BRB Nos. 93-1102
and 93-1361

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| GRADY G. WOFFORD | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| SEALAND SERVICES, INCORPORATED | ) | DATE ISSUED: |
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| and | ) | |
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| CRAWFORD AND COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeals of the Supplemental Decision and Order Re Attorney's Fees of Thomas Schneider, Administrative Law Judge, and the Compensation Order-Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for the claimant.

James J. Wood, Long Beach, California, for the employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Re Attorney's Fees (92-LHC-408) of Administrative Law Judge Thomas Schneider, and the Compensation Order-Award of Attorney Fees (18-039276) of District Director Joyce L. Terry 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).[1] 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

[1]The appeals were consolidated for purpose of decision by Board Order dated February 5, 1993.

On October 3, 1988, claimant injured his left leg while working for employer as a warehouseman. Claimant was off work from October 4, 1988 through November 30, 1989, during which time employer voluntarily paid him temporary total disability compensation. 33 U.S.C. §908(b). Claimant sought additional compensation under the Act for a 20 percent permanent physical impairment pursuant to Section 8(c)(2) and (19) of the schedule, 33 U.S.C. §908(c)(2), (19), based on the rating provided by his treating physician, Dr. Jackson. Employer instituted voluntary payment of compensation for a 15 percent permanent physical impairment based on the disability rating of Dr. Craemer. On April 22, 1991, a Department of Labor claims examiner recommended that the parties compromise and that claimant be compensated for a 17.5 percent impairment based on the average of Dr. Jackson's and Dr. Craemer's disability assessments. Employer accepted the claims examiner's recommendation and instituted payment of compensation for a 17.5 percent permanent physical impairment. Claimant, however, continued to assert his right to compensation based on a 20 percent impairment. On October 31, 1991, the case was referred to the Office of Administrative Law Judges for a formal hearing. Thereafter, claimant's counsel wrote letters to Drs. Jackson and Craemer, requesting that they both reconsider and raise their respective ratings. Dr. Jackson rejected the request but on November 15, 1991, Dr. Craemer informed claimant's counsel that he believed that an additional 5 percent increase over his prior 15 percent rating was warranted. Employer, however, was not served with a copy of Dr. Craemer's November 15, 1991 opinion letter until January 7, 1992, at which time claimant's counsel informed employer's counsel that claimant was willing to settle his case for $5,340, the effective equivalent of compensation for a 20 percent rating plus interest, plus an attorney's fee of $2,260 payable by employer.

On February 10, 1992, employer informed claimant's counsel of its willingness to pay compensation based on a 20 percent impairment rating with the proviso that claimant's counsel identify the exact amount of the attorney's fee he would be claiming so that an appropriate amount could be withheld from claimant's compensation pending the determination of the attorney's fee or that claimant's counsel waive his lien rights for a fee against claimant. Employer erroneously believed that withholding a portion of the compensation due was required because pursuant to California law if employer paid out the total amount of compensation without reserving anything for a fee, when the employer was fully aware that a fee was being claimed, it could result in the employer's being required to pay the fee. Although claimant's counsel initially refused to waive his lien right for a fee against claimant, on April 16, 1992, he ultimately agreed to do so provided that claimant be paid all of the compensation due for a 20 percent permanent physical impairment. Subsequently, on May 26, 1992, the parties submitted stipulations which resolved all of the disputed issues in the case with the exception of attorney's fees which were reserved for separate disposition. On June 4, 1992, the administrative law judge's issued a Decision and Order incorporating these stipulations whereby claimant was to receive $21,739.97 in compensation for a 20 percent loss of use of his left lower extremity. Inasmuch as employer had voluntarily paid claimant a total of $16,512.92 between November 27, 1990 and June 7, 1991, employer was ordered to pay the balance of $5,227.05 in a lump sum plus accrued interest.

Claimant's attorney subsequently filed a fee petition in which he requested $5,305, representing 19.5 hours at $150 per hour, and 17 hours of work at $140 per hour. Employer filed objections. In a Supplemental Decision and Order Re Attorney's Fees, after noting that he was limiting his inquiry to the 19.5 hours of work done before him and that employer had not objected to the $150 hourly rate claimed, the administrative law judge awarded claimant's counsel a fee of $2,100 payable by employer, reflecting 14 hours at $150 per hour. In so concluding, the administrative law judge disallowed the 5.5 hours of services claimed between November 15, 1991, when claimant's counsel secured Dr. Craemer's report, until January 10, 1992, when employer's counsel was provided with a copy of the report, to penalize claimant's counsel for his failure to timely serve employer's counsel with this document. The administrative law judge, however, allowed both the time claimed prior to November 15, 1991, and the time claimed after January 10, 1992, finding that the services performed in the later period appeared to be time necessary for negotiating the fine points of the final settlement which would have been required whenever employer's counsel learned of Dr. Craemer's new opinion, or time necessary to bring the disputed issue of attorney's fees before him for decision.

In addition, claimant filed a fee petition for work performed before the district director, requesting $2,380, representing 17 hours of services at an hourly rate of $140. In a Compensation Order-Award of Attorney's Fee, after considering counsel's petition and employer's objections thereto the district director awarded claimant's counsel the entire fee claimed.

Employer appeals both the administrative law judge's fee award, BRB No. 93-1102, and the district director's fee award, BRB No. 93-1361. Claimant responds, urging that both fee awards be affirmed.

We initially reject employer's argument that it is not liable for claimant's counsel's attorney's fee because it never controverted liability for the claim or refused to pay compensation but simply followed the claims examiner's recommendation. Under Section 28(b), when an employer 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 voluntarily paid or agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In the present case, employer initiated voluntarily payments of compensation for a 15 percent permanent physical impairment and later modified its payments consistent with the claims examiner's recommendation to reflect claimant's entitlement to a 17.5 percent permanent physical impairment. Claimant, however, continued to assert his right to compensation for a 20 percent permanent physical impairment. As a result of counsel's efforts before the administrative law judge, employer ultimately agreed to pay claimant the additional compensation he sought. Therefore, inasmuch as a controversy remained after employer voluntarily initiated compensation and claimant's counsel was successful in obtaining additional compensation over that which employer paid or agreed to pay, employer is liable for claimant's counsel's attorney's fees before both the administrative law judge and district director pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64 (1991)(decision on remand). Employer's argument that no fee was owed pursuant to Section 28(b) prior to the claims examiner's

recommendation is also rejected inasmuch as the record reflects that the controversy between the parties regarding the compensation owed dates back to the filing of the claim. *See generally Caine v. Washington Metropolitan Area Transit Authority,* 19 BRBS 180 (1986).

Employer further asserts that, in any event, the fee awarded by the administrative law judge is excessive and should have been limited to $600, representing 4 hours of services. Employer further avers that the administrative law judge erred in awarding fees for the services claimed after January 10, 1992, inasmuch as no issues remained in dispute subsequent to employer's receipt of Dr. Craemer's November 15, 1991, report with the exception of attorney's fees and attorney's fees may only be awarded for services on behalf of a claimant and not for services performed by an attorney on his own behalf. In particular, employer avers that the 10 hours claimed from June 11, 1992 until August 19, 1992, after the administrative law judge accepted the parties' stipulations as to the disability compensation owed, should have been disallowed because these charges related solely to claimant's counsel's attempt to secure attorney's fees and were of no benefit to claimant as counsel had waived his lien rights against claimant for a fee prior to the time that the parties entered into their stipulations.

The administrative law judge, however, considered these arguments below and acted within his discretion in rejecting them, finding that the time claimed after January 10, 1992, appeared to be necessary for negotiating the fine points of the final settlement, which would have been required whenever employer's counsel learned of Dr. Craemer's medical report, or time necessary to bring the disputed issue of attorney's fees before him for decision. The administrative law judge also specifically determined that claimant's counsel was not litigating the fee issue simply to be paid for the time consumed in litigating it, but rather, because it was a significant issue for claimant.[2] Contrary to employer's assertions, the administrative law judge's decision to hold employer liable for the services necessary to establish employer's liability for a fee for which claimant otherwise may have been liable was a proper exercise of his discretionary authority. *See generally Byrum v. Newport News*

[2]Inasmuch as the administrative law judge found that the time claimed was warranted to protect claimant's interests, we reject employer's assertion that *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986), is controlling.

*Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980). Accordingly, we decline to further reduce or disallow the hours awarded by the administrative law judge.

We further reject employer's assertion that the award made by the district director should have been based upon an hourly rate of $100, inasmuch as employer's unsupported assertions are insufficient to establish that the $140[3] hourly rate awarded by the district director was unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Similarly, we reject employer's assertions that no fee should be owed before the district director in light of claimant's counsel's wrongful withholding of Dr. Craemer's report as employer is raising this assertion 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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). While employer raises a similar argument with regard to the administrative law judge's fee award, the administrative law judge considered employer's argument below and specifically accounted for counsel's conduct in failing to timely serve employer with Dr. Craemer's report by disallowing the 5.5 hours spent between November 15, 1991, when claimant's counsel received this report until January 10, 1992, when employer was provided with a copy.[4]

Inasmuch as employer's unsupported assertions are insufficient to establish that the administrative law judge or the district director abused his or her discretionary authority in awarding the fees, we affirm both the administrative law judge's and the district director's award of attorney's fees. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

[3]Employer mistakenly refers to the hourly rate as $150 in its brief.

[4]The fact that such actions are grounds for contempt under California law is irrelevant to the fee issues before us.

Accordingly, the Supplemental Decision and Order Re Attorney's Fees of the administrative law judge, BRB No. 93-1102, and the Compensation Order-Award of Attorney Fees of the district director, BRB No. 93-1361, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge