

GRACE V. HUCKS)
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 Claimant-Respondent)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 09/29/2003
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Daniel A Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Breit Klein Camden L.L.P.), 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:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (2001-LHC-01542) 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her back on January 10, 1990, during the course of her employment for employer as a pipefitter. Employer voluntarily paid compensation for various periods of temporary total disability, 33 U.S.C. §908(b), from January 17, 1990, to March 29, 2000. Employer also paid claimant compensation for temporary partial

disability, 33 U.S.C. §908(e), from February 4 to February 24, 2000, and it commenced paying continuing compensation for temporary partial disability from March 30, 2000, at the rate of \$203.91 per week. On June 29, 2000, claimant's counsel wrote to employer and the district director requesting conversion of claimant's compensation from temporary partial to permanent partial disability. 33 U.S.C. §908(c)(21). Claimant based her claim on the May 4, 2000, report of Dr. Ross stating that claimant's back condition had reached maximum medical improvement. Claimant's Response Brief at Attachments 1, 2. On July 25, 2000, employer filed a claim for Section 8(f) relief, 33 U.S.C. §908(f), with the district director. The district director denied the application, but he stated that employer may submit additional documentation by September 29, 2000. On September 14, 2000, claimant wrote to the district director requesting modification of an existing order to provide compensation for permanent partial disability from May 4, 2000. *Id.* at Attachment 3.¹ On February 6, 2001, the district director replied that employer declined to supplement its application for Section 8(f) relief and it had not responded to claimant's request for modification. The district director interpreted employer's non-response as its disagreement with claimant's request for modification, and claimant was advised to request transfer of the claim to the Office of Administrative Law Judges (OALJ). *Id.* at 5. On March 5, 2001, the claim was referred to the OALJ for a formal hearing. On March 13, 2001, employer wrote to claimant's attorney and stated that it agreed to pay the claim for permanent partial disability compensation. Subsequently, claimant signed a stipulation agreement on November 9, 2001, which provided, *inter alia*, that claimant is entitled to such compensation from May 4, 2000, and the parties consented to entry of a formal order. JX-1.

In his decision issued on June 12, 2002, the administrative law judge incorporated the parties' stipulations and he awarded claimant compensation for permanent partial disability from May 4, 2000. Employer was awarded Section 8(f) relief. Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$3,838.75, representing 17.06 hours of attorney services at a rate of \$225 per hour. Employer filed objections to the fee request.

In his supplemental decision, the administrative law judge rejected employer's objection that Section 8(f) was the only contested issue, and he found claimant entitled to a fee under Section 28(a) of the Act, 33 U.S.C. §928(a). The administrative law judge determined that Section 8(f) was the final issue left for consideration after the parties entered into the stipulated agreement, which established claimant's entitlement to compensation for permanent partial disability. The administrative law judge reduced the hourly rate to \$200, and he found all the hours expended by claimant's counsel

¹This order, however, is not attached to claimant's letter nor is it contained in the administrative file forwarded to the Board.

reasonable. Accordingly, claimant's counsel was awarded a fee of \$3,412, payable by employer, for work performed before the administrative law judge.

On appeal, employer contends that claimant's counsel's entitlement to a fee payable by employer is governed by Section 28(b), as employer was voluntarily paying compensation for temporary partial disability when claimant requested compensation at the same rate for permanent partial disability. Under Section 28(b), employer asserts, it has no fee liability as there was no informal conference prior to the transfer of the claim to the OALJ. Alternatively, employer argues that its tender of compensation on March 13, 2001, terminated its fee liability. Finally, employer asserts that it should not be held liable for a fee for wind-up services rendered after March 13, 2001. Claimant responds, urging affirmance of the administrative law judge's fee award.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. '928(a). Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a controversy arises over additional compensation due, the employer is liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. '928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In this case, the administrative law judge found employer liable for all of claimant's attorney's fee pursuant to Section 28(a) because employer did not stipulate to claimant's entitlement to compensation for permanent partial disability until after the case was transferred from the district director to the OALJ. Supp. Decision and Order at 2.

We cannot affirm this fee award. Employer was paying claimant compensation for temporary partial disability at the time claimant sought compensation at the same rate for permanent partial disability, commencing on May 4, 2000. Employer did not respond to claimant's claim until claimant requested that the claim be transferred to the OALJ, after which employer agreed to pay claimant permanent partial disability benefits. Employer therefore is correct in averring that its liability for claimant's attorney's fee is governed by Section 28(b). Employer was paying claimant continuing compensation for temporary partial disability from March 30, 2000, and thereafter claimant obtained the greater benefit of an award of permanent partial disability.² *See generally Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Boe v. Dept. of the*

² A temporary partial disability award is payable only for five years, 33 U.S.C. §908(e), whereas a permanent partial disability award is payable for the continuance of the disability, 33 U.S.C. §908(c)(21).

Navy/MWR, 34 BRBS 108 (2000). Accordingly, we vacate the administrative law judge's attorney's fee award pursuant to Section 28(a), and we remand for the administrative law judge to reconsider employer's fee liability pursuant to Section 28(b) and in light of our disposition of employer's remaining contentions.

We reject employer's contention that it is not liable for claimant's attorney's fee under Section 28(b) due to the absence of an informal conference. Following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer's liability for a fee pursuant to Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that an informal conference is a prerequisite to fee liability under Section 28(b)). Moreover, in this case, there was no informal conference due to employer's failure to participate while the claim was before the district director. Employer did not respond to correspondence from both claimant and the district director. Claimant was therefore advised by the district director to and did in fact request the transfer of her claim to the OALJ. As employer was given the opportunity to address the claim for permanent partial disability benefits while the claim was before the district director, employer may not now rely on its non-participation to avoid liability for an attorney's fee for work reasonably required while the claim was before the administrative law judge. *See generally Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

Under Section 28(b), employer's fee liability terminates upon a tender or payment of compensation if claimant thereafter does not obtain benefits greater than those tendered or paid. A valid tender of compensation must be a writing establishing a readiness, willingness and ability on employer's part to make payment to claimant. *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). In this regard, the administrative law judge must review the relevant evidence and determine when employer tendered or paid compensation. On appeal, employer relies on its March 13, 2001, letter to claimant's counsel which states, "the employer hereby agrees to pay the claim of permanent partial disability benefits." Attachment to August 19, 2002, letter from claimant's counsel to administrative law judge. Employer also offered to settle the claim for \$40,000 on April 10, 2001. Attachment to August 19, 2002, letter to administrative law judge from claimant's counsel. In this letter, employer explicitly stated that it would pay claimant compensation for permanent partial disability on the terms demanded by claimant in her June 29, 2000, letter to employer by commencing payments as of May 4, 2000, at the same compensation rate of \$203.91 per week that employer already was paying as compensation for temporary partial disability. Finally, on May 13, 2001, employer filed with the district director an LS-208 form indicating its

voluntary payment of compensation for permanent partial disability commencing on May 4, 2000.³ *Id.*

Although the date employer tendered compensation generally terminates employer's fee liability under Section 28(b), we reject employer's contention that it cannot be liable for a fee for any services rendered by claimant's attorney after the date the administrative law judge determines that it tendered compensation. It is well established that employer may be held liable for reasonable wind-up services after it has agreed to pay benefits. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). On remand, the administrative law judge must provide an adequate discussion of the time requested and services rendered by claimant's counsel after the date he determines that employer tendered compensation, and assess the necessity and reasonableness of the work involved, in order to discern whether these entries represent services for which counsel may be entitled to a fee, payable by employer. *Id.* For example, employer may be liable for a fee for services rendered in response to its April 10, 2001, offer to settle the claim, as claimant's counsel is obligated to discuss the settlement offer with claimant. Moreover, on April 17, 2001, employer propounded interrogatories to claimant's counsel, Fee Petition at 1, and counsel is entitled to a fee payable by employer for time expended responding to employer's discovery request. Finally, a review of claimant's counsel's fee petition indicates that a fee for services may be payable by employer for necessary time expended in preparing and signing the stipulation agreement.

³ On May 3, 2001, claimant's attorney wrote to the administrative law judge that there was no longer an issue in dispute between claimant and employer, that an appropriate stipulation agreement will be submitted, and that the entry of an award was requested.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge