

BRB No. 97-1515

GLINN VESSELL)
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 Claimant-Petitioner) DATE ISSUED:
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 v.)
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 TODD CORPORATION)
)
 and)
)
 EAGLE PACIFIC INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order and Decision on Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi, Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associate, P.S.) Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Reconsideration (96-LHC-2123) of Administrative Law Judge Alfred Lindeman 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 which 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).

Claimant, a painter and scaler for employer, sustained a work-related injury on

October 15, 1993, when he was hit by a sandblasting hose and particulates were embedded in his lower left cheek. Claimant underwent dermabrasion, but was left with facial scarring and skin depigmentation; employer paid medical benefits for the treatment of claimant's injury pursuant to Section 7 of the Act, 33 U.S.C. §907, but, as no work time was lost, did not pay any disability compensation. On April 17, 1996, claimant filed a claim for disfigurement benefits pursuant to Section 8(c)(20) of the Act, 33 U.S.C. §908(c)(20). An informal conference was held before a claims examiner on June 4, 1996, following which the claims examiner recommended that employer pay claimant a disfigurement award of \$3,000; as claimant was not represented by legal counsel at that time, attorney's fees were not at issue. Employer filed a controversion of the disfigurement claim on June 14, 1996, noting that the controversion was filed in order that employer might investigate the claim. On July 2, 1996, the claim was referred to the Office of Administrative Law Judges for formal adjudication and, in a pretrial order dated October 17, 1996, the case was set for formal hearing on March 10, 1997. Thereafter, claimant retained counsel and, by letter dated November 15, 1996, claimant's attorney offered to settle the claim for \$6,500, plus reasonable attorney's fees. By letter dated January 8, 1997, employer offered to settle the claim for \$4,000. Claimant's counsel responded by letter dated January 15, 1997, requesting clarification as to whether the \$4,000 proposed settlement amount was exclusive of attorney's fees and stating that claimant's attorney would nevertheless advise claimant to reject employer's offer and would recommend a settlement amount of \$5,750, plus attorney's fees. Thereafter, a formal hearing was held on March 10, 1997.

In his Decision and Order, the administrative law judge determined that, as claimant sustained a "serious" facial disfigurement, his injury was automatically compensable. Noting that Section 8(c)(20), 33 U.S.C. §908(c)(20), provides for an award of "proper and equitable compensation not to exceed \$7,500..." for a serious facial disfigurement, the administrative law judge rated the degree of seriousness of claimant's disfigurement as a three on a scale of one to ten. Accordingly, he awarded claimant compensation in the amount of \$2,250. Lastly, the administrative law judge found that claimant's counsel is not entitled to a fee payable by employer, inasmuch as employer had offered to settle the case for an amount greater than the amount awarded by the administrative law judge.

In a Decision on Reconsideration, the administrative law judge reaffirmed his \$2,250 disfigurement award, rejecting claimant's argument that a "serious" facial scar automatically entitles claimant to the maximum award of \$7,500. The administrative law judge further reaffirmed his finding that employer is not liable for attorney's fees because claimant was not awarded compensation greater than that tendered by employer.

On appeal, claimant challenges the administrative law judge's decision to award him less than the maximum amount of compensation set forth in the Act for facial disfigurement. Claimant further contends that employer is liable in full for attorney's fees incurred after June 20, 1996, because employer made no tender for claimant's disfigurement prior to the expiration of 14 days after the recommendation made by the claims examiner at the informal conference.

We first address claimant's contention that the administrative law judge erred in awarding compensation of only \$2,250 for claimant's facial disfigurement. Specifically, claimant asserts that a serious facial scar, by definition, entitles him to the maximum amount of compensation set forth in the Act. For the reasons that follow, we reject claimant's contention of error. Section 8(c)(20) of the Act provides as follows:

Disfigurement: Proper and equitable compensation not to exceed \$7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

33 U.S.C. §908(c)(20). In facial disfigurement cases, the administrative law judge must initially find that the disfigurement is "serious" in order to find it compensable, and there is no requirement that the disfigurement be likely to handicap the claimant in securing or maintaining employment. *See Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611, 612-613 (1978); *see also Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). Once a disfigurement has been found to be compensable, a plain reading of Section 8(c)(20) indicates the intent of Congress to limit compensation for such disfigurement to a maximum of \$7,500, *see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), and the administrative law judge has the discretion to set the amount of compensation which will be "proper and equitable" for the particular serious disfigurement. *Schreck*, 10 BRBS at 613.

In the case at bar, the administrative law judge determined, based both on his personal observation of claimant and photographs of claimant taken in January 1997, *see CX-2*, that claimant has a serious facial disfigurement, measuring that impairment as equal to a three on a scale of one to ten. Accordingly, the administrative law judge determined that an award of \$2,250 represents "proper and equitable" compensation for the particular disfigurement suffered by claimant in the instant case. Claimant's contention on appeal that a "serious" facial scar, by definition, is compensable at the maximum allowable amount of \$7,500 is inconsistent with the statutory mandate that the administrative law judge set a "proper and equitable" amount of compensation, not to exceed \$7,500, for a specific disfigurement. *See Schreck*, 10 BRBS at 613. We conclude that there was no abuse of discretion in the administrative law judge's determination that \$2,250 represents "proper and equitable"

compensation for claimant's facial disfigurement, and we therefore affirm the administrative law judge's award.¹ *See Schreck*, 10 BRBS at 612-613.

¹Claimant further contends that inflation has eroded the value of the \$7,500 maximum set by Congress in 1978. The Board, however, must apply the Act as written; while claimant's contention may provide a persuasive justification for a legislative review of the maximum allowable disfigurement award of \$7,500, such contention is outside the scope of the Board's review authority. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 283-284 (1980).

Claimant next assigns error to the administrative law judge's determination that employer is not liable for his attorney's fees pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b).² Section 28(b) provides that in cases in which a controversy develops over the amount of additional compensation to which the claimant may be entitled, an informal conference is held, followed by a written recommendation made by the district director.³ If the employer refuses to accept the written recommendation, it may limit its liability for claimant's attorney's fees by tendering the amount of additional compensation it believes is due within 14 days of its receipt of the district director's recommendation. *See National Steel & Shipbuilding Co. v. Director, OWCP*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). The Board has recognized that the Act encourages the voluntary payment of compensation without resort to formal adversarial proceedings. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986).

In the instant case, employer neither accepted the recommendation made by the

²Section 28(b) states:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to Section 914(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

³Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced "deputy commissioner" used in the statute.

district director at the June 4, 1996 informal conference, nor made any tender of compensation within 14 days of the district director's recommendation. Employer's failure to timely comply with the requirements of Section 28(b) compelled claimant to retain legal counsel. Claimant's attorney thereafter obtained compensation in the amount of \$2,250 for claimant through resort to the adjudication process. Contrary to the administrative law judge's reasoning, the fact that claimant's ultimate award was less than both the amount recommended by the district director and the amount tendered by employer in its settlement offer dated January 8, 1997, does not absolve employer from its liability for attorney's fees incurred during the period in which employer had neither accepted the district director's recommendation nor made any tender of compensation. Thus, we agree with claimant's argument on appeal insofar as he contends that employer's failure to comply with the Section 28(b) requirements within the statutory 14-day period triggered employer's liability for claimant's attorney's fees commencing with the date of the expiration of the 14-day period. *See generally National Steel*, 606 F.2d at 875, 11 BRBS at 68; *Armor*, 19 BRBS at 121.

We disagree, however, with claimant's contention that employer's lack of timely compliance renders employer indefinitely liable for payment in full of claimant's attorney's fees. Although employer did not comply with Section 28(b) in a timely manner, employer's subsequent \$4,000 settlement offer made by letter dated January 8, 1997, constitutes a tender of compensation within the meaning of Section 28(b). *See Armor*, 19 BRBS at 122.⁴ As claimant ultimately was awarded an amount less than the amount offered by employer on January 8, 1997, employer's liability for claimant's attorney's fees ended as of the date of employer's tender. To accept claimant's argument that employer's failure to tender within the requisite 14-day period renders employer liable for *all* attorney's fees incurred thereafter would mean that an employer could not tender beyond the 14-day period without remaining liable in full for claimant's attorney's fees even if claimant ultimately received a nominal amount substantially less than the tendered settlement amount. This position is contrary to the Act's policy of encouraging settlements. *Id.* We therefore modify the administrative law judge's Decision and Order and Decision on Reconsideration to reflect employer's liability for claimant's attorney's fees for services rendered up to the date of employer's tender of compensation on January 8, 1997, and we remand the case for the administrative law judge to award a fee payable by employer for that time period.

Accordingly, the administrative law judge's Decision and Order and Decision on Reconsideration are modified to reflect employer's liability for claimant's attorney's fees

⁴Contrary to claimant's suggestion, the fact that employer's settlement offer failed to address the issue of payment of claimant's attorney's fees does not nullify employer's tender for purposes of attorney's fee liability under Section 28(b).

incurred prior to employer's tender of compensation, and the case is remanded for entry of an attorney's fee award consistent with this decision. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge