

FRANK CORDERO)	BRB No. 92-0716
)	
Claimant-Petitioner)	
)	
v.)	
)	
INTERNATIONAL TERMINAL)	DATE ISSUED:
OPERATING COMPANY,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	
)	
FRANK CORDERO)	BRB No. 92-2637
)	
Claimant-Respondent)	
)	
v.)	
)	
INTERNATIONAL TERMINAL)	
OPERATING COMPANY,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
)	DECISION and ORDER

Appeals of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for self-insured

employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1866) of Administrative Law Judge Paul H. Teitler and employer appeals the Compensation Order (Case No. 2-100929) of District Director Richard V. Robilotti 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). We must affirm the findings of fact and conclusions of law of the administrative law judge 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). The amount of an attorney's fee award is discretionary, and the award 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured while working for employer on September 15, 1989, and has not returned to work since that date. Employer voluntarily paid claimant compensation for temporary total disability, based on an average weekly wage of \$869, from September 16, 1989, to March 26, 1990.¹ 33 U.S.C. §908(b). Thereafter, employer determined that claimant's receipt post-injury of container royalty payments constituted a post-injury wage-earning capacity and, pursuant to this determination, voluntarily commenced payments to claimant for temporary partial disability. 33 U.S.C. §908(e).

In his Decision and Order, the administrative law judge found that claimant's receipt post-injury of container royalty payments established a post-injury wage-earning capacity, and that claimant's disability was therefore partial rather than total. Pursuant to this finding, the administrative law judge concluded that employer properly included the container royalty payments made to claimant post-injury in computing claimant's post-injury wage-earning capacity and corresponding compensation rate. Lastly, the administrative law judge found that employer is entitled to relief from continuing compensation liability, pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant's counsel subsequently submitted an attorney's fee petition to the district director for services rendered in connection with claimant's claim requesting a fee of \$5,000, representing 20 hours at \$250 per hour. The district director awarded a fee of \$4,000, \$2,000 payable by employer and \$2,000 payable by claimant as a lien on his compensation.

¹Claimant's average weekly wage at the time of injury is not disputed.

On appeal, claimant challenges the administrative law judge's finding that receipt of container royalty payments post-injury constitutes a post-injury wage-earning capacity, and the administrative law judge's finding that employer properly relied upon these payments to reduce claimant's compensation. BRB No. 92-0716. Employer responds, urging affirmance. Employer appeals the district director's award of an attorney's fee. BRB No. 92-2637. Claimant responds, urging affirmance.²

Claimant, on appeal, asserts that the administrative law judge erred in concluding that the container royalty payments which he received post-injury should be included in determining his post-injury wage-earning capacity. BRB No. 92-0716. We agree. The Board recently issued a decision in *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), which is dispositive of this issue. In *Branch*, the Board held that the administrative law judge erred in treating holiday/vacation and container royalty payments claimant received while he was temporarily totally disabled as indicative of a post-injury wage-earning capacity, resulting in a reduced "average weekly wage." The Board reasoned that there is no statutory basis for creating a reduced award by altering claimant's average weekly wage. *Branch*, 29 BRBS at 56. Claimant's entitlement to total disability compensation under the Act, moreover, is premised on his complete incapacity due to his injury to return to work and earn wages. *Id.* The Board therefore concluded that the claimant's receipt of container royalty payments due to a provision in the union contract during a period when he is physically incapable of working has no bearing on his entitlement to total disability compensation under the Act. *Id.* Accordingly, for the reasons stated in *Branch*, we hold that the administrative law judge erred in finding that the container royalty payments claimant received after his work injury established a post-injury wage-earning capacity, thus rendering claimant's disability partial rather than total.³ We therefore vacate the administrative law judge's Decision and Order, and we remand the case for entry of a compensation award based on the parties' stipulations.⁴

We next address employer's appeal of the district director's Compensation Order. BRB No. 92-2637. Employer contends only that the district director erred in holding it liable for a portion of claimant's counsel's fee since, employer asserts, there was no successful prosecution of the claim before the administrative law judge.⁵ 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

²By Order issued December 15, 1992, the Board consolidated BRB Nos. 92-0716 and 92-2637 for purposes of decision. 20 C.F.R. §802.104.

³It is uncontroverted that claimant is incapable of resuming his usual employment duties with employer.

⁴We note that although the administrative law judge found the parties' stipulations to be "true and correct," *see* Decision and Order at 4, he did not enter a formal award of compensation.

⁵Employer has not appealed the amount of the fee awarded by the district director.

compensation than that agreed to 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). In the instant case, claimant prevailed on appeal regarding the sole disputed issue, *i.e.*, whether his receipt of container royalty payments constituted a post-injury wage-earning capacity; thus, claimant will receive greater compensation than employer voluntarily tendered. Accordingly, employer is liable for an attorney's fee, pursuant to Section 28(b), since claimant's counsel succeeded in obtaining additional benefits for claimant. *See generally Tait*, 24 BRBS at 59. We therefore reject employer's contention, and we affirm the district director's fee award.

Accordingly, the administrative law judge Decision and Order is vacated and remanded for entry of an award of benefits consistent with this opinion. BRB No. 92-0716. The district director's Compensation Order is affirmed. BRB No. 92-2637.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge