

JOHN W. SMITH)
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 Claimant-Petitioner)
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 v.)
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 NEWPORT NEWS SHIPBUILDING) DATE ISSUED:
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Order Denying Attorney Fee of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk,
Virginia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington,
D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Denying Attorney Fee (95-LHC-0676) of Administrative
Law Judge Fletcher E. Campbell, 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). The amount of an attorney's fee award is discretionary and may only be set
aside if shown 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 May 5, 1987, while working as a pipefitter for employer, claimant sustained an
injury to his back. Employer voluntarily paid various periods of temporary total disability
and temporary partial disability compensation and medical benefits. By letter dated
December 4, 1990, claimant requested an informal conference on the issue of permanent
disability. On January 10, 1991, employer controverted the extent of claimant's permanent
and any temporary disability. In a Memorandum of Informal Conference dated January 23,
1991, the claims examiner recommended against permanent disability compensation but
did find claimant entitled to temporary total disability. Employer then paid claimant
temporary total disability benefits though January 5, 1992.

Thereafter, in a letter to the district director dated January 20, 1992, claimant stated

that he was seeking permanent total disability compensation for his back injury. On April 4, 1994, employer resumed payment of temporary total disability benefits but on September 26, 1994, it instituted payment for temporary partial disability at the rate of \$164.20 per week. By letter dated September 28, 1994, employer informed the district director that it would commence payment of permanent partial disability and was seeking Special Fund relief under 33 U.S.C. §908(f). On October 25, 1994, employer filed its Petition for Section 8(f) relief, in which it stated that the date of maximum medical improvement was February 18, 1991. On November 18, 1994, claimant filed a Pre-Hearing Statement, Form LS-18, in which he asserted entitlement to continuing temporary total disability compensation after September 26, 1994. On December 14, 1994, the case was referred to the Office of Administrative Law Judges for a formal hearing. In its LS-18 filed on May 8, 1995, employer stated that the issue presented is whether claimant is employable in the open market and hence is entitled to a partial disability instead of a total disability award, although it listed the issues presented for resolution as the nature and extent of disability if any and application of Section 8(f). In January 1996, the parties stipulated that claimant was entitled to permanent partial disability compensation commencing September 26, 1994, and continuing at the rate of \$164.20, the same rate which employer had been paying voluntarily. In a Decision and Order dated May 8, 1996, the administrative law judge awarded claimant compensation based on the stipulations of the parties and determined that employer was entitled to Section 8(f) relief.

Claimant's attorney thereafter filed a fee petition for work performed before the administrative law judge in which he requested \$9,661 in fees plus \$500.75 in costs. Employer filed objections, contending that claimant's counsel was not entitled to a fee, as counsel's efforts before the administrative law judge did not result in his obtaining greater compensation than that which employer voluntarily paid or agreed to pay. In an Order dated August 8, 1996, the administrative law judge denied counsel's request for fees, agreeing with employer that inasmuch as employer had only disputed whether claimant was entitled to total disability benefits and had voluntarily paid the exact amount of compensation claimant was ultimately awarded, no basis existed for imposing fee liability upon employer.

On appeal, claimant contends that the administrative law judge erred in denying his request for a fee. Claimant asserts that because his counsel's efforts before the administrative law judge resulted in his obtaining permanent partial disability benefits instead of temporary partial disability benefits, which are subject to a five year maximum, see 33 U.S.C. §908(e), employer is liable for claimant's attorney's fee under Section 28(b), 33 U.S.C. §928(b). Claimant accordingly urges the Board to reverse the administrative law judge's finding to the contrary and remand for entry of a fee. Employer responds that inasmuch as claimant did not raise the issue of permanent disability and it had voluntarily paid the same amount of compensation ultimately awarded, the administrative law judge properly determined that no basis existed for imposing fee liability against employer under Section 28(b).

We affirm the administrative law judge's denial of an attorney's fee payable by

employer. Under Section 28(b), when an employer voluntarily pays or tenders benefits, and thereafter a controversy arises over additional compensation due, employer will be liable for an attorney's fee if the claimant succeeds in obtaining additional compensation greater than that voluntarily paid or agreed to by employer. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this case, claimant asserts that he is entitled to a fee paid by employer because employer controverted the nature and extent of claimant's disability up through the time the parties entered into their stipulations in January 1996. Inasmuch, however, as employer specifically stated in its pre-hearing statement that the issue presented is whether claimant is employable in the open market and hence is entitled to a partial disability instead of a total disability, the administrative law judge rationally concluded that employer was only disputing liability for total disability. Moreover, employer voluntarily paid claimant compensation commencing September 26, 1994, at the same rate ultimately awarded. While the case was before the Office of Administrative Law Judges, claimant asserted entitlement to temporary disability benefits subsequent to September 26, 1994, whereas even prior to referral to an administrative law judge, employer advised it was terminating its payments of temporary partial disability compensation and instituting payment for permanent partial disability. Inasmuch as claimant's counsel's efforts did not result in claimant's obtaining greater compensation than that which employer voluntarily paid or agreed to pay, we affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee. See generally *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162, 164 (1986).

In light of our affirmance of the administrative law judge's determination that employer is not liable for claimant's attorney's fee, the case must be remanded for the administrative law judge to consider whether the fee should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §908(c). Under such circumstances, the administrative law judge must take into account the financial circumstances of the claimant. See 20 C.F.R. §702.132(a).

Accordingly, the Order Denying Attorney Fee 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