

BRB No. 01-0237

CINDY WOODS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LOUIS DREYFUS CORPORATION)	DATE ISSUED: <u>10/29/01</u>
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	
)	
CRAWFORD AND COMPANY)	
)	
Claims Servicing Agent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Decision on Claimant's Request for Reconsideration and Order on Motion for Reconsideration of Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Gregory A. Bunnell and Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier and claims servicing agent.

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

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorney's Fees and Decision on Claimant's Request for Reconsideration and Order on Motion for Reconsideration of Attorney's Fees (99-LHC-3010) of Administrative Law Judge Alfred Lindeman 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 law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her right ankle on August 14, 1995. Tr. at 34. She underwent two surgeries and continued to have problems with her ankle. Employer paid periods of temporary total and temporary partial disability benefits, as well as permanent partial disability benefits for a 20 percent foot impairment. The parties agreed that claimant is entitled to temporary total disability compensation from August 23, 1995, to July 6, 1996, and from May 27, 1998, to January 4, 1999, and to temporary partial disability compensation from July 7, 1996, to April 19, 1997. The parties disagreed over amounts owed during several other periods. For the disputed period from April 20, 1997, to May 26, 1998, the administrative law judge awarded claimant temporary partial disability compensation.¹ The administrative law judge also awarded claimant benefits for an 11 percent impairment of the foot under Section 8(c)(4), (19) of the Act, 33 U.S.C. §908(c)(4), (19), amounting to 22.55 weeks of compensation at a weekly rate of \$673.75, or \$15,193.06. The administrative law judge determined, however, that employer had "advanced" \$27,310.10, or 41 weeks of compensation at \$661.10 per week, based on a 20 percent impairment rating, EX 24A. Decision and Order Awarding Benefits at 10-11. The administrative law judge directed the district director to perform the necessary calculations, and allow employer a credit for payments previously made. *See* 33 U.S.C. §914(j). In a June 19, 2000, letter, the district director wrote that as a result of the administrative law judge's decision, employer owed claimant \$26,805.10. *See* Employer's Brief at Ex. E. Thus, employer's prior payment of permanent partial disability benefits completely offset its liability. The administrative law judge's findings are not challenged on appeal.

¹Claimant also was awarded an additional \$7.65 per week for temporary total disability from August 23, 1995 to July 6, 1996, and from May 27, 1998 to January 4, 1999, and for temporary partial disability from July 6, 1996 to April 17, 1997.

Subsequently, claimant's counsel requested an attorney's fee for work performed between January 20, 1999, and June 23, 2000, representing 79.875 hours of work, ranging from \$175 to \$225 per hour, for a total of \$15,950, and \$930.10 in expenses. Employer objected to the hourly rates charged, to "block billing," and to a \$500 charge for a scheduled and subsequently cancelled deposition of Dr. Beaman. In the same document, employer also responded to claimant's motion for reconsideration of the administrative law judge's calculation of temporary partial disability compensation, stating that claimant's motion was merely an attempt to "find some 'additional compensation' for the claimant, so that claimant's attorney can be successful in his attorney fee application. In point of fact, claimant's attorney has not been successful beyond what the employer already paid out to the claimant." Emp. Obj. and Response, July 31, 2000. Claimant responded to employer's objections, and requested an additional \$400 for two hours spent responding to employer's objections.

In a Supplemental Decision and Order Awarding Attorney's Fees and Decision on Claimant's Request for Reconsideration, the administrative law judge denied claimant's motion for reconsideration, but found that based on the result achieved, the quality of the representation, and the relative complexity of the issues, the requested hourly rates were reasonable and commensurate with rates in the geographic area, that the block billing in this case was not objectionable, and that the \$500 fee for a cancelled deposition of claimant's treating physician was a reasonable litigation cost. He accordingly awarded counsel a fee of \$15,950, and \$903.10 in expenses, and an additional \$200 for the time responding to employer's objections to the fee petition, payable by employer.² In response to employer's motion for reconsideration of the fee award, the administrative law judge rejected employer's contention that it is not liable for claimant's attorney's fee because employer had not "tendered" additional compensation to claimant.

Employer appeals, contending that claimant is not entitled to an attorney's fee because employer made voluntary payments and claimant did not receive greater compensation benefits as a result of the administrative law judge's order than employer had already paid. In the alternative, employer argues that the fee awarded is not commensurate with claimant's degree of success, as the percentage of impairment upon which the administrative law judge awarded compensation is much closer to the 11 percent urged by employer's expert than the 30-45 percent proposed by claimant's physician. Claimant responds, urging affirmance of the award of an attorney's fee. Employer replies, arguing that there was no successful

²The administrative law judge denied \$200 for services rendered relating to claimant's unsuccessful motion for reconsideration.

prosecution in this case within the meaning of Section 28(b) of the Act.

Inasmuch as employer initiated the voluntary payment of compensation in this case, the issue of employer's liability for an attorney's fee is governed by Section 28(b), 33 U.S.C. §928(b). Under Section 28(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 if the claimant succeeds in obtaining greater compensation than that which employer paid or tendered. *See, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir.1998). When, however, claimant does not obtain greater compensation than that paid or tendered, employer is not liable for claimant's attorney's fee. *See, e.g., Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997). Contrary to the administrative law judge's statement in his denial of employer's motion for reconsideration, that employer did not "tender" compensation to claimant is of no import in this case. Employer actually *paid* claimant compensation, and claimant, by virtue of the administrative law judge's award, did not recover benefits in excess of those which employer voluntarily paid.³ Thus, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). *See Barker v. United States Dept. of Labor*, 138 F.3d 431, 32 BRBS 177(CRT)(1st Cir. 1998).

Claimant argues that even if she is not entitled to additional compensation presently, she will be able to receive an award in the future should she again be taken off work or have to have further surgery, due to the fact that the increased benefits she received reduced employer's credit under Section 14(j), citing *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)(9th Cir. 1993). Claimant also contends that the administrative law judge's award preserves her right to seek compensation in the future.

³In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986), the Board held that a "tender" of compensation pursuant to Section 28(b) means "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . payment to the claimant." The Board therefore held that payment of compensation and a tender of compensation were not synonymous. Thus, there is no basis for the administrative law judge's requirement in the instant case that employer's avoidance of fee liability must be predicated on a tender of compensation when employer in fact actually paid compensation.

We reject claimant's contentions, and reverse the administrative law judge's award of an attorney's fee payable by employer. The fact claimant may be entitled to benefits at some undetermined time in the future does not provide a basis for present success under Section 28(b). In *E.P. Paup*, the claimant was awarded ongoing total disability benefits. Due to the State of Washington's exclusion from its workers' compensation law those persons covered under the Longshore Act, the employer was not entitled to credit the payments it made to the claimant under state law against its liability to the claimant under the Longshore Act, pursuant to Section 3(e), 33 U.S.C. §903(e). The claimant thus obtained an inchoate right to those benefits for which employer had previously taken credit. This right supported a finding of employer's liability for claimant's attorney's fee pursuant to Section 28(b). *Id.*, 999 F.2d at 1350, 27 BRBS at 57(CRT). In the instant case, however, claimant has not obtained any inchoate rights. There is no current potential for claimant to recover compensation in excess of the existing credit, because she did not obtain an ongoing disability award. Although claimant has the right to seek modification pursuant to Section 22, 33 U.S.C. §922, within the time frames established by that section, her entitlement to additional benefits is purely speculative. *See Barker*, 138 F.3d 431, 32 BRBS 171(CRT). Thus, employer's voluntary payment of compensation in excess of the liability determined by the administrative law judge absolves employer of liability for claimant's attorney's fee.⁴ Inasmuch as Section 28(b) does not authorize an attorney's fee award against employer, the administrative law judge's finding that employer is liable for claimant's attorney's fee is reversed.

Accordingly, the administrative law judge's award of an attorney's fee payable by employer is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁴In the event that claimant one day obtains additional compensation in excess of employer's credit, claimant may receive an attorney's fee for any work necessary to and reasonable for the achievement of that compensation award, including the necessary services performed in this case.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge