

CHARLES R. POLK )  
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 Claimant-Petitioner )  
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 v. )  
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 GULF COPPER MANUFACTURING )  
 ) DATE ISSUED: Nov. 7, 2001  
 and )  
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 INSURANCE COMPANY OF THE )  
 STATE OF PENNSYLVANIA )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Denying Motion to Compel of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Charles F. Herd, Jr. (Fowler Rodriguez), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and Denying Motion to Compel (1999-LHC-890) of Administrative Law Judge Lee J. Romero, 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his left hand on June 21, 1996, during the course of his employment.

Employer began paying temporary total disability benefits at a rate of \$200 per week. On February 4, 1997, claimant was released to return to work, and employer terminated disability benefits. On February 13 and 14, 1997, claimant attempted to return to work with another employer, but was unable to continue due to his injury. At an informal conference on April 17, 1997, the parties raised the issues of temporary total disability and medical benefits. The district director recommended that claimant be given the opportunity to select his own physician and that employer reinstate temporary total disability benefits “effective February 15, 1997 and continue. . . .” Cl. Ex. 2-14. Employer paid temporary total disability benefits until August 1997, when it again terminated benefits. Emp. Ex. 9. On January 19, 1998, claimant commenced employment as a security guard. Tr. at 56, 70.

A second informal conference was held on October 8, 1998, by telephone. Cl. Ex. 2-16. The district director identified the issues as “nature and extent of disability, permanency” in his report. Claimant sought temporary total disability benefits from August 1997 until the date his condition reached maximum medical improvement and permanent partial disability benefits thereafter based on his doctor’s impairment rating. The district director recommended employer pay permanent partial disability benefits from December 12, 1997, and continuing, based on an impairment rating of 24 percent. *Id.* Based on the opinion of a physician of its choice, who determined that claimant has a seven percent impairment to his hand, employer, in January 1999, tendered benefits in an amount equal to that rating.

A formal hearing was held on September 15, 1999, wherein the parties identified the issues as: the timeliness of the notice of injury to employer, the nature and extent of disability, the percentage of permanent partial disability, medical treatment, the date of maximum medical improvement, overpayment/credit, attorney’s fee, penalty and interest. Decision and Order at 3. The administrative law judge found: claimant’s notice of injury was timely; claimant cannot return to his usual work; February 4, 1997, was the date of maximum medical improvement; employer has not shown evidence of suitable alternate employment; claimant began work as a security guard on January 19, 1998; and claimant’s left hand is permanently impaired to a degree of 10 percent. Decision and Order at 15-16, 19, 22. Consequently, he awarded claimant temporary total disability benefits from June 28, 1996, through February 3, 1997, at a rate of \$197.67 per week, permanent total disability benefits from February 4, 1997, through January 18, 1998, at the same rate, and permanent partial disability benefits pursuant to Section 8(c)(3), 33 U.S.C. §908(c)(3), for 24.4 weeks. *Id.* at 25-26. He also awarded medical benefits, annual increases to permanent total disability compensation pursuant to Section 10(f), 33 U.S.C. §910(f), for the applicable period, and interest, and he found that employer is entitled to a credit for any overpayments. *Id.*

Following the issuance of the decision, claimant’s counsel filed a petition for an attorney’s fee in the amount of \$19,743.97, representing 76.95 hours at an hourly rate of \$234.05 and \$1,499.78 in expenses. Employer filed objections. The administrative law judge found that claimant’s counsel is not entitled to a fee for services rendered on the issue

of permanent total disability because that issue was not raised before the district director. Supp. Decision and Order at 7. He also found that because claimant sought benefits for a 27 percent impairment but was awarded benefits for a 10 percent impairment, his claim was only partially successful. *Id.* at 8-10. Accordingly, after addressing employer's specific objections to the fee petition, he reduced counsel's fee by 50 percent and awarded a total fee of \$4,514.06, plus \$588.50 in expenses. *Id.* at 15.

Claimant appeals the reduction of counsel's fee by 50 percent and argues that the administrative law judge erred in determining that the requirements of Section 28(b), 33 U.S.C. §928(b), were not met with regard to the award of permanent total disability benefits and in determining that claimant's success on the claim for permanent partial disability benefits was only partial.<sup>1</sup> Employer responds, urging affirmance.

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<sup>1</sup>The administrative law judge also denied claimant's motion to compel employer's responses to certain interrogatories. Supp. Decision and Order at 5. Claimant has not appealed that portion of the decision.

Claimant first contends the administrative law judge erred in concluding that the requirements of Section 28(b) were not met as to the issue of permanent total disability benefits, thereby eliminating his success on that issue from the fee computation. 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 paid or tendered by the employer.<sup>2</sup> See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5<sup>th</sup> Cir. 1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the present case arises, has held that an employer's liability under Section 28(b) is predicated on the existence of a controversy remaining following informal proceedings and on a claimant's thereafter obtaining greater compensation than the employer paid or tendered. *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 409, 34 BRBS 105(CRT), *modifying in part on reh'g*, 237 F.3d 404, 34 BRBS 44(CRT) (5<sup>th</sup> Cir. 2000); *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5<sup>th</sup> Cir. 1997); *see also Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9<sup>th</sup> Cir. 1991); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). If an employer pays all benefits due without resort to formal proceedings, it may not be held liable for the claimant's attorney's fee. *Perez*, 128 F.3d at 910, 31 BRBS at 163-164 (CRT); *Boe*, 34 BRBS at 110-111.

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<sup>2</sup>Section 28(b) provides, in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

In this case, employer initially terminated claimant's temporary total disability benefits in February 1997. Claimant obtained counsel, an informal conference was held in April 1997, and benefits were reinstated. Employer again terminated benefits in August 1997, and another informal conference was held in late 1998. Although employer initially followed the first recommendation, its discontinuation of benefits in August 1997 constitutes a refusal of the district director's recommendation. *See generally Loredo*, 237 F.3d at 410, 34 BRBS at 106(CRT). Moreover, employer clearly refused the recommendation following the second informal conference as it tendered benefits based on a much lower impairment rating than that recommended by the district director. *Id.* Thereafter, claimant was awarded additional benefits by the administrative law judge. Thus, employer is properly held liable for claimant's attorney's fee pursuant to Section 28(b). *Bolton v. Halter Marine, Inc.*, \_\_\_ BRBS \_\_\_, BRB No. 01-182 (Oct. 2, 2001).

We agree with claimant that the administrative law judge erred in denying a fee for services related to claimant's obtaining an award of total disability benefits beyond those which employer voluntarily paid. Specifically, claimant obtained an additional award of total disability benefits from August 1997 to January 1998. In considering the petition for an attorney's fee, however, the administrative law judge found that because the district director did not address the specific issue of "permanent total disability" in the informal proceedings, the services rendered in securing those benefits are not compensable, as the criteria of Section 28(b) were not met. We hold that the administrative law judge erred in requiring such specificity at the informal level of the proceedings. Indeed, the Fifth Circuit has affirmed an employer's liability for a fee award pursuant to Section 28(b) when there has been no evidence of the substance of a district director's recommendation, *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT),<sup>3</sup> and when the recommended payments were based on an average weekly wage which was not disputed until the case was before the administrative law judge, *Loredo*, 237 F.3d at 410, 34 BRBS at 106(CRT).<sup>4</sup> *See also Bolton*, slip op. at 5.

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<sup>3</sup>The parties in *Gallagher* stipulated that an informal conference was held, and the employer conceded that numerous issues were raised and discussed therein and that a recommendation was issued. The employer argued that it complied with the recommendation and should not be held liable for an attorney's fee. Nevertheless, there were unresolved issues which were brought before an administrative law judge. Because there was no record evidence with respect to the substance of the recommendation and because there were unresolved issues which were addressed at the formal hearing after which the claimant obtained additional compensation, the employer was held liable for a fee under Section 28(b). *Gallagher*, 219 F.3d at 435, 34 BRBS at 41-42(CRT).

<sup>4</sup>In *Loredo*, the parties originally agreed to an average weekly wage but could not agree on the nature and extent of the claimant's disability, so they brought the issues to an

As the issues raised at both the informal and formal proceedings of this case included the nature and extent of claimant's disability, including claimant's entitlement to additional total disability, the administrative law judge erred in stating that he could not award a fee because the specific issue of *permanent* total disability benefits was not addressed by the district director. Employer ceased total disability payments in August 1997, and claimant obtained an additional award of total disability benefits as a result of the proceedings before the administrative law judge. Consequently, we vacate the administrative law judge's fee award, and we remand the case for him to reconsider employer's liability for an attorney's fee in light of claimant's success in obtaining that additional period of permanent total disability benefits.

Claimant also challenges the administrative law judge's reduction of the fee by 50 percent due to claimant's limited success in obtaining permanent partial disability benefits under the schedule. Claimant contends he was fully successful in prosecuting this claim and the 50 percent reduction is not in accordance with law. We agree. In this case, employer offered claimant permanent partial disability benefits pursuant to Section 8(c)(3) for a seven percent impairment. The administrative law judge awarded claimant benefits under this section based on a 10 percent impairment; thus, claimant was successful in obtaining greater benefits than those tendered by employer. The administrative law judge's comparison between the amount claimant sought and the amount awarded is an incorrect comparison for determining claimant's level of success in this case. Rather, the appropriate consideration is whether claimant gained additional benefits by bringing this case before the administrative law judge. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). Prior to the formal proceedings, claimant had only employer's tender of benefits for a seven percent impairment. In proceedings before the administrative law judge, although claimant did not obtain benefits in compensation for a 27 percent impairment, he did gain benefits for a 10 percent impairment: three percentage points more than employer tendered and 10 percentage points more than employer had paid. Consequently, this case is not a "partially successful" case requiring analysis under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en*

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informal conference. The district director issued a recommendation, but issues remained unresolved, so the claim was transferred to the Office of Administrative Law Judges for a formal hearing. At the hearing, the parties agreed that the claimant was temporarily totally disabled, but they could not agree on an average weekly wage. The administrative law judge awarded benefits based on the claimant's computations, resulting in an award of additional compensation. Consequently, the Fifth Circuit held that the employer was liable for a fee under Section 28(b) because average weekly wage was included in the district director's recommendation and the employer did not accept that recommendation. *Loredo*, 237 F.3d at 410, 34 BRBS at 106(CRT).

*banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part, mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5<sup>th</sup> Cir. 1995). Therefore, on remand, the administrative law judge must reconsider the fee petition in light of claimant's fully successful prosecution of this claim.<sup>5</sup>

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<sup>5</sup>Claimant has not objected to the administrative law judge's determinations with regard to employer's specific objections. Therefore, those adjustments to the fee requested are affirmed.

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Supplemental Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge