BRB No. 88-2616

MICHAEL FINNEGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
CARGILL, INCORPORATED	)	
	)	
and	)	
	)	
RED SHIELD SERVICE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Approving Settlement and Denying Attorney Fee and the Order Denying Motion for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

David A. Hytowitz and Robert K. Udziela (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Order Approving Settlement and Denying Attorney Fee and the Order Denying Motion for Reconsideration (87-LHC-896) of Administrative Law Judge Alexander Karst 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On May 6, 1985, claimant injured his left knee while working for employer. Stip. Comp. Order at 1. Employer voluntarily furnished claimant with medical treatment, and it paid temporary total disability benefits in the amount of $19,560.28 for the period from May 12, 1985 to April 12, 1986. Id. at 2. Claimant

returned to work on April 1, 1986. On June 18, 1986, Dr. Mandiberg determined claimant's left leg is impaired to a degree of 15 percent. At employer's request, claimant was evaluated by Dr. Grossenbacher. Dr. Grossenbacher examined claimant three times and concurred with Dr. Mandiberg's impairment rating.

At the informal conference on September 9, 1986, employer conceded that claimant has a permanent partial disability but did not agree with the 15 percent impairment rating. On October 14, 1986, the claims examiner for the Office of Workers' Compensation Programs (OWCP) recommended that employer pay claimant benefits for a 15 percent permanent partial disability. However, he was unable to determine the amount of temporary total disability benefits due claimant because of confusing or missing evidence regarding the dates of claimant's temporary total disability. Motion for Recon. at Ex. 4.

Employer rejected the OWCP recommendation. Id. at Ex. 3. In its letter of rejection, employer informed the OWCP that it had scheduled an appointment for claimant to be examined by Dr. Langston but that claimant had refused. Id. Claimant stated he refused to attend the appointment because he already had submitted to three evaluations by a doctor of employer's choice and that doctor had concurred with claimant's physician's findings. On July 13, 1987, employer again requested counsel to allow claimant to submit to an examination performed by a doctor of its choice. In the alternative, employer offered to pay benefits based on a "permanent partial disability of 10% loss of the use of the leg." Letter dated July 13, 1987. These options were rejected by claimant, and the case was referred to the Office of Administrative Law Judges. In its pre-hearing statement, employer listed maximum medical improvement, average weekly wage and extent of permanent disability as issues for the hearing.

Insisting it needed an impairment rating based on the American Medical Association Guides to the Evaluation of Permanent Impairment (the AMA Guides) in order to pay compensation, employer moved to compel claimant's attendance at a medical examination by Dr. Langston. The administrative law judge granted employer's motion, and claimant was examined by Dr. Langston on September 28, 1987. Dr. Langston concurred with the opinions of Dr. Mandiberg and Dr. Grossenbacher and determined that claimant has a 15 percent impairment.

Based on Dr. Langston's agreement with the other doctors, employer offered to pay claimant compensation. The parties filed a settlement agreement on April 18, 1988, wherein they agreed claimant has a 15 percent permanent partial impairment of the leg and is entitled to 43.2 weeks of compensation at a rate of $396.54 per week for a total of $17,130.53. They stipulated that claimant was entitled to temporary total disability benefits for the period during which employer voluntarily paid benefits, in the amount of $19,033.92, based on the same weekly rate, and that employer waived any overpayment it made during that period. Stip. Comp.

Order at 2. Further, the parties agreed that employer would continue to provide medical benefits to claimant. Id. at 2-3. The administrative law judge approved the agreement, ordered employer to pay compensation to claimant, and discharged employer of any additional liability as a result of claimant's May 6, 1985 injury. Id. at 2-4; Order Approving Settlement and Denying Attorney Fee.

Claimant's counsel filed an application for an attorney's fee for work performed before the administrative law judge. He requested 8.375 hours at a rate of $150 per hour, for a total of $1,256.25. Employer filed objections. The administrative law judge denied counsel's application for an attorney's fee, finding that employer had been precluded from settling the issue of the extent of claimant's disability because of claimant's refusal to submit to a medical examination. Order Approving Settlement and Denying Attorney Fee at 1-2. To support his decision, he cited the Board's decision in Flowers v. Marine Concrete Structures, Inc., 19 BRBS 162 (1986). Claimant moved for reconsideration, but his motion was summarily denied by the administrative law judge on July 12, 1988. Claimant appeals the denial of an attorney's fee, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying his attorney a fee, asserting error in the finding that claimant "unreasonably refused" to submit to a medical examination and in the administrative law judge's reliance on Flowers. Given the numerous medical examinations which he underwent and given the fact that employer's doctor agreed with claimant's doctor concerning the extent of claimant's disability, claimant contends that his refusal to be re-evaluated was justified, as additional examinations were unnecessary. Claimant also contends that employer's excuse of obtaining an impairment rating pursuant to the AMA Guides was invalid, as the Act does not require the use of the AMA Guides except in hearing loss and retiree cases controlled by Sections 2(10), 8(c)(13), and 8(c)(23) of the Act, 33 U.S.C. §§902(10), 908(c)(13), (23) (1988).

Section 28(b) of the Act, 33 U.S.C. §928(b), applies when employer voluntarily pays or tenders payment of compensation to claimant, as in this case. Specifically, it provides:

> 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 deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse 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. . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).[1] Thus, Section 28(b) provides that employer is liable for an attorney's fee if the employer refuses to pay the amount of compensation recommended following the informal conference and thereafter the claimant is successful in obtaining a greater award than the employer paid or offered to pay. See generally Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991).

We reverse the administrative law judge's denial of an attorney's fee to claimant's counsel, as the instant case is controlled by the plain language of Section 28(b) of the Act. In this case, employer ceased voluntary temporary total disability payment on April 12, 1986, and a controversy arose concerning the extent of claimant's permanent partial disability thereafter.

