

LAWRENCE A. LEE)	
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Claimant-Petitioner)	
)	
v.)	
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NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>FEB 14, 2005</u>
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order on Petition for Attorney's Fees of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order on Petition for Attorney's Fees (2003-LHC-0331) of Administrative Law Judge Fletcher E. Campbell, 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, a machinist, suffered a groin injury on September 25, 2002, and thereafter sought temporary total disability benefits for the period from October 3 to November 18, 2002. The parties were unable to resolve the issues before the district director, and the case was referred to the Office of Administrative Law Judges (OALJ) on

November 6, 2002. On November 25, 2002, employer accepted claimant's claim for compensation and sent proposed stipulations for claimant's agreement. Claimant's counsel modified the stipulations and returned them to employer on December 23, 2002.¹ CX 3. Employer notified claimant that it would not accept the modified stipulations; claimant answered that he would not accept the stipulations without the proposed modification. CXs 9-11. A formal hearing was held on July 29, 2003, at which time the parties submitted stipulations to the administrative law judge and requested the entry of an order. On July 31, 2003, the administrative law judge issued an order awarding claimant temporary total disability benefits from October 3 to November 18, 2002, inclusive, consistent with the stipulations submitted by the parties.²

Subsequently, claimant's attorney filed a fee petition with the administrative law judge seeking an attorney's fee of \$2,844.50, representing 11.86 hours of attorney services at \$225 per hour and 2 hours of paralegal services at \$80 per hour, plus expenses of \$16. Employer filed objections to this fee request, contending that it should not be liable for any fees incurred after its November 25, 2002, offer to pay benefits.

In his Order, the administrative law judge disallowed all time requested for work performed prior to November 6, 2002, the date upon which the case was transferred to the OALJ.³ He further determined that claimant's counsel is not entitled to a fee for services performed after November 25, 2002, the date of employer's offer to pay benefits, because claimant did not "successfully prosecute" his claim. After reducing the requested hourly rate from \$225 to \$185 per hour based upon the lack of complexity involved in this claim, the administrative law judge awarded claimant's counsel a fee of \$46.25 for legal services performed on November 18, 2002.⁴ Order at 3.

Claimant appeals, contending that the administrative law judge erred in not holding employer liable for legal services performed after the date of employer's alleged

¹ Claimant's attorney crossed out the stipulation that read, "[t]hat the parties are aware of no other outstanding legal issues as of the date of the execution of these Stipulations." CX 3.

² The stipulations ultimately agreed to by the parties did not contain the disputed stipulation and the amount of compensation to which they agreed claimant was entitled was the same amount to which employer stipulated on November 25, 2002.

³ Prior to the transfer date, claimant's counsel listed 1.1 hours of attorney services, \$247.50.

⁴ Claimant does not appeal the administrative law judge's reduction in his hourly rate or the denial of the requested costs. These findings, therefore, are affirmed.

tender. Employer responds, urging affirmance of the administrative law judge's attorney fee award.

Section 28(a) of the Act states that an employer shall be liable for claimant's attorney's fee "[i]f the employer or carrier declines to pay for any compensation on or before the thirtieth day after receiving written notice of a claim for compensation," and claimant thereafter successfully prosecutes the claim. 33 U.S.C. §928(a). Under Section 28(b), 33 U.S.C. §928(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 paid or tendered by employer. *See, e.g., Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). The Board has held that a "tender" under Section 28(b) must be an offer to pay compensation, expressed in writing, without any conditions attached thereto. *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39, 42 (2004).

We cannot affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee after November 25, 2002, for the reasons stated in *Jackson*. On that date, employer submitted to claimant proposed stipulations regarding claimant's entitlement to disability benefits, including the statement "[t]hat the parties are aware of no other outstanding legal issues as of the date of the execution of these Stipulations." CX 3. The Board held in *Jackson* that where employer conditions an offer to pay benefits on such stipulations, it has not "tendered" payment under Section 28(b), as a valid "tender" is an offer to pay which is not subject to any condition or stipulation. *Jackson*, 38 BRBS at 42. The Board rejected the approach taken by the administrative law judge in the two cases on appeal in *Jackson*, which was to assess whether the proposed stipulation was potentially detrimental to the claimant such that claimant obtained a benefit when employer ultimately agreed to drop that stipulation. The Board reasoned that whether a tender is unconditional is not dependent on the claimant's reason for rejecting a condition imposed by employer. *Id.*; *see also Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004). The Board concluded that as employer did not unconditionally "tender" compensation pursuant to Section 28(b), and as claimants obtained an award of benefits, employer is liable for claimants' attorney's fees. *Jackson*, 38 BRBS at 42; *see also Hitt*, 38 BRBS at 52.

Moreover, the administrative law judge's reliance upon the Board's holding in *Weirich v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0734 (July 23, 2002)(unpublished), is inapplicable to this case. In *Weirich*, the Board addressed the award of an attorney's fee under Section 28(b) in a case in which the employer had already paid all compensation ultimately awarded the claimant prior to the case's referral to the OALJ. The Board held that claimant's tactical victory in securing the deletion of an "offending" stipulation did not constitute "greater compensation" within the meaning

of Section 28(b) given that employer had already paid all compensation due. Contrary to the administrative law judge's statement, since *Weirich* did not involve a purported tender of benefits, the employer's prior actual payment of benefits is indeed the seminal distinction between that case and the instant case.

Accordingly, since employer's offer of payment was conditioned on claimant's accepting all of its stipulations,⁵ it was not a valid tender under Section 28(b). As employer herein did not pay or tender benefits to claimant under Section 28(b), it is liable for a fee under Section 28(a). Claimant obtained an award of temporary total disability compensation while the case was before the administrative law judge, pursuant to the parties' later stipulated agreement, and therefore successfully prosecuted the claim. Employer is liable for a fee for all necessary work performed by claimant's counsel before the administrative law judge. *Jackson*, 38 BRBS at 42; *see generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). We, therefore, vacate the administrative law judge's denial of an attorney's fee payable by employer for work performed after November 25, 2002, and we remand the case for the administrative law judge to reconsider the amount of the attorney's fee for which employer is liable. In this regard, the administrative law judge should apply the regulation at 20 C.F.R. §702.132(a). *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

⁵ Some stipulations are, of course, necessary to an agreement, such as those which specify the benefits to be paid. *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003)(court rejected argument settlement agreement requiring claimant agree to dismiss claim was invalid as conditional because dropping a claim is a condition inherent in all tenders offering to settle a claim). When employer requires agreement on additional stipulations, however, the tender is not unconditional.

Accordingly, the administrative law judge's Order on Petition for Attorney's Fees is vacated, and the case remanded for reconsideration of the fee petition and objections thereto.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge