

RICHARD E. NEWCOMB)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: _____
CHAPARRAL STEVEDORES)	
)	
and)	
)	
TEXAS EMPLOYERS' INSURANCE)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Atreus M. Clay, Houston, Texas, for claimant.

Dixie Smith (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (84-LHC-1589) of Administrative Law Judge Martin J. Dolan 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his foot on February 9, 1982 in the course of his employment with employer. Based on an average weekly wage of \$773.22, employer voluntarily paid temporary total disability benefits from February 10, 1982 through May 11, 1982, temporary partial disability benefits from May 12, 1982 through September 28, 1982, temporary total disability benefits from September 29,

1982 through October 31, 1983 (less time worked from September 29, 1982 through May 24, 1983), and permanent partial disability benefits for a 5 percent impairment of the left foot. Decision and Order at 2; Emp. Ex. 1. Claimant sought benefits for continuing temporary total disability benefits through November 1, 1983 and for a permanent partial impairment of 20 percent.

A hearing was held on July 11, 1984, wherein the parties disputed the nature and extent of claimant's disability and the date on which his condition reached maximum medical improvement. Decision and Order at 2. The administrative law judge found that claimant's condition reached maximum medical improvement on September 21, 1982 and awarded him temporary total disability benefits from February 10, 1982 through May 11, 1982 and temporary partial disability benefits from May 12, 1982 through September 21, 1982. He also found that claimant has no residual permanent impairment. Decision and Order at 4-5. The administrative law judge ordered employer to pay related and reasonable medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907, and claimant to reimburse employer for all payments made in excess of the award. Decision and Order at 5.

Claimant appealed the decision to the Board. In an unpublished decision, the Board affirmed all aspects of the administrative law judge's Decision and Order except that part requiring claimant to reimburse employer, which the Board reversed. Newcomb v. Chaparral Stevedores, BRB No. 85-1331 (August 31, 1988); see 33 U.S.C. §914(j). Subsequent to the Board's decision, claimant petitioned both the administrative law judge and the Board for an attorney's fee for services rendered. Reasoning that claimant received an economic benefit because he was no longer required to repay employer, the Board awarded an attorney's fee of \$1,587.50 to be paid by employer directly to counsel. Order, BRB No. 85-1331 (June 21, 1989), aff'd on recon., Order, BRB No. 85-1331 (October 3, 1989). The Board also stated that it would not allocate an attorney's fee between successful and unsuccessful issues. See Battle v. A.J. Ellis Construction Co., 16 BRBS 329 (1984). The administrative law judge, however, denied claimant's application for a fee because claimant secured no benefit during the original adjudication and the Board's reversal of a portion of the order did not change that result. Supp. Decision and Order. Claimant appeals the administrative law judge's denial of an attorney's fee and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying an attorney's fee and cites the Board's rationale in its fee order as support. Claimant argues that his attorney's fee should not be allocated between the successful issue, reimbursement, and the unsuccessful issue, disability. He also argues that he received an economic benefit at the administrative law judge level because he was not required to reimburse employer.

In response, employer maintains that, although claimant succeeded in reversing an isolated portion of the decision, he was

unsuccessful on all other issues. Moreover, neither party raised the reimbursement issue before the administrative law judge; therefore, employer asserts that counsel did not perform any work on that issue and is not entitled to an attorney's fee at that level.

Section 28(b) of the Act, 33 U.S.C. §928(b), applies when an employer voluntarily pays or tenders payment of compensation to a 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). Thus, if employer has voluntarily paid compensation and a controversy later develops, employer is liable for counsel's fee only if claimant is awarded a greater amount than employer previously tendered or paid. See, e.g., Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61 (1991) (decision after remand).

We affirm 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, following employer's voluntary payment of compensation, a controversy arose concerning the nature and extent of claimant's disability. The administrative law judge determined that claimant is entitled to compensation; nevertheless, he concluded that claimant is entitled to an amount less than employer previously paid. Thus, employer is not liable for an attorney's fee under

Section 28(b). See Scott v. C & C Lumber Co., Inc., 9 BRBS 815 (1978).

That claimant succeeded in obtaining a reversal of the administrative law judge's order requiring reimbursement does not change this fact. Where an attorney's fee is otherwise proper, each administrative level should award an attorney's fee for services performed before it. Owens v. Newport News Shipbuilding & Dry Dock Co., 11 BRBS 409 (1979). The Board, therefore, awarded claimant an attorney's fee based on his successful prosecution of an issue at the Board level. See Battle, 16 BRBS at 329. Generally, if a claimant is ultimately successful in his claim, his counsel is entitled to an attorney's fee for services performed at each preceding level, even if the claimant was not initially successful at that level. Hole v. Miami Shipyards Corp., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). On the facts presented in this case, this general proposition cannot apply. In this case, claimant relies only on the Board's decision vacating the reimbursement ordered by the administrative law judge, sua sponte, to support his fee application for work performed before the administrative law judge. Claimant, however, was not successful in obtaining additional benefits at that level and the Board's decision does not affect that outcome, as his success at the Board level did not affect the fact that the administrative law judge awarded less benefits than those voluntarily paid by employer. Therefore, although claimant's counsel was entitled to an attorney's fee for work performed before the Board, he is not entitled to an attorney's fee for work performed before the administrative law judge. Scott, 9 BRBS at 815; 33 U.S.C. §928(b).

Claimant's reliance on Battle, 16 BRBS 329, is also inappropriate. In that case, the Board held that it would not distinguish between successful and unsuccessful issues in awarding an attorney's fee.¹ Reimbursement of compensation in excess of the

¹Employer disputes claimant's contention that the issues in this case are inseparable, and that the administrative law judge erred in not awarding a fee for all work performed before him, citing a decision of the United States Court of Appeals for the First Circuit. See Er's Brief at 5-7; General Dynamics Corp. v. Horrigan, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir. 1988), cert. denied, 448 U.S. 1078, 109 S.Ct. 554 (1988); see also George Hyman Construction Co. v. Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). Horrigan is inapposite to this case. In Horrigan, claimant filed two distinct claims, one for disability under Section 8, 33 U.S.C. §908, and one for discrimination under Section 49, 33 U.S.C. §948a. The claims against employer were consolidated for judicial efficiency. The administrative law judge awarded an attorney's fee after determining that 60 percent of counsel's work was in pursuit of the successful disability claim. Horrigan, 848 F.2d. at 323-324, 21 BRBS at 75-76 (CRT).

award cannot be considered an issue disputed before the administrative law judge in this case because the administrative law judge raised that "issue" sua sponte. See Newcomb, BRB No. 85-1331, slip op. at 3. As there were no successful and severable claims or issues before the administrative law judge, and as litigation did not provide claimant with additional compensation over that which employer voluntarily paid, the administrative law judge properly determined that counsel is not entitled to an attorney's fee for services performed before him.² Scott, 9 BRBS at 815; 33 U.S.C. §928(b); 20 C.F.R. §702.134(b).

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY

The First Circuit reasoned that there are occasions when claims are easily severable. At such times it is rational and within the administrative law judge's discretion to separate the claims for purposes of calculating the attorney's fee. Horrigan, 848 F.2d at 325-326, 21 BRBS at 79-82 (CRT). See also Brooks, 963 F.2d at 1532, 25 BRBS at 161. In the instant case, as claimant filed only one claim and it proved to be unsuccessful, the analogy to Horrigan is not fitting.

²We reject the suggestion made in claimant's reply brief that the award of future medical benefits will support the award of an attorney's fee before the administrative law judge. Claimant did not rely on this theory before the administrative law judge, but rather contended that the Board's award of a fee provides the basis for an award before the administrative law judge. See generally Clophus v. Amoco Production Co., 21 BRBS 261, 265-266 (1988). Moreover, we note that the award of future medical benefits is speculative in this case because the administrative law judge found that claimant has no residual permanent impairment and can perform his usual work, a finding affirmed by the Board on appeal.

Administrative Appeals Judge