BRB No. 91-1207

RICHARD O. DICKERSON)
)
Claimant-Petitioner)
)
v.)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED:
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Respondent) DECISION and ORDER

Appeal of the Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for the claimant.

William C. Bell, Newport News, Virginia, for the employer.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Order (88-LHC-0523) of Administrative Law Judge Edward J. Murty Jr. denying an attorney's fee 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 rational, supported by substantial evidence and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was exposed to loud noise while working for employer, with whom he has been employed since 1964. Claimant underwent annual audiometric testing from 1980 through 1985 which ultimately indicated he had a noise-induced hearing loss, and he filed a claim for benefits under the Act. The parties subsequently agreed to settle this case pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The proposed settlement states that employer agrees to pay claimant the sum of $400 plus an attorney's fee of $500. This

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

proposal was signed by counsel for claimant and employer. It was

not signed by claimant. This proposal was forwarded to claimant's counsel under a cover letter dated January 13, 1989, in which employer's counsel states that the proposal "is intended to confirm our resolving this case for $1,500.00 for all compensation and attorney's fees." Thereafter, on January 19, 1989, claimant's counsel wrote a letter to the deputy commissioner stating that employer agreed to pay claimant the sum of $1000 "in an 8(i) settlement for his hearing loss," plus an attorney's fee of $500. In July 1989 claimant informed his attorney that he was not satisfied with the settlement, and he withdrew his assent to it. The case therefore proceeded to a formal hearing before an administrative law judge.

In his Decision and Order, the administrative law judge awarded benefits to claimant based on a .938 percent binaural hearing loss, a percent to which the parties had stipulated after the hearing. This translated into $634.97 in compensation to claimant. Claimant's attorney thereafter filed a fee petition for work performed before the administrative law judge, requesting a fee of $7,132.50, although counsel indicated he would accept a fee of $5806.04. Employer objected to its liability for an attorney's fee, contending claimant received less than it had tendered. Specifically, employer contended that it offered to settle the case for $1,000, and that "it was entirely the choice of [employer] as to how to split the settlement money between the Virginia Act and the Longshore Act." Employer also objected to the hourly rate and to various entries in the fee petition.

The administrative law judge issued a supplemental Order denying an attorney's fee to claimant's counsel payable by employer, and he also stated that claimant was not liable for the fee at that time because a copy of the fee petition had not been served on him. The administrative law judge stated that it was "crystal clear" from claimant's counsel's letter of January 19, 1989, that employer agreed to pay $1,000 in settlement of the claim. The administrative law judge further indicated it was unclear as to what amounts employer agreed to pay under the Act as opposed to the state workers' compensation law, but that employer would be entitled to a credit for state payments. He therefore concluded that claimant received less by virtue of the formal proceedings and that employer was not liable for an attorney's fee.

On appeal, claimant contends that counsel is entitled to an attorney's fee payable by employer because the amount of benefits ultimately awarded, $634.97, was more than employer tendered in the proposed settlement. Claimant asserts that although he agreed to settle his state and Longshore Act claims for a total of $1000, only $400 of this sum was for settlement of the Longshore claim as set forth in the proposed settlement agreement. In its response brief, employer asserts that whatever separate amounts it agreed

to pay claimant pursuant to either a state or Longshore claim is irrelevant and that the total settlement offer of $1000 constituted a tender of compensation to claimant greater than that ultimately awarded by the administrative law judge. Therefore, employer asserts, it is not liable for an attorney's fee in this case pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Employer further maintains that if it is liable for an attorney's fee, the amount requested by counsel is excessive in light of the amount of compensation awarded to claimant.

We hold that the administrative law judge erred in denying claimant's counsel an attorney's fee payable by employer. Section 28(b) provides that if employer pays or tenders compensation and thereafter a controversy arises over additional compensation due, employer will be liable for an attorney's fee if claimant succeeds in obtaining greater compensation than that agreed to by employer. A valid offer to settle a case may constitute a "tender" of compensation if it is in writing. Kaczmarek v. I.T.O. Corp. of Baltimore, 23 BRBS 376 (1990). In this case, the proposed settlement of January 1989, which was signed by employer's attorney, clearly states that employer agreed to pay $400 pursuant to Section 8(i) of the Longshore Act in settlement of claimant's Longshore Act claim. Although the cover letter from employer's counsel refers to a settlement of $1,500 for compensation and an attorney's fee, the copy of this letter is not signed. We hold that in view of the fact that the settlement proposal was actually signed by employer's representative, it must control the result herein, particularly in light of employer's later acknowledgment that some portion of the $1,000 was in settlement of a state claim.[1] Thus, as employer tendered $400 in compensation for claimant's Longshore Act claim and since claimant received greater compensation as a result of the formal proceedings, employer is liable to claimant's counsel for an attorney's fee pursuant to Section 28(b).[2] That claimant's total recovery under the two

[1] The letter dated January 19, 1989, from claimant's counsel to the deputy commissioner also is not signed. This letter cannot be construed as a tender, in any event, as it is does not express employer's willingness, in writing, to pay claimant. See generally Kaczmarek v. I.T.O. Corp. of Baltimore, 23 BRBS 376, 379 (1990).

[2] We note that the administrative law judge stated that employer would be entitled to a credit for any payments it made under the state act, a concept also noted by employer in its objections to the fee petition. In Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992), the Board stated that the mere fact that an employer may be entitled to a credit for state payments pursuant to Section 3(e), 33 U.S.C. §903(e)(1988), does not mean that claimant did not successfully prosecute his claim under the Act.

compensation schemes may have been greater than the amount awarded by the administrative law judge does not negate claimant's success in obtaining more than employer tendered under the Longshore Act.

We therefore reverse the administrative law judge's denial of an attorney's fee award payable by employer and remand this case to the administrative law judge for consideration of counsel's fee petition and employer's objections thereto under the criteria set forth in 20 C.F.R. §702.132. The administrative law judge noted that the amount of benefits was "quite modest." The regulations state that the amount of benefits awarded is one criterion to be considered in awarding a fee. 20 C.F.R. §702.132. The administrative law judge should thus review the reasonableness of the number of hours and rate requested in view of the size of the award and employer's other objections.

Accordingly, the Order of the administrative law judge denying an attorney's fee is reversed. The case is remanded for further consideration in accordance with this decision.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge