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| HELEN G. RUCKMAN |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| PENNZOIL COMPANY |) | |
| |) | DATE ISSUED: _____ |
| and |) | |
| |) | |
| INA/AETNA/CIGNA COMPANIES |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | DECISION and ORDER |

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Joseph L. Lemoine, Jr. (Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell), Lafayette, Louisiana, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (87-LHC-177) of Administrative Law Judge Ben H. Walley 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act).¹ The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

¹By Order dated January 19, 1994, the Board granted employer's motion to dismiss claimant's appeal for failure to file a timely Petition for Review and brief. BRB No. 88-3372.

*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).

The facts in this case are not in dispute. Claimant, who developed back problems during the course of her employment as a roustabout for employer, was working on an offshore oil and gas production platform when she aggravated her back condition. Employer paid claimant temporary total disability benefits from October 30, 1983 through March 17, 1985, based on an average weekly wage of \$490.61. 33 U.S.C. §908(b). Thereafter, claimant filed a claim for permanent total or permanent partial disability benefits.

Before the administrative law judge, the parties stipulated, *inter alia*, that employer paid temporary total disability benefits to claimant through March 17, 1985, at a weekly rate of \$327.08, that employer paid claimant's medical expenses through March 7, 1985, and that claimant worked 40-hour weeks, plus two hours of overtime per week, at an hourly rate of \$12.265. Decision and Order at 2; Stipulations; Tr. at 9, 14. The parties disputed the cause, nature and extent of claimant's disability. Thereafter, in her post-hearing brief, claimant acknowledged the parties' stipulations but noted that the temporary total disability compensation paid by employer was inadequate, as it was based on an improper average weekly wage; specifically, claimant alleged that her average weekly wage was \$527.39, and that employer, when making temporary total disability compensation payments, underpaid claimant by \$24.51 per week. Cl. Post-Hearing Brief at 7. Employer, in its post-hearing brief, responded to claimant's average weekly wage assertion, contending that even if claimant was correct about the applicable compensation rate, it had overpaid claimant and she was not entitled to further benefits. Emp. Post-Hearing Brief at 3. In his Decision and Order, the administrative law judge listed the issue of claimant's average weekly wage as one of the issues in dispute. The administrative law judge subsequently determined that claimant had sustained a work-related injury, that claimant both reached maximum medical improvement and was able to return to work as of March 14, 1985, and that claimant's average weekly wage for compensation purposes is \$527.40. Based upon these findings, the administrative law judge denied claimant's request for permanent disability benefits, but ordered employer to pay claimant \$24.17 per week for the period October 29, 1983 through March 14, 1985, the difference between the compensation rate calculated by employer and the compensation rate as determined by the administrative law judge, as well as interest and medicals benefits.² Decision and Order at 7-10. Lastly, the administrative law judge determined that claimant's counsel is entitled to an attorney's fee.

Claimant's counsel thereafter filed a fee petition with the administrative law judge, requesting a fee of \$6,260, representing 62.6 hours of services rendered at \$100 per hour, and \$1,073.60 in expenses. Employer filed objections to the petition. In his Supplemental Decision and Order, the administrative law judge reduced the time requested by 23 hours, reduced the requested hourly rate of \$100 to \$90, and thereafter awarded claimant's counsel a fee of \$3,564, representing 39.6 hours of services at a rate of \$90 per hour, plus expenses of \$1,073.60.

²We note that employer voluntarily paid medical benefits until March 7, 1985 and that the administrative law judge held employer liable for claimant's future medical expenses. Decision and Order at 2, 10. Although an award of future medical benefits generally constitutes a successful prosecution under Section 28, *see, e.g., Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987), employer has not challenged this finding on appeal.

On appeal, employer challenges the administrative law judge's determination that it is liable for claimant's counsel's fee. Specifically, employer contends that neither Section 28(a) nor 28(b) of the Act, 33 U.S.C. §928(a), (b), is applicable to the case at bar, as it prevailed on the only claim formally raised before the administrative law judge, and as none of the prerequisites of those sections was fulfilled. Claimant has not responded to employer's appeal.

Initially, we agree with employer's contention that it cannot be held liable for claimant's counsel's fee pursuant to Section 28(a) of the Act. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director,³ and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a); *see Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993). As it is undisputed that employer timely commenced payments of benefits to claimant in this case, Section 28(a) cannot be applied to hold employer liable for claimant's counsel's fee. *See Henley v. Lear Siegler, Inc.*, 14 BRBS 970 (1982).

Next, employer contends that claimant's counsel is not entitled to a fee under Section 28(b) of the Act. In support of its contention of error, employer states that, although it voluntarily paid benefits and the administrative law judge awarded additional compensation, the requisite conditions necessary for Section 28(b) to apply have not occurred; specifically, employer avers there was no controversy over the amount of temporary total disability benefits to which claimant is entitled, no informal conference on the matter, and no refusal to abide by the informal solution to the alleged dispute. Pursuant to Section 28(b) of the Act, 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 employer. 33 U.S.C. §928(b); *see, e.g., Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision after remand).

We reject employer's argument that the requisite conditions for the application of Section 28(b) are not present in the case before us. The Board has determined that the district director's decision to conduct an informal conference is discretionary and that references to informal conferences and other procedures in Section 28(b) should be regarded as guidelines and not prerequisites.⁴ *See Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986).

³Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

⁴We also reject employer's contention that the fee award must be limited to the difference between the additional amount awarded to claimant and the amount voluntarily paid by employer. Although the amount of benefits is a factor to be considered when awarding an attorney's fee, the Board has held that the administrative law judge need not limit the fee to the amount of compensation awarded because to do so would drive competent counsel from the field. *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329 (1984).

Moreover, employer's assertion that the controversy which existed subsequent to its termination of benefits on March 17, 1985 concerned solely the nature and extent of claimant's disability and not whether claimant is entitled to additional temporary total disability benefits lacks merit. In this case, both parties indicated in their pre-hearing statements that the cause, nature and extent of claimant's disability were disputed issues. At the formal hearing, the parties again set forth the nature and extent of disability as issues to be resolved by the administrative law judge. Thereafter, in her post-hearing brief to the administrative law judge, claimant unequivocally raised the issue of the applicable average weekly wage to be used in calculating the benefits to which she claimed entitlement. Specifically, claimant alleged that the temporary total disability compensation paid by employer was inadequate, as it was based on a low average weekly wage. Thereafter, claimant set forth an average weekly wage which she alleged was proper. Employer, in response to claimant's post-hearing brief, informed the administrative law judge that, even if claimant's calculation were correct, claimant was not entitled to further compensation benefits inasmuch as employer had overpaid claimant. In his decision, the administrative law judge accepted claimant's calculation of her average weekly wage, and ordered employer to pay claimant \$24.17 per week for the period October 29, 1983 through March 14, 1985.⁵

Employer on appeal concedes that claimant is correct in asserting that its payment of temporary total disability benefits was deficient.⁶ See Emp. Brief at 8. In light of employer's concession that it had in fact underpaid claimant, and based on the fact that the administrative law judge may address new issues if the evidence so warrants and the parties are given the opportunity to respond, 20 C.F.R. §702.338(b); see, e.g., *Olsen v. Triple A Machine Shops, Inc.* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993), we reject employer's contention that it is not liable for an attorney's fee pursuant to Section 28(b). While this case was before the administrative law judge, a controversy developed regarding claimant's average weekly wage. Thereafter, despite claimant's lack of success in her claim for permanent disability benefits, she was successful in obtaining additional temporary total disability compensation based upon her establishment of an average weekly wage higher than that calculated by employer, and that is all that is required by Section 28(b). See *Vanison v. Greyhound Lines, Inc.*, 17 BRBS 179, 182 (1985). Because claimant obtained additional compensation greater than the amount employer voluntarily paid, we affirm the administrative law judge's determination that claimant's counsel is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(b). As employer has not appealed the amount of the attorney's fee awarded by the administrative law judge, we also affirm the fee award.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision

⁵Employer's calculation of claimant's average weekly wage, \$490.61, yielded a weekly compensation rate of \$327.08; the administrative law judge's determination of claimant's average weekly wage, \$527.40, yields a weekly compensation rate of \$351.25.

⁶Based upon the administrative law judge's determination that employer had underpaid claimant \$24.17 per week, claimant's success in establishing a higher average weekly wage will result in her receiving approximately \$1,622.84 in additional compensation. (\$24.17 per week X 67 1/7 weeks = \$1,622.84).

and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge