

DAVID TAYLOR)
)
 Claimant-Respondent)
)
 v.)
)
 MARINE INSULATION CORPORATION) DATE ISSUED:
)
 and)
)
 FLORIDA INSURANCE GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Motion to Modify of James Guill, Associate Chief Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

John S. Smith (Shofi, Smith, Hennen & Gramovot, P.A.), Tampa, Florida, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

Employer/carrier appeals the Decision and Order Denying Motion to Modify (94-LHC-1254) of Associate Chief Judge James Guill 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*,

380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). In connection with its appeal, employer/carrier has filed a motion to remand the case to the administrative law judge. In response, claimant agrees that the case should be remanded.

This case presents a single issue, *i.e.*, whether the attorney's fee of claimant's counsel in the amount of \$10,000, plus costs of \$2,954.52, is to be paid by claimant or by employer or its insurer carrier. Employer/carrier asserts that as part of a settlement in a third-party case, the parties agreed that the carrier, Florida Insurance Guaranty Association (FIGA), would not be held liable for claimant's counsel's attorney's fee. To arrive at a determination of liability for the fee, it is necessary to review pertinent facts in the history of the case together with the procedural developments.

Claimant sustained a back injury that arose out of and in the course of his employment with Marine Insulation Corporation on August 21, 1984. Benefits were paid under the Act for temporary total disability from August 22, 1984 to April 7, 1986, and for temporary partial disability from April 8, 1987, to October 27, 1987. Claimant brought a third-party suit which was settled on November 18, 1986, for the gross amount of \$140,000. Claimant received a net amount of \$89,885.44, and FIGA, which took over for the bankrupt Midland Insurance Company, employer's original carrier, received \$14,000 in reimbursement of its lien. A Form LS-33, Approval of Compromise of Third Person Cause of Action was executed on November 8, 1993, by Harley E. Martine, who had been president of employer, and by FIGA on August 23, 1994, after an addendum was added. In this addendum, claimant agreed, *inter alia*, that FIGA would not be liable for claimant's attorney's fee in exchange for FIGA's approval of the third-party settlement.

This case was referred for hearing on August 25, 1994, before Administrative Law Judge G. Marvin Bober. Claimant's counsel opened by referring to the amount of compensation already paid, the amount of the third-party settlement and by stating further that claimant waived any entitlement to attorney fees and expenses payable by employer and that claimant would assume responsibility for any attorney fees and costs to be ordered by the administrative law judge or the district director. Reference to this waiver was incorporated in the addendum to the LS-33. Claimant's counsel also stated that the issues consisted of the nature and extent of the claim and that the carrier was raising Section 8(f) as an issue. Counsel for the carrier stated that he agreed with all of the foregoing statements. Tr. at 6.

Judge Bober issued his Decision and Order on September 14, 1995. In it he referred to three issues - nature and extent of disability, application of Section 33(g) and employer's entitlement to Section 8(f) relief. Decision and Order at 4. He also identified Stipulation 24 concerning claimant's waiver of attorney fees and expenses payable by employer. Decision and Order at 3. In his decision, he found claimant entitled to temporary total disability benefits from August 21, 1984 through July 29, 1985, and permanent total disability benefits from July 30, 1985. He found employer entitled to Section 8(f) relief resulting in its liability for the first 104 weeks of permanent total disability with the Special Fund liable thereafter for the duration of claimant's disability. Finally, he

noted claimant's counsel's application for an attorney's fee of \$10,000 and costs to be paid by claimant, but he ordered claimant's attorney to file an itemized application for attorney fees within 30 days.

Pursuant to the above order, counsel for claimant timely submitted an application for attorney fees and expenses. Claimant's counsel itemized a fee of \$10,000 plus \$2,954.52 in expenses. He did not make any reference to the party liable for this fee. Judge Bober issued an Order on April 2, 1996, approving the fee and expenses as requested and assessing liability on employer, Marine Insulation Company. No reference was made to claimant's alleged waiver.

Claimant's counsel timely filed a motion to modify, alleging that Marine Insulation Company is now defunct, that claimant and FIGA agreed that in exchange for FIGA's approval of the third-party settlement claimant would waive any rights to attorney fees payable by FIGA and that claimant agreed to pay the sum of \$12,954.52¹ for attorney fees and expenses. The motion to modify the attorney fee award was referred to James Guill, Associate Chief Administrative Law Judge, due to the fact that Judge Bober was no longer with the Office of Administrative Law Judges. Judge Guill denied the motion in an Order dated August 14, 1996, stating that claimant's agreement to pay the attorney fees and expenses was null and void. He pointed out that nature and extent of disability were at issue and that claimant was awarded permanent total disability benefits. He held that claimant successfully met the requirements of Section 28(a) of the Act and that he was entitled to a reasonable fee to be paid by the employer. Judge Guill stated that Section 28 of the Act was the only authority for an award of an attorney's fee to a claimant's counsel and that any agreement to otherwise place liability for the attorney's fee was null and void.

¹At the hearing, claimant responded to a question from the administrative law judge by conceding that he would have to pay his attorney's fee. Tr. at 32. It appears, however, that the amount of the fee was not known since the application for a fee had not been filed at that time.

Marine Insulation Corporation and FIGA filed a timely Notice of Appeal to the Board, appealing the Order of Associate Chief Judge Guill dated August 14, 1996 in which he denied claimant's motion to modify the prior order of Judge Bober placing liability for the attorney's fee and expenses on employer.² This is the only decision appealed; the Decision and Order of Judge Bober of September 14, 1995, in which he found claimant entitled to permanent total disability benefits and employer entitled to Section 8(f) relief has not been appealed and has become final. The only issue before the Board is the question of liability for the attorney's fee and expenses of claimant's attorney.

On November 8, 1996, counsel for Marine Insulation Company and FIGA filed with the Board a Motion for Expedited Remand to the Office of Administrative Law Judge, pointing out, in effect, that the parties had entered into an agreement outlined in the LS-33 and addendum that in consideration of approval of the third-party settlement by FIGA claimant agreed not to seek any further benefits from the carrier and the carrier would not be liable for claimant's attorney's fees and expenses. The motion avers that contrary to the agreement, Judge Guill invoked Section 28 of the Act in ruling that employer is liable for the attorney's fee and expenses. Petitioners request that the case be remanded to the Office of Administrative Law Judges for reconsideration. Claimant, in a letter from his counsel dated May 22, 1997, agreed that the matter should be remanded.

Upon consideration of the Motion to Remand, together with a review of the facts of this case and the procedural developments, we agree to grant this motion and remand the case to the Office of Administrative Law Judges to reconsider the issue of liability for claimant's counsel's attorney fees and expenses. In this connection, we point to various determinations that should be made.

Preliminarily, the administrative law judge must determine whether the agreement, signed by claimant's counsel, but not by claimant, is enforceable against claimant. Did claimant knowingly and intelligently enter into this agreement, understanding the responsibility, he was assuming as well as the rights he was surrendering?

Throughout the record, in the transcript and motions and in the letters from counsel, references are made that Marine Insulation Corporation is defunct, bankrupt or insolvent and that Midland Insurance Company is insolvent. There is no documentation of these assertions, however. This is critical in determining the efficacy and legal effect of the signing of the approval of the third-party settlement, LS-33, by Harley E. Martine on behalf of Marine Insulation on November 8, 1993, and the necessity, if any, to have the form with the addendum signed on behalf of FIGA on August 23, 1994. The terms defunct, bankruptcy and insolvent have different meanings. *See Black's Law Dictionary* 134, 381, 716 (5th ed. 1979). Insolvency could mean an inability to pay one's debts, or an inability to pay one's debts as they fall due or in the usual course of trade or business, or that the

²We note that Judge Guill incorrectly identified employer as having filed the motion to modify.

assets if immediately available would not be sufficient to discharge all liabilities. *Id.* at 716. Bankruptcy has various states and being defunct could be *de facto* or *de jure*. Determinations of the status of the employer and the status of the carrier could affect the legal status of the execution of the LS-33 by Mr. Martine and could render superfluous the requirement for further execution with addendum by FIGA. We note that the Motion for Expedited Remand was done on behalf of Marine Insulation Corporation, whether existing currently in fact, or existing in form only.

In his Decision and Order Denying claimant's Motion to Modify, Judge Guill held that liability for payment of the fee and expenses was controlled by Section 28(a) of the Act in that the issues before Judge Bober, who heard the case on its merits involved Section 33(g), Section 8(f), and nature and extent of claimant's disability. Judge Guill observed that claimant prevailed on the nature and extent of disability issue in that he obtained an award for permanent total disability. He held, therefore, that claimant was entitled to an additional award for a reasonable attorney's fee to be paid by employer or carrier. In his Motion for Remand, counsel for employer and its carrier takes issue with this analysis by Judge Guill, contending in paragraph 5 of the motion that the nature and extent of claimant's disability were never issues between claimant and employer/carrier, and that it suspended benefits due to its Section 33(f) credit. This is an area for reconsideration on remand after an examination of Judge Bober's Decision and Order of September 14, 1995, and the comments of counsel in the hearing transcript.³

In this regard, we note that Judge Guill erroneously stated that employer's liability for the attorney's fee is predicated upon Section 28(a) of the Act. In fact, if the parties' agreement, made in connection with approval of the third-party settlement, is not to be enforced, Section 28(b) of the Act would govern the situation herein if claimant received greater compensation than that paid or tendered by employer. See generally *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

³At the hearing counsel for employer/carrier asserted that claimant is well capable of returning to employment and should be working and is not permanently and totally disabled. Tr. at 8.

On remand, the administrative law judge should analyze the terms of the Addendum to Form LS-33. It states that in consideration for the agreement of the carrier to sign the LS-33 and approve the third-party settlement, carrier will assign to claimant all its rights under Section 8(f) of the Act and that claimant stipulates to accept the Section 8(f) assignment,⁴ whatever the effect of this might be, and that the carrier has no further responsibility to pay attorney fees to claimant's counsel. The addendum also provides that claimant will invoke no further claims against carrier relating to the August 21, 1984, injury and that he agrees not to pursue benefits for hearing loss arising from his employment with Marine Insulation. On remand, these provisions should be analyzed to determine whether claimant's assumption of his own counsel's fee and expenses constitutes a waiver of his right under Section 28 to obtain a reasonable fee from employer and whether, as such, it amounts to a reduction in the total amount of compensation benefits to which he would be entitled. See 33 U.S.C. §928(d). A determination also should be made whether claimant's agreement to assume his own legal fees and expenses, together with the agreement not to make further claims against the carrier, and to forego any claim for hearing loss is prohibited by Section 15(b) of the Act, 33 U.S.C. §915(b), which provides that no agreement by an employee to waive his right to compensation under the Act shall be valid.

Accordingly, the Decision and Order Denying Motion to Modify is vacated, and the case is remanded to the Office of Administrative Law Judges for reconsideration consistent with this decision.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

REGINA C. MCGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring:

I concur in the decision to remand this case inasmuch as both parties desire this course of action. I do not agree, however, with the scope of the remand as set forth by my

⁴Despite the stipulation counsel for the carrier raised the Section 8(f) issue at the hearing. Tr. at 6, 37.

colleagues.

Initially, I note that the simple issue presented in this case is whether claimant can agree, *inter alia*, to waive his right to have his attorney's fee paid by FIGA in exchange for FIGA's approving claimant's third-party settlement and waiving any defenses under Section 33 of the Act, 33 U.S.C. §933. This issue does not require that the Board, or the administrative law judge on remand, inquire into the legal effect of employer's approval of claimant's third-party settlement. FIGA would not be involved in this case if Midland were not bankrupt, and it is FIGA's agreement with claimant, not employer's approval of the settlement, that is at issue herein.

As noted in the majority opinion, Judge Guill identified the incorrect subsection of Section 28 under which fees are payable by employer absent an enforceable agreement between claimant and FIGA. In this regard, I would also hold that the administrative law judge's reliance on *Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd sub nom. Jacksonville Shipyards Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT)(11th Cir. 1988), is misplaced. In *Stokes*, the employer stipulated it was the responsible employer, thereby enabling the administrative law judge to dismiss the shipyard's prior owners from the case. After addressing the merits of the claim, the administrative law judge disapproved the parties' agreement that claimant was to pay his attorney's fee out of the proceeds of his award in consideration for employer's stipulations. On employer's appeal to the Board, the Board affirmed the administrative law judge's finding that there was a lack of consideration on employer's part, despite its stipulations, because the evidence overwhelmingly established employer's liability and the parties had been informed that the stipulations would not automatically be accepted. The Board found rational the administrative law judge's finding that it was unreasonable to make claimant pay the \$14,000 fee in exchange for a foreshortened hearing.

This case is distinguishable in that there is consideration on the part of both parties for the agreement in this case, as a genuine benefit accrued to each party. FIGA agreed to approve the third-party settlement and to waive any defenses with regard to the settlement and claimant agreed, *inter alia*, to waive his right to an employer-paid attorney's fee for work done on the compensation claim. Moreover, the parties stipulated to this arrangement at the formal hearing before Judge Bober, he incorporated the stipulations into his decision, and he did not inform them that the stipulations would not be accepted. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). It is clear there is no disagreement between the parties concerning the fee agreement - claimant sought to correct Judge Bober's fee order by filing the motion to modify and FIGA has appealed Judge Guill's refusal to rectify Judge Bober's imposition of fee liability on employer. Neither the Board nor the administrative law judge should interfere with the parties' agreement under these circumstances. *See generally Ballard v. General Dynamics Corp.*, 12 BRBS 966 (1980). Therefore, I would remand the case so that the parties' agreement can be enforced.

ROY P. SMITH
Administrative Appeals Judge