

LEON P. BAILEY )  
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 Claimant-Petitioner )  
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 v. )  
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 NEWPORT NEWS SHIPBUILDING AND ) DATE ISSUED: 03/26/2007  
 DRY DOCK COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Attorney Fee Orders of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

Leon P. Bailey, Carrollton, Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Attorney Fee Orders (2005-LHC-01478) of Administrative Law Judge Richard E. Huddleston 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 was working as a shipbuilder when he injured his left leg on May 29, 1975. Employer voluntarily paid claimant various periods of temporary total disability benefits from October 11, 1975 to May 26, 2003. In July 2004, claimant's treating physician assigned a 50 percent permanent impairment rating for claimant's left leg. On

August 17, 2004, employer began voluntary payments of permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).<sup>1</sup> On August 16, 2004, employer submitted proposed stipulations to claimant's counsel, agreeing to the entry of an order awarding benefits for a 50 percent leg impairment. Claimant's attorney amended the stipulations to include a potentially-related injury to claimant's back, but employer refused to accept this stipulation and requested a hearing on February 7, 2005. The claim was referred for a formal hearing on February 15, 2005, but was remanded for an informal conference on March 14, 2005. Employer objected to the remand and the district director agreed that there was no need for an informal conference and again transferred the claim for a formal hearing on March 21, 2005. Before a hearing could be held, however, claimant signed the original stipulations submitted by employer that stated that claimant is entitled to permanent partial disability benefits for a 50 percent impairment to his left leg. There was no stipulation concerning a back injury. The administrative law judge entered an order based on the stipulations on August 12, 2005.

Subsequently, claimant's attorney filed a petition for an attorney's fee for work performed before the administrative law judge, beginning on February 17, 2005. He requested \$2,466.25, representing 9.3 hours of attorney services at the hourly rate of \$250 and 1.75 hours of paralegal services at the hourly rate of \$95. In an Order dated February 27, 2006, the administrative law judge found that employer cannot be held liable for claimant's attorney's fee as there was no successful prosecution of the claim before him. The administrative law judge found that employer paid the requested permanent partial disability benefits while the case was before the district director. The administrative law judge also considered counsel's request to assess an attorney's fee as a lien on claimant's compensation and found there was no evidence that the fee petition had been served upon claimant. Thus, the administrative law judge allowed counsel to make proper service and gave claimant an opportunity to object to the petition.

Claimant's counsel certified that he mailed his fee petition to claimant on March 8, 2005. Claimant did not respond. On March 24, 2006, the administrative law judge issued an award of an attorney's fee in the amount of \$2,238.10, payable as a lien against claimant's compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant appeals this decision without legal representation. Neither claimant's counsel nor employer has responded to this appeal.

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<sup>1</sup> Employer began making payments of \$105 per week for 144 weeks, based on an average weekly wage of \$158.30.

We affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee. Employer paid or tendered to claimant all the benefits claimed prior to the case's referral to the Office of Administrative Law Judges, and the administrative law judge found that claimant did not gain any additional compensation from employer as a result of the proceedings at that level. Counsel also did not obtain any alteration of the stipulation originally submitted by employer at the district director level. *Cf. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123 (4<sup>th</sup> Cir. 2007) (claimant's elimination of proposed stipulation is success, rendering employer liable). The administrative law judge correctly found that an award of an attorney's fee payable by employer is not authorized on these facts. 33 U.S.C. §928(b); *see generally Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003); *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1<sup>st</sup> Cir. 1998); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

The administrative law judge found that claimant's counsel is entitled to have his fee assessed against claimant pursuant to Section 28(c), 33 U.S.C. §928(c). We agree that claimant is *potentially* liable for his attorney's fee as the claim was successfully prosecuted in that claimant obtained a compensation order awarding him benefits for a 50 percent leg impairment. *Boe*, 34 BRBS at 111; *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). We cannot affirm the fee award, however, as the administrative law judge did not assess the fee request in light of the regulatory criteria. The regulation at 20 C.F.R. §702.132(a) states, in relevant part, that,

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant.

In this case, the administrative law judge gave an adequate explanation for awarding counsel an hourly rate of \$225, but the administrative law judge did not assess whether the work counsel performed before him was necessary to claimant's receipt of the award or whether the fee was reasonably commensurate with any necessary work done and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997). Moreover, the administrative law judge did not address claimant's financial circumstances in assessing against his award the full fee requested. *Boe*, 34 BRBS at 111. Therefore, we must vacate the administrative law judge's assessment of the attorney's fee against claimant's award, and we remand this case for the administrative law judge to make additional findings consistent with the regulatory criteria. *See Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002).

Accordingly, the administrative law judge's finding that employer is not liable for claimant's attorney's fee is affirmed. The Attorney Fee Order of the administrative law judge awarding claimant's counsel an attorney's fee payable by claimant as a lien against his compensation award is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge