

BRB No. 98-1402

OTIS COOPER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
POOL COMPANY)	DATE ISSUED: <u>July 19, 1999</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LTD.)	
)	
Employer/Carrier-)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits, the Supplemental Decision and Order Awarding Attorney's Fees, and the Second Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metarie, Louisiana, for claimant.

S. Daniel Meeks and Jimmy A. Castex, Jr. (Reich, Meeks & Treadway, L.L.C.), Metarie, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits, the Supplemental Decision and Order Awarding Attorney's Fees, and the Second Supplemental Decision and Order Awarding Attorney's Fees (97-LHC-1299) of Administrative Law Judge Lee J. Romero, 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). 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 began working as a floor hand for employer in 1979. In 1989, he slipped while setting up a drilling rig and injured his right knee. As a result of this injury, he eventually underwent surgery on his right knee, but returned to his former duties as a floor hand with employer in 1990. On August 20, 1990, he re-injured his right knee, when he slipped on a muddy floor while pushing drill collars to the side of the drilling rig. He continued to work that day, but eventually reported the knee injury to his supervisor. He was authorized to seek medical attention for his knee, and sought treatment from Dr. Morrison, who referred him to Dr. Barrett. Based on an MRI, Dr. Barrett recommended, and then performed, surgery to repair claimant's anterior cruciate ligament (ACL) on February 24, 1993. Claimant was released from treatment on February 28, 1994, and received his last compensation payment on April 25, 1994. Claimant was unable to return to his former duties following his surgery and began working in alternate employment as a security guard, a position he found through his own efforts, on September 3, 1994. Claimant continued to seek treatment with Dr. Barrett complaining of pain and grinding in his knee. Joint Ex. 2. He filed a claim on February 25, 1995, for benefits under the Act.

Due to the continuing complaints of pain, Dr. Barrett recommended and performed an arthroscopic procedure on claimant's right knee on January 31, 1997. He discovered that the earlier ACL repair had dissolved and opined that the ACL would have to be replaced or rebuilt with a cadaver muscle. Claimant was unable to work from the date of the arthroscopic procedure, January 31, 1997, to April 10, 1997. Employer authorized the recommended ACL repair, but denied liability for any further compensation benefits.

Initially, the administrative law judge found that the claim was filed ten months from the last payment of compensation, and four months from the date claimant became aware that work-related injury would affect his wage-earning capacity, and thus rejected employer's contention that the claim was not timely filed. He noted that the claim was never adjudicated and thus was open and pending. The administrative law judge found that claimant has not reached maximum medical improvement as Dr. Barrett recommended further treatment and found that the previous ACL repairs have dissolved. Thus, the administrative law judge found that claimant was temporarily totally disabled from February 24, 1994, through September 2, 1994, the date he found a security guard job, from January 31, 1997, to April 9, 1997, the date he was able to return to his security job after the January 1997 arthroscopic procedure, and from the date of his prospective procedure until he reaches maximum medical improvement therefrom. In a Second Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel a fee in the amount of \$7,627.50, representing 50.85 hours at the hourly rate of \$150, plus \$856.60 for expenses for a total of \$8,484.10.

On appeal, employer contends that the administrative law judge erred in finding that

the claim was not time-barred. In addition, employer contends that the administrative law judge erred in finding that claimant was entitled to temporary total disability benefits from February 28, 1992 to September 2, 1992, as claimant's counsel withdrew the claim for this period at the hearing.¹ Lastly, employer contests liability for claimant's counsel's fee. Claimant responds, urging affirmance of the administrative law judge's decisions.

Initially, employer contends that as there was no viable claim or dispute in February 1995, and as there are no provisions for protective filings, the form filed on February 25, 1995, was insufficient to constitute a claim. We disagree. Section 13(a) of the Act, 33 U.S.C. §913(a), states that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware of the relationship between the injury or death and the employment. If voluntary payments have been made, a claim may be filed within one year of the last payment. The claim form is not required to contain any particular language so long as claimant's intent to seek compensation can be inferred from the writing. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon. en banc*, 32 BRBS 251 (1998).

¹Employer's brief contains an error as it lists these dates as occurring in 1992. However, as the administrative law judge addresses the same dates in 1994, we will address this contention based on the dates noted by the administrative law judge.

In the instant case, the administrative law judge found that the claim, in the form of the LS-203, was filed ten months after the last payment of compensation, and thus was timely. *See* Joint Ex. 7. As the administrative law judge found, the form included information regarding when the injury occurred, where it occurred, what the specific injury was, and noted that claimant continued to suffer a disability. The administrative law judge thus found it was sufficient to put employer on notice of a compensation claim. Employer contests this finding, arguing that there was no viable claim at the time this claim was filed, and thus it did not constitute a claim for compensation purposes. However, as discussed *infra*, claimant had not been fully compensated for his disability at the time the claim was filed, as he was not compensated for the period from February 28, 1994, to September 2, 1994. Thus, employer's contention that no viable claim existed at the time the LS-203 was filed is rejected. Moreover, the administrative law judge properly found that as claimant did not file a written request with the district director to withdraw his claim, *see* 20 C.F.R. §702.225, and the claim was never adjudicated, it remained open and pending.² *See Intercounty Construction Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998), *aff'd on recon.*, 32 BRBS 224 (1998). Finally, the administrative law judge properly distinguished the decision in *ITO Corp. of Va. v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996), upon which employer relies, as claimant here specifically filed an LS-203 with pertinent information, which the district director served on employer, unlike the vague letters which were relied upon by claimant in *Pettus*. Therefore, we affirm the administrative law judge's finding that the claim was timely filed.³

²The letter written by a claims examiner after the LS-203 was filed is not an order disposing of the claim. As the administrative law judge reasonably found, the letter simply notified claimant of employer's assertion that it had paid all benefits due and stated that if claimant disagreed, additional information was necessary. The claim thus remained open.

³The administrative law judge also found that claimant did not have the requisite awareness until he was advised to quit his job as a security guard on October 24, 1994. However, employer is correct in noting that claimant was aware of the effect of his injury on

his wage-earning capacity in February 1994, when he was told he could not return to work as a roughneck.

Employer also contends that the administrative law judge erred in awarding benefits from February 28, 1994 through September 2, 1994, inasmuch as there was no evidence claimant was unable to return to work on March 1 and 2, 1994.⁴ A claimant who suffers an injury to a scheduled member is not limited to recovery under the schedule, but may recover compensation for total disability if the facts support such an award. *See Sketoe v. Dolphin Titan Int'l*, 28 BRBS 332 (1989)(Smith, J., dissenting on other grounds). If claimant establishes that he cannot return to his former duties, and employer fails to establish suitable alternate employment, claimant may be found to be totally disabled by an injury to a scheduled member. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In the present case, claimant's treating physician reported on February 24, 1994, that claimant would not be able to return to his former duties due to his work-related injury. Joint Ex. 2 at 21. Once claimant shows an inability to return to usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. The same standard applies whether the claim is for permanent or temporary total disability benefits. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), modified on other grounds on recon., 22 BRBS 335 (1989). Employer did not submit any evidence of suitable alternate employment. Rather, claimant began working as a security guard in September 1994, a position he obtained through his own efforts, establishing suitable alternate employment as of that date. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). Therefore, we affirm the administrative law judge's award of temporary total disability benefits from February 28, 1994 through September 2, 1994, as it is supported by substantial evidence. *See generally Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Lastly, employer contends that the administrative law judge erred in finding that employer was liable for claimant's counsel's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). We agree. Employer voluntarily paid temporary total disability benefits from November 24, 1992 through February 28, 1994, and five percent permanent partial disability benefits for claimant's work-related knee injury, thereby precluding employer's liability under Section 28(a) of the Act. Employer, however, is liable for claimant's attorney's fees pursuant to Section 28(b). Employer commenced voluntary payment of temporary total disability benefits which ended on February 28, 1994. The administrative law judge found that claimant was entitled to a period of temporary total disability from February 28, 1994 through September 2, 1994, when claimant began alternate employment, from January 31, 1997 to April 9, 1997, while claimant recovered from the arthroscopic procedure, and from the date of claimant's prospective allograft procedure until he reaches

⁴Employer also asserts that the administrative law judge erred in awarding benefits from March 3, 1994 through September 2, 1994, as claimant's counsel withdrew the claim for benefits for the period from March 3, 1994 through September 2, 1994, at the hearing. We reject this contention as there is no allegation that the proper procedure was followed to withdraw the claim, including a determination that the withdrawal is in claimant's best interests and for a proper purpose. 20 C.F.R. §702.225; *Hargrove*, 32 BRBS at 14.

maximum medical improvement therefrom. 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 but hold that it is to be assessed against employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

Accordingly, the Decision and Order-Awarding Benefits, the Supplemental Decision and Order Awarding Attorney's Fees, and the Second Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge