

BRB No. 92-2043

STANLEY J. BLAND)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Granting Attorney Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

M. Janet Palmer (Wilder & Gregory), Richmond, Virginia, for self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order - Granting Attorney Fees (91-LHC-1316) of Administrative Law Judge Richard K. Malamphy 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 may be set aside only if the challenging party shows it 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).

On March 11, 1985, claimant, a welder, sustained an injury to his back while working for employer. In his Decision and Order dated April 14, 1992, the administrative law judge accepted the parties' stipulations concerning claimant's loss of wage-earning capacity, and he found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge, therefore, ordered employer to pay claimant compensation for permanent partial disability at the rate of \$12.98 per week, beginning September 26, 1990, for 104 weeks. After this time, compensation was to be paid by the Special Fund pursuant to 33 U.S.C. §944. The administrative law judge additionally ordered employer to provide medical treatment to claimant pursuant to 33 U.S.C. §907.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$2,066.25, representing 13.25 hours of attorney services at \$155 per hour and .25 hours of paralegal services at \$50 per hour. Employer did not file objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge reduced the hourly rate sought to \$125 and the number of hours sought by 7.75. The administrative law judge disallowed entries on March 11, 1991, February 24, 1992, March 6, 1992, and March 9, 1992, as these services were not performed before him. After noting that services performed on Section 8(f) issues are not compensable, the administrative law judge disallowed all time after the hearing on October 7, 1991, stating that the parties had settled all issues with the exception of employer's entitlement to Section 8(f) relief at the hearing. The administrative law judge, therefore, awarded claimant's counsel a fee of \$718.75, representing 5.75 hours of legal services at \$125 per hour to be paid by employer.

On appeal, claimant challenges the administrative law judge's disallowance of all time after October 7, 1991, asserting that the fee be awarded as requested as claimant's interests remained vulnerable until the Decision and Order was issued and the administrative law judge accepted the parties' stipulations. Employer responds, urging affirmance of the fee award. Alternatively, employer recommends that no fees should be awarded as counsel's work in this case did not result in any additional benefits to claimant greater than those offered by employer prior to March 11, 1991, the first entry on counsel's fee petition.¹ The Director, Office of Workers' Compensation Programs,

¹Employer did not raise this contention below, and may not raise it for the first time in a response brief, as it does not support the administrative law judge's decision. *See Del Vacchio v. Sun Shipbuilding and Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6

responds requesting that the case be remanded to the administrative law judge for further consideration as it is unclear from the fee petition whether the disallowed services were related to Section 8(f) or to other aspects of the case.

Claimant's challenge to the administrative law judge's disallowance of all time after October 7, 1991, has merit. Although the administrative law judge accurately noted that services performed on Section 8(f) issues are not compensable, *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989); *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231, 235 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), it is not clear from the attorney's fee petition whether the disallowed services rendered were related to Section 8(f) issues or to other aspects of the case. It appears from the record that the parties' stipulations concerning claimant's entitlement to permanent partial disability benefits were not formalized until February 1992, *see* Letter dated January 22, 1992, and the administrative law judge did not state his acceptance of the stipulations until his decision was issued in April 1992. Counsel was obliged to protect his client's interests until this time. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980). Therefore, the administrative law judge's award of fees must be vacated and the case remanded for further consideration. On remand, the administrative law judge must determine the nature of counsel's services rendered after October 7, 1991, before concluding that the services were performed on Section 8(f) issues. The administrative law judge may require claimant's counsel to resubmit his fee petition designating the services, if any, that pertain to Section 8(f) relief. 20 C.F.R. §702.132; *Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

BLR 1-87 (1983). *See also* *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's Supplemental Decision and Order - Granting Attorney Fees disallowing all services for work performed after October 7, 1991, is vacated and the case is remanded for further consideration of the fee award consistent with this opinion. In all other respects, the Supplemental Decision and Order - Granting Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL,

Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge