRBS at 69(CRT). Hence, it does not matter whether or not employer objected below to the attorney fee in its entirety: the parties cannot confer upon the administrative law judge, the Board or courts that authority which Congress has withheld. In the case at bar, it appears that the majority believes that the parties have also conferred upon the Board authority to reverse in part a legally correct decision.

To justify its decision, the majority argues that employer should be held liable for an attorney fee for services performed prior to the tender offer because after employer controverted the claim for additional benefits claimant required counsel's advocacy to obtain employer's offer and the administrative law judge's award. That argument, however, ignores the plain language of Section 28(b) precluding an award where the specific statutory requirements are not satisfied. That provision is not a fluke. It is entirely consistent with the provision in Section 28(c) that in some cases the claimant is to be held liable for the fee:

> An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

33 U.S.C. §928(c). This provision reflects the American Rule, which the federal courts have adopted, whereby even successful litigants cannot recover attorney fees except in these circumstances which Congress determines. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975). *See Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 421, 13 BRBS 741, 743-744 (5th Cir. 1981).

Finally, not only does the majority contravene the statute in directing an award of an attorney fee, it also contravenes the statute in directing the fee's calculation, based upon a determination of "necessary services." In contrast, the statute provides for the calculation of "a reasonable attorney's fee based *solely* upon the difference between the [greater] amount awarded and the [lesser] amount tendered or paid . . ." (emphasis added). Courts have required administrative law judges to pay heed to the strict limitation these words impose upon an attorney fee award under Section 28(b). *See*

[4] On appeal, however, employer argues that the administrative law judge's decision should be affirmed in toto.

Avondale Industries Inc., 348 F.3d 487, 490-91, ___ BRBS ___, ___(CRT) (5th Cir. 2003); *George Hyman Constr. Co.*, 963 F.2d 1532, 1536, 25 BRBS 161, 165(CRT). Since claimant did not receive an award greater than the amount tendered, there is no basis for determining a reasonable attorney fee in the case at bar.

In sum, I believe that the majority errs: in vacating the administrative law judge's decision denying an attorney fee; in directing the award of an attorney fee pursuant to Section 28(b) when claimant did not receive a greater award than the amount tendered; and in directing that the fee be based upon a determination of necessary services when the only statutory basis for calculation is the difference between the amount awarded and that offered.

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REGINA C. McGRANERY
Administrative Appeals Judge