[1]Section 28(b) also enables an employer to avoid liability for an attorney's fee if the controversy that develops relates to the degree or length of a claimant's disability, if the employer offers to submit the case to an independent physician for a medical evaluation and offers to abide by that evaluation before it takes place. Hadel v. I.T.O. Corp. of Baltimore, 6 BRBS 519 (1977), overruled on other grounds Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986); 33 U.S.C. §928(b). Employer cannot avoid liability for an attorney's fee on these grounds because there is no evidence that Dr. Langston is an independent physician, and even if he is, there is no evidence that employer agreed to accept his findings in advance of his evaluation of claimant. Carballo v. Northeast Marine Terminal Co., Inc. 11 BRBS 514 (1979); see also letter dated July 13, 1987 ("We may not even have a difference of opinion regarding the extent of permanent partial disability. We simply ask to be allowed to get a rating examination for permanent partial disability on your client pursuant to AMA guidelines. . . [W]e again request that you allow your client to be examined by a doctor of our choice. . . .").

Although employer conceded claimant's entitlement to permanent partial disability benefits, it contested the extent of the disability. The claim proceeded to informal conference and employer refused to accept the claims examiner's recommendation to pay compensation based on a 15 percent permanent partial disability. Moreover, after the claims examiner's recommendation and prior to employer's receipt of Dr. Langston's report, employer only offered to pay claimant for a 10 percent permanent partial disability. Thus, in settling the claim approximately two years after employer's last voluntary payment and obtaining an order for employer to pay permanent partial disability benefits based on a 15 percent permanent impairment, claimant succeeded in obtaining greater compensation than employer paid or tendered. 33 U.S.C. §928(b). See also Todd Shipyards, 950 F.2d at 607, 25 BRBS at 65 (CRT). The circumstances in this case fit precisely within the requirements of Section 28(b). Employer, therefore, is liable for an attorney's fee to claimant's counsel.

By relying on Flowers and claimant's "unreasonableness," the administrative law judge erred in denying counsel an attorney's fee. In Flowers, the employer voluntarily paid temporary total disability benefits to the claimant (Flowers) from the date of his injury to the date of the administrative law judge's Decision and Order. Flowers, 19 BRBS at 163. All parties agreed Flowers was permanently disabled, and the only remaining issue was the extent of his disability. Id. The administrative law judge awarded temporary total, permanent total, and permanent partial disability benefits for periods of time. However, she denied counsel an attorney's fee, holding that a hearing could have been avoided had Flowers cooperated with employer by submitting to an evaluation by an industrial psychologist for the determination of the availability of suitable alternate employment. Id.

Counsel for Flowers appealed the decision, contending that he was entitled to an award of an attorney's fee for obtaining an enforceable award of permanent partial disability benefits, as opposed to the voluntary temporary total disability benefits employer was paying. The Board rejected this contention. It concluded that counsel had not established any error of law because an attorney's fee can only be assessed pursuant to Section 28(a), (b) when an employer has controverted some aspect of a claim and the claimant thereafter obtains greater compensation. Flowers, 19 BRBS at 164. The Board held that there was no controversion of the claim and Flowers did not obtain greater compensation than his employer was paying, as his employer voluntarily and continuously paid temporary total disability benefits and conceded Flowers' entitlement to permanent partial disability benefits. Id. Thus, by continuously paying temporary total disability benefits, Flowers' employer paid more than it ultimately owed. The Board further noted that "claimant's intransigence [in refusing to attend a vocational evaluation]

rather than any controversion" caused the litigation. Id.

Unlike Flowers, employer in the present case did not continuously pay benefits or overpay its liability. Thus, in the settlement here, claimant did obtain greater benefits than those voluntarily paid or tendered. Furthermore, while it is true that had claimant cooperated sooner, the case might have been resolved earlier, we note that employer's insistence on requiring claimant to undergo an additional medical evaluation for the stated purpose of determining an impairment rating in accordance with the AMA Guides, together with claimant's refusal to do so, forced this case into litigation. The administrative law judge's finding that claimant's refusal to cooperate is entirely to blame ignores employer's rejection of the claims examiner's recommendation and other pre-hearing actions taken by employer.[2] See generally Todd Shipyards, 950 F.2d at 607, 25 BRBS at 65 (CRT). Moreover, a claimant's refusal to cooperate does not, in itself, justify denial of a fee where the prerequisites of Section 28(b) have been met. As the sequence of events in this case falls squarely into the provisions of Section 28(b), we hold that claimant's counsel is entitled to an attorney's fee payable by employer. See, e.g., Kaczmarek v. I.T.O. Corp. of Baltimore, Inc., 23 BRBS 376 (1990).

[2]Apparently, prior to its April 12, 1986 suspension of benefits, employer had previously suspended claimant's compensation and caused difficulty concerning claimant's medical benefits. See letters dated January 23, February 19, May 5, 1986; Motion for Recon. at Ex. 8.

Accordingly, the Order Denying Attorney Fee and the Order Denying Motion for Reconsideration of the administrative law judge are reversed, and the case is remanded for him to consider counsel's petition for an attorney's fee and employer's objections thereto. The Order Approving Settlement is affirmed.[3]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Counsel requests the Board to vacate the administrative law judge's decision concerning the attorney's fee, and he seeks a remand for the administrative law judge to reconsider the case "in light of claimant's explanation for his refusal to agree to yet another independent medical examination." Cl's Reply Brief at 2. Counsel, however, is not entitled to a formal hearing on the matter of an attorney's fee. Carroll v. Hullinghorst Industries, Inc., 12 BRBS 401 (1980), aff'd, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).