

BRB No. 08-0575

L.A. )  
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 Claimant-Respondent )  
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 v. )  
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 DOMINO SUGAR CORPORATION ) DATE ISSUED: 01/29/2009  
 )  
 and )  
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 ACE AMERICAN INSURANCE )  
 COMPANY )  
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 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order on Remand and the Second Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Leonard A. Washofsky, Metairie, Louisiana, for claimant.

John J. Rabalais, Janice B. Unland, Robert T. Lorio (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Second Supplemental Decision and Order Awarding Attorney's Fees (2006-LHC-00778) of Administrative Law Judge C. Richard Avery 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for a second time. Claimant sustained injuries, initially diagnosed as contusions of the left elbow, hip and shoulder, as a result of a slip and fall accident which occurred in the course of his usual work for employer on July 17, 2000. Claimant was later diagnosed as suffering from disc herniations at C4-5 and C6-7, for which he underwent surgery. Claimant sought permanent total disability benefits under the Act.

In the decision on the merits, the administrative law judge found that claimant is not able to return to his former position and concluded, after reviewing and rejecting the positions identified in a labor market survey, that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from September 7, 2000, to December 8, 2004, and continuing permanent total disability benefits from December 8, 2004, as well as medical benefits. The administrative law judge also found, contrary to employer's contention, that claimant's refusal to undergo a functional capacity evaluation (FCE) requested by Dr. Montz did not bar his recovery of compensation.

Claimant's counsel thereafter requested an attorney's fee totaling \$9,099.20, representing 44.25 hours of services at an hourly rate of \$200, plus costs of \$249.20. Employer filed specific objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge found employer liable for an attorney's fee to claimant's counsel totaling \$8,959.20, representing 43.55 hours at an hourly rate of \$200, plus the requested costs of \$249.20. Employer appealed this decision, contending the administrative law judge erred in finding that claimant is totally disabled and that his benefits should not be suspended due to claimant's refusal to undergo a FCE. Employer also challenged the award of an attorney's fee

On appeal, the Board affirmed the award of permanent total disability benefits and affirmed the administrative law judge's finding that claimant's refusal to undergo the FCE does not support a suspension of compensation under Section 7(d)(4), 33 U.S.C. §907(d)(4). *L.A. v. Domino Sugar Corp.*, BRB No. 07-0502 (Nov. 26, 2007)(unpub.). The Board also rejected employer's contention that the formal hearing was necessitated solely due to claimant's refusal to undergo the FCE recommended by Dr. Montz. *Id.* at 6. However, the Board held that the administrative law judge did not address employer's contention that it cannot be held liable for an attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), because it paid total disability benefits at all relevant times and claimant, therefore, did not obtain greater compensation than employer paid. *Id.* The Board vacated the administrative law judge's finding that employer is liable for claimant's attorney's fee and remanded the case for further consideration of this issue.

On remand, the administrative law judge requested briefs from the parties. In its brief, employer contended that the requirements of Section 28(b) had not been satisfied

because employer never refused the recommendation of the district director after the informal conference, at which permanency was not discussed. In his Decision and Order on Remand, the administrative law judge found that claimant obtained greater compensation than employer was paying for temporary total disability benefits because the administrative law judge awarded permanent total disability benefits with Section 10(f), 33 U.S.C. §910(f), adjustments. In a Second Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an additional \$930, representing 4.65 hours of legal services at the hourly rate of \$200, for work performed before the administrative law judge on remand.

Employer appeals these decisions, contending that no informal conference was held on the disputed issue of permanent total disability and, thus, employer did not reject any recommendation to pay permanent total disability benefits. Therefore, employer contends it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). In addition, employer again contends that it was only claimant's intransigence regarding undergoing an FCE that necessitated a formal hearing.

We decline to address employer's contention regarding the lack of an informal conference and recommendation. Employer did not raise this issue in its initial objections to claimant's fee petition, and there has been no change in law since that time which would permit employer to belatedly raise this issue. In its initial objections to counsel's fee petition, employer raised the following issues: 1) claimant is not entitled to an attorney's fee, payable by employer, because the litigation arose solely due to claimant's refusal to undergo a FCE; 2) employer is not liable for a fee because claimant did not gain any further benefits as a result of the hearing as employer voluntarily paid temporary total disability benefits; (3) specific objections to itemized entries.

The Board affirmed the administrative law judge's finding that claimant's refusal to undergo the FCE was not the sole reason for the formal hearing. The Board remanded the case for the administrative law judge to make a finding as to whether claimant was awarded greater benefits than those paid by employer prior to referral. On remand, the employer raised for the first time the issue of fee liability on the basis that there had been no informal conference on the issue of the nature of claimant's disability, and thus that there was no recommendation by the district director which was rejected by employer.

Initially, we note that on remand, the administrative law judge properly addressed only the issue on which the Board remanded the case. 20 C.F.R. §802.405(a); *see generally Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). Moreover, it is well established that objections to a fee petition are waived, and cannot be raised on appeal, unless they are raised before the administrative law judge or district director in the first instance. *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5<sup>th</sup> Cir. 2008); *Ross v. Ingalls Shipbuilding, Inc.*, 28 BRBS 42 (1995). If,

however, a newly raised objection is based on intervening case law or on a legal issue that arose from the administrative law judge's decision itself, the Board may address the contention notwithstanding the lack of an objection below. See *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988); see also *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980).

In this case, however, all the case precedent on which employer relies was decided prior to the time claimant's counsel filed his fee petition on March 29, 2007. See *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6<sup>th</sup> Cir. 2007); *Virginia Int'l Terminals Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4<sup>th</sup> Cir. 2005), *cert. denied*, 456 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5<sup>th</sup> Cir. 2000); *Andreport v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (Hall, J., dissenting), *aff'd and modified on recon.*, 41 BRBS 73 (2007)(Hall, J., concurring). Employer thus cannot assert a change in law and in fact, offers no argument regarding its failure to raise this issue prior to the proceedings on remand. Under these circumstances, we cannot say that the administrative law judge erred in failing to address an issue not previously raised before him or within the scope of the remand order. See *Ross*, 29 BRBS 42. In addition, we reject employer's contention that the sole cause of the formal litigation was claimant's refusal to undergo the FCE as this issue was addressed and disposed of in the initial appeal and thus is the law of the case. See, e.g., *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Therefore, as employer does not raise any other objections to the fee awards, we affirm the administrative law judge's Decision and Order on Remand and the Second Supplemental Decision and Order Awarding Attorney's Fees.

Accordingly, the Decision and Order on Remand and the Second Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge