BRB No. 00-732

LARRY ANDREW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: March 29, 2001
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Attorney's Fee of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Jay W. Beattie and William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Denying Attorney's Fee (99-LHC-2900) of Administrative Law Judge Stuart A. Levin 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 sustained a work-related left knee injury on October 24, 1997, and underwent surgery on his knee on December 24, 1997. Employer paid temporary total disability compensation from October 25, 1997, to September 3, 1998. On December 30, 1998, Dr. Newman, claimant's treating physician, assessed claimant's impairment at seven percent of the lower extremity due to his knee condition. On January 7, 1999, employer notified claimant's attorney that it accepted this assessment and asked that claimant inform the Office of Workers' Compensation Programs (OWCP) of its agreement so that OWCP could issue an order memorializing the parties' agreement. Emp. Ex. 20. On March 12, 1999, claimant's attorney notified employer that Dr. Newman revised his opinion and increased the disability rating, and that claimant would be willing to accept compensation for a 16 percent permanent partial disability to settle the issue. Emp. Ex. 22. Dr. Newman amended the impairment rating to 12 percent of the lower extremity in an April 6, 1999, report. In an April 19, 1999, letter to claimant's counsel, employer wrote that "it seems unusual that there should be so much confusion regarding rating a residual disability," and proposed that the Department of Labor arrange for a medical examination in order to provide an impairment rating by which it agreed to be bound, but if claimant did not accept this arrangement, employer would provide for its own medical examination. Emp. Ex. 26.

On April 26, 1999, claimant requested that the case be referred to the Office of Administrative Law Judges (OALJ) for a hearing. On April 29, 1999, employer wrote to OWCP asking that the case not be forwarded for a few weeks until employer could arrange for another medical examination, because there was a possibility that the parties could agree on the extent of claimant's disability. A medical examination was scheduled by employer, and then canceled by claimant. On June 21, 1999, a claims examiner-mediator from OWCP wrote to employer, copying claimant and his attorney, recommending that an impairment rating of nine percent, seemingly based on a compromise of Dr. Newman's seven and twelve percent ratings, be set to resolve the dispute. Emp. Ex. 36. Employer agreed to accept the recommendation on June 29, 1999, Emp. Ex. 37, but claimant did not, and the case was referred to the OALJ on September 1, 1999. On March 7, 2000, prior to a hearing, the administrative law judge issued A Stipulated Compensation Order-Award of Compensation in which the parties agreed to permanent partial disability compensation for a nine percent impairment.

Claimant's counsel thereafter requested an attorney's fee of $3,946.88, for work performed between October 20, 1998, and February 1, 2000, representing 16.875 hours at $225 per hour, two hours at $75 per hour, and $315.33 in expenses. Employer objected to its liability for an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. In the decision which is the basis of this appeal, the administrative law judge determined that a fee in this case is governed by Section 28(b) of the Act, 33 U.S.C. §928(b). He disallowed all the time for services performed before the district director.[1] He then found that as employer

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[1]The administrative law judge disallowed all the time prior to June 23, 1999, for work before the district director, despite the parties' agreement to allow him to determine all of the fees. Thus, only about six hours are actually at issue here, as the administrative law judge properly declined jurisdiction over work performed at the district director level. *See Stratton v. Weedon Engineering Co.,* BRBS , BRB No. 00-583 (Feb. 13, 2001), slip op. at 13.

agreed to accept OWCP's recommendation, and claimant received no benefits greater than the amount employer agreed to at the district director level, employer is not liable for a fee for work performed before the administrative law judge. Claimant appeals the denial of an attorney's fee, and employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in denying claimant an attorney's fee, as employer made no commitment to be bound by a new medical opinion and agreed to be liable for a seven percent impairment only after receipt of Dr. Newman's medical report. Claimant also argues that employer did not agree to be bound by the findings of a physician selected by the Secretary, but requested it be allowed to schedule its own examination and that employer's settlement offer did not constitute a tender of an amount specified in a written recommendation. Claimant maintains that the June 21, 1999, letter from the district director was not a formal recommendation, but rather the advice of a mediator, and even if this letter were a recommendation, employer's response is too equivocal to be a "tender" of compensation.

Claimant's contentions are without merit. Section 28(b), 33 U.S.C. §928(b), states that if an employer pays compensation without an award, and thereafter a controversy arises over the amount of additional compensation to which claimant is entitled, employer is liable for an attorney's fee if claimant obtains greater compensation than employer agreed to pay. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). If, following informal proceedings, the employer does not accept the recommendation of the district director, employer may pay or tender the compensation, if any, which it believes claimant is entitled to receive. If claimant refuses to accept this amount and thereafter utilizes the services of an attorney, he is entitled to payment of that attorney's fee so long as he obtains greater compensation than that tendered or paid. *See id.; E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

In the instant case, the district director made a recommendation through a mediator, that employer pay benefits for a nine percent impairment. Employer agreed to pay benefits for this impairment. Claimant rejected this recommendation, and requested a hearing before an administrative law judge. Claimant, however, ultimately stipulated to the same degree of impairment that employer agreed to pay prior to referral. Claimant therefore did not obtain greater benefits by virtue of the proceedings before the administrative law judge than those employer agreed to pay.[2] Accordingly, since by virtue of the administrative law judge

[2]Inasmuch as employer accepted the recommendation of the district director, we need not address whether employer's offer to pay constituted a "tender" as contemplated by the Act. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). We also reject claimant's argument that even if employer tendered payment for a nine percent impairment, claimant obtained "greater value" by virtue of employer's lump sum payment

proceedings, claimant's counsel's services did not result in his obtaining compensation additional to that which employer agreed to pay while the case was before the district director, we affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee under Section 28(b) of the Act for work performed before the administrative law judge.[3] *See Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

Accordingly, the administrative law judge's Order Denying Attorney's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

under the terms of the administrative law judge's decision, as opposed to the period of 25.9 weeks recommended by the district director. Inasmuch as claimant reached maximum medical improvement on December 30, 1998, the full amount was due for the nine percent impairment at the time employer agreed to pay on June 29, 1999.

[3]The administrative law judge expressed no opinion regarding claimant's entitlement to an attorney's fee for work performed the district director.