

WAYNE JACKSON	)	BRB No. 03-0629
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: <u>12/20/04</u>
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
PHILLIP ATKINS	)	BRB No. 03-0651
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	ORDER on MOTION
Employer-Respondent	)	for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board’s decision in the captioned cases, *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Claimants respond in support of the Board’s decision. We deny claimants’ motion to dismiss employer’s motion for reconsideration. The legislation requiring the Board to issue a decision within one year of an appeal’s being filed does not divest the Board of jurisdiction to address a timely motion for reconsideration filed after the one-year period. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9<sup>th</sup> Cir. 1998).

In its decision, the Board held that in order for a “tender” to be valid pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), such that employer can avoid fee liability, it must be “an offer to pay, expressed in writing, without any conditions attached thereto.” *Jackson*, 38 BRBS at 42. As employer’s purported tenders were conditioned on claimants’ accepting a stipulation, the Board held that employer did not tender compensation within the meaning of Section 28(b). In *Jackson*, the Board affirmed the administrative law judge’s award of an attorney’s fee payable by employer. *Id.* The

Board reversed the administrative law judge's denial of an employer-paid fee in *Atkins*, and the case was remanded for the administrative law judge to determine the amount of an appropriate fee. *Id.*

In its motion for reconsideration, employer contends that the Board's decision is contrary to its unpublished decisions in *Boyd v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0607 (May 22, 2003), and *Jenkins v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0870 (Aug. 8, 2002).<sup>1</sup> We reject employer's contention, as *Boyd* and *Jenkins* are factually distinguishable from the cases now before the Board and employer has not established through citation to these cases that the Board's decision is in error.<sup>2</sup> Therefore, employer's motion for reconsideration is denied. 20 C.F.R. §802.409.

Claimants' counsel has filed petitions for an attorney's fee in each case. In *Jackson*, claimant's counsel has filed an itemized fee petition for 3.52 hours of attorney services at \$225 per hour and 5.25 hours of attorney services at \$160 per hour, for a total of \$1,632.<sup>3</sup> Employer objects to its liability for an attorney's fee, to the amount of the requested fee in light of the benefits awarded and the issue involved, to the hourly rate, to the specificity of the fee petition, and to specific entries.

We reject employer's contention that it is not liable for an attorney's fee. Employer appealed the administrative law judge's fee award of \$3,000 and the Board affirmed this award. Thus, claimant is entitled to an employer-paid attorney's fee. *See, e.g., Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). Section 28(b) states, "If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel . . ." *See Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4<sup>th</sup> Cir. 2001).

Employer next objects to the amount of the fee request in view of the amount of the attorney's fee at stake and the alleged lack of novelty. Contrary to employer's

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<sup>1</sup> The Board issued a subsequent decision in the *Jenkins* case. *Jenkins v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 03-0569/A (May 5, 2004).

<sup>2</sup> In *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2. (1990), the Board stated, "The Board regards its unpublished Decisions and Orders as lacking precedential value. Therefore, unpublished Board decisions generally should not be cited or relied upon by the parties in presenting their cases." The unpublished cases cited by employer in support of its motion for reconsideration demonstrate the soundness of this principle, as the Board's decisions therein are based on specific facts, whereas the decision in *Jackson* resolved an issue of law. That unpublished cases are more readily available does not lessen the validity of the Board's statement in *Lopez*.

<sup>3</sup> Counsel incorrectly totaled this as \$1,710.75.

contention the fee request is not disproportionate to claimant's full success on appeal, *see Hensley v. Eckerhart*, 461 U.S. 424 (1983), and moreover, the issue addressed by the Board was one of first impression. We also reject employer's contention that an hourly rate of \$225 is excessive. Claimant's counsel was recently awarded a fee based on this hourly rate by the United States Court of Appeals for the Fourth Circuit, *see Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004), and the rate requested is commensurate with the reasonable and customary rate in the geographic area. 20 C.F.R. §802.203(d)(4).

Employer contends that counsel's fee petition is insufficiently specific as to the work performed and objects to the 4.5 hours spent by a second attorney in counsel's firm who reviewed the file and wrote the brief.<sup>4</sup> Counsel's fee petition is sufficiently specific to satisfy the regulation at 20 C.F.R. §802.203(d) except for the entry on August 8, 2003, that says only "Receive and Review." We disallow the \$112.50 charge for this entry. Counsel has not billed for any duplicative services, and therefore there is nothing objectionable to more than one attorney working on the case. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4<sup>th</sup> Cir. 1999)(table). We award claimant's counsel an attorney's fee in *Jackson* in the amount of \$1,519.50, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Claimant's counsel filed a fee petition in *Atkins*, seeking a fee of \$3,736, representing 4.76 hours of attorney services at \$225 per hour, 15 hours of attorney services at \$175 per hour, and one-half hour of paralegal services at \$80 per hour. The parties subsequently informed the Board that they have reached an agreement on an attorney's fee of \$2,875. The Board finds this fee to be reasonable for the work performed and in view of the results obtained. Therefore, in *Atkins*, we award claimant's counsel a fee of \$2,875, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

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<sup>4</sup> We observe that employer's objection to the fee petition does not accurately discuss the fee petition at issue, as employer's brief contains references to entries not in counsel's fee petition, such as "multiple entries to counsel, physicians . . ." and complains of seven hours' being spent on the brief when only 4.25 hours of such activity were billed.

Accordingly, employer's motion for reconsideration is denied and the Board's decision is affirmed. 20 C.F.R. §802.409. Claimants' counsel is awarded a fee of \$1,519.50 in *Jackson* and of \$2,875 in *Atkins*.

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