

ROBERT G. CORONADO)	
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Claimant-Respondent)	
)	
v.)	
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CERES GULF, INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Kathleen K. Charvet and David L. Barnette (McGlinchey, Stafford & Lang) New Orleans, Louisiana, for the self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1900) of Administrative Law Judge Quentin P. McColgin 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).

On August 20, 1985, claimant suffered injuries to his right shoulder and chest while operating a grain elevator for employer. Claimant immediately experienced pain in his right arm and subsequently developed pain in his neck. Employer voluntarily paid claimant temporary total disability benefits from August 21, 1985, through March 31, 1986, and from June 12, 1986 to August 17, 1986. On August 16, 1987, claimant's treating physician, Dr. Wright opined that claimant suffered a 15 to 20 percent permanent impairment of his right arm and released him to return to work without restriction. Claimant returned to work at that time, but sought permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), or alternatively under 33 U.S.C. §908(c)(1), (19). In addition, claimant asserted that he was entitled to compensation based on a higher average weekly wage than that on which employer's voluntary payments were made.

In his initial Decision and Order, the administrative law judge awarded claimant compensation for a 20 percent permanent impairment of the right arm under Section 8(c)(1), based

on Dr. Wright's opinion. Moreover, the administrative law judge agreed with claimant that the container royalty payments he received in the year prior to his injury were properly included in determining his average weekly wage. Employer filed two Motions for Reconsideration which were denied by the administrative law judge. Employer appealed the administrative law judge's Decisions, reiterating the arguments it made below.

In a Decision and Order dated April 16, 1992, after rejecting claimant's assertion that it lacked jurisdiction to entertain employer's appeal, the Board held that inasmuch as Dr. Wright's opinion unequivocally established that claimant's arm condition resulted from an unscheduled injury to a nerve in his neck, claimant was limited to an award under Section 8(c)(21) of the Act. Accordingly, the Board remanded the case for the administrative law judge to ascertain whether claimant's injury caused a loss in his wage-earning capacity. The Board, however, affirmed the administrative law judge's determination that the container royalty payments were properly included in the calculation of his claimant's average weekly wage.

In a Decision On Remand dated August 14, 1992, the administrative law judge found that claimant suffered no loss in his wage-earning capacity as a result of the work injury. Accordingly, he denied claimant permanent partial disability compensation.

Meanwhile, on February 22, 1989, claimant's attorney's filed a fee petition for work performed before the administrative law judge, requesting \$13,156.25, representing 105 hours of attorney services at \$125 per hour, 3.5 hours of paralegal services at \$45 per hour, and \$1,797.70 in expenses. Employer filed objections to the petition. Claimant's counsel replied to employer's objections and requested an additional \$187.50 in fees for time spent in defending his petition. On April 28, 1992, after receiving the Board's Decision and Order, claimant's counsel contacted the administrative law judge to remind him that his fee request remained outstanding.

In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, in accordance with employer's objections, disallowed the 26 hours requested by counsel prior to the referral of the case on March 30, 1988, and an additional .5 hours claimed on April 18, 1988, for correspondence with claimant's creditors regarding his financial difficulties. Accordingly, he awarded claimant's counsel a fee of \$10,093.75, representing 80.75 hours of attorney services at \$125 per hour, 3.25 hours of paralegal services at \$45 per hour, plus the requested expenses. Employer appeals the administrative law judge's fee award on various grounds. Claimant does not respond to employer's appeal.

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that the amount of benefits claimant was ultimately awarded did not exceed the \$5,000 it tendered to claimant in settlement of the scheduled permanent partial disability claim prior to its receipt of the Memorandum of Informal Conference. We disagree. Under Section 28(b), 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

agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, it is undisputed that employer voluntarily paid claimant temporary total disability compensation from August 21, 1985, through March 31, 1986, and from June 12, 1986 to August 17, 1986. Claimant, however, continued to assert his right to compensation based on a higher average weekly wage than that on which employer's voluntarily payments were made. Although claimant did not prevail in establishing his entitlement to permanent partial disability compensation, he did prevail in establishing his right to compensation based on an average weekly wage which included container royalty payments. This adjustment in the applicable average weekly wage resulted in claimant's receiving an additional \$1,229.43 in temporary total disability compensation plus interest over that which employer had voluntarily paid. Moreover, claimant also prevailed on the contested issue of causation, entitling him to medical benefits under Section 7 of the Act, 33 U.S.C. §907. Employer contends that claimant nonetheless obtained less than it tendered claimant in settlement of his claim. In order to foreclose liability under Section 28(b), employer must tender compensation in writing. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986)(*en banc*). Employer points to no written confirmation of its alleged offer. Therefore, employer has not established it tendered compensation exceeding claimant's recovery. For this reason, and as claimant was successful in obtaining additional compensation over that which employer voluntarily paid, employer is liable for claimant's counsel's attorney's fee pursuant to Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64 (1991)(decision on remand).

Employer also contends that the fee award should be vacated because the administrative law judge failed to analyze the fee request in terms of the degree of claimant's success consistent with the principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). We need not address this argument, however, as it is being raised by employer for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part, part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The administrative law judge considered and accepted employer's timely objections, and did not abuse his discretion by awarding the remaining fee, to which employer did not object.

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge