

SHERMAN E. PAYNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 05/11/2007
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	DECISION and ORDER
Employer-Respondent	)	

Appeal of the Order Denying Attorney's Fee of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene A. Moring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Denying Attorney's Fee (2003-LHC-01028) 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). 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 was injured while working for employer on November 9, 1993. On October 21, 2002, claimant's treating physician, Dr. Carter, assigned him a permanent impairment rating to his right arm of 40 percent. Claimant sought benefits under the Act. An informal conference was held on December 4, 2002. Claimant was examined by Dr.

Apostoles at the request of employer. On December 17, 2002, Dr. Apostoles assigned claimant a permanent impairment rating of 30 percent of the upper extremity.

The case was transferred to the Office of Administrative Law Judges for resolution on January 30, 2003, per claimant's request, on the issue of the extent of claimant's permanent arm impairment. On February 6, 2003, employer submitted proposed stipulations to claimant, stating that employer has paid medical benefits and temporary total disability benefits for numerous periods from November 11, 1999, to March 3, 2002, in the amount of \$39,128.36. The proposed stipulations stated that claimant is entitled to permanent partial disability benefits in the amount of \$57,097.87 for a 30 percent impairment to the right upper extremity. Included in the stipulations was a sentence that read: "That the parties are aware of no other outstanding compensation issues as of the date of the execution of these Stipulations." After striking out that sentence, claimant agreed with the 30 percent impairment rating, signed the stipulations and returned them to employer on June 19, 2003. Because claimant had not responded to the request that he identify any remaining issues, employer filed a motion to compel and answer. The administrative law judge issued an order to compel on July 11, 2003, and in response, claimant admitted that there were no other outstanding issues. At the formal hearing on July 17, 2003, the parties agreed to stipulations without the objectionable language, and the administrative law judge awarded benefits to claimant based on the stipulations.

On August 17, 2003, claimant's counsel filed a fee petition with the administrative law judge requesting a total of \$3,379.85, representing 12.97 hours of legal services at the hourly rate of \$225 and 5.77 hours of paralegal services at the hourly rate of \$80. Employer objected to the petition, asserting it was not liable for a fee because it tendered benefits and claimant obtained no benefits greater than those tendered. The administrative law judge issued a cursory Order denying the attorney's fee petition as the amount of benefits awarded was "identical to the offer made to claimant by employer on February 6, 2003."

Section 28(b) of the Act states in relevant part that if an employer pays or tenders benefits without an award, it is liable for a claimant's attorney's fee only if the claimant obtains greater compensation than the employer paid or tendered. 33 U.S.C. §928(b). The term "tender" is not defined by the Act, but the Board has held that a valid "tender" under the Act requires "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (*en banc*). The Board held in *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004), that a "tender" pursuant to Section 28(b) must be unconditional; thus, an offer to pay compensation coupled with a proposed stipulation containing language similar to that which employer used in the instant case is not a "tender" under Section 28(b). Recently,

in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123 (4<sup>th</sup> Cir. 2007), the Fourth Circuit agreed with the analysis used by the Board in *Jackson*. The court held that employer's conditioning its offer to pay compensation on claimant's accepting a stipulation with which he disagreed rendered employer's tender invalid. As claimant Hassell obtained greater compensation than employer offered to pay because he obtained an award of benefits "without the inclusion of the challenged stipulation," the court held that employer was liable for claimant's attorney's fee pursuant to Section 28(b). *Id.* at 128 (holding additionally that the other prerequisites for application of Section 28(b) were satisfied).

For the reasons stated in *Jackson* and *Hassell*, we vacate the administrative law judge's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). After the case was referred to the administrative law judge, employer submitted to claimant proposed stipulations including essentially the same disputed phrase as that in *Jackson* and *Hassell*. Prior to the hearing, the parties stipulated that claimant is entitled to permanent partial disability benefits for a 30 percent impairment of his right upper extremity *without* the disputed language in the original stipulations. Pursuant to *Hassell* and *Jackson*, the administrative law judge's denial of the fee is vacated. The case is remanded for the administrative law judge to consider employer's remaining objections to the fee petition and any other necessary issues. *See* 20 C.F.R. §702.132.

Accordingly, the Order Denying Attorney's Fee of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

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