BRB No. 14-0051

IGNATIUS E. SERFONTEIN	)	
	)	
Claimant-Respondent	)	
	)	
DAVID C. BARNETT	)	
(Former attorney for claimant)	)	
	)	
Petitioner	)	
	)	
v.	)	
	)	
ERINYS INTERNATIONAL	)	DATE ISSUED: Nov. 19, 2014
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Order Partially Approving Award of Attorney's Fees and Costs for David C. Barnett of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for Mr. Barnett.

Stephanie Seaman Brown and Lisa Gumbita Wilson (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Claimant's former counsel, David C. Barnett (Barnett), appeals the Supplemental Order Partially Approving Award of Attorney's Fees and Costs for David C. Barnett

(2011-LDA-00419) of Administrative Law Judge Stephen R. Henley 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a personal security officer in Iraq. On June 5, 2006, while traveling in a convoy to a remote area, claimant injured his back when his head hit the vehicle's ceiling as the result of severe jolting due to road defects. Employer commenced paying temporary total disability benefits on June 30, 2006, at the maximum compensation rate. Claimant retained Barnett on October 17, 2006, and filed a claim for benefits on November 1, 2006. To obtain additional information about the incident, employer deposed claimant on July 18, 2009. On August 1, 2009, claimant was examined by employer's expert, Dr. Carew, who stated there was no evidence that claimant sustained a thoracic or cervical injury as a result of the incident but that he sustained only a soft tissue low back injury which would have healed in three to six months, after which he could have returned to work without restrictions. In a supplemental report on January 13, 2010, Dr. Carew reiterated his opinion. Based on these reports, employer ceased paying benefits on May 6, 2010, and filed an LS-207 form controverting the claim on June 18, 2010. Pursuant to the LS-208 final report of payment, employer had paid claimant temporary total disability benefits from June 30, 2006 through May 6, 2010.

An informal conference was held on March 30, 2011, and the district director recommended that employer reinstate claimant's disability benefits and continue paying his medical benefits. Employer rejected the recommendation, and, on April 21, 2011, claimant requested the case be referred to the Office of Administrative Law Judges for formal proceedings. In October 2011, just before the hearing was scheduled to be held, claimant retained new counsel, Scott J. Bloch (Bloch), and on December 6, 2011, Barnett filed a "notice of charging lien" claiming entitlement to an attorney's fee for services rendered. On March 11, 2013, Bloch informed the administrative law judge that the parties had reached a settlement. On May 1, 2013, the administrative law judge approved the parties' Section 8(i), 33 U.S.C. §908(i), settlement application which provided that employer would pay claimant $200,000: $175,000 for past, present, and future compensation and $25,000 for medical care. Employer also agreed to pay Bloch $20,000 for his services. Further, the settlement agreement stated that employer would be responsible for Barnett's fee, and the parties agreed to have the administrative law judge retain jurisdiction for this purpose. As the parties were unable to amicably resolve the amount of Barnett's fee by July 1, 2013, Barnett submitted an application for an

attorney's fee to the administrative law judge. *See* Decision and Order Approving Settlement at 2, 4.

Barnett requested a fee of $53,614.50, plus $219.05 in costs. Employer filed objections, challenging Barnett's right to seek a fee, the hourly rates claimed, its liability for pre-controversion services, entries for paralegal time, and allegedly excessive, duplicative, and clerical hours. Barnett replied and requested an additional fee for preparing his reply, bringing the total amount requested to over $57,000. The administrative law judge first determined that, although Barnett is not the attorney who negotiated claimant's settlement, he performed reasonable and necessary work for claimant and is entitled to an employer-paid fee under Section 28(b), 33 U.S.C. §928(b). Supp. Order at 3. The administrative law judge awarded hourly rates of $425, reduced from $465, and $165; he awarded the requested 5.5 hours for preparing the initial fee petition but reduced the hours for preparing the reply brief from 7.8 to 2.4 hours; he disapproved a number of itemized entries; and he disapproved all pre-controversion work and costs, 51.9 hours and $55.05, respectively. *Id.* at 4-10. The administrative law judge thus awarded Barnett a total fee of $23,880.50.[1] *Id.* at 11. Barnett appeals, and employer responds, urging affirmance.

Barnett contends his entitlement to an attorney's fee is controlled by the settlement agreement and is not restricted to the terms in Section 28(b). Barnett asserts that the settlement provision cannot be interpreted as limiting employer's liability for a fee to only those amounts for which it would be statutorily liable under Section 28(b) because the plain language of the settlement agreement states that employer "will" be responsible for his fee, i.e., employer is liable for his entire fee (employer-paid as well as any payment which could be made by way of a lien against claimant's benefits under Section 28(c), 33 U.S.C. §928(c)).[2] Alternatively, Barnett asserts that employer is liable for both

[1] 56 hours at $425 per hour = $23,800; .4 hour at $165 = $66; $14.50 in costs.

[2] Section 28(a), 33 U.S.C. §928(a), would not apply to this case because employer was paying compensation at the time it received notice of claimant's claim for benefits. There is no dispute that, if any section of the Act were to control employer's liability for Barnett's fee based on the facts of the case, it would be Section 28(b). Section 28(b) applies where: (1) an informal conference on the disputed issue has been held; (2) a written recommendation on that issue is made; (3) the employer refuses to accept the recommendation; and (4) the claimant obtains additional compensation. *Davis v. Eller & Co.*, 41 BRBS 58 (2007) (citing *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied* 546 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001)).

pre- and post-controversion fees under Section 28(b). Additionally, Barnett contends the administrative law judge erred in disallowing all but 2.4 hours of the time he claimed for preparing a reply to employer's objections to his fee petition. Employer responds that the administrative law judge correctly limited its liability for a fee to only those amounts for which it would be liable under Section 28(b) and found that Section 28(b) does not permit the shifting to employer of pre-controversion fees. Employer also asserts that the administrative law judge reasonably reduced the reply brief time to 2.4 hours. Claimant has not responded to this appeal.

Barnett contends that the settlement provision controls employer's liability for his fee, and thus that the administrative law judge erred in restricting his fee to that authorized by Section 28(b). Barnett asserts he is entitled to an attorney's fee for all his services. As stated above, claimant and employer entered into a Section 8(i) settlement to resolve claimant's claim for benefits. Therein, claimant and employer agreed that employer would be liable for Barnett's fee. The administrative law judge, pursuant to Section 28(b) and the Board's decision in *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983), found that employer is not liable for any fees incurred prior to June 18, 2010, when he found employer filed its notice of controversion of the claim.[3] Supp. Order at 3-4. Accordingly, the administrative law judge summarily disapproved all work and costs incurred prior to that date.

Paragraph 3 of the parties' settlement agreement provides:

> David Barnett, prior counsel from 2006 through December 2011[,] filed a Notice of Charging Lien for his professional services and representation with the Department of Labor. As part of this settlement, *the parties agree that Defendants will be separately responsible for satisfaction of Mr. Barnett's fees and costs* by way of payment, a negotiated settlement, or litigation.

Settlement application at 8 (emphasis added).[4] Barnett asserts that, by this paragraph, employer agreed to be responsible for his entire fee, regardless of whether the amount, under normal circumstances, would have been awardable pursuant to Section 28(b) or 28(c), 33 U.S.C. §928(b), (c). He asserts that this paragraph was part of the reason claimant agreed to the settlement, as claimant would receive the entire settlement

[3] In *Trachsel*, the Board held that, pursuant to the Section 28(b), an employer cannot be held liable for an attorney's fee prior to the time that "an actual controversy develops." 15 BRBS at 470-471.

[4] Barnett was not a signatory to the settlement.

proceeds without having them reduced by an attorney's fee for which he may have been liable.[5] Thus, Barnett contends, employer is liable for a fee for all his services, and the administrative law judge erred in failing to interpret the settlement in this manner. We agree that the administrative law judge erred in applying Section 28(b) to limit employer's liability for Barnett's fee.

Generally, an attorney is entitled to a fee for his services when his client obtains benefits. 33 U.S.C. §928. If the circumstances of the case do not permit the shifting of fee liability to the employer under Section 28(a) or (b), the claimant may be required to pay for his attorney's services as a lien on his compensation. 33 U.S.C. §928(c);[6] *see*, *e.g.*, *Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (2007) (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting on other grounds), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). However, parties may agree to an attorney's fee as part of a Section 8(i) settlement. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); *Rohm v. Republican Nat'l Committee*, 14 BRBS 266 (1981); 20 C.F.R. §§702.132(c), 702.241(e). The Act does not place a limit on the attorney's fees that may be agreed to in a settlement. *See*, *e.g.*, *Losacano*, 48 BRBS at 53-54 (fee negotiated by parties in settlement is proper when settlement has been approved); *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002) (fee in approved settlement resolved fee payable at all levels of the adjudication).

A settlement is a contract and must be construed in accordance with contract law. *In re World Trade Center Disaster Site Litigation*, 754 F.3d 114 (2d Cir. 2014). The Act's regulations provide that a Section 8(i) settlement agreement must be "a self-sufficient document which can be evaluated without further reference to the administrative file." 20 C.F.R. §702.242(a). In view of this regulation, the Board has stated that parol evidence "appears to be proscribed" as it relates to construing Section 8(i) settlements. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring); *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992). Moreover, the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011), has stated that the intent of the parties to a contract controls, that the best evidence of their intentions is the contract

[5] Employer also agreed to pay Bloch's attorney's fee.

[6] Section 28(c) states: "An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment." *See also* 20 C.F.R. §702.132(a).

itself, and that determining whether a contract is ambiguous is a question of law. *In re Lehman Bros. Holdings, Inc.*, 761 F.3d 303 (2d Cir. 2014); *Keiler v. Harlequin Enterprises Ltd.*, 751 F.3d 64 (2d Cir. 2014). The words of the contract are to be given their plain meaning. If the contract is "complete, clear, and unambiguous, on its face[,]" it "must be enforced according to the plain meaning of its terms." *World Trade Center*, 754 F.3d at 122 (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002)). The meaning must be fair and reasonable. *World Trade Center*, 754 F.3d at 122. Only if, in applying the plain language, it is demonstrated that an ambiguity exists, may the court then consider extrinsic evidence.[7] *Lehman Bros.*, 761 F.3d at 308; *Roberts v. Consol. Rail Corp.*, 893 F.2d 21, 24 (2d Cir. 1989).

In this case, the plain language of the settlement agreement states that employer "will be separately responsible for satisfaction of Mr. Barnett's fees and costs[.]" There is no language limiting employer's liability for Barnett's fee to that for which it would be held statutorily liable under Section 28(b). Moreover, this meaning is fair, reasonable and unambiguous because there is nothing in the settlement agreement providing that claimant must pay Barnett a fee out of his settlement proceeds;[8] as Barnett contends, this language gives meaning to the entire integrated contract in that claimant's proceeds are not diminished by his potential liability for Barnett's attorney's fee. Because the plain language is unambiguous, we disagree with our dissenting colleague's opinion that the case should be remanded for the administrative law judge to consider extrinsic evidence to interpret the settlement provision. *See Keiler*, 751 F.3d 64; *McPherson*, 24 BRBS 224; 20 C.F.R. §702.242(a). We hold that, in this case, employer agreed in the settlement to relieve claimant of all attorney fee liability and to assume liability for any attorney fee payable under Section 28 of the Act, irrespective of the fee-shifting provisions. Therefore, we reverse the administrative law judge's conclusion that employer's liability

[7] An ambiguity exists only if the language "is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Lehman Bros.*, 761 F.3d at 308 (quoting *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011)).

[8] The rest of the settlement clause, stating that employer's "responsibility for satisfaction" of Barnett's fee will be established by way of "payment, a negotiated settlement, or litigation" is not a limitation on employer's liability through Section 28 of the Act in view of the settlement's silence on claimant's liability of any attorney's fee. Rather this language references the methods by which employer and Barnett can arrive at the amount of a reasonable attorney fee for all necessary services performed.

for Barnett's fee is limited to post-controversion fees pursuant to Section 28(b).[9] We remand the case to the administrative law judge for him to address the previously-denied pre-controversion fees and costs and any itemized objections thereto and to award Barnett a reasonable fee for pre-controversion services, payable by employer, in addition to the fees previously awarded.[10]

We reject, however, Barnett's contention that the administrative law judge erred in "arbitrarily" disapproving over five hours of his requested time for responding to employer's objections to his fee petition. He asserts the administrative law judge misapplied the Board's decision in *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). Attorney time spent for preparing and defending fee applications is compensable; however, only a "reasonable" fee is to be awarded. *Bogdon v. Consolidation Coal Co.*, 44 BRBS 121 (2011). In *Beckwith*, claimant's counsel filed two supplemental fee requests, seeking a fee for 16.3 hours spent in replying to employer's objections to the original fee petition. The Board disapproved 8 of the hours requested and awarded a fee for 8.3 hours, stating that counsel had unnecessarily escalated the disagreement over his entitlement to his claimed fee. *Beckwith*, 43 BRBS at 157.

The administrative law judge observed that Barnett requested a fee for 13.9 hours litigating his attorney's fee and that this amount is "well above" the hours the Board had found to be excessive in *Beckwith*. He questioned Barnett's assertion that he had spent 3.8 hours reading employer's objections and four hours drafting a response. In this respect, the administrative law judge accurately stated that, rather than providing case law to support his entitlement to this fee, Barnett addressed the "absurdity" of employer's position against pre-controversion fees but failed to address the itemized objections. Supp. Order at 6. In light of the content of the 5.5-page reply brief, the administrative law judge found the requested 7.8 hours for preparing the reply brief to be "clearly excessive," and he reduced the time from 7.8 hours to two hours.

We reject Barnett's contention that the administrative law judge erroneously used *Beckwith* as a "bright-line" for disallowing time for his reply brief. The administrative

[9] In light of our decision, we need not address Barnett's contention that pre-controversion fees are within the scope of an employer's liability under Section 28(b) or his assertion of error with regard to the date the administrative law judge found a controversy began between the parties.

[10] The administrative law judge is not obligated to award the entire fee claimed by Barnett. Rather, the administrative law judge is entitled to review Barnett's fee petition and employer's objections thereto, and to determine the necessity of the services provided and the reasonableness of the fee claimed.

law judge clearly was of the opinion that it did not take Barnett 7.8 hours to read employer's objections and to draft a reply which did not address those objections. Supp. Order at 6. Section 702.132 of the regulations provides that any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §702.132(a); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989); *see generally Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (Order). Barnett has not established that the administrative law judge abused his discretion in reducing the time claimed for responding to employer's objections to two hours. *See*, *e.g.*, *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Therefore, we affirm the award of two hours for this service.

Accordingly, the administrative law judge's Supplemental Order is vacated insofar as it denies pre-controversion fees, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Supplemental Order is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

_____
REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

Initially, I concur with my colleagues' affirmance of the administrative law judge's decision to reduce the time Barnett claimed for preparing the reply to employer's objections, as Barnett has not established an abuse of the administrative law judge's discretion. However, I respectfully disagree with their decision to reverse the administrative law judge's application of Section 28(b). Rather, I would remand the case for the administrative law judge to address the settlement provision to determine its meaning in the first instance. The administrative law judge noted Barnett's contention that employer's liability for his fee was not restricted to that which would be its liability

under Section 28 of the Act. *See* Supp. Order at 2. The administrative law judge, however, did not address this contention, and proceeded to apply Section 28(b). *Id.* at 3-4. Employer and claimant agreed "that Defendants will be separately responsible for satisfaction of Mr. Barnett's fees and costs by way of payment, a negotiated settlement, or litigation." Unlike my colleagues, I believe (as evidenced by employer's arguments) this provision is not unambiguous and that the administrative law judge in the first instance must address the parties' contentions regarding the provision's construction. *In re Lehman Bros. Holdings, Inc*., 761 F.3d 303 (2d Cir. 2014). "A provision is ambiguous where a natural and reasonable reading of its language allows for two or more possible meanings." *Roberts v. Consolidated Rail Corp.*, 893 F.2d 21, 24 (2d Cir. 1989). As the Section 8(i) settlement agreement is unclear on its face and the extent of employer's liability thus is uncertain, the administrative law judge erred in failing to address the meaning of the agreement. The administrative law judge approved the settlement between claimant and employer; thus, he is in the best position to ascertain the meaning of this provision. Additionally, it is properly his role, as opposed to that of the appellate body, to make findings of fact. *See, e.g., Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In cases of ambiguity, the administrative law judge may "look to the acts and circumstances surrounding execution of the ambiguous term to ascertain the parties' intent." *Roberts,* 893 F.2s at 24. Therefore, I would remand the case for further findings in this regard, and for reconsideration of Barnett's fee petition as necessary. Accordingly, I dissent.

_____

JUDITH S. BOGGS
Administrative Appeals Judge