

BRB No. 92-2121A

ROBERT CASTELLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STATEN ISLAND OPERATING	)	DATE ISSUED:
COMPANY	)	
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James R. Campbell, New York, New York, for claimant.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (89-LHC-1261) of Administrative Law Judge Gerald M. Tierney 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).<sup>1</sup> 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 January 30, 1987, claimant sustained an injury to his right side when he slipped on ice and snow while working for employer. Employer voluntarily paid claimant compensation from

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<sup>1</sup>Claimant's appeal, BRB No. 92-2121, was dismissed by the Board at his request by Order dated December 29, 1992.

January 30, 1987, until June 19, 1992, the date of the administrative law judge's Decision and Order. As of the time of the hearing, the only issue was whether claimant's permanent disability was total or partial. The administrative law judge awarded claimant temporary total disability compensation from January 30, 1987, through January 12, 1989, based upon the stipulated average weekly wage of \$809.64, and \$379.76 per week in permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(21) thereafter, based on his determination that claimant had a post-injury wage-earning capacity of \$240 per week.

Claimant's counsel submitted a fee petition to the administrative law judge, requesting \$11,000, representing 28.5 hours of services at an hourly rate of \$250 and \$3,875 in expenses. Employer objected to the fee petition, arguing that it should not be held liable for counsel's fee because he was unsuccessful in his prosecution of the permanent total disability claim. Moreover, employer noted that, although it took the position that claimant had a permanent partial disability effective September 3, 1988, which justified a reduced compensation rate of \$395.31, it nevertheless continued to pay claimant at the higher temporary total disability rate through the date of the administrative law judge's Decision and Order. Employer concludes that, thus, claimant did not obtain benefits exceeding those it voluntarily paid. Claimant's counsel objected to employer's position in a letter dated July 8, 1992.

In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge found employer's fee liability arguments unpersuasive, and awarded claimant's counsel a fee of \$11,000 payable by employer. Employer appeals the administrative law judge's fee award, reiterating the fee liability arguments it made below. Employer further contends that although the administrative law judge relied on the fact that employer did not stipulate to permanent partial disability in holding it liable for counsel's fee, his Decision and Order awarding benefits belies this finding because it states that the only unresolved issue was whether claimant had a permanent partial or permanent total disability. Claimant responds that since employer vigorously litigated the issue of whether claimant was entitled to any disability benefits, the administrative law judge's determination that employer is liable for claimant's attorney's fees should be affirmed. Claimant further responds that because employer never stipulated at the hearing that claimant had a permanent disability and his counsel was successful in establishing his right to a continuing permanent partial disability award, this inchoate right to compensation for life constitutes additional compensation sufficient to support a finding of fee liability under 33 U.S.C. §928(b).<sup>2</sup> Claimant's Counsel's Brief at 2-3.

We agree with employer that the administrative law judge erred in holding it liable for claimant's attorney's fee. We need not address employer's arguments relating to fee liability under

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<sup>2</sup>Claimant's counsel also stated that employer had unilaterally reduced claimant's temporary total disability payments on September 3, 1988 without a court order. Although there was temporary reduction in benefits made by employer on August 29, 1988, which would have been effective on September 3, 1988, the payments of compensation at the temporary total rate of \$539.76 were reinstated and current as of the date of referral and remained so through the issuance of the administrative law judge's Decision and Order.

Section 28(a), 33 U.S.C. §928(a), because the case at bar is governed by Section 28(b). Under Section 28(b) when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, employer will be liable for an attorney's fee if the claimant succeeds in obtaining additional compensation greater than that voluntarily paid or agreed to by employer. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Claimant correctly asserts the nature and extent of claimant's disability were controverted by employer up through the time of the hearing as reflected in its pre-hearing statement. Employer's payment of compensation, however, did not reflect this controversy; it voluntarily paid claimant at the temporary total disability compensation rate at all times prior to the administrative law judge's Decision and Order. Inasmuch as employer voluntarily paid claimant at all times prior to the administrative law judge's Decision and Order at a rate equal to or greater than that ultimately awarded, and employer conceded that claimant was at least permanently partially disabled at the hearing, Transcript at 5, claimant did not obtain greater compensation than that which employer paid or agreed to pay. The administrative law judge's determination that employer is liable for claimant's attorney's fees is therefore reversed. *See Flowers v. Marine Concrete Systems*, 19 BRBS 162, 164 (1986); *Henley v. Lear Siegler, Inc.*, 14 BRBS 970, 972 (1982).

In light of our determination that employer is not liable for claimant's attorney's fee, the fee awarded by the administrative law judge must be vacated, and the case must be remanded for the administrative law judge to consider whether the fee should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §908(c). Under such circumstances, the administrative law judge must take into account the financial circumstances of the claimant. *See* 20 C.F.R. §702.132(a). *See generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. February 26, 1980), *amended*, (D.C. Cir. March 31, 1980).

Accordingly, the administrative law judge's determination that employer is liable for claimant's attorney's fee is reversed. The Supplemental Decision and Order Granting Attorney Fees is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge