

BRB No. 98-1031

MICHAEL D. REED )  
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 Claimant-Respondent )  
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 v. )  
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 CIRCLE MARINE, INCORPORATED ) DATE ISSUED: April 21, 1999  
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 and )  
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 LOUISIANA WORKERS' )  
 COMPENSATION CORPORATION )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

David B. Allen (Stephen M. Larussa & Associates), Houma, Louisiana, for claimant.

J. Michael Stiltner (Egan, Johnson, Stiltner and Patterson), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Attorney Fees (97-LHC-0401) of Administrative Law Judge Clement J. Kennington 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 *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on August 9, 1994, while working for employer as a welder for only 12 days. Employer voluntarily paid temporary total disability benefits from the date of injury in varying amounts until December 29, 1994. From December 30, 1994, until the date of the hearing on July 15, 1997, employer paid weekly compensation benefits of \$266.67. Cl. Ex. 5; Jt. Ex. 1. At the hearing the parties litigated the issues of average weekly wage, credit for employer in the event of overpayment, and the sufficiency of employer's compensation payments from August 10, 1994, to December 29, 1994. Claimant argued below that the administrative law judge should calculate his average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), multiplying the number of hours and days of an unidentified welder working for another company during the year prior to the accident, by claimant's actual \$10 hourly rate; claimant thus argued for a finding of an average weekly wage of \$424.85, with a resultant compensation rate of \$283.23 per week. Employer contended that the administrative law judge should rely on claimant's actual earnings during the 52 weeks prior to the accident, resulting in an average weekly wage of \$131.26, with a similar compensation rate.

In his Decision and Order, the administrative law judge, having determined that claimant's average weekly wage should be calculated pursuant to the provisions of Section 10(c), 33 U.S.C. §910(c), found that claimant's weekly compensation rate should remain at \$266.67 per week, the rate the employer had been paying. The administrative law judge arrived at this figure based on claimant's average weekly wage calculated by multiplying an eight hour work day by \$10 per hour. Consequently, since that was the amount employer had been paying, the administrative law judge determined that the issue of overpayment was moot. He also rejected claimant's argument that employer's compensation payments from August 10, 1994, to December 29, 1994, were inadequate. The administrative law judge's findings are not challenged on appeal.

Subsequently, claimant's counsel filed a fee petition, requesting \$10,390.63, representing 83.125 hours of work performed at an hourly rate of \$125, and expenses in the amount of \$1,457.69. Employer objected, contending that claimant is not entitled to a fee because there was no successful prosecution of the case, as claimant failed to obtain additional benefits as a result of this action. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge rejected employer's argument that there was no successful prosecution of the claim. The administrative law judge reasoned that even though claimant did not receive greater compensation than what employer was currently paying, employer

asserted that claimant's average weekly wage should be calculated pursuant to Section 10(a), 33 U.S.C. §910(a), which would have reduced claimant's weekly benefits to \$131.26, and that claimant's counsel successfully defended against this argument. The administrative law judge concluded that claimant was at least partially successful. He accordingly reduced the number of hours requested by 25 percent, awarding counsel a fee of \$7,792.97, and \$1,457 in expenses.

Employer appeals, contending that the administrative law judge's fee award cannot be upheld, since claimant did not successfully prosecute the claim before the administrative law judge. Claimant responds, urging affirmance. Claimant contends that he successfully defended employer's attempt to reduce his compensation rate, asserting that the additional compensation he obtained is the formal order of compensation for the amount of benefits employer was until now voluntarily paying. In addition, claimant contends that he is entitled to a fee based on his obtaining payments of medical treatment which was disputed until shortly before the hearing.

Where an employer voluntarily pays compensation without an award and thereafter a conflict arises over additional compensation, employer will be liable for attorney's fees under 33 U.S.C. §928(b) if claimant successfully obtains greater compensation than that paid or tendered by employer. *Ping v. Brady Hamilton Stevedore Co.*, 21 BRBS 223 (1988); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In this case, while the initial requirement of Section 28(b) was triggered, in that a controversy developed over the amount of additional compensation to which claimant may be entitled, claimant ultimately received no greater benefits in the compensation award than those which had been voluntarily paid by employer. See *Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982). Despite employer's assertion that claimant's average weekly wage should be reduced below the amount voluntarily paid, employer continued to pay at the higher rate. Since the administrative law judge awarded benefits based on this average weekly wage, claimant did not obtain greater benefits as is required for employer to be liable under Section 28(b). He therefore is not entitled to recover an attorney's fee from employer on this basis. See *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997). Accordingly, the administrative law judge's fee award is vacated.

However, claimant asserts an alternate basis for employer to be liable for a portion of his fee. In his post-hearing brief, claimant asserted that employer refused to pay Dr. Craft's medical bills until shortly before the hearing, thus requiring that he take Dr. Craft's deposition on July 8, 1997. While this issue was no longer in dispute at the hearing on July 15, 1997, claimant asserts that only after the deposition, when it was clear there were no grounds to challenge the expenses, did employer agree to pay the outstanding bills. Claimant reiterates this contention before the Board in

response to employer's appeal. Employer's position is that medical expenses were not an issue at the hearing and that there is no evidence of unpaid bills. Nonetheless, claimant's fee petition includes work before the administrative law judge which appears to relate to this issue, including time spent deposing Dr. Craft, and the administrative law judge did not address this basis for fee liability. Where benefits are at issue when the case is referred to the Office of the Administrative Law Judges and employer agrees to pay them prior to hearing, it may be liable for a reasonable fee for work performed on this issue prior to employer's agreement to pay. See *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981). Payment of outstanding medical expenses is an issue listed in claimant's LS-18 pre-hearing statement, and it was resolved immediately prior to hearing. Tr. at 8-9. This case is remanded for the administrative law judge to address whether claimant obtained payment of disputed medical bills while the case was pending before him; if so, employer may be held liable for a reasonable fee for this work.

Finally, in defending his fee, counsel notes the benefit to claimant of obtaining a formal award and defending against employer's arguments for a lower average weekly wage. Employer, however, may only be liable if the requirements of Section 28(a) and (b) are met, and, as we have discussed, employer's voluntary payments at the awarded level results in the conclusion that employer is not liable for counsel's successful efforts in this regard. However, where subsections (a) and (b) do not apply, counsel may receive a fee for necessary work as a lien on claimant's compensation under Section 28(c). On remand, the administrative law judge should consider whether claimant should be liable for a fee for counsel's work in defending against employer's efforts to reduce his average weekly wage.<sup>1</sup>

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<sup>1</sup>The applicable regulation provides that where a fee is assessed against claimant, the administrative law judge must take into account his financial circumstances in addition to the other relevant factors. 20 C.F.R. §702.132.

Accordingly, the award of an attorney's fee against employer is vacated and the case is remanded to the administrative law judge for reconsideration of a fee award.<sup>2</sup>

SO ORDERED.

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BETTY JEAN HALL, Chief  
Chief Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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<sup>2</sup>Claimant requests additional attorney's fees for defending his appeal before the Board. Claimant is not at this time entitled to an attorney's fee before the Board, as he has not successfully defended his claim.