| | | |
|---|---|---|
| FERNANDO JACOBO | ) | BRB No. 92-184 |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| TRIAD MARINE AND INDUSTRIAL CLEANING CORPORATION | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| INDUSTRIAL INDEMNITY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| | ) | |
| FERNANDO JACOBO | ) | BRB No. 92-350 |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| TRIAD MARINE AND INDUSTRIAL CLEANING CORPORATION | ) | |
| | ) | |
| and | ) | |
| | ) | |
| INDUSTRIAL INDEMNITY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeals of the Order Denying Attorney Fee of James J. Butler, Administrative Law Judge, and the Compensation Order Denying Attorney Fee of Edward B. Bounds, District Director, United States Department of Labor.

Preston Easley, San Pedro, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff & Tichy), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Attorney Fee (89-LHC-0509) of Administrative Law Judge James J. Butler, and the Compensation Order Denying Attorney Fee (18-0026865) of Edward B. Bounds, District Director, 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).[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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer as a tank cleaner from 1980 to 1985. On August 19, 1985, while working in a tank aboard a vessel, claimant was overcome by hydrogen sulfide fumes, briefly lost consciousness, and fell. Claimant, who was examined and treated by various specialists for organic brain syndrome, never returned to work following the incident. Employer voluntarily paid claimant temporary total disability benefits from August 20, 1985 to September 14, 1987, at a rate of $230.76 per week and from September 15, 1987, to November 30, 1987, at $224 per week, as well as permanent partial disability benefits from December 4, 1987, until April 7, 1988, at a rate of $140 per week, for a total of $29,840.15. Tr. at 10; Emp. Ex. 4 at 4.

Claimant sought temporary total disability benefits from August 20, 1985, through March 8, 1987, and permanent total disability benefits thereafter, at a rate of $239.36 per week based on an average weekly wage of $359.40.[2] Claimant also sought payment of an $885 medical bill for treatment rendered by Dr. Grisolia, his treating neurologist.

The administrative law judge found that claimant sustained a neurologic disturbance as a result of his exposure to hydrogen sulfide fumes which rendered him temporarily totally disabled from August 20, 1985, through October 1987, and awarded claimant compensation accordingly based on an average weekly wage of $386.63, and a compensation rate of $257.76.[3] While the

[1]By order issued June 17, 1992, the Board consolidated claimant's appeal of the Compensation Order Denying Attorney Fee of the district director, BRB No. 92-0350, with claimant's appeal of the administrative law judge's Order Denying Attorney Fee, BRB No. 92-0184, for purposes of decision. 20 C.F.R. §802.104.

[2]Claimant's request for permanent total disability benefits after March 8, 1987 is based on Dr. Grisolia's report of March 9, 1987, finding that claimant reached maximum medical improvement on that date.

[3]While the administrative law judge does not explain how he determined that claimant's temporary total disability benefits should continue through October 1987, this date appears to have been based on an October 26, 1987, report from Sharp Hospital where claimant underwent a

administrative law judge found that claimant was unable to return to any gainful employment, he concluded, based on the opinion of Dr. Baser and studies performed at Sharp Hospital, that his inability to perform any work was due to physical and mental conditions unrelated to his work injury. The administrative law judge therefore declined to award permanent total disability benefits. The administrative law judge also determined that employer was liable for payment of all outstanding and future medical bills reasonably incurred in the treatment of the August 19, 1985 injury. Finally, he awarded claimant interest and directed counsel to present an application for approval of an attorney's fee.

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's attorney submitted a fee petition for services rendered at the district director level between November 18, 1985, and November 13, 1988, requesting $7,425 for 49.5 hours of legal services at $150 per hour, plus $2,248 in expenses. The district director found that claimant's counsel was effective in obtaining a compensation rate adjustment and payment of an $885 medical bill, and noted that the carrier had tendered an offer of $7,500 for a lump sum resolution of the claim which claimant's counsel declined. The district director further found that based on employer's Form LS-208, Notice of Final Payment, dated April 1, 1988, employer had voluntarily paid $29,840.15, or $271.40 more than the administrative law judge ultimately awarded, prior to referral of the case to the Office of Administrative Law Judges. In light of the aforementioned, he denied the attorney's fee request, finding that claimant's counsel failed to demonstrate a successful prosecution of the case.

Claimant's attorney also filed an attorney's fee petition for work done at the administrative law judge level, requesting $13,095, representing 87.3 hours of services at $150 per hour plus $920 in expenses. Employer filed objections. The administrative law judge summarily denied the attorney's fee request, stating that there was no successful prosecution of the claim. 33 U.S.C. §928.

Claimant's counsel appeals both the administrative law judge's Order, BRB No. 92-184, and the district director's Compensation Order, BRB No. 92-350, denying an attorney's fee. Counsel avers that employer is liable for an attorney's fee because he prevailed in establishing claimant's right to payment of $885 for Dr. Grisolia's medical bill and future medical benefits and interest. Counsel further asserts that he also prevailed in establishing claimant's right to compensation based on a higher average weekly wage than that on which employer's voluntary payments were made, thereby entitling claimant to an assessment under Section 14(e), 33 U.S.C. §914(e).

Employer responds, urging that both the district director's and administrative law judge's decisions denying an attorney's fee be affirmed. Employer argues that inasmuch as it voluntarily paid claimant more compensation than was ultimately awarded prior to referral, claimant's counsel did not secure additional compensation for claimant, and no Section 14(e) penalty was awarded or is owed. Employer further avers that even if claimant succeeded in securing payment of Dr. Grisolia's $885 medical bill, claimant's counsel did not obtain additional compensation sufficient to support fee liability under Section 28(b) because in December 1988, prior to referral, employer tendered a $7,500 lump sum settlement in addition to the voluntary payments previously made. Employer

---

comprehensive work capacity evaluation, which the administrative law judge partially relied upon in assessing the extent of claimant's disability. *See* Emp. Ex. 26.

further asserts that the fact that claimant was awarded future medical benefits does not provide a sufficient basis to support a finding of fee liability on the facts in this case, arguing that inasmuch as claimant has not sought any medical treatment for many years, and the administrative law judge did not find that claimant had sustained a permanent injury requiring future medical treatment, it is premature to conclude that any such treatment will be reasonably necessary.

Claimant replies that employer's argument with regard to the settlement offer must fail because employer did not present evidence of this offer at the administrative law judge level. In the alternative, claimant contends that the offer is meaningless insofar as it relates to fee liability, because the offer does not mention future medical benefits and it cannot reasonably be predicted whether claimant's need for future medical treatment will exceed the amount tendered by employer. Employer responds that evidence of its lump sum tender offer was in the record before the district director and administrative law judge and that the administrative law judge's denial of an attorney's fee is presumably partly based on that offer. Employer also asserts that claimant's attorney's efforts did not result in his obtaining the award of future medical benefits, as this was not an issue before the administrative law judge.

Under Section 28(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 paid or tendered by the employer. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Our review of the administrative law judge's decision on the merits reflects that employer disputed liability for the medical treatment previously rendered by Dr. Grisolia and for future medical treatment and that claimant's counsel ultimately prevailed in establishing claimant's right to these benefits.[4] While establishing entitlement to past and future medical benefits can constitute additional compensation for purposes of imposing fee liability under 28(b), before fee liability can be imposed based on an inchoate right to future medical benefits, an adequate evidentiary basis must exist to support the need for future medical care. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993); *Hoda v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 88-3187/A (August 12, 1994)(McGranery, J., concurring and dissenting). *See also generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993). While employer argues that the award of future medical benefits in this case cannot properly support a fee award payable by employer because the necessity for, and reasonableness of, any future medical care required is speculative, resolution of this question involves factual finding which is beyond our review function. *See generally Pryor v. James McHugh Construction Co.*, 27 BRBS 47, 55 (1993). As the administrative law judge summarily denied the fee, he made no findings regarding whether the medical and other benefits awarded support a fee award under Section 28(b). This case must be remanded for the administrative law judge to reconsider the question of fee liability and to make explicit factual findings.

[4]Employer's argument that the issue of future medical benefits was not before the administrative law judge fails. The administrative law judge found that employer disputed liability for future medical benefits in his decision on the merits which is not before us on appeal.

On remand, the administrative law judge should address employer's argument that even if claimant did obtain additional compensation beyond that which it voluntarily paid, it is not liable for an attorney's fee under Section 28(b), because in a letter to claimant's attorney prior to referral dated December 28, 1988, it offered to settle the claim for $7,500, in addition to the voluntary payments of compensation which it had previously made. Claimant asserts that employer's argument with respect to its settlement offer cannot be accepted, as no evidence on this issue was presented to the administrative law judge. Employer referred to the tender offer in its objections to the fee petition before the administrative law judge, however, and attached a copy of the offer to this letter.[5] That the tender offer was also a part of the administrative file before the district director is evidenced by the fact that he referred to the $7,500 offer in denying counsel's fee request. Because the question of employer's tender was raised before the administrative law judge but not addressed by him in his Order denying a fee, he must also consider the effect of the tender offer on employer's fee liability on remand. If on remand the administrative law judge ultimately finds that employer is liable for an attorney's fee, he should tailor the fee award to claimant's relative degree of success on the claims asserted consistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Claimant also contends that even though employer voluntarily paid claimant more disability compensation overall than the amount awarded by the administrative law judge, because claimant succeeded in establishing his right to compensation based on a higher weekly compensation rate than that which employer had voluntarily paid, employer is liable for an assessment under Section 14(e) on the difference between the amounts it paid periodically and the amounts the administrative law judge found it should have paid.[6]

Section 14(e) of the Act provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not be paid within the period prescribed. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12, 33 U.S.C. §912, or the

[5]The parties refer to employer's settlement offer as an "Armour [sic] offer," pursuant to *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986)(*en banc)*, where the Board held that employer's written offer to settle the claim was a tender of compensation pursuant to Section 28(b) of the Act.

[6]Claimant alleges that between August 20, 1985, and September 14, 1987, employer underpaid claimant by $2,981.93, and overpaid him $733.33, for the period between September 15, 1987 and November 30, 1987, thus producing a net underpayment of $2,248.60, on which the Section 14(e) 10 percent penalty would amount to $224.86.

employer has knowledge of the injury.

The issue of entitlement to a Section 14(e) assessment may be raised by the parties at any time and has been raised by the Board *sua sponte* where a properly filed appeal regarding claimant's entitlement is before the Board. *See, e.g., Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981). In the instant case, however, although claimant filed a timely appeal with regard to the orders denying attorneys' fees of the district director and administrative law judge, no appeal has been taken of the decision issued by the administrative law judge on the merits of the claim. As the only appeals in the present case involve the district director and administrative law judge's fee awards, it would be improper for the Board to address this issue. Claimant, however, may raise his entitlement to a Section 14(e) assessment before the administrative law judge on remand.[7]

In light of our decision to vacate the administrative law judge's Order denying a fee and to remand for him to reconsider whether claimant was ultimately successful in establishing entitlement to additional compensation beyond that voluntarily paid or tendered by employer, the district director's Compensation Order denying a fee, which was based on his evaluation of claimant's success before the administrative law judge, must also be vacated. On the facts presented in this case, because claimant's success, if any, occurred while the case was before the administrative law judge, the administrative law judge's findings on remand regarding fee liability under Section 28(b) will be determinative of whether counsel is entitled to a fee payable by employer for work performed before the district director. If the administrative law judge finds that claimant's counsel was ultimately successful in obtaining additional compensation within the meaning of Section 28(b), counsel will be entitled to a fee for work performed before the district director consistent with the general rule that success at a higher level will result in fee liability at a lower level. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). Accordingly, if the administrative law judge finds that employer is liable for an attorney's fee on remand pursuant to Section 28(b), the district director must enter an appropriate fee award for reasonable and necessary work performed at that level of the proceedings.

Accordingly, the administrative law judge's Order Denying Attorney Fee, BRB No. 92-184, and the district director's Compensation Order Denying Attorney Fee, BRB No. 92-350, are vacated, and the case is remanded to the administrative law judge for additional findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[7]If the administrative law judge finds that claimant is entitled to a Section 14(e) assessment on remand, this additional liability should be considered in making the fee award. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge