

BRB Nos. 03-0569
and 03-0569A

SPENCER K. JENKINS)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>May 5, 2004</u>
DRY DOCK COMPANY)	
)	
Self Insured)	
Employer-Respondent)	DECISION and ORDER
Cross-Petitioner)	

Appeals of the Decision and Order on Remand Awarding Disability Compensation and Attorney's Fee of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand Awarding Disability Compensation and Attorney's Fee (01-LHC-0793) of Administrative Law Judge Daniel A. Sarno, Jr., 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman &*

Grylls Associates, Inc., 380 U.S. 359 (1965). This is the second time this case has been before the Board.

Claimant, a shipfitter, injured his right knee on August 10, 1999, and underwent arthroscopic knee surgery on September 21, 1999; employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from September 21 to November 9, 1999. Claimant reached maximum medical improvement on April 24, 2000, and was found to have a five percent knee impairment with permanent work restrictions. EX A. On April 24, 2001, the district director issued a Compensation Order, pursuant to the parties' stipulations, awarding claimant compensation for a five percent permanent disability of his right leg.

During the course of claimant's pursuit of compensation for the initial injury, a second knee condition, a neuropathic abnormality, was linked to claimant's work injury. Claimant sought compensation for temporary total disability from February 8 to 11, February 17 and 18, and March 16 and 17, 2000, as well as related medical bills arising out of the second condition. Employer sought to have this claim dismissed, arguing that in the stipulations submitted to the district director, the parties had agreed upon all material facts, leaving no issues before the administrative law judge, including those relating to any other condition or disability. The administrative law judge agreed with employer that all issues regarding claimant's disability had been resolved by the parties' stipulations, and he dismissed the claim.

On appeal, the Board agreed with claimant that the administrative law judge erred in dismissing his claim. The stipulations to which the parties had agreed did not address the unresolved issues listed by claimant concerning his neuropathic abnormality, including entitlement to treatment and to specified days of temporary total disability. Moreover, the Board observed that the compensation order issued by the district director was subject to modification pursuant to Section 22, 33 U.S.C. §922, as the parties had not settled the claim pursuant to Section 8(i), 33 U.S.C. §908(i). *Jenkins v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0870 (Aug. 8, 2002)(unpublished). Accordingly, the case was remanded for the administrative law judge to address the merits of claimant's claim for benefits relating to his neuropathic condition.

On remand and based upon the stipulations of the parties, the administrative law judge awarded claimant compensation for temporary total disability on February 9, 2000, in the amount of \$61.21, and reimbursement of medical expenses of \$65. Additionally, the administrative law judge awarded claimant's counsel an attorney's fee of \$2674.70, payable by employer. Employer appeals the administrative law judge's award of benefits, and both parties appeal the administrative law judge's fee award.

We first address employer's contention that the administrative law judge's initial decision dismissing claimant's claim for benefits for a neuropathic condition was correct and should be reinstated. This issue was fully addressed in the Board's first decision, and that decision constitutes the law of the case.¹ As employer raises no argument that necessitates our revisiting the prior decision, we affirm the administrative law judge's award of benefits on remand. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Both claimant and employer appeal the administrative law judge's award of an attorney's fee. 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).

Claimant's attorney submitted a fee petition to the administrative law judge requesting a fee of \$5,052.75, representing 18.33 hours of attorney services at \$200 and \$225 per hour, 3.25 hours of paralegal services at \$75 and \$80 per hour, and \$931 in costs. Employer filed objections to the requested fee. In his decision, the administrative law judge awarded claimant a fee of \$2,674.70, representing 13.78 hours of attorney services at \$175 per hour and 3.76 hours of paralegal services at \$70 per hour; the administrative law judge did not award any costs based upon the lack of specificity in claimant's fee petition.

Claimant appeals this award, arguing that the administrative law judge erred in reducing the hourly rate for the attorney services and in failing to award the requested costs. Employer appeals, contending that the administrative law judge erred in holding it liable for a fee after January 22, 2003, the date upon which it alleges it effectively tendered compensation to claimant.

Claimant contends that the administrative law judge unreasonably reduced his hourly rate to \$175 and that the hourly rates of \$200 and \$225 for services rendered in 2002 and 2003 respectively are commensurate with his experience and the merits of this case. The administrative law judge thoroughly reviewed counsel's fee petition and properly took into consideration the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, the applicable geographic area,

¹ Employer concedes that the Board's prior Decision and Order in this case constitutes the law of the case on this issue but seeks to maintain the issue for purposes of appeal to the United States Court of Appeals. Employer's Petition for Review and Brief at 1.

and the delay in receiving the award. 20 C.F.R. §702.132; *see Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Contrary to claimant's assertion, the administrative law judge is not bound by hourly rates awarded to counsel in other cases. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). Thus, as the administrative law judge specifically considered the regulatory criteria in determining the appropriate hourly rate in this case, and as claimant raises no reversible error on appeal, we affirm the administrative law judge's award of an hourly rate of \$175.

Claimant also contends that the administrative law judge erred in failing to award the requested \$931 in costs. Costs may be assessed against employer pursuant to Section 28(d), 33 U.S.C. §928(d), if they are found to be reasonable and necessary. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge found that claimant failed to provide sufficient information for him to determine that the costs are necessary and reasonable.² Decision and Order on Remand at 5. As the test for compensability of costs is whether the expense requested could be reasonably regarded as necessary, *see generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000), and the administrative law judge reasonably concluded that such a determination could not be made given the lack of an adequate explanation, we affirm his denial of the award of costs.

Employer appeals the attorney's fee award, arguing that the administrative law judge erred in holding it liable for a fee for services incurred after January 22, 2003, the date of its alleged tender of benefits. 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, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), the Board held that the term "tender" in Section 28(b) means a "readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Id.* at 122. Recently, in *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003), the Ninth Circuit quoted BLACK'S LAW DICTIONARY 1479 (7th ed. 1999), and stated that a "tender" is "an unconditional offer of money or performance to satisfy a debt or obligation." *Id.*, 336 F.3d at 1107, 37 BRBS at 83(CRT).

² There are three itemized costs: the first is unidentified by name, the second states "Hamp. Rds. Neuro & Spine Center," and the third states, "Marie W. Lawson, Reporter – 99-632 Spencer Jenkins." Fee Petition at 4.

The January 22, 2003, correspondence upon which employer relies states that in order to resolve the period of disability at issue, employer will pay “compensation for any time missed from work for all periods claimed, subject to a credit for actual wages paid for work during the same period.”³ Letter of January 22, 2003 (emphasis in original). The administrative law judge found that employer’s letter is not a valid tender because it failed to provide either a dollar figure or a range of dates for which employer offered to pay compensation. The administrative law judge concluded that without that information he was unable to determine whether the amount finally agreed to by the parties was more or less than the amount offered.

We reject employer’s contention that the administrative law judge erred in finding its letter was not a “tender” of compensation within the meaning of Section 28(b). Employer’s letter did not contain an unconditional offer to pay compensation to claimant. Rather, it states that employer will pay compensation if claimant establishes he has a loss in actual wages after employer applies a credit for wages it paid claimant.⁴ Additional correspondence between the parties demonstrates there was still a disagreement as to the days claimant was disabled and claimant’s compensation rate that does not seem to have been resolved until the February 27, 2003, correspondence from employer documenting claimant’s employment records as well as out of pocket medical expenses. Moreover, the administrative law judge rationally determined that as employer’s January 2003 letter does not contain a specific dollar amount it offered to pay, he cannot determine if claimant succeeded in obtaining additional compensation by virtue of the formal proceedings. Thus, as it is rational and in accordance with law, we affirm the administrative law judge’s finding that employer did not make an unconditional tender of compensation. *See generally Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). Therefore, we affirm the administrative law judge’s finding that employer is liable for the attorney’s fee awarded for services performed after this date.

³ The letter elucidated this offer by stating:

this means that if your client is entitled, **for example**, to an average daily compensation rate of \$75, but missed only three hours of work on the date claimed and was paid more than \$75 for the remaining five hours, no compensation would be due.

Letter of January 22, 2003 (emphasis in original).

⁴ Generally, wages are not credited against compensation due, unless the wages were intended as advance payments of compensation. 33 U.S.C. §914(j); *see generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

Claimant's counsel filed a petition for an attorney's fee pursuant to 20 C.F.R. §802.203 for services performed before the Board in BRB No. 01-0870. In an Order dated March 24, 2003, the Board stated that claimant was successful on appeal, but had yet to be awarded any benefits on remand. Thus, the Board denied a fee at that time. Counsel now renews his request for a fee of \$1,537.50 for work in the initial appeal.⁵ Employer objects to the requested hourly rates and states that given claimant's small recovery before the administrative law judge, the requested fee is excessive.⁶

Claimant is entitled to a fee for services performed before the Board as he successfully prosecuted his appeal, and he obtained an award of benefits on remand which the Board has affirmed. *See Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989). We reject employer's objection to the hourly rates. Although employer generally contends that the billing rate is "unreasonably high" in the geographic area in which the case arises, claimant's average requested hourly rate is \$120, which is not unreasonably high for the Hampton Roads area. *See* 20 C.F.R. §802.203(d)(4). We also reject employer's conclusory contention that the fee request is too high given the amount of benefits awarded on remand. The services performed before the Board were a necessary prerequisite to establishing claimant's entitlement to an award of any benefits, and employer raises no specific objections to the individual itemized entries. We, therefore, approve a fee of \$1,537.50 for work performed before the Board in the initial appeal. 33 U.S.C. §928; 20 C.F.R. §802.203.

⁵ The fee petition itemizes .63 hours of attorney services at an hourly rate of \$225, 1.01 hours of attorney services at an hourly rate of \$200, 2 hours of attorney services at an hourly rate of \$160, 9 hours of attorney services at an hourly rate of \$95, and .25 hours of paralegal services at an hourly rate of \$75.

⁶ Employer also contends that because it intends to appeal the underlying issue of claimant's entitlement to additional compensation based on his secondary condition, claimant's counsel is not yet entitled to any fee. An attorney's fee award may be made while an appeal is pending, but it is not enforceable until the compensation order becomes final. *See Story v. Navy Exchange Service*, 33 BRBS 111 (1999).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Disability Compensation and Attorney's Fee is affirmed. Claimant's counsel is awarded an attorney's fee of \$1,537.50 for work performed before the Board in BRB No. 01-0870, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge