BRB No. 05-0260
and 05-0260A

DAVID W. HASSELL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 11/30/2005
	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Order on Petition for Attorney's Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Order on Petition for Attorney's Fees (2003-LHC-2361) of Administrative Law Judge Larry W. Price 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured while working for employer on April 21, 2002. On May 27, 2003, employer submitted proposed stipulations to claimant, stating that employer has paid medical benefits and temporary total disability benefits for the period between April

23 and September 29, 2002, in the amount of $13,002.74. The proposed stipulations stated that claimant is entitled to permanent partial disability benefits in the amount of $31,128.57 for a 19 percent impairment to the left leg. Included in the stipulations was a sentence that read: "That the parties are aware of no other outstanding compensation issues as of the date of the execution of these Stipulations." After striking out that sentence, claimant signed the stipulations and returned them to employer. On June 11, 2003, employer notified claimant that it agreed with the 19 percent impairment rating but did not agree with the modification he made to the stipulations. Employer re-submitted the original stipulations and asked claimant to identify any other issues there may be. On June 17, 2003, employer filed a notice of controversion of the claim, noting as the reason a challenge to the extent of permanent disability pending a second opinion. The case was transferred to the Office of Administrative Law Judges (OALJ) on July 16, 2003. Because claimant had not responded to the request that he identify any remaining issues, employer ultimately filed a motion to compel and answer. The administrative law judge issued an order to compel on November 21, 2003, and in response, claimant admitted that there were no other outstanding issues. Cl. Exs. 3-10. At the formal hearing on January 14, 2004, the parties agreed to stipulations without the objectionable language, and the administrative law judge awarded benefits to claimant based on the stipulations.

On February 23, 2004, claimant's counsel filed a fee petition with the administrative law judge requesting a total of $3,817, representing 18.62 hours of service. Employer objected to the petition, asserting it was not liable for a fee because it tendered benefits and claimant obtained no benefits greater than those tendered. Employer also challenged specific entries, the hourly rate, and the specificity of the petition. Citing *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004), the administrative law judge found that employer did not "tender" benefits under Section 28(b), 33 U.S.C. §928(b), so as to avoid liability for the fee because the "tender" was not unconditional. Order at 2-3. The administrative law judge also reduced the hourly rate from the requested $225 to $185, rejected the argument that the petition lacked specificity, reduced certain entries from one-quarter to one-eighth of an hour, and disallowed other entries. *Id.* at 4. Thus, the administrative law judge awarded claimant's counsel a fee in the amount of $2,318.12, representing 12.1 hours of work at a rate of $185 per hour and one hour of work at a rate of $80 per hour. *Id.*

Employer appeals the fee award, arguing that it is not liable for a fee because it tendered benefits to claimant when this case was before the district director and claimant did not obtain greater benefits when the case was before the administrative law judge. Claimant responds, urging affirmance. BRB No. 05-0260. Claimant cross-appeals the fee award. He asserts that the administrative law judge erred in reducing the hourly rate from $225 to $185 without thoroughly considering prior decisions awarding a fee based on the higher hourly rate. Employer responds, urging the Board to reject claimant's arguments. BRB No. 05-0260A.

Section 28(b) of the Act states in relevant part that if an employer pays or tenders benefits without an award, it is liable for a claimant's attorney's fee only if the claimant obtains greater compensation than the employer paid or tendered. 33 U.S.C. §928(b); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981); *Jackson*, 38 BRBS 39. The term "tender" is not defined by the Act, but the Board has held that a valid "tender" under the Act requires "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (*en banc*). The United States Court of Appeals for the Ninth Circuit has held that a "tender" is an "unconditional offer of money or performance to satisfy a debt or obligation." *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). The Board held in *Jackson* that a "tender" pursuant to Section 28(b) must be unconditional; thus, proposed stipulations that contained language similar to that which employer used in the instant case did not constitute a "tender" under Section 28(b). *Jackson*, 38 BRBS at 42.

Contrary to employer's arguments that its offer constituted a valid tender under Section 28(b), this case is directly on point with *Jackson*. In *Jackson*, the claimant sought permanent partial disability benefits for impairment to his left arm. The employer sent a letter stating it was "unconditionally tendering" benefits; however, enclosed in the proposed stipulations was the statement that "the parties are aware of no other outstanding issues as of the date of the execution of these stipulations." *Jackson*, 38 BRBS at 40. The claimant refused to sign the stipulations with this statement, and the case was transferred to the OALJ, where the claimant sought permanent partial disability benefits, a Section 14(e), 33 U.S.C. §914(e), assessment, and interest. Before the administrative law judge, the parties stipulated to the claimant's entitlement to permanent partial disability benefits without the disputed language. The administrative law judge then awarded the claimant's counsel an attorney's fee. At issue before the Board was whether the employer was liable for the attorney's fee. The Board held that the employer was liable under Section 28(b) because employer's offer was not unconditional and, therefore, was not a valid tender under Section 28(b). *Jackson*, 38 BRBS at 42.

In this case, employer submitted a set of stipulations including essentially the same disputed phrase as that in *Jackson*. In addition, employer filed a notice of controversion of claimant's entitlement to permanent partial disability benefits. Thereafter, the case was transferred to the OALJ where the parties subsequently agreed claimant is entitled to permanent partial disability benefits for a 19 percent impairment *without* the disputed language. On these facts, the administrative law judge properly found that employer did not unconditionally tender benefits under Section 28(b). For the reasons set forth in *Jackson*, we affirm the administrative law judge's determination that employer is liable for an attorney's fee under Section 28(b). *Jackson*, 38 BRBS at 42.

In a cross-appeal, claimant contends the administrative law judge erred in reducing the hourly rate from the requested $225 to $185. Claimant argues that, because he has received fee awards based on the hourly rate of $225 in other cases from both the Board and administrative law judges, it was erroneous for the administrative law judge to award a fee based on a reduced hourly rate without fully considering those cases and explaining why this case does not warrant a fee award at that rate. The administrative law judge stated that he considered both the cases submitted by claimant and the Altman & Weil *2002 Survey of Law Firm Economics* submitted by employer. The administrative law judge rejected employer's suggested hourly rate of $150 based on the *Survey*, and he awarded the hourly rate of $185 based on "the issues involved, the degree of skill with which Claimant was represented, the amount of time involved, and other relevant factors. . . ." Order at 4; *see* 20 C.F.R. §702.132.

The administrative law judge has broad discretion in awarding an attorney's fee and the party challenging the reasonableness of the fee award bears the burden of showing that the award is contrary to law or is arbitrary, capricious or an abuse of discretion. *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). It is the administrative law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done. In awarding a fee, he must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. *Muscella*, 12 BRBS 272; 20 C.F.R. §702.132.

Contrary to claimant's assertions, previous decisions do not set a precedent for the hourly rate to be applied in all cases. While the rates awarded to counsel in other cases are relevant to the rate he seeks in a given case, *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), the administrative law judge is not bound by those awards. Rather, the previous decisions reaffirm the well-established principle that the amount of a fee award, and, hence, the hourly rate which applies, is determined by the body awarding the fee based on a consideration of the regulatory factors relevant to a particular case. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The administrative law judge, therefore, is in the unique position of assessing the amount of a reasonable fee. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). Because the administrative law judge addressed the relevant regulatory factors and arrived at a reasonable hourly rate, and as claimant has not met his burden of showing that the $185 hourly rate awarded is unreasonable or is an abuse of discretion, we affirm the hourly rate awarded. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Order on Petition for Attorney's Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge