

CLIFFORD SLIGHTOM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MAINTENANCE AND	)	DATE ISSUED: <u>MAR 8, 2004</u>
REPAIR	)	
	)	
and	)	
	)	
FRANK GATES ACCLAIM	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order – Granting Attorney Fees of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Joseph E. Hoefert (Hoefert and Perica, P.C.), Alton, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Granting Attorney Fees (2000-LHC-1670) 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). 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On November 8, 1994, claimant sustained injuries to his left and right upper extremities while working for employer. Claimant returned to light duty work for employer in June 1997, after undergoing several surgeries. Employer voluntarily paid claimant temporary total disability benefits from March 28, 1995, to June 10, 1997, and from June 16 to 26, 1997, and permanent partial disability benefits for an 11 percent impairment to each upper extremity. 33 U.S.C. §908(b), (c)(1); Emp. Notice of Final Payment dated April 4, 2000, attached to Emp. Br. In his decision, Administrative Law Judge Mosser awarded claimant temporary total disability benefits from March 28, 1995, through June 25, 1997, and permanent partial disability benefits thereafter for an 18 percent impairment to his left upper extremity and a one percent impairment to his right upper extremity. The Board subsequently affirmed the award of permanent partial disability benefits over claimant's challenge. *Slightom v. Nat'l Maint. & Repair*, BRB No. 01-0710 (May 23, 2002)(unpub.). Both employer and claimant concede that the only disputed issue before the administrative law judge in this case was the extent of claimant's permanent disability to his right and left upper extremities.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$3,458.45, representing 21.1 hours of attorney services at \$150 per hour and including \$303.45 in expenses. Employer objected to its liability for the fee, to which claimant responded. In his Supplemental Decision and Order-Granting Attorney Fees, Administrative Law Judge Roketenetz (the administrative law judge)<sup>1</sup> held employer liable for the attorney's fee, and awarded counsel the fee in its entirety.

On appeal, employer challenges the administrative law judge's finding that it is liable for claimant's attorney's fee. Claimant's counsel responds in support of the fee award, to which employer replies.

Employer argues that it is not liable for the administrative law judge's fee award as the only disputed issue was claimant's entitlement to permanent partial disability benefits and it voluntarily paid claimant more permanent partial disability benefits than the administrative law judge awarded. 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 only if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. See *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT)(9<sup>th</sup> Cir. 2003); *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT)(1<sup>st</sup> Cir. 1998); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT)(5<sup>th</sup> Cir. 1997).

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<sup>1</sup> Judge Roketenetz issued the decision awarding attorney's fees in this case because Judge Mosser had retired.

We agree with employer that it cannot be held liable for claimant's attorney's fee, as claimant did not obtain greater compensation than employer voluntarily paid. The administrative law judge awarded claimant permanent partial disability benefits totaling \$14,857.94, for an impairment of 18 percent to the left upper extremity and one percent to the right upper extremity. Employer voluntarily paid claimant \$17,401.58 for an 11 percent impairment of each upper extremity. *See* Emp. Notice of Final Payment dated April 4, 2000, attached to Emp. Br. While claimant's counsel's cross-examination of Dr. Brigham resulted in Dr. Brigham's increasing the impairment ratings to 18 percent to the left upper extremity and one percent to the right upper extremity from his initial assessment of 13 percent and zero percent respectively, claimant did not obtain greater compensation by virtue of this change in Dr. Brigham's opinion. Thus, as claimant did not receive greater compensation than employer voluntarily paid before the case was referred to the administrative law judge, claimant's counsel is not entitled to a fee payable by the employer pursuant to Section 28(b) for work performed before the administrative law judge. We therefore reverse the assessment of the attorney's fee against employer. *See Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Barker*, 138 F.3d 431, 32 BRBS 171(CRT); *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT).

Accordingly, the administrative law judge's Supplemental Decision and Order – Granting Attorney Fees is reversed.

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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PETER A. GABAUER, Jr.  
Administrative Appeals Judge