

BRB No. 92-2368

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| RALPH SIRIANNI |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| PORT OF PORTLAND |) | DATE ISSUED: |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order, Amended Decision and Order on Reconsideration and Order Awarding Attorney Fees, and Amended Decision on Granting Employer's Motion for Reconsideration of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Sheri B. Greenbaum (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order, the Amended Decision and Order on Reconsideration and Order Awarding Attorney Fees, and the Amended Decision on Granting Employer's Motion for Reconsideration (91-LHC-671) of Administrative Law Judge Ellin M. O'Shea 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 findings of fact and conclusions of law of the administrative law judge 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 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 April 25, 1989, claimant, a supervisor for employer, injured his right leg and knee. Dr.

Gambee, an orthopedic surgeon, performed an arthroscopic partial medial and partial lateral meniscectomy on June 15, 1989. Claimant was released to return to work on July 19, 1989. Employer voluntarily paid claimant temporary total disability compensation from June 15, 1989 to July 21, 1989, at the maximum rate of \$636.24, for a total of \$3,362.98. Employer also voluntarily paid claimant \$13,742.78 in permanent partial disability compensation for a 7.5 percent permanent physical impairment of the right knee. *See* 33 U.S.C. §908(c)(2), (19). After performing a closing examination at claimant's attorney's request on June 7, 1990, Dr. Gambee rated claimant's impairment under a descriptive word percentage index provided by counsel as "mild."¹ Claimant filed a claim under the Act, seeking compensation for a 20 percent permanent physical impairment.

The parties attended an informal conference on September 26, 1990. In his Memorandum of Informal Conference issued on October 1, 1990, the district director recommended that the parties compromise on a 12 percent scheduled permanent partial disability, which would result in claimant's receiving \$21,988.45 in compensation. After employer failed to respond to the district director's recommendation, the case was referred at claimant's request to the Office of Administrative Law Judge for a formal hearing on December 11, 1990.

On January 6, 1991, claimant was evaluated at employer's request by Dr. Vessely, who after reviewing Dr. Gambee's findings and conducting an examination, rated claimant's leg impairment at 10 percent. On January 25, 1991, Dr. Vessely's report was forwarded to Dr. Gambee who indicated his agreement with Dr. Vessely's rating on January 31, 1991. Thereafter, on May 23, 1991, employer's attorney wrote to claimant's counsel, indicating that he was authorized to offer to settle the matter for a total of \$21,088.45, less the permanent partial disability payments previously made and an attorney's fee. Claimant rejected this offer, and the case proceeded to a formal hearing on July 16, 1991. Meanwhile, on July 1, 1991, Dr. Gambee indicated in a letter written to claimant's attorney that after further review of claimant's records, he had done claimant a modest disservice in agreeing with Dr. Vessely's disability rating and that his earlier estimation of mild impairment with a high end of 20 percent was correct and consistent with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d. edition 1988) (*AMA Guides*) and the American Academy of Orthopedic Surgeons' schedule.

The administrative law judge awarded claimant compensation for a 10 percent permanent physical impairment under Section 8(c)(2), (19), for a total of \$18,323.71 plus interest, subject to a credit for the \$13,742 in voluntary payments which claimant had previously received. Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting \$4,875.00 for 24 and 7/8 hours of services at \$175 per hour before July 1, 1991, and \$200 per hour after July 1, 1991, plus \$144.50 in expenses. Employer filed objections to the fee request, and claimant responded. In her award, the administrative law judge reduced the hourly rate sought to \$150, but found that the fee request was otherwise reasonable and held employer liable for a total fee of

¹The descriptive word percentage index rated a "mild" impairment at 10 to 20 percent, and claimant asserts that the index was based on the American Academy of Orthopedic Surgeons' schedule.

\$3,875, representing 24 and 7/8 hours at \$150 plus \$79.50 in expenses. Thereafter, she modified her prior fee award to reflect that employer was only liable for those fees incurred prior to employer's May 23, 1991, tender of compensation. Accordingly, she awarded claimant's counsel a fee of \$318.75 for the 2 and 1/8 hours of services performed prior to May 23, 1991, at \$150 per hour, plus \$79.50 in expenses payable by employer. Inasmuch as claimant's counsel had not requested assessment of the requested fee against claimant, and it was not clear whether claimant had been served with a copy of the fee petition or knew of his right to file comments on and objections to any such request, the administrative law judge indicated that she would take no further action on counsel's fee request.

On appeal, claimant challenges both the administrative law judge's finding that he sustained only a 10 percent permanent physical impairment and her finding that employer's fee liability terminated as of May 23, 1991. Employer responds, urging affirmance.

After review of the administrative law judge's Decisions and Orders in light of the record before us, the compensation award for a 10 percent permanent physical impairment under Section 8(c)(2), (19) is affirmed. Claimant argues that in making this determination, the administrative law judge erred in relying solely on the *AMA Guides* and in failing to recognize the American Academy of Orthopedic Surgeons' rating system employed by Dr. Gambee. We note, however, that the administrative law judge correctly recognized that in determining the extent of claimant's physical impairment she was not bound by the *AMA Guides*. See *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). Moreover, the administrative law judge discredited Dr. Gambee's 20 percent assessment, not because of the rating system under which it was made, but rather because she found his opinion to be undocumented and unreasoned; she noted that he failed to identify the medical foundation for his opinions and neglected to adequately explain his change in opinion from his earlier agreement with Dr. Vessely's 10 percent disability rating. In contrast, the administrative law judge found Dr. Vessely's disability rating persuasive because he fully explained his methodology and the objective medical basis for his impairment rating, and testified that it would compute to 10 percent under any medically recognized system. Although claimant argues that the administrative law judge erred in failing to accord determinative weight to Dr. Gambee's opinion in light of his status as claimant's treating physician, we disagree. The administrative law judge is free to accept or reject all or any part of any testimony according to her judgment. See generally *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990)

We also reject claimant's arguments that the administrative law judge failed to apply the *AMA Guides* correctly because she relied on Dr. Vessely's 10 percent impairment rating and Dr. Vessely neglected to consider claimant's subjective complaints or to rate claimant's ligament instability, his retropatellar crepitation and patella pain, or his pre-existing varus condition of the right knee. Although, as previously discussed in determining the extent of claimant's disability under the schedule, the administrative law judge was not required to apply the *AMA Guides*, see *Pimpinella*, 27 BRBS at 159 n.9, she accurately determined that Dr. Vessely had considered each of the objective medical factors cited by claimant in assessing the extent of claimant's disability but

found that they were not of rateable significance.² While Dr. Vessely testified that he did not rate claimant's subjective complaints, we conclude that his failure to do so is harmless because the administrative law judge did consider this factor in assessing the extent of claimant's disability.³ After considering claimant's testimony and that of his wife regarding his symptoms and the physical effects of his injury, the administrative law judge, however, rationally characterized this testimony as self-serving puffing for the purpose of litigation because it was inconsistent with claimant's representations to Dr. Gambee, with his daily life activities including his ability to perform his usual job an average of more than forty hours per week, and his failure to seek further medical attention. Decision and Order at 8; Emp. Ex. 10; Tr. at 49-54, 59-63; *see generally Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). Inasmuch as the medical opinion of Dr. Vessely provides substantial evidence to support the administrative law judge's finding that claimant has a 10 percent permanent physical impairment of the right knee, and claimant has failed to raise any reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations, her award of compensation is affirmed. *See Pimpinella*, 27 BRBS at 157; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Claimant also challenges the administrative law judge's finding that employer is not liable for attorney's fees and expenses rendered subsequent to May 23, 1991, when employer tendered its offer to settle the claim based on a 12 percent permanent physical impairment. Claimant asserts that inasmuch as employer did not comply with Section 28(b), 33 U.S.C. §928(b), by paying or tendering in writing the additional compensation to which it believed claimant was entitled within fourteen days of the district director's written recommendation following the informal conference, the administrative law judge erred in terminating employer's fee liability as of May 23, 1991.

Claimant's argument is without merit. While Section 28(b) states that employer should pay or tender payment within 14 days after its receipt of the district director's recommendation, the issuance of the district director's recommendation is not required to establish employer's liability, as employer may be liable even if the district director does not issue a recommendation. *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). In light of the Ninth Circuit's decision in *National Steel & Shipbuilding Co.*, the Board has held that references in Section 28(b) to informal conferences and other procedures are to be viewed

²Although Dr. Vessely considered claimant's varus deformity mild and not of a rateable degree pursuant to the *AMA Guides*, he testified that if it were includable he would rate it at 1 to 2 percent, which when added to the 5 to 6 percent impairment attributable to claimant's medial meniscus surgery and the 1 percent impairment attributable to the repair of claimant's lateral meniscus still amounts at most to a 10 percent impairment. Decision and Order at 6; Cl. Ex. 14; Tr. at 9, 10, 20, 38, 39, 41, 42.

³Under the same rationale, any error which the administrative law judge may have made in stating that pain and suffering is not compensable under the schedule is also harmless. Although a scheduled award may not be augmented to compensate claimant for pain and suffering as in a tort sense, *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985), pain which contributes to claimant's loss of use is clearly compensable. *See Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154, 158-159 (1993).

as guidelines rather than prerequisites. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180, 182 (1987). Thus, once employer pays or tenders the compensation to which it believes claimant is entitled and claimant is not subsequently successful in obtaining greater compensation, employer's fee liability terminates under Section 28(b) as of that date. *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991). Inasmuch as the amount tendered by employer on May 23, 1991, exceeded the amount ultimately awarded by the administrative law judge, the administrative law judge properly found that employer was not liable for additional fees incurred after that date. Inasmuch, however, as employer has conceded liability for an additional one-quarter hour of services contested by claimant on appeal, we modify the administrative law judge's fee award to reflect this concession. Employer is therefore liable for a fee of \$356.25, representing 2 and 3/8 hours of services at \$150 per hour, plus \$79.50 in expenses.

Accordingly, the administrative law judge's award of disability benefits as set forth in her Decision and Order and Amended Decision and Order on Reconsideration and Order Awarding Attorney Fees is affirmed. The administrative law judge's Amended Decision on Granting Employer's Motion for Reconsideration is modified to reflect employer's liability for an additional one-quarter hour fee consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge