U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0481

BERNARD CASTRO	)	
	)	
Claimant	)	
	)	
ERIC A. DUPREE	)	
(Former attorney for claimant)	)	
	)	
Petitioner	)	
	)	DATE ISSUED: July 26, 2016
v.	)	
	)	
SSA TERMINALS, LLC	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Eric A. Dupree, Coronado, California, for petitioner.

Laura G. Bruyneel (Bruyneel Law Firm, LLP), San Francisco, California, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel, Eric A. Dupree, appeals the Attorney Fee Order (2012-LHC-01935, 2012-LHC-01936) of Administrative Law Judge Richard M. Clark 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 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries while working for employer on April 8, 2009. As a result, claimant, originally represented by Steven Birnbaum, filed a claim under the Act on April 13, 2009, as well as an Application for Adjudication of his state workers' compensation claim before the California State Division of Workers' Compensation. During the course of litigation, claimant, on February 18, 2010, retained Mr. Dupree (counsel) to handle his longshore claim, while Mr. Birnbaum continued to represent claimant in his California workers' compensation claim. Counsel informed claimant, via telephone on August 24, 2012, and then by written correspondence dated August 31, 2012, of his intent to withdraw as counsel. Counsel subsequently filed his October 1, 2012 Notice of Intent and Motion to Withdraw as Claimant's Attorney of Record with the Office of Administrative Law Judges (OALJ).[1]

On or about May 19, 2013, claimant, now representing himself, settled both the Longshore and state workers' compensation claims. Claimant settled his state claim for $4,000, which was formally granted by an Order Approving Compromise and Release on October 17, 2013. Meanwhile, with regard to his Longshore claim, claimant and employer jointly requested the appointment of a settlement judge to mediate settlement negotiations.[2] As a result of the negotiations, the parties submitted to the OALJ a joint Application for Approval of Settlement Pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Acknowledging claimant's settlement of his state workers' compensation claim for the net sum of $4,000, "for which [employer] claim[s] credit under Section 3(e)" of the Act, 33 U.S.C. §903(e), the parties agreed that claimant "will receive a lump sum payment of $0.00" to settle all claims under the Act. The administrative law judge set forth the provisions of the settlement agreement, found it reasonable, adequate and not procured under duress, and approved it in his decision dated October 23, 2013. No party appealed the administrative law judge's October 23, 2013 decision.

[1]Mr. Birnbaum, by letter dated May 19, 2013, filed a Substitution of Attorneys pleading with the California Workers' Compensation Appeals Board, to allow claimant to thereafter represent himself in his state claim.

[2]Specifically, by Order dated March 6, 2013, Administrative Law Judge William R. Dorsey was appointed. Exhibit H. Judge Dorsey, on July 9, 2013, issued a Notice of Conclusion of Settlement Judge Proceeding, ending his participation in the case and returning the case to "the presiding judge for appropriate action." *Id.*

On April 14, 2014, counsel filed an attorney's fee petition for work he performed before the OALJ, seeking a total fee of $33,518.04, representing 40.4 hours of attorney work at an hourly rate of $500, 33.4 hours of attorney work at an hourly rate of $300, 1.1 hours of paralegal work at an hourly rate of $150, and $3,133.04 in costs. Employer filed objections to the fee petition and counsel filed a reply. In his Attorney Fee Order dated May 12, 2015, the administrative law judge denied counsel's fee petition in its entirety, finding there was no successful prosecution of the claim resulting in an economic benefit to claimant under the Act.

On appeal, counsel challenges the administrative law judge's denial of an attorney's fee. Employer responds, urging affirmance of the administrative law judge's Attorney Fee Order. Counsel has filed a reply brief.

Counsel contends the administrative law judge's conclusion that there was no successful prosecution of claimant's Longshore Act claim upon which to base an award of an attorney's fee is erroneous and contrary to his finding, in approving the Section 8(i) settlement agreement, that the settlement was reasonable and adequate. Specifically, counsel contends that claimant's receipt of "a lump sum payment of $0.00" under the Act must be interpreted in conjunction with the agreement's explicit recognition of employer's entitlement to a Section 3(e) credit for the $4,000 settlement of the state workers' compensation claim Thus, counsel contends that the $4,000 payment was accepted in compromise and release of claimant's rights arising out of April 8, 2009 work injury under both applicable statutes, i.e., the Longshore Act and California workers' compensation statute. In response, employer maintains that counsel's position ignores the explicit terms of the parties' Section 8(i) agreement.

Section 28(a), which applies in this case,[3] states, inter alia, that: "the person seeking benefits" shall be entitled to "a reasonable attorney's fee against the employer or carrier" upon the successful prosecution of his claim. 33 U.S.C. §928(a);[4] *see, e.g., E.P.*

[3]Neither counsel nor employer disputes the applicability of 33 U.S.C. §928(a) in this case.

[4]Section 28(a) states, in relevant part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be

Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 34, 20 BRBS 79(CRT) (8th Cir. 1988); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that a claimant "successfully prosecutes" his claim when he obtains "some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106 37 BRBS 80, 82(CRT) (9th Cir. 2003) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)). "Actual relief" is not limited to the receipt of additional money. *See Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). For example, proceedings which result in the claimant's obtaining an inchoate right to greater compensation under the Act may constitute a "successful prosecution" for purposes of Section 28(a). *See generally E.P. Paup*, 999 F.2d 1341, 27 BRBS 41(CRT); *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992). However, a "successful prosecution" under the Act requires the claimant to obtain something of substance. *Clark*, 38 BRBS 67. Thus, resolution of this issue on appeal turns on whether claimant successfully prosecuted his claim under the Act through the parties' Section 8(i) settlement.

In this case, the administrative law judge reviewed the parties' positions and the settlement agreement and concluded that claimant did not successfully prosecute his claim under the Act. The administrative law judge accurately stated that the parties agreed that "Claimant will receive a lump sum payment of $0.00" under the Act. Settlement Agreement at 3.[5] While, as counsel asserts, the administrative law judge did not specifically address the parties' consideration in executing the settlement agreement, he nonetheless concluded, based on the plain language of that agreement, that the settlement did not result in the modification of employer's behavior to claimant. In this regard, the administrative law judge addressed, but rejected, counsel's position that the agreement's reference to employer's entitlement to a Section 3(e) credit for the state settlement amount constitutes a successful prosecution of the claim under the Act,

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> awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

[5]The administrative law judge's October 23, 2013 Decision and Order Approving Settlement was not appealed and is not subject to modification. 33 U.S.C. §922. Thus, any contentions regarding the validity of certain language within the Section 8(i) settlement, such as "lump sum payment of $0.00," or the approved settlement itself, are not subject to consideration by the Board in this appeal. *Diggles v. Bethlehem Steel Corp*., 32 BRBS 79 (1998); *Rochester v. George Washington University*, 30 BRBS 233 (1997).

because Section 3(e), as written, is inapplicable.[6] The administrative law judge found, based on the facts of this case, that claimant obtained no benefits under the Act, and thus employer had no liability under the Act, as a result of the settlement agreement. He thus concluded that employer, despite the agreement's reference to its entitlement to a Section 3(e) credit, is not entitled to any credit pursuant to that provision.

The plain language of the settlement agreement states, as the administrative law judge found, that claimant "will receive a lump sum payment of $0.00" under the Act. Settlement Agreement at 3. The administrative law judge's interpretation of this provision as evidence that employer has no liability under the Act to claimant is reasonable. *See generally D.G. [Graham] v. Cascade General, Inc.*, 42 BRBS 77 (2008); *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002). Therefore, because employer has no liability under the Act, the administrative law judge properly found that it is not entitled to a Section 3(e) credit. 33 U.S.C. §903(e); *see generally Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990); *see also Hunter v. Huntington Ingalls, Inc.*, 48 BRBS 55 (2014). The administrative law judge's conclusion that claimant did not successfully prosecute his claim is supported by the plain language of the parties' settlement agreement that claimant is to receive no benefits. In this case, it cannot be said that claimant obtained "some actual relief [under the Act] that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). Claimant did not obtain anything of substance under the Act.[7] *Clark*, 38 BRBS 67.

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[6]Section 3(e) of the Act, 33 U.S.C. §903(e), provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

See generally Bouchard v. General Dynamics Corp., 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990).

[7]Even assuming that counsel's underlying premise is correct, i.e., that the acknowledgement of employer's Section 3(e) credit for the $4,000 payment it made to claimant under the state compensation Act served as consideration for the Section 8(i) settlement, that alone is insufficient to establish entitlement to an attorney's fee under Section 28(a) in this case. The Board has held that an attorney may be entitled to an

Consequently, based on the administrative law judge's reasonable interpretation of the parties' settlement agreement, we affirm the administrative law judge's rational conclusion that counsel did not carry his burden to show that he is entitled to an attorney's fee pursuant to Section 28(a) because there was no successful prosecution of the claim under the Act.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

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attorney's fee, even though the claimant might never receive additional benefits due to a large credit, because the claimant, through counsel's assistance, "successfully prosecuted" his claim under the Act by obtaining an inchoate right to compensation. *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992). This case, however, is distinguishable from *Kinnes*, in that claimant received no actual compensation under the Act and no inchoate rights to compensation due to the settlement of his claim. Employer's behavior under the Act thus was not materially changed because claimant received no rights, inchoate or present, under the Act. *Kinnes*, 25 BRBS 311.