BRB No. 92-2006

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

Appeal of the Supplemental Decision and Order Denying Attorney Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for the claimant.

Cathleen Reilly Brew (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for the self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (91-LHC-462) of Administrative Law Judge Daniel A. Sarno, Jr., 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his lower back while working as a welder for employer on March 21, 1983. Employer voluntarily paid claimant temporary partial disability benefits for various periods from

[1]Although claimant states in his Petition for Review that his appeal also involves the denial of fees before the district director, the Board has no record of a notice of appeal being filed relating to the district director's June 23, 1992, Order Denying Attorney's Fee.

April 4, 1983 through June 8, 1986, temporary total disability benefits for various periods between April 4, 1983 and June 8, 1986, and continuing temporary total disability benefits from June 9, 1986 until January 6, 1992, when it modified its payments to reflect claimant's entitlement to permanent partial disability compensation at the rate of $172.36 per week. Claimant, who has not been engaged in any form of gainful employment since June 6, 1986, sought permanent total disability compensation as of September 24, 1987, the stipulated date of maximum medical improvement or alternatively permanent partial disability compensation commencing as of the date of the hearing. As of the time of the October 23, 1991, hearing, the only issues pending for adjudication were whether claimant's permanent disability was total or partial, and whether employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief.

The administrative law judge awarded claimant continuing permanent partial disability compensation commencing on September 24, 1987, the stipulated date of maximum medical improvement at the rate of $188.38 per week.[2] The administrative law judge also found that employer was entitled to Section 8(f) relief and awarded employer a credit for all compensation it had previously paid to claimant.

Claimant's counsel subsequently filed a fee petition for work performed before the administrative law judge, requesting $4,093.75, representing 1 hour of services at an hourly rate of $145, 24.75 hours of services at an hourly rate of $155, and 2.25 hours of paralegal time at the hourly rate of $50. Employer objected to the petition, asserting that it should not be held liable for counsel's fee because counsel was not successful in securing additional compensation for claimant while the case was before the administrative law judge. Employer argued that it had conceded that claimant's disability had reached permanency and had requested a hearing on this issue and its entitlement to Section 8(f) relief, apparently referring to a letter written to the district director on May 23, 1990. Employer further asserted that inasmuch as the administrative law judge indicated in his Decision and Order that employer overpaid claimant based on its mistaken payment of total as opposed to partial disability benefits for four and one-half years, and was accordingly entitled to a substantial credit for its overpayment, claimant's counsel failed to obtain anything beyond that which employer paid or agreed to pay.

In his Supplemental Decision and Order Denying Attorney Fees, the administrative law judge, agreeing with employer, denied counsel a fee payable by employer on the rationale that claimant's counsel did not obtain additional compensation by virtue of his efforts before the administrative law judge. Claimant appeals the administrative law judge's finding of no fee liability and employer, reiterating the arguments presented below, responds, urging affirmance.

After review of the administrative law judge's Supplemental Decision in light of the record

[2]The administrative law judge arrived at this figure by taking two-thirds of claimant's stipulated average weekly wage, $416.58, which amounted to $272.58, and subtracting $134, which the administrative law judge found was claimant's residual post-injury wage-earning capacity based on employer's vocational evidence.

evidence, we affirm his determination that employer is not liable for claimant's counsel's attorney's fee. Under Section 28(b), 33 U.S.C. §928(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 voluntarily paid or agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990). Although employer controverted claimant's entitlement to permanent total disability compensation as was reflected in its May 23, 1990, letter to the district director, employer's voluntary payment of compensation did not reflect this controversy; employer voluntarily paid claimant at the temporary total disability rate of $277.72 from June 6, 1986 until January 6, 1992, subsequent to the hearing before the administrative law judge. Moreover, employer conceded claimant's entitlement to permanent partial disability compensation even prior to referral. Inasmuch as claimant was awarded permanent partial disability compensation as of September 24, 1987 at the rate of $188.83 per week, between this date and January 6, 1992, employer voluntarily paid claimant $88.89 more per week than was ultimately awarded. Although on January 6, 1992, three months prior to the issuance of the administrative law judge's Decision and Order on April 21, 1992, employer instituted voluntary payment of permanent partial disability compensation at a rate of $177.36 per week which was less than the $188.83 permanent partial disability rate awarded, the administrative law judge acted within his discretion in attributing this discrepancy to an inadvertent mathematical error based on affidavits which employer had attached to its objections to the fee petition rather than to a controversy over the amount due. Inasmuch as employer voluntarily paid claimant at a rate substantially greater than that ultimately awarded from September 24, 1987 through January 6, 1992, conceded that claimant was permanently partially disabled as of the time of the hearing,[3] and provided what was viewed by the administrative law judge as a credible explanation for its inadvertent payment of permanent partial disability compensation at the reduced rate between January 6, 1992 and the issuance of the administrative law judge's Decision and Order on April 21, 1992, the administrative law judge rationally found that claimant's counsel did not secure greater benefits than that which employer voluntarily paid or agreed to pay. *See Flowers v. Marine Concrete Systems*, 19 BRBS 162 (1986); *Henley v. Lear Siegler, Inc.,* 14 BRBS 970, 972 (1982). Counsel therefore has failed to establish any error in the administrative law judge's refusal to assess a fee against employer.

In light of our determination that employer is not liable for claimant's attorney's fee, the case must be remanded for the administrative law judge to consider whether the fee should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Under such circumstances, the administrative law judge must take into account the financial circumstances of the claimant. *See* 20 C.F.R. §702.132(a). *See generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. February 26, 1980), *amended,* (D.C. Cir. March 31, 1980).

Accordingly, the administrative law judge's Supplemental Decision and Order holding that employer is not liable for claimant's attorney's fee is affirmed. The case, however, is remanded for

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[3]Contrary to claimant's assertion the Board's decision in *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985), does not mandate imposition of fee liability employer on the facts in the present case. In this case, unlike *Turney*, employer not only overpaid claimant temporary total disability compensation but also conceded that claimant was entitled to permanent partial disability compensation well before the time of the hearing.

the administrative law judge to consider whether the fee should be assessed against claimant pursuant to Section 28(c).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge