

FRANCESCO LATERZA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A.G. SHIP MAINTENANCE	)	DATE ISSUED:
	)	
and	)	
	)	
NORTH ATLANTIC SAFETY & CLAIMS	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Nicholas Scibilia, Scarsdale, New York, for claimant.

Michael N. Cotignola (Kalmus & Martuscello), Berkeley Heights, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (92-LHC-2794) of Administrative Law Judge Donald W. Mosser 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 17, 1989, claimant, a lasher, sustained injuries to his back and both feet while working for employer, and employer voluntarily paid claimant temporary total disability benefits

from April 18, 1989. Cl. Ex. 1; Emp. Ex. 1. Subsequently, a controversy arose as to claimant's entitlement to additional compensation in the form of permanent total disability benefits after claimant's treating physician, Dr. Owaid, and his psychiatrist, Dr. Florio, stated that claimant could not return to work, while employer's physician, Dr. Leonhardt, stated that claimant could return to work and reached maximum medical improvement on March 5, 1990. Cl. Exs. 5, 10; Emp. Exs. 2, 4, 7. Employer stipulated to claimant's entitlement to permanent total disability benefits from March 5, 1990, and continuing, at the hearing on June 29, 1994. Tr. at 6-7.

In his Decision and Order dated September 26, 1995, the administrative law judge ordered employer to pay temporary total disability benefits under Section 8(b) of the Act, 33 U.S.C. §908(b), from April 17, 1989, through March 4, 1990, permanent total disability benefits under Section 8(a) of the Act, 33 U.S.C. §908(a), from March 5, 1990 and continuing, interest, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$13,166, representing 52 hours and 40 minutes of attorney services at \$250 per hour and \$494.63 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied.

In a Supplemental Decision and Order, the administrative law judge reduced the hourly rate sought to \$200 and the number of hours sought by 4.5, as they were services claimed with respect to employer's pursuit of Section 8(f) relief. The administrative law judge, therefore, awarded claimant's counsel a fee of \$9,633.33, representing 48 hours and 10 minutes of legal services at \$200 per hour and \$497.53 in expenses to be paid by employer.

On appeal, employer challenges the administrative law judge's award of an attorney's fee, asserting that it is not liable for claimant's attorney's fee as the sole issue presented to the administrative law judge for adjudication involved employer's right to Section 8(f) relief. Claimant responds, urging affirmance of the fee award.

Section 28(b) of the Act, 33 U.S.C. §928(b), provides for an award of an attorney's fee payable by employer when employer pays or tenders some compensation, and claimant subsequently uses the services of an attorney to recover a greater amount of compensation. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), *aff'g* 24 BRBS 84 (1990); 33 U.S.C. §928(b). If the employer agrees to claimant's entitlement to additional compensation at the hearing before the administrative law judge, employer is liable for any attorney's fee incurred prior to the agreement. *See Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

In this case, employer voluntarily paid claimant temporary total disability benefits from the time of injury. A controversy arose upon claimant's filing of a Form LS-18 on June 15, 1992.

Claimant alleged his entitlement to compensation for permanent total disability, permanent partial disability, and temporary total disability benefits under Sections 8(a)-(c) of the Act, 33 U.S.C. §908(a)-(c), in addition to cost-of-living adjustments, continuing medical care under Section 7, and an attorney's fee under Section 28 of the Act, 33 U.S.C. §928. Cl. Ex. 17. Employer contested these issues in its Form LS-18 filed on July 2, 1992, and challenged claimant's allegation that the injury was work-related under Section 20(a) of the Act, 33 U.S.C. §920(a), and that he had suffered a loss in wage-earning capacity under Section 8(h) of the Act, 33 U.S.C. §908(h). Employer additionally requested relief from continuing compensation liability pursuant to Section 8(f). Cl. Ex. 14. At the hearing on June 29, 1994, employer conceded claimant's entitlement to permanent total disability benefits under Section 8(a), and advised the administrative law judge that the only remaining issue was employer's entitlement to relief under Section 8(f). Tr. at 6-7.

As a result of the proceedings before the administrative law judge, claimant obtained permanent total disability benefits, which entitle him to a cost-of-living adjustment pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f). This constitutes additional compensation within the meaning of Section 28(b). *See generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand)(employer is liable for an attorney's fee where claimant obtains a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), as it results in the accrual of a benefit to claimant greater than that voluntarily paid by employer). Employer, therefore, is liable for the attorney's fee. *See Rihner*, 41 F.3d at 997, 29 BRBS at 43 (CRT); 33 U.S.C. §928(b). Moreover, the administrative law judge found that it was reasonable and necessary for claimant's counsel to prepare for every contested issue in this case as employer did not concede claimant's entitlement to permanent total disability benefits until the date of the hearing. *See Kleiner*, 16 BRBS at 297; *see also Cahill v. International Terminal Operating Co., Inc.*, 14 BRBS 483 (1981); Supplemental Decision and Order at 3-4; Tr. at 6-7. Consequently, the administrative law judge properly held employer liable for claimant's attorney's fee in this case, even though it ultimately involved resolution of the Section 8(f) issue, as employer did not concede claimant's entitlement to permanent total disability benefits until the date of the hearing on June 29, 1994. *See Rihner*, 41 F.3d at 997, 29 BRBS at 43 (CRT); *Kleiner*, 16 BRBS at 297; Supplemental Decision and Order at 3-4; Tr. at 6-7. As employer is liable for the attorney's fee under Section 28(b), and employer does not challenge the amount of the fee awarded, we affirm the administrative law judge's award of an attorney's fee payable by employer.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge