BRB No. 02-0734

JOHN WEIRICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 07/23/2003
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order on Petition For Attorneys= Fees of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order on Petition for Attorneys= Fees (2000-LHC-0072) of 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 be set aside only if the challenging party shows it 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 sustained a work-related low back injury on June 25, 1994. On July 19, 2001, the parties submitted stipulations to the Office of Workers= Compensation Programs (OWCP) for approval and the entry of an order awarding claimant various benefits for specific periods of disability as set forth in the stipulations. The OWCP rejected the proposed compensation order, because it included overlapping periods of temporary total and temporary partial disability. Thereafter, claimant objected to the proposed stipulation AThat the claimant has incurred no other

disability and no other loss of wage-earning capacity to date, beyond that reflected in these stipulations.@ Claimant stated that this stipulation would preclude him from claiming compensation for any disability occurring between the time the stipulations were signed and the time they were approved in an order by the district director or administrative law judge. When the parties could not reach an agreement on this issue, claimant requested that the OWCP transfer the case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was transferred on October 2, 2001. On June 4, 2002, prior to the convening of a formal hearing, employer agreed to delete the stipulation at issue. Thus, the administrative law judge issued a compensation order awarding claimant temporary total, temporary partial and permanent partial disability benefits for various periods between June 28, 1994 and September 23, 2001, based on the parties= stipulations. The parties also stipulated that as of September 23, 2001, employer had paid all compensation due. Order on Stipulations at 2, stipulation 6.

Claimant=s counsel filed a fee petition for work performed before the administrative law judge, requesting a fee of $1,083.75. Employer objected to its liability for any attorney=s fee on the ground that it paid all benefits by September 23, 2001. Claimant countered that employer=s refusal to accede to the changes in the proposed stipulations renders employer liable for his attorney=s fee. Employer responded that the dispute had no effect on the amount of compensation actually at issue.

The administrative law judge denied claimant an attorney=s fee, holding that employer cannot be liable for any attorney=s fee pursuant to the Board=s decision in *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989). The administrative law judge found that, as the dispute between the parties occurred subsequent to employer=s September 23, 2001, payment of all claimed compensation, no basis existed for granting claimant=s attorney fees for work performed after employer=s tender. In addition, the administrative law judge found that claimant=s counsel is not entitled to an employer-paid fee for wind-up services, on the facts of this case.

On appeal, claimant argues that the administrative law judge erred in denying him an employer-paid attorney=s fee, because the administrative law judge misapplied the provisions of Section 28(b) of the Act. Alternatively, claimant contends that the administrative law judge erred in denying him an employer-paid attorney=s fee, because his services constituted compensable Awind-up@ services. Employer responds, urging affirmance of the administrative law judge=s denial of an attorney=s fee payable by employer.

Under Section 28(b) of the Act, when an employer pays or tenders compensation without an award and thereafter a controversy arises over additional compensation due, the employer will be liable for claimant=s attorney=s fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. 33 U.S.C. ' 928(b); *see, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Claimant alleges that although employer tendered compensation, he obtained a greater benefit in that employer ultimately agreed to remove the offending stipulation.

We cannot accept this construction of Section 28(b) on the facts presented. This case does not involve a Atender@ of compensation,[1] but the actual payment of all compensation due. Thus, we need not address the parties= contentions concerning the requirements for a valid tender of compensation,[2] as all compensation claimed and due was paid on September 23, 2001, before the case was transferred to the OALJ. Thus, employer=s liability for an attorney=s fee under Section 28(b) hinges on whether claimant obtained Agreater compensation@ than that paid by employer. *See Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). As claimant did not obtain more compensation, employer cannot be held liable for claimant=s attorney=s fee.

Claimant contends that the elimination of the offending stipulation constitutes Agreater compensation.@ It is apparent, as employer suggests, that the elimination of the stipulation had no effect on any compensation to which claimant is entitled. It neither resulted in an award of additional actual compensation, *see generally Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), nor in an inchoate right to additional compensation. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). The fact that claimant *could have* obtained additional benefits by the elimination of the proposed stipulation does not compel the conclusion that he in fact gained greater compensation within the meaning of Section 28(b). In fact, case law developed under Section 28(a) of the Act, 33 U.S.C. ' 928(a), leads to the opposite conclusion. In *Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997),

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[1]In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), the Board held that the term Atender@ in Section 28(b), means Aa readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant.@ *Armor*, 19 BRBS at 122. On remand, the Board affirmed the administrative law judge=s finding that the employer=s tender in that case was valid. To the extent the employer=s offer was contingent on claimant=s giving up future benefits, the Board noted that there was no basis for speculating on entitlement to future benefits in that claimant had a scheduled injury and had retired, at age 64, from employment. *Armor*, 22 BRBS 316 (1989). As the claimant did not obtain greater benefits than employer had tendered, the Board affirmed the finding that employer cannot be held liable for claimant=s attorney=s fee. Contrary to the administrative law judge=s decision herein, there is no contradiction between the Board=s decisions in *Armor* and *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). In *Finch*, despite an award of Section 8(f) relief, the employer was held liable for claimant=s attorney=s fees based on its refusal to stipulate and its contesting of various issues. The significant fact in *Finch* is that the claimant obtained an award of benefits through resort to formal proceedings, albeit one ultimately paid by the Special Fund.

[2]In this regard, we accept claimant=s supplemental pleading, dated June 30, 2003, as part of the record before the Board. Inasmuch as an appeal is pending on the case submitted by claimant, *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0629, and as this case is resolved without addressing the issue therein, we need not address the arguments raised.

Director, OWCP v. Palmer Coking Coal Co., 867 F.2d 552 (9th Cir. 1989), and *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997), the courts and the Board addressed cases similar to this one, wherein the claimant obtained a Atactical victory,@ but no compensation. These cases hold that as the claimants did not obtain an economic benefit as a result of the proceedings, they did not Asuccessfully prosecute@ the claims such that the employers could be held liable for an attorney=s fee under Section 28(a). *See also Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991). We similarly hold that claimant=s tactical victory herein does not render employer liable for claimant=s attorney=s fee under Section 28(b) as claimant did not obtain compensation greater than employer had paid prior to the case=s referral to the OALJ.

We also reject claimant=s alternative argument that employer is liable for payment of claimant=s attorney=s fees on the grounds that the services provided by claimant=s attorney constitute Awind-up services@ to assure that claimant received the benefits to which he is entitled. In *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff=d on recon. en banc,* 33 BRBS 38 (1999), the Board, citing its decision in *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), held that employer may be liable for an attorney=s fee, after it pays benefits, for reasonable Awind-up services@ such as reading the decision, explaining the decision to claimant, or calculating the benefits due. In *Everett*, the employer was liable as well for an attorney=s fee for services rendered before employer paid benefits. The instant case, however, is distinguishable from *Everett*, in that all benefits were paid prior to the case=s referral to the OALJ, and employer cannot be held liable for any services performed before the administrative law judge as claimant did not obtain additional compensation. *See Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT)(discussed and distinguished in *Everett*, 33 BRBS at 39-40).

Accordingly, we affirm the administrative law judge=s Order on Petition for Attorneys= Fees denying claimant an employer-paid attorney=s fee. The case is remanded for the administrative law judge to address claimant=s liability for an attorney=s fee pursuant to Section 28(c), 33 U.S.C. '928(c).[3]

SO ORDERED.

[3]In a case such as this where employer cannot be held liable for claimant=s attorney=s fee, the fee may be assessed against claimant as a lien on his compensation. 33 U.S.C. '928(c). The administrative law judge must take into account claimant=s financial circumstances in assessing a fee against claimant. 20 C.F.R. '702.132(a).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge