

BRB No. 96-1162

DONALD CODDINGTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PORT OF PORTLAND)	DATE ISSUED:_____
)	
and)	
)	
LIBERTY NORTHWEST)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeal of the Compensation Order - Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Robert K. Udziela (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order - Approval of Attorney Fee Application (No. 14-90897) of District Director Karen P. Staats 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Following an injury to his back on May 3, 1987, claimant sought permanent partial disability benefits after January 31, 1988, when he was released for full duty work, with restrictions against prolonged sitting and repetitive bending. The parties stipulated that employer voluntarily paid all compensation due through January 31, 1988, the date of

maximum medical improvement. In her Decision and Order, the administrative law judge rejected employer's argument that claimant suffered no loss in wage-earning capacity after that date because his average hourly rate remained essentially the same both before and after the injury and found that claimant sustained a loss of wage-earning capacity of \$292.35 per week. Employer appealed this decision.

On appeal, the Board rejected employer's argument that the administrative law judge erred in determining that claimant's actual post-injury earnings did not represent his post-injury wage-earning capacity and affirmed the administrative law judge's finding that claimant sustained a loss in his wage-earning capacity based on the decrease in the average number of hours he was able to work post-injury and the physical effects of his injury. However, as the administrative law judge did not explain the basis for her calculation of claimant's post-injury wage-earning capacity, the Board remanded the case for the administrative law judge to explain her computations consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *Coddington v. Port of Portland*, BRB No. 90-1859 (July 25, 1995)(unpublished). Claimant's motion for reconsideration was summarily denied by the Board. *Coddington v. Port of Portland*, BRB No. 90-1859 (July 12, 1996)(order) (unpublished).

On May 17, 1996, while the motion for reconsideration was pending before the Board, the district director awarded claimant's counsel a fee of \$1,558.75, representing 7.75 hours at \$175 per hour, and 1.5 hours at \$135 per hour. Counsel had requested this amount for work performed between May 14, 1987 and December 16, 1988 in a July 13, 1990, fee petition. In the present appeal, employer contends that because the district director issued the fee award while the merits of the nature and extent of claimant's disability were pending before the Board, the fee award was premature. Employer avers that if the award of permanent partial disability benefits were overturned on appeal, there would be no basis for imposing fee liability against employer, as claimant's counsel would not have successfully prosecuted the claim. Employer avers that until the issue of claimant's permanent partial disability is resolved through the appellate process, the issue of whether claimant's counsel is entitled to a fee payable by employer cannot be properly addressed and urges that the Board stay the district director's fee award and decide the issues raised in both appeals simultaneously. Claimant responds that employer's argument that the award of attorney fees should be stayed pending the outcome of the appeal on the merits is moot in light of the Board's July 12, 1996, Order denying reconsideration. Moreover, claimant avers that the district director properly determined that claimant's counsel was entitled to a fee payable by employer because claimant's counsel was successful before the administrative law judge and subsequently before the Board in establishing claimant's entitlement to permanent partial disability benefits greater than the compensation which employer had paid or agreed to pay. Employer replies that inasmuch as the Board remanded the case to the administrative law judge for further consideration of claimant's entitlement to permanent partial disability benefits, claimant's counsel has not yet successfully prosecuted the case and argues that the question of claimant's counsel's entitlement to a fee before the district director should be deferred until the substantive issues are decided.

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 the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be 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).

We reject employer's arguments and affirm the district director's award of attorney's fees. As claimant avers, employer's argument that the award is premature has been rendered largely moot by virtue of the Board's July 12, 1996, Order on reconsideration. Moreover, it is well-established that in order to further the goal of administrative efficiency a fee may be awarded at a different level of the proceedings while an appeal of the merits of the case is pending before the Board. Such an award, however, does not become effective and is thus not enforceable until all appeals are exhausted. See *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987); *Wells v. International Great Lakes Shipping Co.*, 14 BRBS 868 (1982). Thus, we deny employer's request for a stay as unnecessary.

Employer's argument that the district director's fee award is inappropriate because claimant's counsel has yet to successfully prosecute the claim for permanent partial disability compensation in light of the Board's decision to remand the case is also rejected. The present case is governed by Section 28(b) because employer voluntarily paid claimant the compensation owed through the date of maximum medical improvement but controverted his entitlement to additional disability compensation after that date. Accordingly, the question of fee liability in this case is contingent on whether counsel's efforts resulted in claimant's obtaining additional compensation greater than that which employer voluntarily paid or agreed to pay. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand). On appeal, the Board affirmed the administrative law judge's finding that claimant sustained a loss in wage-earning capacity entitling him to continuing permanent partial disability compensation based on the decrease in his hours and his physical impairment and remanded only for the administrative law judge to explain how she arrived at the computation of the amount of claimant's post-injury wage-earning capacity. Inasmuch as our remand to the administrative law judge did not affect the fact that claimant's counsel established his entitlement to disability compensation exceeding employer's voluntary payments, employer is liable for a reasonable attorney's fee for work done before the district director pursuant to Section 28(b). *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154, 158 (1990).¹ Inasmuch as employer does not otherwise

¹We note that on remand, the parties did not further pursue this case. On January 14, 1997, the administrative law judge issued a Decision and Order on Dismissal, based on the parties' lack of response, the claimant's death, and the fact that the Board's findings

contest the fee entered by the district director, the district director's award of attorney's fees is affirmed.

Accordingly, the district director's fee award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

had rendered the contested matters moot. *Coddington v. Port of Portland*, Case No. 89-LHC-912 (January 13, 1997).