

BRB No. 04-0867

CHARLES R. EASON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 07/28/2005
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Klein Camden,  
LLP), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-2783 and 2001-LHC-2784) of Administrative Law Judge Richard E. Huddleston 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). 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).

This case is before the Board for the second time on the issue of attorney's fees. To reiterate, employer voluntarily paid claimant temporary total disability benefits from

May 4 to June 12, 2001, based on claimant's average weekly wage on August 30, 1995, the date claimant sustained a work-related right knee injury. Claimant subsequently asserted that the period of temporary total disability was, in fact, caused by a new work-related right knee injury on April 6, 2001, entitling him to an additional \$91.39 in compensation based on his 2001 average weekly wage. After holding an informal conference on June 12, 2001, the district director recommended that employer accept liability based on claimant's April 6, 2001, average weekly wage.

On June 25, 2001, employer forwarded to claimant's counsel proposed stipulations for approval so that the district director could enter an order awarding compensation pursuant to his recommendation. Although employer agreed that claimant's disability compensation was to be paid at his 2001 average weekly wage, claimant objected to the wording of another portion of employer's proposed stipulations.<sup>1</sup> On June 2, 2001, claimant requested that the district director transfer the case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was transferred to OALJ for a formal hearing, which was set for January 10, 2002.

Prior to the hearing, however, employer agreed to delete the language at issue. At the hearing, the parties further agreed that claimant is entitled to compensation under the schedule for a seven percent permanent disability of the right knee, based on the opinion of claimant's treating physician, Dr. Hubbard, who also stated that claimant's knee condition reached maximum medical improvement on August 10, 2001. *See* 33 U.S.C. §908(c)(2); Tr. at 4-5; CX 2 at 5-6. On January 11, 2002, the administrative law judge issued a decision awarding claimant temporary total disability benefits from May 4 to June 12, 2001, based on claimant's 2001 average weekly wage, and compensation for a seven percent permanent impairment of the right leg.

Subsequently, claimant's counsel filed an attorney's fee petition for \$2,460.90. Employer did not file any objections. The administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees totaling \$1,606.10. Employer filed a motion for reconsideration, and, in response, claimant's counsel filed a new fee petition for a fee of \$2,601.25 for services rendered from July 27, 2001 to March 15, 2002.

On reconsideration, the administrative law judge vacated his prior award of an employer-paid attorney's fee, and, in a Supplemental Decision and Order Denying Attorney Fees, found that claimant is not entitled to a such a fee under Section 28(b) of

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<sup>1</sup> The objectionable proposed wording stated, "That the claimant has incurred no other disability and no other loss of wage-earning capacity to date, beyond that reflected in these stipulations."

the Act, 33 U.S.C. §928(b). Claimant appealed, and the Board reversed the administrative law judge's denial of an employer-paid attorney's fee award under Section 28(b). *Eason v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0466 (Apr. 2, 2004)(unpub.). The Board held that employer's contingent offer to pay claimant an additional \$91.39 in compensation was not a "tender" within the meaning of Section 28(b). *Id.* at 4-5. Therefore, the Board held that because claimant had utilized the services of an attorney to obtain greater compensation, an additional \$91.39 in temporary total disability benefits, without having to accept the objectionable proposed stipulation, he had successfully obtained greater benefits than employer had paid, entitling claimant's counsel to an employer-paid attorney's fee. *Id.* at 5. Moreover, the Board held that claimant's counsel may be entitled to an employer-paid attorney's fee for time reasonably expended in obtaining a compensation award for the seven percent knee impairment. *Id.* at 6. Consequently, the Board remanded the case to the administrative law judge to reconsider the amount of the fee for which employer is liable.

On remand, the administrative law judge awarded claimant's counsel an attorney's fee of \$475 for obtaining disability benefits,<sup>2</sup> and of \$1,823.50 "in defense" of the claim for an employer-paid attorney's fee.<sup>3</sup> Employer appeals the fee award, and claimant responds, urging affirmance.

On appeal, employer argues that the administrative law judge erred in awarding claimant's counsel an employer-paid attorney's fee of \$1,823.50 for the defense of his entitlement to an employer-paid attorney's fee. Employer contends that it is not liable for a fee for this work because the attorney's fee is not "compensation" within the meaning of Section 28 of the Act.

We reject this contention, as it is contrary to law. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that employer is liable for an attorney's fee under the fee-shifting provisions of Section 28 of the Act where claimant succeeds in pursuing a petition for an attorney's fee, so as not to diminish the value of the fee eventually received. *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4<sup>th</sup> Cir. 2001); *see also Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7<sup>th</sup> Cir. 2003); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982).

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<sup>2</sup> The administrative law judge allocated \$250 of the fee to the temporary total disability award and \$225 of the fee to the permanent partial disability award. This fee award is affirmed as it is unchallenged on appeal.

<sup>3</sup> The services at issue were rendered between the issuance of the Decision and Order and Supplemental Decision and Order Denying Attorney Fees.

Moreover, we reject employer's contention that the administrative law judge abused his discretion in awarding a fee of over \$1,800 to defend a fee award of \$225. The fee claimant defended was \$475, not \$225, and, in addition, the administrative law judge specifically found that the services rendered in this regard were reasonable and necessary. *See* 20 C.F.R. §702.132; Attorney Fee Order at 3. It is employer's burden, as the challenging party, to establish that the administrative law judge abused his discretion and, on appeal, employer has failed to demonstrate such. *See, e.g., Maddon v. Western Asbestos Coal Co.*, 23 BRBS 55 (1989). Therefore, we affirm the administrative law judge's Attorney Fee Order.

Claimant's counsel has filed a petition for an attorney's fee of \$787.50 for work performed before the Board in this appeal, representing 3.5 hours of attorney services at \$225 per hour. Employer has not objected to the fee petition. We award counsel the requested fee, as it is reasonably commensurate with the necessary work performed in defending the fee award on appeal and as the hourly rate is consistent with that awarded in other cases in the Tidewater area. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004); 20 C.F.R. §802.203; *see also Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Accordingly, we affirm the administrative law judge's Attorney Fee Order. Claimant counsel is awarded an attorney's fee of \$787.50 for work performed before the Board, to be paid directly to counsel by employer.

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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BETTY JEAN HALL  
Administrative Appeals Judge