BRB No. 91-1322

MASTAQUE AHMED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION AND ORDER

Appeal of the Order Granting Attorney's Fees of Glenn Robert Lawrence, Administrative Law Judge, United States Department of Labor.

William S. Hopkins (McChesney, Duncan & Dale), Washington, D.C., for claimant.

Michael P. DeGeorge (Mell & Associates), Washington, D.C., for self-insured employer.

BEFORE: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Attorney's Fees (90-DCW-037) of Administrative Law Judge Glenn Robert Lawrence 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the Act). The amount of 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 the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On January 14, 1980, claimant, a revenue attendant for employer, sustained injury to his lower back which arose out of and in the course of his employment. Employer voluntarily paid claimant temporary total disability compensation from January 21, 1980 through August 29, 1982 and temporary partial disability compensation from August 30, 1982 to August 31, 1983. Claimant, thereafter, sought additional temporary total disability compensation from June 24, 1989 to November 6, 1989, in the amount of $3,484.32 and payment of two medical bills totalling $611.50. Between October 10, 1989 and February 22, 1990, employer's counsel sent three letters to claimant's counsel regarding the possibility of a settlement. No settlement was ever reached, however, and on November 16, 1990, a formal hearing was held. In his Decision and Order, the administrative law

judge denied claimant's temporary total disability claim pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a), but ordered employer to pay $611.50 in medical expenses pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a).[1]

Claimant's counsel subsequently submitted a fee petition requesting $3,000, representing 19.4 hours of attorney services at $150 per hour and 1.8 hours of paralegal services at $50 per hour. Thereafter, employer filed objections to the fee petition, contending that it was not liable for claimant's attorney's fee because it voluntarily tendered a settlement offer which exceeded the amount ultimately awarded and that the amount of the fee sought was excessive. In his Order Granting Attorney's Fees, the administrative law judge awarded claimant's counsel a fee of $2,670, representing 17.6 hours of legal services at an hourly rate of $150 and .6 hours of paralegal services at an hourly rate of $50 payable by employer.

Employer appeals the award of an attorney's fee, arguing that it should not be held liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), because claimant refused its settlement offer and was ultimately awarded less than the offered amount. Alternatively, employer argues that the fee awarded is excessive as a matter of law because it exceeds the $611.50 in medical bills recovered and that the complexity of the case does not justify the $150 hourly rate awarded. Claimant responds, urging affirmance.

Initially, we reject employer's assertion that the administrative law judge erred in holding it liable for claimant's attorney's fees. Under Section 28(b) of the Act, 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., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990);*Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, counsel for employer submitted two letters into the record in support of its assertion that it had made a settlement offer in which it tendered an amount greater than that ultimately awarded. In a letter dated October 10, 1989, employer's counsel stated that she would be willing to recommend a $1,500 settlement plus open medicals to her client. In a January 19, 1990 letter, employer's counsel reiterated her belief that a settlement under the aforementioned terms would be acceptable to her client.

[1]Employer was ordered to pay $226.50 for Dr. Bruno's April 19, 1989 medical bill and $385 for treatment rendered by the Center for Orthopaedic and Sports Physical Therapy in accordance with their bill of May 19, 1989.

After considering these letters, the administrative law judge determined that no definitive offer of compensation had been made and noted that employer's counsel never stated that she had the authority to settle for the indicated amount. Because the October 10, 1989 and January 19, 1990 letters submitted by employer's counsel indicate only that she was willing to recommend settlement of a $1,500 plus medicals to her client, and not that she was authorized to agree to a settlement for that amount, we agree with the administrative law judge's finding that these letters do not tender compensation as required by Section 28(b), as they do not establish a readiness, willingness, and ability on employer's part to make payment to claimant. *See Kaczmarek v. I.T. O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990); *Armour v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). Accordingly, as the administrative law judge properly found the letters do not constitute a tender of compensation under Section 28(b) and claimant's counsel succeeded in establishing claimant's entitlement to $611.50 in medical expenses while the case was pending before the administrative law judge, we affirm his determination that these additional benefits support an attorney's fee award payable by employer. *See Fairley v. Ingalls Shipbuilding*, 25 BRBS 61 (1991).[2]

We agree with employer, however, that the $3,000 attorney's fee awarded by the administrative law judge cannot be affirmed in view of the recent decision of the United States Court of Appeals for the District of Columbia Circuit, within whose jurisdiction the present case arises, in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161, 165 (CRT)(D.C. Cir. 1992), inasmuch as claimant was unsuccessful on his temporary total disability claim and was awarded only $611.50 in medical benefits. In *Brooks*, the court held that the test developed by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), for awarding fees applies to attorney's fee awards under the Act. The Court in *Hensley* addressed the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

461 U.S. at 434, 103 S.Ct. at 1940. The Supreme Court noted that the degree of success attained is the most crucial factor to consider and that if a plaintiff achieves only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may result in an excessive amount. 461 U.S. at 436, 440; 103 S.Ct. at 1941, 1943. The Court stated, however, that there is no precise rule or formula, but that a court (factfinder) may address such case

[2] A third letter from employer's counsel dated February 22, 1990 although not specifically discussed in the administrative law judge's Decision and Order also may not be properly construed as extending a settlement offer. In this letter employer's counsel merely indicated that employer was not interested in accepting claimant's temporary total disability claim and was contesting Dr. Bruno's medical expenses.

by eliminating hours or simply reducing the award. 461 U.S. at 436-437, 103 S.Ct.at 1941. Claimant in the present case succeeded only on his medical benefits claim, which was unrelated to the unsuccessful attempt to recover additional disability benefits. Inasmuch as the administrative law judge did not specifically consider claimant's limited success in making the fee award in this case, we vacate the fee award and remand the case for the administrative law judge to reconsider the amount of the fee award consistent with *Hensley* and *Brooks*.

Employer also challenges the $150 hourly rate awarded by the administrative law judge in this case. In general, this rate may be reasonable in a case under the regulatory criteria. 20 C.F.R. §702.132. In light of our decision to vacate the fee award, however, we need not address employer's assertion that the complexity of this case does not warrant a $150 hourly rate. The complexity of the legal issues involved and the reasonableness of the hourly rate sought in view of claimant's limited success are among the factors to be considered by the administrative law judge in reconsidering the fee award on remand under *Hensley* and *Brooks*.

Accordingly, the administrative law judge's determination that employer is liable for claimant's attorney's fee is affirmed. The administrative law judge's award of an attorney's fee, however, is vacated, and the case is remanded for further consideration of the fee award consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge