BRB No. 04-0466

EDWARD E. HEISE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JACK GRAY TRANSPORT	)	DATE ISSUED: 01/13/2005
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits and Attorney's Fee Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and Attorney's Fee Order (2003-LHC-1910) of Administrative Law Judge Daniel J. Roketenetz 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, an operating engineer specializing in operating and maintaining cranes, suffered work-related polyneuropathy and bilateral carpal tunnel syndrome. CX 1. Employer voluntary paid temporary total disability benefits from September 3 through October 21, 1998. Following conservative treatment with splints and gel gloves, claimant returned to his usual job on October 22, 1998. The parties stipulated that claimant's condition reached maximum medical improvement on April 23, 2002. Claimant sought permanent partial disability benefits under the Act.

In his Decision and Order, the administrative law judge credited Dr. Richter's opinion that claimant does not have a present permanent impairment to either hand or arm.[1] He found, however, that the medical evidence supports the conclusion that claimant may be subject to future debilitating symptomology. Accordingly, the administrative law judge found that a *de minimis* award is appropriate and awarded claimant benefits in the weekly amount of one percent of his average weekly wage at the time of his injury, $19.90. The administrative law judge also found that claimant is entitled to future medical care for his injuries. Subsequent to this decision, the administrative law judge awarded claimant's attorney a fee of $9,635.98, payable by employer.

Employer appeals both decisions, arguing that the administrative law judge erred in entering a *de minimis* award because claimant's recovery for permanent partial disability benefits to his hands and wrists limited him to an award under the schedule and in awarding an attorney's fee as there was no successful prosecution in this claim. Claimant responds, urging affirmance of both decisions.

In his Decision and Order, the administrative law judge found that claimant suffers no current permanent impairment or present loss in his wage-earning capacity related to his work injury, but that claimant's condition may worsen. The administrative law judge therefore found that the possibility of the progression in or return of claimant's symptomology merits a *de minimis* award. Decision and Order at 12. Employer contends that because claimant's injury was to his hands, a body part covered by the schedule at Section 8(c)(3), 33 U.S.C. §908(c)(3), he cannot receive a *de minimis* award because such awards are premised on Section 8(h) which is inapplicable to scheduled injury cases.

The schedule at Section 8(c)(1)-(20), 33 U.S.C. §908(c)(1)-(20), provides the exclusive recovery for permanent partial disability for body parts listed in the schedule. *Potomac Electric Power Co. v. Director, OWCP [PEPCO],* 449 U.S. 268, 14 BRBS 363 (1980). A claimant with a permanent partial disability to a scheduled member cannot elect to receive benefits pursuant to Section 8(c)(21) based on a loss of wage-earning capacity as determined under Section 8(h), 33 U.S.C. §908(h). *Id.*, 449 U.S. at 271, 14 BRBS at 365.

[1] Claimant does not challenge this finding on appeal.

As the Board discussed in *Jones v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 105 (2002), the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121 31 BRBS 54(CRT)(1997), in approving nominal, or *de minimis,* awards in appropriate cases, relied on Section 8(h) which takes into account "the effect of disability as it may naturally extend into the future." *Rambo II*, 521 U.S. at 131, 31 BRBS at 58(CRT). In *Porter v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 113 (2002), the claimant sustained an injury to her arm and received scheduled permanent partial disability benefits pursuant to a stipulated compensation order. Within one year of the last payment of benefits, the claimant filed a modification claim for a nominal award. The Board held, *inter alia*, that because the claimant was permanently partially disabled and her injury was to a scheduled member, she was precluded from receiving any benefits pursuant to Section 8(c)(21), including a nominal award. In contrast, the Board has held that a claimant who is temporarily partially disabled due to an injury to a scheduled member may receive a *de minimis* award pursuant to Sections 8(e) and 8(h). *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 Fed. Appx. 333 (4th Cir. 2004).

We agree with employer that a *de minimis* award is precluded under the circumstances of this claim. In the instant case, claimant suffered injuries to a scheduled body part, his hands. Moreover, the parties stipulated that claimant's condition had reached maximum medical improvement. As such, claimant may not receive any benefits premised on Section 8(h), and therefore is precluded from receiving a nominal award under Section 8(c)(21). *Porter,* 36 BRBS at 118. Accordingly, the administrative law judge's *de minimis* award is vacated.

Employer also appeals the administrative law judge's award of an attorney's fee, contending, *inter alia*, that it is not liable for any fee award because claimant did not obtain additional benefits over those which employer paid. Under Section 28(b) of the Act, 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 paid or tendered by employer. *See, e.g., Richardson v. Continental Grain Co.,* 336 F.3d 1103, 37 BRBS 80(CRT)(9th Cir. 2003). In the instant case, employer voluntarily paid temporary total disability benefits and claimant sought additional permanent partial disability benefits. Because we vacate the administrative law judge's *de minimis* award, claimant is not entitled to any additional disability benefits. Moreover, the administrative law judge's award of future medical benefits cannot support an attorney's fee award in this case, as there is no evidence that employer has declined payment of any necessary medical care. The parties stipulated that employer paid for claimant's medical care through December 2002, and there is no indication in the record that employer has refused to pay additional medical benefits or to authorize treatment for claimant's work-related injury. *See Barker v. U.S. Dept. of Labor,* 138 F.3d 431, 32

BRBS 171(CRT)(1st Cir. 1998). Therefore, we hold that employer cannot be held liable for claimant's attorney's fee because claimant had not obtained any benefits beyond those which employer voluntarily paid. *Id.; see also Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). The administrative law judge's attorney's fee award therefore is vacated.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits and Attorney's Fee Order are vacated.

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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JUDITH S. BOGGS
Administrative Appeals Judge