

ROBERT THOMPSON)	
)	
Claimant-Respondent)	
)	
v.)	
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NEWPORT NEWS SHIPBUILDING)	DATED ISSUED: <u>JAN 23 2006</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and the Order on Reconsideration - Attorney Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (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:

Employer appeals the Order Awarding Attorney Fees and the Order on Reconsideration - Attorney Fees (2004-LHC-550) of Administrative Law Judge Larry W. Price 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 shown by the challenging party 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 July 11, 2001, claimant sustained an injury to his right knee while working for employer as a sheet metal mechanic. Claimant has not returned to work with employer, and employer voluntarily paid claimant temporary total disability compensation from July 12, 2001, through September 14, 2003. 33 U.S.C. §908(b). Claimant subsequently sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that employer presented evidence of a range of suitable alternate employment opportunities that were available to claimant and that claimant did not establish that he had undertaken a diligent

job search post-injury. The administrative law judge thus denied claimant's claim for ongoing permanent total disability benefits. The administrative law judge did award claimant permanent partial disability compensation pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), for a two percent impairment to his right lower extremity.

Claimant's counsel then sought on attorney's fee in the amount of \$3,954.75, for work performed before the administrative law judge. Employer filed objections to counsel's fee petition challenging its liability for any fee; alternatively, employer challenged specific items and the hourly rates sought by claimant's counsel. Claimant's counsel thereafter filed a reply brief, to which employer in turn responded. In his Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel a fee of \$2,000; upon considering employer's subsequent motion for reconsideration of this fee award, the administrative law judge reiterated his opinion that the sum of \$2,000 constitutes a reasonable fee.

Claimant appealed the administrative law judge's Decision and Order to the Board. In a decision issued on August 30, 2005, the Board affirmed the administrative law judge's award of permanent partial disability benefits to claimant for a two percent impairment to claimant's right leg, but remanded the case for the administrative law judge to reconsider the issue of whether claimant diligently sought employment post-injury. *Thompson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0913 (Aug. 30, 2005)(unpub.). On January 9, 2006, the administrative law judge issued a Decision and Order on Remand denying claimant's claim for permanent total disability benefits subsequent to September 14, 2003.

In the present appeal, employer challenges the attorney fee award of \$2,000 made by the administrative law judge to claimant's counsel. Claimant has not filed a brief in response to employer's appeal.

Pursuant to Section 28(b) of the Act, 33 U.S.C. §928(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 agreed to by the employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In the instant case, employer voluntarily paid claimant temporary total disability benefits through September 14, 2003. At some point in time, a controversy then arose between the parties over the amount, if any, of additional compensation due claimant.

In challenging the fee awarded to claimant's counsel by the administrative law judge, employer contends that it did not, as claimant's counsel asserted to the administrative law judge in her response brief, agree to a fee payable to claimant's counsel in the amount of \$2,000; to the contrary, employer avers that it specifically disputed its liability for any fee to claimant's counsel, and that it took the alternative position before the administrative law judge that, if any fee was to be assessed against it, such an amount should not exceed \$2,000. *See* Employer's objections to counsel's fee dated October 22, 2004 and December 13, 2004. The administrative law judge did not

address employer's specific objection to its liability for claimant's counsel's fee. Rather, in his initial Order, the administrative law judge summarily set forth the factors contained in Section 702.132 of the Act's implementing regulations, 20 C.F.R. §702.132, as well as claimant's counsel's assertion that an agreement regarding the fee to be awarded to claimant's counsel had been reached between respective counsel and awarded claimant's counsel a fee of \$2,000 payable by employer. Thereafter, in addressing employer's motion for reconsideration, the administrative law judge restated his fee award of \$2,000 in a single sentence which referenced the regulatory factors but did not mention the purported agreement to a fee amount. However, where employer objects to its potential liability for an attorney's fee, the administrative law judge must address this issue.¹ We therefore vacate the administrative law judge's fee award, and remand the case for the administrative law judge to address employer's objections consistent with this decision.

¹We note that while employer contends in its brief that it previously tendered to claimant all benefits awarded to him by the administrative law judge, the parties stipulated only to the tender of temporary total disability benefits to claimant. *See* JX-2; Decision and Order at 2. Additionally, our review of the specific objections to counsel's fee petition filed by employer with the administrative law judge reveals that, as employer contends on appeal, it unequivocally took the position that it was not liable for claimant's counsel's fee and only presented the possibility of its liability for a fee in the amount of \$2,000 as an alternative position should it be found liable for such a fee.

Accordingly, the administrative law judge's Order Awarding Attorney Fees and the Order on Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge