BRB No. 99-605

ROBERT C. USHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES OREGON STEVEDORING COMPANY	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Attorney's Fees of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Denying Attorney's Fees (93-LHC-2066) of Administrative Law Judge Edward C. Burch 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his knees in 1988 while working for employer. The injury aggravated pre-existing hip and knee conditions and resulted in three surgeries: left and right knee replacements and a total hip replacement.[1] Between January 1989 and December 1992, claimant traveled a total of 3,795 miles for his medical treatment. He filed a claim for reimbursement of his transportation costs, as well as of the cost of two continuous passive motion devices to exercise his knees, for a total of over $3,200. In a letter dated September 3, 1998, employer offered to pay claimant for the knee exercisers, if claimant could prove he paid for them, and to reimburse his mileage at the rate in effect at the time the mileage was incurred, plus interest. Claimant rejected the offer and continued with formal proceedings.

The administrative law judge noted that employer reiterated its offer at the hearing. In his decision dated December 22, 1998, the administrative law judge stated that, based on the previous decision in this case, employer is liable for all reasonable and necessary medical treatment, including the exercisers and the traveling costs. However, as claimant could not provide proof of payment for the exercise devices, his request for reimbursement was denied. Decision and Order/Transp. at 4. With regard to the transportation costs, the administrative law judge found that employer is liable for mileage at the rates then in effect, plus interest. *Id.* at 5.

Following this decision, claimant's counsel submitted a petition for an attorney's fee for work performed between June 1, 1998, and February 1, 1999, amounting to six hours at an hourly rate of $200, plus ½-hour at an hourly rate of $75, for a total fee of $1,237.50. Employer objected to the hourly rate of $200 and to all charges for work performed on or after September 3, 1998. In the decision which is the basis of this appeal, the administrative law judge determined that a fee in this case is governed by Section 28(b) of the Act, 33 U.S.C. §928(b). Order Denying Attorney's Fees at 1. He found that employer's September 3, 1998, offer constituted a "tender" under Section 28(b), and, consequently, as claimant rejected the offer and failed to obtain additional benefits by proceeding to trial, employer is not liable for a fee for work performed after September 3, 1998. Additionally, the administrative law judge concluded that Section 28(b) relieves employer of liability

[1]As a result of this injury, claimant obtained permanent total disability benefits from July 17, 1992, and continuing, and medical benefits. *Usher v. Jones Oregon Stevedoring* Co., BRB Nos. 96-469/A (Nov. 20, 1996), *aff'd mem.*, 152 F.3d 931 (9th Cir. July 7, 1998) (table).

for work performed prior to the date of the tender, despite the fact that employer did not object to this time. *Id.* at 2. Claimant appeals the denial of the fee, and employer responds, urging affirmance.

Claimant puts forth three reasons why he believes employer should be liable for the fee. First, he argues that fee liability in this case is grounded in Section 28(a), 33 U.S.C. §928(a), rather than Section 28(b), asserting that there was an original controversy, employer refused to pay the requested amount and employer is now paying benefits pursuant to an award. This contention is rejected, as Section 28(a) applies where employer refuses to pay any benefits, and here, employer was paying disability and medical benefits under the initial decision at the time the new controversy arose. Thus, Section 28(b) applies. *See Hawkins v. Harbert International, Inc.*, 33 BRBS 198, 203 (1999).

Next, claimant contends the September 1998 offer was not complete, as it did not address payment for a reasonable attorney's fee. In order to escape liability under Section 28(b), however, an employer or carrier must tender the payment of disputed disability or medical benefits. Where the claimant rejects such an offer, the employer is liable for a fee only to the extent that the claimant obtains additional benefits. There is nothing in Section 28(b) supporting the proposition that the fee itself must be included in the offer, particularly since the tendered amount is one which is compared with the ultimate award to determine whether the claimant obtained more than was offered. Assessment of the attorney's fee is a task undertaken after benefits have been established; the amount of benefits awarded is relevant to the amount of the fee. *See* 20 C.F.R. §702.132. Therefore, we reject claimant's contentions that the tender offer by employer was incomplete.

Claimant's final contention has merit. Claimant contends the administrative law judge erred in denying him an employer-paid fee for work performed prior to receipt of the tender. He asserts that the administrative law judge erred in applying *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), *decision after remand*, 22 BRBS 316 (1989), to deny the fee in its entirety rather than denying only those services performed subsequent to employer's tender offer. Claimant argues that the rule in *Armor* must be clarified by explaining whether an employer is liable for a fee for work performed prior to the tender of payment and, if so, whether such liability extends to the date of the tender or to the date the tender is received by the claimant.

Armor provides that an offer to settle a claim is a tender of compensation under Section 28(b), and a "tender" demonstrates the employer's "readiness, willingness and ability . . . expressed in writing," to make the payment of

compensation. *Armor*, 19 BRBS at 122. *Compare Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993) (counsel's willingness to recommend a settlement to client employer is not a tender); *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.,* 23 BRBS 376 (1990) (oral stipulation is not a tender). In *Armor*, the employer made two lump sum offers to the claimant, both of which were made while the case was before the district director. After the claimant rejected both offers, the case was transferred to the Office of Administrative Law Judges and formal adjudication followed. *Armor*, 19 BRBS at 120. Because the amount ultimately awarded was less than the amount of the second offer, the Board vacated the administrative law judge's assessment of an attorney's fee against the employer and remanded the case for him to consider a fee payable by the claimant. *Id.* at 122-123. In the present case, the offer was made while the case was before the administrative law judge; indeed, it occurred one month before the hearing. Thus, claimant argues he is entitled to an attorney's fee payable by employer at least until the time he received the tender.

In *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 299 (1984), the Board held that where the parties signed a stipulation at the hearing which resolved the controversy, the employer remained liable for work performed prior to such agreement. In *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 836 (1982), the claimant underwent several audiometric evaluations, one of which revealed a 25.3 percent binaural impairment. The employer paid benefits for a lesser impairment. Four days before the hearing, the employer made a second payment. The total of the two payments constituted full compensation for the claimant's 25.3 percent binaural impairment, which was the full loss the administrative law judge later determined the claimant had sustained. *Id.* at 835-836. The Board reversed the administrative law judge's award of a fee for work performed after the second payment, as the claimant did not obtain additional compensation, but it held that the employer was liable for an attorney's fee for work performed up to the date of the second payment. *Id.* at 836.

Relying on the rationale of *Kleiner* and *Byrum*, and on the fact that employer did not object to liability for a fee for work performed prior to the tender of payment, we hold that the administrative law judge in this case erred in denying counsel a fee for work performed prior to September 3, 1998.[2] *Kleiner*, 16 BRBS at 299; *Byrum*, 14 BRBS at 836. As claimant could not have accepted or rejected an offer he knew

[2]It is well-settled that any objections to a fee which are not raised before the administrative law judge are waived. *See, e.g., Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). The administrative law judge thus erred in raising for employer the argument that it is not liable for a pre-tender fee.

nothing about, the logical date for terminating employer's liability for the fee is the date on which claimant *received* the written tender. Thus, we hold that if an employer tenders payment of compensation and the claimant rejects the offer and later fails to obtain additional compensation, the employer is not liable for an attorney's fee for work performed after the date on which the claimant received the tender offer. Therefore, we reverse the administrative law judge's decision that claimant is not entitled to any fee payable by employer, and we remand the case for further consideration. Specifically, the administrative law judge must determine when claimant received the tender, and award claimant's counsel a reasonable fee for work performed through that date, addressing employer's remaining objections.

Accordingly, the administrative law judge's Order Denying Attorney's Fees is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge