

WALTER MARTINIANO)
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 Claimant-Respondent)
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 v.)
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 GOLTEN MARINE COMPANY) DATE ISSUED:
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 and)
)
 STATE INSURANCE FUND)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney Fee of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney Fee (87-LHC-1343) of Administrative Law Judge Edward C. Burch 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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, a rigger, injured his back during the course of his employment on August 15, 1984. Employer voluntarily paid temporary total disability benefits from August 16, 1984 to May 21, 1986, 33 U.S.C. §908(b), when employer terminated its payments. Claimant sought benefits under the Act for continuing temporary total disability.

In his original Decision and Order, the administrative law judge found that claimant could not return to his former employment, and that employer failed to establish the availability of suitable alternate employment. Claimant was awarded benefits for temporary total disability from August 16, 1984, through the date of the administrative law judge's March 3, 1988, Decision and Order and continuing, and employer received a credit for all sums previously paid. Employer's motion for reconsideration was denied.

Subsequently, claimant's counsel filed a fee petition for work performed before the administrative law judge, requesting \$6,375, representing 42.5 hours of legal services at the hourly rate of \$150. Employer thereafter submitted objections. After considering employer's objections, the administrative law judge reduced the number of hours requested by 8.5; thus, the administrative law judge awarded claimant's counsel a fee in the amount of \$5,100.

Employer appealed the administrative law judge's Decision and Order, contending that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment and in denying its motion to remand the case to the district director in order to compel claimant to undergo a second impartial medical examination. This appeal was assigned BRB No. 88-2874. In addition, employer appealed the administrative law judge's award of the attorney's fee contesting its liability therefor, if claimant was not ultimately successful in prosecuting the claim. This appeal was assigned BRB No. 89-3506.

In a decision addressing the merits of employer's appeal, the Board vacated the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and remanded the case for reconsideration of the evidence. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). In addition, the Board affirmed the administrative law judge's denial of employer's motion for a second impartial medical examination. *Martiniano*, 23 BRBS at 367. The Board did not address the appeal of the attorney's fee award.

In an Order on Remand dated March 25, 1991, the administrative law judge again awarded claimant benefits. However, the parties petitioned for reconsideration on the basis that they had previously submitted on July 12, 1990, stipulations of settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The administrative law judge vacated the Order on Remand and approved the stipulations of settlement, which included a provision that employer would pay claimant's counsel an attorney's fee in the amount of \$5,000 for legal services rendered.¹

¹In a letter dated August 13, 1990, claimant's counsel notes to the administrative law judge that employer had withdrawn its appeal of the Supplemental Order Awarding Attorney Fee and he requested an additional fee. However, the Board has no record of receiving a motion to withdraw the appeal of this order.

Under Section 28(b), 33 U.S.C. §928(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 paid or tendered by employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, employer voluntarily paid claimant temporary total disability benefits from August 16, 1984 to May 21, 1986, when employer terminated its payments. However, claimant continued to seek benefits under the Act for continuing temporary total disability. On remand, the administrative law judge entered an order approving the parties' stipulations of settlement which provides for a lump sum payment to claimant for both compensation and medical benefits in the amount of \$25,000. Therefore, inasmuch as a controversy remained after employer voluntarily paid some benefits and claimant was successful in obtaining additional compensation over that employer initially agreed to pay, we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee award to be assessed against employer pursuant to Section 28(b) of the Act.² *See generally Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 (1993).

Accordingly, the administrative law judge's decision that employer is liable for an attorney's fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²Moreover, we note that the stipulations of settlement include a provision for an attorney's fee in the amount of \$5,000 payable by employer.