BRB No. 03-0466

| | | |
|---|---|---|
| CHARLES R. EASON | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: April 2, 2004 |
| | ) | |
| | ) | |
| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Denying Attorney Fees and the Order on Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees and the Order on Reconsideration (2001-LHC-2783, 2874) of Administrative Law Judge Richard E. Huddleston 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Employer voluntarily paid claimant temporary total disability, 33 U.S.C. §908(b), from May 4 to June 12, 2001, based on claimant's average weekly wage on August 30, 1995, the date claimant sustained a work-related right knee injury. Claimant subsequently asserted that the period of temporary total disability was caused by a new work-related right knee injury on April 6, 2001, and that he is therefore entitled to an additional $91.39 in compensation based on his average weekly wage as of April 6, 2001. On June 12, 2001, an informal conference was held to resolve the cause of claimant's temporary total disability. The district director recommended that employer accept liability based on the April 6, 2001, average weekly wage.

On June 25, 2001, employer forwarded to claimant's counsel stipulations for approval, so that the district director could enter an order awarding compensation pursuant to the district director's recommendation. Although claimant agreed he is entitled to compensation for temporary total disability at his 2001 average weekly wage, claimant objected to that portion of the proposed stipulations that stated, "That the claimant has incurred no other disability and no other loss of wage-earning capacity to date, beyond that reflected in these stipulations." On July 2, 2001, claimant requested that the district director transfer the case to the Office of Administrative Law Judges (OALJ) for a hearing.

Prior to the convening of a formal hearing on January 10, 2002, employer agreed to delete the language at issue. At the hearing, the parties further agreed that claimant is entitled to compensation for a seven percent permanent partial disability of the right knee, 33 U.S.C. §908(c)(2), pursuant to the opinion of claimant's treating physician, Dr. Hubbard, and that claimant's knee condition reached maximum medical improvement on August 10, 2001. Tr. at 4-5. The administrative law judge issued a decision on January 11, 2002, awarding claimant temporary total disability benefits from May 4 to June 12, 2001, at the 2001 average weekly wage, and compensation for a seven percent permanent partial impairment of the right leg.

Claimant's counsel filed a fee petition for work performed before the administrative law judge. Employer did not file any objections. The administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees totaling $1,606.10. Employer filed a motion for reconsideration, to which claimant stated he did not object. On March 20, 2002, the administrative law judge issued an Order Granting Reconsideration, in which claimant was permitted 10 days to file a supplemental fee petition; thereafter, employer was ordered to file any objections within 10 days of receiving claimant's counsel's supplemental fee petition.

In his Supplemental Decision and Order Denying Attorney Fees, the administrative law judge vacated his prior award of an attorney's fee, and he found that claimant is not entitled to a fee payable by employer. The administrative law judge determined that employer cannot be held liable for any attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and the Board's decision in *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*). The administrative law judge found that employer's written offer on June 25, 2001, following the informal conference, to pay claimant $2,881.94 in temporary total disability compensation as recommended by the district director, and the fact that it had already paid claimant all but $91.39 of this amount, was an unequivocal tender of compensation within the meaning of *Armor*. The administrative law judge also found that claimant's counsel is not entitled to a fee payable by employer based on the award of compensation for permanent partial disability because this issue was not the subject of a recommendation by the district director.

Claimant filed a motion for reconsideration, which the administrative law judge denied. The administrative law judge rejected claimant's contention that employer's objections to the fee petition should not have been considered because they were not timely filed. The administrative law judge also rejected claimant's contention that a fee is payable by employer since it could have agreed to delete the objectionable stipulation after claimant responded to employer's proposed stipulations on August 8, 2001, but it chose to not do so until just prior to the scheduled hearing on January 10, 2002.

On appeal, claimant argues that the administrative law judge erred by denying him an employer-paid attorney's fee, because the administrative law judge misapplied the provisions of Section 28(b). Claimant also argues that the administrative law judge should not have addressed employer's objections to the fee petition because they were not timely filed. Employer responds, urging affirmance of the administrative law judge's denial of an attorney's fee payable by employer.

Initially, we reject claimant's contention that the administrative law judge erred by considering employer's objections to the fee petition because employer was late in filing its objections. Employer's objections were filed two days after the deadline set by the administrative law judge. In his Order on Reconsideration, the administrative law judge addressed claimant's contention in this regard and stated that the issue of attorney fee liability is to be determined under Section 28, and should not rest on whether employer's response was filed two days late. Order on Reconsideration at 2. The administrative law judge has the discretion to accept filings out of time, and claimant has not demonstrated that the administrative law judge abused his discretion in doing so in this case. *See generally Harmon v. Sea-Land Service Inc.*, 31 BRBS 45 (1997); *Paynter v. Director, OWCP*, 9 BLR 1-190 (1986). Moreover, the administrative law judge may properly address fee liability in a case before him without regard to whether employer has filed a timely objection.

Claimant next contends the administrative law judge erred by not awarding claimant an employer-paid attorney fee under Section 28(b). Claimant alleges that employer did not "tender" compensation because its offer to comply with the district director's recommendation was contingent on claimant's agreeing to the "offending" stipulation. Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [*sic*] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation . . . .

33 U.S.C. ' 928(b). In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), the Board held that the term "tender" in Section 28(b), means "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor*, 19 BRBS at 122. Recently, in *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003), the Ninth Circuit quoted BLACK'S LAW DICTIONARY 1479 (7th ed. 1999), and stated that a "tender" is "an unconditional offer of money or performance to satisfy a debt or obligation." *Richardson*, 336 F.3d at 1107, 37 BRBS at 83(CRT).

In this case, claimant contends that employer's offer to pay pursuant to the district director's recommendation does not constitute a "tender" within the meaning of Section 28(b) because the offer was contingent on claimant's acceptance of the "offending" stipulation. Moreover, claimant notes that when claimant refused to stipulate, employer withdrew its offer to pay the additional benefits. We agree with claimant that employer's offer to pay does not demonstrate an unconditional readiness and willingness to pay claimant the additional compensation recommended by the district director. On June 25, 2001, employer submitted proposed stipulations to claimant, which incorporated the district director's recommendation. Employer also included the stipulation , "[T]hat the claimant has

incurred no other disability and no other loss of wage-earning capacity to date, beyond that reflected in these stipulations." Employer's Response Brief, at Attachment 2. On August 8, 2001, claimant responded by signing the stipulations; however, he crossed out the offending stipulation. Claimant's Petition for Review at Attachment 2. On December 17, 2001, employer's case manager, Jeffrey K. Carawan, informed claimant's attorney that employer would not pay claimant the additional temporary total disability compensation because of claimant's deletion of a portion of the proposed stipulations. *Id*. at Attachment 4.

Employer's letter makes clear that its acceptance of the district director's recommendation was conditioned on claimant's acceptance of the offending stipulation. Employer's conditional acceptance of the district director's recommendations is not a valid tender of compensation under Section 28(b). *See Richardson*, 336 F.3d at 1107, 37 BRBS at 83(CRT); *Hadel v. I.T.O Corp. of Baltimore*, 6 BRBS 519 (1977). Moreover, claimant utilized the services of his attorney to obtain greater compensation, an additional $91.39 in temporary total disability compensation, without agreeing to accept the offending stipulation. As claimant succeeded in obtaining greater benefits than those paid by employer while the case was before the district director, claimant is entitled to payment of his attorney fees under Section 28(b). *See Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999). Accordingly, we reverse the administrative law judge's finding that claimant is not entitled to an employer-paid attorney's fee. We remand this case for the administrative law judge to award claimant a reasonable attorney's fee payable by employer, taking into account the regulatory criteria and employer's objections. 20 C.F.R. §702.132.

Claimant also challenges the administrative law judge's denial of an employer-paid attorney's fee for time expended in relation to his obtaining a compensation award for a seven percent permanent partial knee impairment. In his supplemental decision, the administrative law judge found no basis for awarding claimant's attorney a fee payable by employer. The administrative law judge reasoned that claimant's entitlement to compensation for permanent partial disability was never raised before the district director, claimant did not request a hearing to resolve the extent of his knee impairment, and there is no indication that employer ever refused to pay compensation for a permanent knee impairment, nor has employer ever objected to paying an attorney's fee for time expended by claimant's counsel to obtain the award.[1] Supplemental Decision and Order at 3-4.

We agree with claimant that he may be entitled to an employer-paid attorney fee for time reasonably expended in relation to obtaining a compensation award for claimant's

[1] Mr. Carawan wrote to claimant's attorney on January 31, 2002, that employer agreed to pay claimant's attorney a fee of $175 for time expended in relation to the permanent partial disability claim.

permanent partial knee impairment. Initially, we reject the administrative law judge's finding that employer is not liable for claimant=s attorney=s fee under Section 28(b) due to the absence of an informal conference on this issue. Following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer=s liability for a fee pursuant to Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that an informal conference is a prerequisite to fee liability under Section 28(b), but holds employer liable for the fee under Section 28(a)). Moreover, under the regulations, claimant is allowed to raise the issue of his entitlement to a permanent partial disability award for a permanent knee impairment after the case was transferred to the OALJ, as it is well established that the administrative law judge may address in the first instance issues that did not arise when the case was before the district director. 20 C.F.R. §§702.336, 702.338; *see generally Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). It follows that, where an issue is permissibly raised before the administrative law judge in the first instance, requiring remand to the district director for an informal conference on that issue would serve no purpose. In this case, an informal conference was held prior to the transfer of the case to the OALJ. The record establishes that the issue of the permanency of claimant's knee condition arose after the case was transferred to the OALJ. The parties resolved the extent of claimant's knee impairment prior to the formal hearing. Employer's Response Brief at Attachment 4; Tr. at 4-5. Claimant's attorney is entitled to an employer-paid fee for time reasonably expended at the administrative law judge level on issues that were resolved in his favor prior to the formal hearing.[2] *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Accordingly, on remand, the administrative law judge should

[2] In addition, under the reasoning of the Fifth Circuit in *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), employer is potentially liable for a fee under Section 28(a) if claimant's request for permanent partial disability is considered a "new claim." On remand, in determining the amount of employer's liability, the administrative law judge should consider when the permanent partial disability claim arose and when employer agreed to pay it.

consider an employer-paid fee for attorney time reasonably expended on the claim for a seven percent permanent partial knee impairment.[3]

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees and the Order on Reconsideration denying claimant an employer-paid attorney's fee are reversed. Claimant's attorney is entitled to an employer-paid fee for services reasonably expended while the case was before the administrative law judge. The case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3] Thus, we need not address claimant's alternative argument that employer is liable for payment of claimant's attorney's fees on the grounds that the services provided by claimant's attorney constitute "wind-up services" to assure that claimant received the benefits to which he is entitled.