

RICK A. WASSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEA LAND SERVICES,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown, Houston, Texas, for claimant.

Kenneth G. Engerrand and John R. Walker (Brown, Sims, Wise & White), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (94-LHC-0119) of Administrative Law Judge Paul H. Teitler 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, employed as a rigger, was injured when he was hit in the head by a rigging spreader bar on November 20, 1990. Employer voluntarily paid temporary total disability benefits in the amount of \$646.46 per week, from November 25, 1990, through May 27, 1991, at which time employer, based on a labor market survey, reduced its payment of compensation to \$419.79 per week, to reflect a change in the nature and extent of claimant's condition from temporary total to permanent partial disability. An informal conference was held on May 4, 1993, wherein the district director recommended that compensation for permanent partial disability benefits continue at the present rate paid by employer of \$419.79 per week. Additionally, the district director acknowledged employer's agreement to update its labor market survey.

As a result of employer's failure to timely submit an updated labor market survey, claimant obtained counsel and notified employer and the Department of Labor of his intention to pursue his claim for permanent partial disability benefits. The district director thereafter declined claimant's request for a second informal conference on the grounds that such action would be unproductive, and the case was referred to the Office of Administrative Law Judges. Prior to a hearing, the parties entered into stipulations, which were approved by the administrative law judge in his Decision and Order Approving Settlement. Among the stipulations, the parties agreed: that claimant was able to return to full-time suitable alternate employment with a weekly wage-earning capacity of \$260 beginning on December 10, 1990; that employer was therefore required to pay claimant \$473.13 per week in permanent partial disability benefits commencing on March 31, 1994; that claimant would begin two years of vocational rehabilitation and retraining in May 1994, during which time claimant agreed that he would continue to have a weekly earning capacity of \$260; and that upon completion of claimant's retraining in May 1996, either party could file a request for Section 22, 33 U.S.C. §922, modification.¹

On August 10, 1994, claimant's counsel filed a fee petition for work performed on this case, requesting \$8,837.50 for 50.5 hours of services at \$175 per hour, plus \$318.75 for 4.25 hours of paralegal services. Noting that no objections to counsel's fee request were filed, the administrative law judge, by Supplemental Decision and Order Awarding Attorney Fees dated October 7, 1994, granted the requested fee in its entirety. Subsequently, employer filed an objection to claimant's request for an attorney's fee which was treated as a timely motion for reconsideration of the administrative law judge's October 7, 1994, Supplemental Decision and Order Awarding Attorney Fees. In his Supplemental Decision and Order Granting Attorney Fees dated December 15, 1995, the administrative law judge, after addressing employer's specific objections, again awarded claimant's counsel a fee of \$9,156.25, pursuant to Section 28(a) and (b), 33 U.S.C. §928(a), (b), representing 50.5 hours of services at \$175 per hour, plus 4.25 hours at \$75 per hour for paralegal services.

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erroneously held it liable for claimant's attorney's fee, alleging that the provisions of Sections 28(a) and 28(b) do not apply. First, employer argues that inasmuch as it voluntarily paid benefits to claimant, it cannot be held liable for an award of attorney's fees under Section 28(a). Secondly, as employer accepted the written recommendations of the district director with regard to the disposition of this case, and employer has never terminated

¹Other stipulations included: that claimant's pre-injury average weekly wage was \$969.69; that medical benefits will continue to be provided under Section 7, 33 U.S.C. §907, of the Act; that all disputes regarding past temporary total, temporary partial and permanent partial disability benefits, as well as any potential credits for previously paid compensation are herein resolved; and that the issue of attorney's fees will be submitted before the administrative law judge for resolution in the event that a compromise agreement on said issue cannot be reached.

or controverted claimant's entitlement to compensation and/or medical treatment, employer contends no controversy ever arose regarding claimant's entitlement to benefits and thus, it cannot be held liable for an attorney's fee under Section 28(b).

Under Section 28(a), if an employer declines to pay any compensation within thirty 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, claimant is entitled to an attorney's fee award payable by employer. 33 U.S.C. §928(a). Inasmuch as employer voluntarily paid compensation throughout the litigation of this claim, employer correctly asserts that the administrative law judge improperly found employer liable for an attorney's fee under Section 28(a). *See generally Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995). However, 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). In the instant case, although employer voluntarily paid permanent partial disability benefits pursuant to the terms of the district director's recommendation, claimant retained an attorney and sought additional compensation.² A controversy therefore remained even after employer voluntarily paid compensation. As a result of the parties' stipulations approved by the administrative law judge, claimant obtained an additional \$53.34 per week in permanent partial disability benefits as of March 31, 1994,³ as well as vocational rehabilitation and retraining, and an agreement that employer would not file a petition for modification during the two-year period ending in May 1996. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981). This additional compensation is sufficient to support an award of an attorney's fee payable by employer pursuant to Section 28(b). *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993). Consequently, we affirm the administrative law judge's finding that employer is liable for an attorney's fee in the instant case pursuant to Section 28(b) of the Act. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

²While employer accepted the district director's written recommendation that payment of benefits for claimant's permanent partial disability remain at \$419.79 per week, employer did not follow through on its agreement to have an up-to-date labor market survey done.

³Claimant also received additional compensation in the sum of \$236.22 for past due portions owed as a result of the increased compensation rate.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge