

L.B.)
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 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: 01/29/2009
 DRY DOCK COMPANY)
)
 Self-Insured) DECISION and ORDER
 Employer-Respondent)

Appeal of the Supplemental Decision and Order on Remand Denying Attorney's Fee of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP) Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant's counsel appeals the Supplemental Decision and Order on Remand Denying Attorney's Fee (2005-LHC-01478) of Administrative Law Judge Kenneth A. Krantz 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 law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. Claimant sustained a work-related injury on May 29, 1975, for which employer voluntarily paid periods of temporary total disability benefits from October 11, 1975 to May 26, 2003. In July 2004, claimant's treating physician assigned a 50 percent permanent impairment rating for

claimant's left leg, prompting employer, on August 17, 2004, to begin voluntary payments of permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).¹ Employer also submitted proposed stipulations to claimant's counsel, agreeing to the entry of an order awarding benefits for a 50 percent leg impairment. Claimant's attorney amended the stipulations to include a potentially related injury to claimant's back, but employer refused to accept this stipulation and requested a hearing on February 7, 2005. The case was transferred to the Office of Administrative Law Judges. Before a hearing could be held, claimant signed the original stipulations submitted by employer that stated that claimant is entitled to permanent partial disability benefits for a 50 percent impairment to his left leg. There was no stipulation concerning a back injury. Administrative Law Judge Richard E. Huddleston entered an order based on the stipulations on August 12, 2005.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed before Judge Huddleston, beginning on February 17, 2005.² In an Order dated February 27, 2006, Judge Huddleston found that employer cannot be held liable for claimant's attorney's fee as there was no successful prosecution of the claim before him. Judge Huddleston also considered counsel's request to assess an attorney's fee as a lien on claimant's compensation and found there was no evidence that the fee petition had been served upon claimant. Thus, he allowed counsel to make proper service and gave claimant an opportunity to object to the petition.

Claimant's counsel thereafter certified that he mailed his fee petition to claimant on March 8, 2005. Claimant did not respond. On March 24, 2006, Judge Huddleston issued an award of an attorney's fee in the amount of \$2,238.10, payable as a lien against claimant's compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant appealed this decision to the Board without legal representation. In its decision, the Board affirmed Judge Huddleston's finding that employer is not liable for an attorney's fee. [*L.B.*] v. *Newport News Shipbuilding & Dry Dock Co.*, BRB No. 06-0552 (Mar. 26, 2007) (unpub.). The Board agreed with Judge Huddleston that claimant is *potentially* liable for his attorney's fee,³ but the Board vacated the fee award payable by claimant because Judge Huddleston did not assess the fee request in light of the

¹ Employer began making payments of \$105 per week for 144 weeks, based on an average weekly wage of \$158.30.

² He requested \$2,466.25, representing 9.3 hours of attorney services at the hourly rate of \$250 and 1.75 hours of paralegal services at the hourly rate of \$95.

³ The Board also held that Judge Huddleston provided an adequate explanation for awarding counsel an hourly rate of \$225.

regulatory criteria at 20 C.F.R. §702.132(a) or whether the work counsel performed was necessary to claimant's receipt of the award of benefits.⁴ The Board thus remanded the case for the administrative law judge to make additional findings.

On remand, the case was assigned to Administrative Law Judge Kenneth A. Krantz (the administrative law judge) who determined that counsel's requested fee was not reasonably commensurate with the necessary work performed, the amount of benefits awarded, or the legal complexity of the issue involved. The administrative law judge found that the work performed by claimant's counsel while the case was pending before the Office of Administrative Law Judges dealt only with the issue of whether claimant's back condition was related to claimant's work-related knee condition. The administrative law judge thus concluded that as Judge Huddleston's award of benefits in this case, based on the parties' stipulations, represented compensation only for claimant's work-related knee injury, the work performed on the back injury "claim" was not necessary to the award on the work-related knee injury claim. The administrative law judge thus concluded that claimant's counsel is not entitled to an attorney's fee payable by claimant pursuant to Section 28(c) of the Act.

On appeal, claimant's counsel challenges the administrative law judge's denial of an attorney's fee under Section 28(c) of the Act. Employer responds, only to request that the Board restate its prior holding in this case that employer is not responsible for any attorney's fee under Section 28. Claimant has not responded.

We affirm the administrative law judge's denial of an attorney's fee payable by claimant. The administrative law judge found, based on the pre-hearing statements submitted by claimant and employer, as well as counsel's March 18, 2008, letter, that the only issue potentially in dispute while the case was before the Office of Administrative Law Judges involved whether claimant's back condition was related to his work-related knee condition. *See, e.g.*, Attorney Klein's Exhibits 4, 5. The administrative law judge found that since the award of benefits did not include a stipulation concerning claimant's back injury, and thus was based entirely on the same stipulations that had originally been submitted by employer to claimant while the case was before the district director,

⁴ 20 C.F.R. §702.132(a) states, in relevant part, that:

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant.

counsel's work before the Office of Administrative Law Judges, though diligent, was not necessary to the award of benefits entered. The administrative law judge thus rationally concluded that counsel's fee request is not reasonably commensurate with the *necessary* work performed, the amount of benefits awarded, or the legal complexity of the issue involved. Decision and Order at 3-4. He therefore found that counsel is not entitled to an attorney's fee pursuant to Section 28(c) for work he performed while the case was pending before the Office of Administrative Law Judges. As counsel has failed to demonstrate either legal error or an abuse of discretion in the administrative law judge's findings, the denial of an attorney's fee payable by claimant is affirmed.⁵ See *Muscella*, 12 BRBS 272.

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand Denying Attorney's Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ If claimant subsequently pursues a claim for benefits based on his alleged back injury and is successful in obtaining additional benefits under the Act based on that injury, counsel may then file a petition for an attorney's fee for any work he performed with regard to that injury.