

BRB Nos. 07-0362  
and 07-0362A

B.G.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 09/25/2007
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Order Awarding Attorney Fee and Paralegal Fee and Amended Order Awarding Attorney Fee and Paralegal Fee of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene A. Moring (Montagna, Klein, Camden LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (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 Awarding Attorney Fee and Paralegal Fee and Amended Order Awarding Attorney Fee and Paralegal Fee (2006-LHC-1246) of Administrative Law Judge Alan L. Bergstrom 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related left knee injury on January 17, 1991, for which she received various periods of compensation,<sup>1</sup> including a *de minimis* award of temporary partial disability benefits under Section 8(e) of the Act, 33 U.S.C. §908(e).<sup>2</sup> Claimant's left knee eventually deteriorated to the point that her treating physician, Dr. Siegel, performed a left total knee replacement on September 27, 2004. Employer voluntarily paid claimant temporary total disability benefits following the surgery up until January 19, 2005, at which time claimant returned to suitable alternate employment, prompting employer to reinstate its payment of a *de minimis* award of temporary partial disability benefits. Dr. Siegel opined that claimant reached maximum medical improvement with regard to her left knee as of September 30, 2005, with a 37 percent permanent impairment of the left lower extremity.

Claimant thereafter sought a scheduled award of permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). The district director recommended, on March 8, 2006, that employer pay claimant permanent partial disability benefits based on a 37 percent impairment of the left lower extremity. Claimant sought a hearing on the issue of permanent partial disability and employer responded seeking termination of the prior *de minimis* award of temporary partial disability benefits. Employer also offered to settle the claim for outstanding compensation and attorney's fees for \$35,000, with the parties' ultimately agreeing that claimant was owed \$34,164.20 in compensation. The parties then submitted joint stipulations to the Office of Administrative Law Judges (OALJs) regarding the amount of compensation to which claimant was entitled. Employer, however, argued that it was not liable for claimant's attorney's fee.

Administrative Law Judge Alan L. Bergstrom (the administrative law judge) found claimant entitled to, among other things, 106.56 weeks of permanent partial disability benefits based on a 37 percent loss of use of her left lower extremity under

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<sup>1</sup> The record reflects that claimant received temporary total disability benefits for several periods between the date of her injury and August 5, 1998. Thereafter, the district director entered an award of temporary total disability benefits on November 6, 1998, based on the parties' agreement, with employer's last payment having been made on November 10, 1998, as a result of claimant's return to suitable alternate employment.

<sup>2</sup> Administrative Law Judge Richard K. Malamphy issued the *de minimis* award that was subsequently affirmed by the Board. [*B.G.*] v. *Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333, 37 BRBS 120(CRT) (4<sup>th</sup> Cir. 2004).

Section 8(c)(2).<sup>3</sup> Claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge, totaling \$3,262.50, representing 11.53 hours of attorney work at an hourly rate of \$250, and four hours of paralegal work at an hourly rate of \$95. Employer objected, arguing that it could not be liable for an attorney's fee as it validly "tendered" compensation within the meaning of Section 28(b) of the Act, 33 U.S.C. §928(b).

In his initial order, the administrative law judge rejected employer's assertion that claimant's counsel is not entitled to any attorney's fees because employer was willing to pay claimant benefits pursuant to the district director's recommendation, as he found that employer's only valid offer to settle the case was not unconditional and it involved an amount less than the amount to which claimant was entitled. Addressing employer's other objections, the administrative law judge reduced the requested hourly rate for paralegal work, reduced the amount of time itemized for various services, and disallowed various other services and expenses, including the time itemized for preparation of the fee petition. Accordingly, claimant's counsel was awarded an attorney's fee of \$3,615. Upon reconsideration, the administrative law judge again rejected employer's assertion that it cannot be liable for an attorney's fee pursuant to Section 28(b). Nonetheless, he modified his attorney's fee award to \$2,527.50, to reflect a mathematical error.

On appeal, employer challenges the administrative law judge's award of an attorney's fee pursuant to Section 28(b). Claimant responds, urging affirmance. Additionally, claimant's counsel requests that the Board award an attorney's fee for work performed in defending against employer's appeal. Employer has not filed any objections to the fee request. In her cross-appeal, claimant challenges the administrative law judge's disallowance of attorney time spent in defending the fee petition. Employer responds, urging affirmance.

Employer argues that, contrary to the administrative law judge's finding, the terms of its June 19, 2006, letters, reflect an offer to pay a scheduled award of permanent partial disability benefits in an amount equivalent to that recommended by the district director and ultimately awarded to claimant by the administrative law judge. Employer thus argues that, as it made a valid tender to claimant which claimant's counsel accepted, employer's liability for an attorney's fee to claimant's counsel must be limited to those

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<sup>3</sup> The administrative law judge also memorialized claimant's entitlement to, and employer's payment of, temporary total and *de minimis* temporary partial disability benefits for various periods between September 23, 1997, and September 29, 2005. Decision and Order at 1-2. The administrative law judge also reiterated claimant's entitlement to continued medical benefits for the treatment of her work-related injury.

services which occurred up to June 21, 2006, the date upon which claimant received employer's offer.

The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that in order for an employer to be liable for an attorney's fee under Section 28(b) of the Act, the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer voluntarily agreed to pay. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4<sup>th</sup> Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4<sup>th</sup> Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4<sup>th</sup> Cir.), *cert. denied*, 126 S.Ct. 478 (2005). Employer can avoid liability for an attorney's fee pursuant to Section 28(b) of the Act if it pays or tenders to claimant compensation without an award and claimant fails to obtain greater compensation than employer paid or tendered. *See Hassell*, 477 F.3d 123, 41 BRBS 1(CRT); *see also Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5<sup>th</sup> Cir. 1981).

After reviewing the correspondence between the parties,<sup>4</sup> the administrative law judge found that employer's second letter of June 19, 2006, "effectively withdrew, prior

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<sup>4</sup> On June 19, 2006, while the case was pending before the OALJs, employer's supervisor of case management sent one letter to the district director, which contained no indication of settlement or willingness to accept the district director's recommendation, CX 5-1, and two letters to claimant's counsel proposing alternative means for resolving the permanent partial disability claim. CXs 3-1, 4-1. One of the letters to claimant stated "[i]n order to resolve the outstanding issues, the employer is willing to terminate [claimant's] *de minimis* payments effective September 30, 2005 . . . and to issue scheduled disability benefits for the 37 percent impairment." CX 3-1. The second letter indicated that employer "is prepared to offer [claimant] \$35,000.00, which includes an attorney's fee, to settle all of her claims against the shipyard," excluding any additional claims for medical benefits which "would remain open under the Virginia Workers' Compensation Act." CX 4-1. Responding to claimant's request for clarification, CX 2-1, employer initially agreed that claimant was entitled to \$34,164.20 in compensation less its overpayment in *de minimis* benefits paid after September 30, 2005. Employer also put forth its position that it was not liable for an attorney's fee in this case because "the [informal] conference requirement" at the district director level had not been satisfied. CX 1-1. On August 7, 2006, employer sent claimant's counsel draft stipulations which culminated in the issuance of the administrative law judge's Decision and Order on Stipulations dated October 19, 2006.

to claimant's acceptance, the first written offer of June 19, 2006, to terminate *de minimis* benefits effective September 30, 2005, and issue scheduled disability benefits for the 37 % impairment." Order dated November 27, 2006, at 5. The administrative law judge thus found that the only valid offer from employer's June 19, 2006, letters was "the offer to pay \$35,000.00 to settle all issues including attorney's fees." *Id.* He therefore concluded that since employer withdrew the June 19, 2006, offer to accept the district director's March 8, 2006, written recommendation and substituted an offer not equivalent to that recommendation, employer "has failed to establish its willingness to accept the [district director's] written recommendation at any time prior to employer's counsel forwarding to claimant's counsel draft Stipulations of Fact for review by letter dated August 7, 2006." *Id.* Upon reconsideration, the administrative law judge reiterated his finding that employer put forth only one valid offer from June 19, 2006, that being for claimant to settle the case, including attorney's fees, for a lump sum of \$35,000, and further clarified that said offer was "the equivalent of a settlement offer of \$32,472.50 to the claimant,"<sup>5</sup> which is "clearly less than the \$34,164.20 to the claimant recommended by the [district director] and achieved by claimant's counsel." Order dated December 19, 2006, at 2, n 2.

The administrative law judge's findings that employer's offer of a lump sum settlement represented a rejection of the district director's written recommendation in this case, and that claimant obtained a sum "greater than the amount paid or tendered by the employer" are rational and supported by substantial evidence. *See* 33 U.S.C. §928(b); *Hassell*, 477 F.3d 123, 41 BRBS 1(CRT) *Moody*, 474 F.3d 109, 40 BRBS 69(CRT); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT). The \$35,000 offer would have diminished claimant's recovery below the recommended 37 percent impairment due to the inclusion of an attorney's fee in the terms of the settlement. Moreover, as employer has not challenged the administrative law judge's findings regarding the other requisite elements for liability pursuant to Section 28(b), we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee under Section 28(b). *Id.*

In her cross-appeal, claimant challenges the administrative law judge's disallowance of two hours of attorney time spent in responding to employer's objections to the fee petition. In the instant case, the administrative law judge disallowed claimant's counsel's entries on October 3, 2006, for attorney time expended in researching (.5 hours) and drafting (1 hour) a brief, as well as an entry on October 12, 2006, to file the brief (.5 hours), as he found that this represented "work done in support of the attorney fee petition," and as such "does not fall within reimbursable fee items." Order dated

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<sup>5</sup> The administrative law judge arrived at this figure by subtracting his award of an attorney's fee in this case, \$2,527.50, from the \$35,000 lump sum offered by employer's June 19, 2006, settlement letter.

November 27, 2006 at 4. The Board however has held that an attorney fee may be awarded for time spent defending the fee petition. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979); *see also generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 903 (7<sup>th</sup> Cir. 2003). In this regard, claimant's counsel submitted the brief in question in response to employer's argument that it could not be liable for an attorney's fee under Section 28(b) because the requirements of *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), had not been met, an argument which was explicitly rejected by the administrative law judge in this case. Consequently, we hold that counsel's time spent in this manner is reasonable, and we modify the administrative law judge's attorney's fee award to reflect that claimant's attorney is entitled to an additional fee of \$500, representing two hours at an hourly rate of \$250 for time spent in defending his fee petition.

Claimant's counsel also requests an attorney's fee for work performed before the Board in defending against employer's appeal. He requests a fee for 16.25 hours, presumably at an hourly rate of \$250.<sup>6</sup> Employer has not filed objections to the fee request. Claimant is entitled to an attorney's fee reasonably commensurate with the work performed before the Board if she successfully defends her award on appeal. 33 U.S.C. §928; 20 C.F.R. §802.203; *see, e.g., Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993). As the administrative law judge's attorney's fee award has been affirmed, and as the hours requested are reasonably commensurate with the necessary work done, we award claimant's counsel the requested fee. 33 U.S.C. §928; 20 C.F.R. §802.203.

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<sup>6</sup> We necessarily infer that claimant's counsel is seeking an hourly rate of \$250, which is equivalent to the amount that counsel requested, and the administrative law judge granted, for work at the OALJ level.

Accordingly, the administrative law judge's finding that employer is liable for claimant's attorney's fees is affirmed, and his award of an attorney's fee is modified to reflect inclusion of an additional two hours spent in defense of the fee petition resulting in an attorney's fee award totaling \$3,027.50. Employer is liable for an attorney's fee for work performed before the Board in the amount of \$4,062.50, payable directly to claimant's counsel.

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