

BRB Nos. 90-1972  
and 92-2380

LOU JEAN STINSON )  
 )  
 Claimant )  
 )  
 and )  
 )  
 DAVID UTLEY ) DATE ISSUED:  
 )  
 Intervenor- )  
 Respondent )  
 )  
 v. )  
 )  
 LONG BEACH CONTAINER TERMINAL )  
 )  
 and )  
 )  
 SIGNAL MUTUAL INSURANCE )  
 ASSOCIATION )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION AND ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's Fees of Edward B. Bounds, District Director, United States Department of Labor.

James P. Aleccia (Mullen & Filippi), Long Beach, California, for employer/carrier.

David Utley (Devirian & Utley), Wilmington, California, intervenor.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees of Administrative Law Judge Alfred Lindeman (89-LHC-3043) and the Compensation Order - Award of Attorney's Fees of District Director Edward B. Bounds (OWCP File No. 18-39325) 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). An attorney's fee award is discretionary and may only be

set aside if shown by the challenging party 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 injured his right elbow and knee in a work related vehicular accident on July 31, 1988. Employer and claimant, acting without benefit of counsel, entered into a proposed settlement agreement of claimant's disability claim for \$5,633.20, which was forwarded to the Department of Labor for consideration on December 23, 1988. By letter dated January 20, 1989, the parties' proposed settlement agreement was rejected as inadequate.<sup>1</sup>

On February 3, 1989, claimant retained David Utley to represent him in his Longshore claim. While the case was pending before the Office of Workers' Compensation Programs, employer made three additional settlement offers to claimant and an informal conference was held on June 2, 1989. Because the parties were unable to come to an agreement, on July 6, 1989, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Shortly thereafter, on July 18, 1989, employer tendered another settlement offer for \$11,000, which included future medical benefits and an attorney's fee. Before the case came to trial, claimant was advised by Mr. Utley to seek new counsel. Accordingly, claimant retained Robert L. Kelly. After considerable negotiations, the parties ultimately agreed to settle the disability claim for \$15,000. In addition, the parties agreed that employer would pay Mr. Kelly an attorney's fee of \$1,250 and that claimant would be held harmless for any fee awarded to Mr. Utley.

On June 15, 1990, Mr. Utley filed a fee petition with the administrative law judge, requesting a fee of \$5,590.16 for 36.75 hours of attorney services at \$150 per hour plus \$77.66 in costs. Employer thereafter submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney's Fees, after considering the complexity of the issues and claimant's apparent lack of satisfaction with the services rendered by Mr. Utley, the administrative law judge reduced the hourly rate requested from \$150 per hour to \$125 per hour, and disallowed 2.5 hours of the 36.75 hours sought. In addition, the administrative law judge approved the \$77.66 in requested expenses. Accordingly, the administrative law judge awarded Mr. Utley a total fee of \$4,358.91 representing 34.25 hours of services at \$125 per hour plus \$77.66 in expenses.

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<sup>1</sup>The proposed settlement was intended to compensate claimant for a 5 percent permanent impairment of the lower right extremity and a 1 percent permanent impairment of the upper right extremity. In denying the settlement application, the claims examiner found that the only medical evidence submitted indicated that claimant had a 12 percent permanent impairment of the right leg and no permanent impairment in the right arm.

Mr. Utley also filed a fee petition for work performed before the district director, requesting \$2,375.00 for 19 hours of services at \$125.00 per hour. In a Compensation Order - Award of Attorney's Fees, the district director, disallowing 1/4 of an hour of the services requested, awarded Mr. Utley a fee of \$2,343.75.

On appeal, employer challenges both the district director's and administrative law judge's attorney's fee awards, arguing that Mr. Utley is not entitled to an attorney's fee because he failed to successfully prosecute the case and failed to inform claimant of the proposed \$11,000 settlement offer, thereby severely prejudicing claimant. Mr. Utley has intervened in this case and urges affirmance of the fee awards.

Initially, we reject employer's argument that Mr. Utley is not entitled to an award of an attorney's fee because he failed to successfully prosecute the case. In general, an attorney's fee can only be assessed against employer pursuant to Section 28 of the Act when employer has controverted some aspect of the claim and claimant thereafter successfully obtains an award. Subsection 28(b) provides that when employer pays or tenders payment of compensation without an award, and the employee refuses to accept such payment or tender, employer will be liable for an attorney's fee if the employee successfully obtains greater compensation than that originally paid or tendered by employer. 33 U.S.C. §928(b).

The Board has held that an employer's offer to settle the claim is a tender of compensation pursuant to Section 28(b). Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986).

In this case, prior to claimant's obtaining counsel, employer offered claimant \$5,633.20 in settlement of his disability claim.

After claimant retained counsel, additional settlement offers were made in increasingly greater amounts with the last settlement offer made during Mr. Utley's representation being for \$11,000, a figure which would have included attorney's fees. When the case was ultimately settled, claimant received \$15,000 in settlement of the disability claim plus \$1,250 in attorney's fees for claimant's new counsel, and an agreement that employer would hold claimant harmless for the pending claim for attorney's fees by his former counsel. Accordingly, because claimant ultimately received a greater recovery than that tendered by employer and Mr. Utley's efforts were at least partially instrumental in obtaining this recovery, he is entitled to a reasonable attorney's fee payable by employer. See generally Kaczmarek v. I.T.O. Corporation of Baltimore, Inc., 23 BRBS 376, 379 (1990).

Employer also contends that the quality of Mr. Utley's representation does not warrant a fee award in this case, arguing that his failure to inform claimant of the proposed \$11,000 settlement offer resulted in severe prejudice to claimant. We note, however, that both the administrative law judge and the

district director considered this argument and rejected it, finding that a fee award was warranted. We affirm their determinations that Mr. Utley is entitled to a fee in this case. See Muscella, supra.

We also reject employer's final argument that if a fee is awarded pursuant to 33 U.S.C. §928(b), it should be limited to the difference between the \$5,366.80 initially tendered and the \$11,000 tendered during the period of Mr. Utley's representation. Although the amount of benefits awarded to the claimant is a valid consideration in granting an attorney's fee, see, e.g., Muscella, supra, the amount of an attorney's fee is not limited by the amount of compensation gained, since to do so would drive competent counsel from the field. See Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), aff'd on recon. en banc, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); Battle v. A.J. Ellis Construction Co., 16 BRBS 329 (1984). The administrative law judge and the district director considered relevant factors and issued their awards after review of the fee petitions and employer's objections. As employer has not demonstrated that the decisions regarding the amount of the fee were arbitrary, capricious or an abuse of discretion, we affirm both fee awards.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and the district director's Compensation Order - Award of Attorney's Fees are affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge