U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 October 2012

CASE NO.: 2010-LHC-01306

OWCP NO.: 13-105756

In the Matter of:

RONNIE BELL,
Claimant,

vs.

SSA TERMINALS,
Employer,

and

HOMEPORT INSURANCE COMPANY,
Carrier,

and

ILWU-PMA WELFARE PLAN,
Intervenor.

Appearances: Eric A. Dupree, Esq.
Dupree Law, a PLC
For Claimant

Laura G. Bruyneel, Esq.
Bruyneel & Leichtnam, LLP
For Employer/Carrier

Before: Steven B. Berlin
Administrative Law Judge

ORDER ON RECONSIDERATION MODIFYING FEE AWARD

After the parties settled the substantive issues in stipulations that I approved on January 11, 2011, Claimant's counsel petitioned for a fee award. The parties briefed the issues, and in an

order issued on April 23, 2012, I awarded counsel $37,592 in fees and $1,513 in costs, for a total of $39,105. The parties filed cross-motions for reconsideration. They submitted extensive new briefing; Claimant submitted new evidence.[1] Claimant's motion focuses on his counsel's hourly billing rate, seeking an increase above the awarded $385 per hour. Employer/Carrier's motion asserts that the order fundamentally misapprehends the relevant procedural history and must be reevaluated, and that the accrual of fees must be cut off when Employer/Carrier tendered or paid Claimant all compensation owed. *See* 33 U.S.C. §928(b). Employer/Carrier similarly argues that fees for litigating the fee dispute must be cut off when it offered Claimant's counsel all the fees to which he is entitled.

I will address each motion separately. Having reviewed this voluminous record, I will conclude that there is some merit to each party's arguments on reconsideration. Although I will not modify the hourly billing rate that I allowed Claimant's counsel, I will withdraw a particular finding in the initial order; Claimant's counsel's objections to that finding have merit. I will find meritorious as well Employer/Carrier's argument that the relevant chronology was not as I understood it initially and that a different result is required under *Armor v. Maryland Shipbuilding and Dry Dock Co*, 19 BRBS 119 (1986), and its progeny. I will then modify the fee award based on these findings.[2]

For purposes of this order, I will not repeat all of the facts and history detailed in the order of April 23, 2012. But I will make some additional findings and correct others.

I. Claimant's Counsel Has Not Demonstrated an Entitlement to a Higher Billing Rate, but an Erroneous Finding in the Initial Decision Must Be Corrected.

For the most part, I find Claimant's counsel's re-argument concerning his hourly billing rate without merit. Claimant's counsel protests that I found portions of the evidence he submitted to establish the relevant market rate unpersuasive for reasons that Employer/Carrier did not advance in its opposition. What counsel neglects is that, "'The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053 (9th Cir. 2009), quoting *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984). Thus, an employer is not technically required to offer *any* evidence or argument; it is the attorney seeking fees who must carry the burden of persuasion on his hourly billing rate.

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[1] Claimant's counsel previously submitted the current Exhibits 1, 5, 9, and 10 exhibits as part of his "Supplement to Petitions," filed in January 2012. I therefore strike them as duplicative. Generally, motions for reconsideration are not an opportunity for a party to present evidence after a ruling, when the evidence was available to him at the time he briefed the issues initially. *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3rd Cir. 1995); *Frietsch v. Refco. Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.). I therefore strike Exhibit 4, a publication available to Claimant's counsel at the time of both his initial petition and his supplement, which he filed prior to the ruling on the initial petition.

[2] Employer/Carrier argues that Claimant's cross-motion for reconsideration was not timely filed. The argument raises many issues. Rather than reach them, however, I will address and essentially deny the cross-motion on the merits.

Counsel's argument also neglects that Employer/Carrier in fact was not silent in its opposition to his requested hourly rate. It argued that much of counsel's evidence was irrelevant, vague, or otherwise unpersuasive. Employer/Carrier critiqued the proffered so-called "Dupree Matrix" as containing cases from outside the relevant community or distinguishable because they were class actions. It argued that many of the cases counsel cited did not give enough information about the skill or reputation of the attorney who received the award to allow a comparison with Claimant's counsel's skill and reputation.[3] It argued that, in any event, those cases do not support the hourly rates that counsel sought, either for himself or for his associate. Employer/Carrier gave multiple examples of what it contended were practices showing that counsel lacked the skills generally associated with an attorney practicing at the level at which Claimant's counsel portrays himself. *See* Employer/Carrier's Opp. Br. at 14-18. I found many of these arguments persuasive to varying degrees. I explained the reasons in the initial order.

Claimant's counsel also argues on reconsideration that market billing rates in geographically distant Los Angeles and San Diego (about 400 to 500 miles away from the location of trial in San Francisco) are relevant, yet those much closer in Sacramento (about 90 miles from the trial site) are not because the Los Angeles and San Diego markets are "roughly similar" to San Francisco's. This argument fails on the law. It is well-settled in the Ninth Circuit that, "The relevant community is generally defined as 'the forum in which the district court sits.'" *Van Skike v Director, OWCP*, 557 F.3d 1041, 1046 (9th Cir. 2009), *quoting Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).[4] I therefore look to the market in the San Francisco area (and judicial district) and accord little if any weight to data from other federal judicial districts.[5]

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[3] Claimant's counsel argues on reconsideration that ERISA litigation is similar to federal workers' compensation because the particular ERISA cases he cited, for the most part, concern long-term disability benefits. This argument is without merit. The skills that ERISA lawyers must master differ significantly from those that workers' compensation lawyers need. As I wrote in the initial order, ERISA requires complex mathematical analysis, knowledge of finance (as for fiduciary responsibilities), and familiarity with a regulatory scheme approaching the Byzantine (more similar to the tax code than to employment law). The fact that an ERISA specialist happened to be working on a long-term disability case doesn't mean that she lacks the skills most ERISA specialists must have, even if she wasn't called upon to use all of them in the particular case. Her billing rate reflects the full ambit of her skills, not just those that happened to be required in a particular case. Certainly, nothing in these reported cases suggests that the lawyers weren't skilled ERISA lawyers capable of doing the more esoteric aspects of that specialty, none of which skills Claimant's counsel claims to have.

I reject as well counsel's argument that he developed skills in civil litigation some 25 years ago when Longshore litigation was less than a third of his practice. Those skills are long outdated. I have reviewed Claimant's counsel's reported decisions as counsel in the federal courts of appeals and district courts and in the state courts nationwide and find them undistinguished; those reported outside Longshore litigation border on non-existent for someone with 32 years of litigation experience.

[4] An exception might occur, for example, where the litigation involves a highly specialized area, for which there are no local lawyers with the needed expertise. In that case, the plaintiff might have to retain an attorney from a remote location and pay that attorney's customary fees for his home location. Another exception might apply to appellate attorneys who work entirely out of their offices and do not be spend time interviewing witnesses on location, taking depositions where witnesses live, or appearing at the trial court for oral argument, pre-trial conferences, or at times multiple-day evidentiary hearings. The Board generally sets rates for these appellate attorneys according to the location of their offices rather than the Board's location in Washington, D.C. The case at bar presents none of these circumstances.

[5] I routinely receive motions for awards of attorney's fees in cases across the Western United States, and most especially from the port cities on the Pacific coast (Seattle, Portland, San Francisco, Los Angeles, Long Beach, and San Diego). Having reviewed numerous surveys of hourly billing rates, I have found that billing rates are not the

Next, Claimant's counsel cites three cases in which he states he was awarded an hourly rate over $400 per hour. At the outset, for an attorney with over 30 years of experience, three cases present a very small – and potentially unrepresentative – sample. In any event, for a variety of reasons the evidence of rates Claimant was awarded in other cases does not support an increase in the billing rate I have assigned him.

One of the cases is an appeal. Rates in appellate courts are not analogous to those at the trial level. The required skills differ significantly. In the case that counsel cites, the appellate commissioner who decided the fee petition relied substantially on his experience reviewing other fee requests. Given his role as an appellate commissioner at the Ninth Circuit, I can only infer that he was relying on fees awarded for appellate work before that Court. Claimant's counsel offers no evidence that market billing rates for attorneys practicing before the federal courts of appeals are the same as for those practicing at the trial level before an administrative agency. Even so, because the commissioner found Claimant's counsel's work so inefficient for someone who would merit a $450 billing rate, he reduced counsel's fees from a requested $9,855 to $7,200, which rendered an effective billing rate for actual hours expended of $329 per hour.[6]

The second case is an arbitration award. The arbitrator explains that this was an unusually demanding case because of a parallel Jones Act case pending simultaneously. When setting an hourly rate, the arbitrator does not identify the relevant community (whether San Francisco or elsewhere), nor does he recite or analyze any relevant market data; he refers instead to his personal feeling. Unlike the arbitration case, the case at bar is not extraordinary, and I can accord little weight to an opinion that might relate to some other market and includes no discussion of the objective evidence on which it is based.[7]

The third case is a fee award by then-District Director Eric L. Richardson on a remand. The Director awarded Claimant's counsel $385 per hour, the same rate as I awarded. Nothing about this suggests that counsel is entitled to a higher rate.

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same across California's coastal cities. Moreover, counsel's argument begs the question: Counsel's argument that the Los Angeles and San Diego markets are the same as San Francisco's requires that he first establish what the San Francisco market rate is so that he may compare it to the other two. If we already knew what the San Francisco market was (so that we could compare with other markets), we wouldn't need to perform this entire exercise.

[6] There is a fine line between, on one hand, an attorney who is skilled but in the particular case lacked the efficiency normally associated with that level of skill and, on the other hand, an attorney who is somewhat less skilled and, on account of that, is expected to take more time to get the work done. A fee award for two such attorneys could well produce the same result: one is allowed a higher billing rate with more time excluded; the other gets a lower billing rate with fewer hours excluded. Here, the Commissioner allowed the billing rates for Mr. Dupree and his associate but seriously cut the billable hours.

As to the associate Mr. Myers, the Commissioner allowed his requested billing rate of $225 per hour but significantly reduced his billable hours because of inefficiency. The Commissioner reduced Mr. Myers' awarded fees from a request of $5,085 to $4,000, rendering an effective billing rate based on actual time expended of $177 per hour.

[7] In *Van Skike* and *Christensen*, the Ninth Circuit rejected this Office's prior practice of assigning billing rates without market data; it found the practice arbitrary and inconsistent with the lodestar approach applied generally in federal fee shifting cases.

Claimant's counsel also placed a fourth fee award on the record. *Azua v. National Steel and Shipbuilding Co.*, OALJ No. 2007-LHC-01099 (July 13, 2010). There, as here, counsel requested a billing rate of $450 per hour. But after Judge Pulver analyzed the market data on that record, he awarded counsel $368 per hour. He allowed counsel's associate, Mr. Myers, $205 per hour. Both rates are less than those that I am allowing these attorneys. If anything, Judge Pulver's decision suggests that I should lower the rates I awarded in my initial order.

In all, I find no basis to modify the finding in the initial order that a proper hourly billing rate for Mr. Dupree's work in a San Francisco-based case is $385, and for Mr. Myers, $225.[8]

Nonetheless, I must modify one of the findings stated in the initial order. I found in that order that Claimant's counsel's practice would benefit by a broader range of modulation; that "hardball" tactics might be appropriate and even necessary at times; but at other times those same tactics increase the cost of litigation and on occasion might lead to a lesser result for the client. I cited as an example that, had Claimant's counsel been more conciliatory in the present settlement negotiations, the result might have been the same for his client but with considerably less expenditure of attorney time and delay. I concluded that Claimant's counsel's skills for settling cases were below average for attorneys practicing in the relevant community.

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[8] Claimant's counsel submits a supplemental declaration from Mr. Gillelan (exhibit 3). I strike portions of Mr. Gillelan's supplemental declaration as argument. (*See, e.g.*, ¶¶3.b, 3.c, 4.) Mr. Gillelan is not counsel on this case; his persistence in arguing brings into question his confidence in Mr. Dupree's ability to present the needed arguments himself. It does not promote a higher billing rate for Mr. Dupree.

I reject Mr. Gillelan's argument that because he has worked a lot with Mr. Dupree, he is objective. Regrettably, being informed and being objective are not the same. And Mr. Gillelan is not entirely informed in any event. For example, his lack of trial level experience brings into question the value of his opinions about the range of tactics likely to bring the best results when attempting to settle trial level cases; Mr. Gillelan offers no indication that he has any experience with that process. Mr. Gillelan also admits that he was not involved at any stage of this particular case.

If anything, Mr. Gillelan's supplemental declaration discloses information that increases the likelihood of bias. He reveals a more substantial business relationship with Mr. Dupree than previously disclosed. Each of the two attorneys has represented the other as a client. In addition, they have in the past and continue to refer considerable business to each other. For example, after handling a trial level case, Mr. Dupree hires Mr. Gillelan to first-chair the appeal, while Mr. Dupree remains on the case, both of them collecting fees. When Mr. Gillelan concludes his work on an appeal, if there is a remand, he refers the case to Mr. Dupree to take over at the trial level.

Mr. Gillelan states that, in the course of this relationship, he has "reviewed the records of *dozens* of cases [Mr. Dupree] has tried, and [has] discussed with him his development of *many dozens* more as he thought them through and designed and developed his evidentiary presentations." (¶2.c. – emphasis added.) Given the limited number of cases Mr. Dupree tries per year, and the fact that there would be little reason to review the records following trial in many of them, I can only conclude that, to extend to "dozens" of cases, this consulting or referral relationship is years in the making. Mr. Gillelan also quantifies his referrals to Mr. Dupree on remand as "many" cases "in recent years" (¶2.d).

In view of the extent of these attorneys' relationship, I limit the weight I give Mr. Gillelan's opinions to the weight I might accord a lawyer praising a partner in his own firm – that is to say, little weight on account of the likelihood of bias. As I stated in the initial order, I do not question that Mr. Gillelan offers his honestly believed opinion; he simply does not have the perspective of a trial judge (or even an opposing counsel); rather he has the perspective of an appellate lawyer with little experience in the trial courts and no direct awareness of the pending case, and who has had and continues to have a long and mutually profitable business relationship with Mr. Dupree.

It is that last conclusion that I must modify. From my experience of Claimant's counsel's work in numerous cases, I continue to believe that his practice would benefit from a broader range of interaction, to include more "olive branches" to complement his quiver of "arrows." But I have reviewed more closely the course of the parties' settlement discussions (at least to the extent they are reflected on the record). And although I continue to believe that a more conciliatory approach would have avoided delay and the unnecessary expenditure of attorney time, I find that Claimant's counsel's conduct was reasonable and in good faith.[9] He demonstrated settlement skills appropriate to an experienced attorney. I therefore withdraw any finding to the contrary.

In all, however, as I have not altered my conclusion that a broader modulation of tactics and tone would make Mr. Dupree a stronger lawyer, I find no reason to adjust the awarded hourly billing rate.[10]

II. A Portion of the Fee Award Must Be Vacated Because Employer/Carrier Paid All Compensation Owing.

Having considered the parties' arguments on reconsideration, I conclude that my initial order erroneously neglects some of the controlling law and must be revised. My corrected findings and conclusions follow.

This case involves compensation for a closed period of temporary total disability, following which Claimant returned to work without loss of wages. The temporary disability was on account of both a scheduled and an unscheduled injury. After Claimant returned to work, he reached maximum medical improvement and became eligible for an award of permanent partial disability on the scheduled injury.

Initially, Employer/Carrier controverted the claim and denied benefits. But as the medical record developed with Claimant still in temporary disability status, Employer/Carrier initiated settlement discussions and offered to pay what it contended was all compensation owed for

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[9] I discuss the specific settlement negotiations in the section below on Employer/Carrier's *Armor* argument.

[10] For the most part, Claimant's counsel does not seek reconsideration on the disallowance of hours expended on particular tasks. But he does address time that he expended on a reply brief on his supplemental petition for additional fees. I struck the reply because it was filed without permission.

Claimant's counsel does not dispute that it is within an administrative law judge's discretion to strike a reply brief filed without the judge's permission. *See* 29 C.F.R. §18.6(b). Instead, he moves now for permission to file the reply and asks that, once the filing is allowed, *nunc pro tunc*, he be allowed fees for his work on it.

Claimant's motion comes way too late, and unlike the primary fee petition (on which I allowed Claimant a reply), nothing on the supplemental petition required a reply. I allowed Claimant a reply on the initial fee petition because Employer/Carrier introduced new material in its opposition. But the reply on the supplemental petition is different.

The Supreme Court recently reemphasized that the determination of appropriate attorney's fees should not be an occasion for "a second major litigation." *Fox v. Vice*, 563 U.S. ___, 131 S.Ct. 2205, 2216 (2011), quoting *Hensley v. Eckerhart*, 461 US 424, 437 (1983). As the Supreme Court has done all it can to discourage extended fee litigation, I deny the motion to amplify a record on a fee dispute already far in excess of the record addressed to the substance of the claim. Similarly, I deny Employer/Carrier's motion for leave to file a reply to Claimant's opposition to Employer/Carrier's motion for reconsideration. (I do, however, allow Employer/Carrier's opposition to Claimant's cross-motion for reconsideration; a party of course is entitled to an opposition on any motion.)

temporary total disability. The parties dispute how those negotiations failed, but they do not dispute the result: no stipulations or other settlement agreement was filed for review and approval. Employer/Carrier then voluntarily paid what it viewed as full compensation for the closed period of temporary total disability with interest. When the parties soon afterward received medical evidence that Claimant had reached maximum medical improvement on the scheduled injury, together with an opinion of the extent of loss, Employer/Carrier again voluntarily paid what it viewed as full compensation, now for scheduled permanent partial disability. Ultimately, the case resolved with Claimant agreeing that the amounts Employer/ Carrier had paid voluntarily in fact satisfied its obligations. The question is what this history implies for the award of attorney's fees. The relevant chronology is as follows.

Claimant returned to work on July 12, 2010. On August 29, 2010, Employer/Carrier's counsel wrote to Claimant's counsel: "We are getting ready to make a settlement offer on Bell. I have the AWW as $1,185.64 with a compensation rate of $790.43. Can we agree to those numbers?"

On September 21, 2010, Employer/Carrier's counsel followed up with an offer to stipulate to temporary total disability (at the $790.43 compensation rate she'd mentioned) from the date Claimant stopped working (September 1, 2010) until his actual return to work on July 12, 2010. The written offer included past and future medical care. With respect to attorney's fees, Employer/Carrier's counsel wrote:

> Defendant will pay reasonable attorney's fees and costs to be agreed to by the parties and if no agreement can be reached to be determined by the OWCP and OALJ.

E.Opp., Ex. 21. As there was no evidence as of that date that Claimant was at maximum medical improvement, Employer/Carrier's offer was to pay all compensation potentially then owing, assuming no dispute as to average weekly wage.

According to Claimant's counsel's billing records, counsel called Employer/Carrier's counsel on October 1, 2010 to accept the offer. But the parties did not conclude a settlement at that time. An email trail on the record contains the following:[11]

- During the conversation in which Claimant's counsel called to accept the offer, Employer/Carrier's counsel asked Claimant's counsel to provide a copy of his fee bill. Claimant's counsel declined. As he wrote immediately after the phone call: "I feel it puts me in a conflict with my client. I stand ready to present an itemized fee petition upon approval of the stipulation on the merits and to comply with the terms you set forth in paragraph 7 of your offer letter. There is nothing in your letter that requires, nor should it, a resolution of the attorney fee amount as a precondition to execution of stipulations as to the TTD length and amounts." (10/1/2010)
  From this, I conclude that Claimant's counsel initially understood that Employer/Carrier wanted to see his fee bill to negotiate the fees while the amount of compensation being offered Claimant still remained negotiable.

[11] *See* C.Reply, Ex. 1.

- Employer/Carrier's counsel's response was ambiguous and could have left Claimant's counsel still thinking that the amount being offered to Claimant was subject to revision until the amount of fees could be agreed. Employer/Carrier's counsel answered: "If your attorney's fees and costs are reasonable, then we have nothing to argue about. Your refusal to disclose them, however, is not a good sign. No one is going to draft stipulations without agreement on your attorney's fees and costs. I think I made that perfectly clear." (10/3/2010.) Defense counsel's comment and refusal to draft settlement papers could be taken as a suggestion that nothing was final without an agreement on fees.
- Claimant's counsel's reply was consistent with his earlier stated concern about setting up what he perceived to be a conflict between himself and his client. As he wrote: "It was only after I accepted . . . that you then *decided to condition the stipulations* on reaching an agreement as to the exact amount of fees that I would receive. [Claimant] and I stand ready to execute stipulations on the exact terms that you set forth in your 9/21/2010 communication. Once the stipulations are executed and approved, then you get to see my detailed petition for attorney fees, we try to reach an agreement, if we do fine, if not I file my petition and you file your objections and we let owcp/oalj decide, just like paragraph 7 [of the offer letter] says" (emphasis added). Claimant's counsel thus again asserted that he understood the compensation to his client to be conditioned on an agreement as to fees (or at least some amount of negotiation as to fees). (10/3/2010)
- At this point, Employer/Carrier's counsel seems to have understood Claimant's counsel's concern; she clarified and assured Claimant's counsel that the amount of compensation being offered Claimant was not contingent on what Employer/Carrier found in counsel's fee bill. She explained that she just was trying to see if the entire stipulation – including fees – could be addressed in a single document. To her, there was no conflict because she was not withdrawing the offer to Claimant (or making it conditional). As she wrote: "I simply want to get this done now and in one fell swoop . . .. Get your fee petition to me now. If we can agree, we will put it in the stipulations. If we cannot, we will submit the fee issues to the OALJ at the same time as the stipulations . . .. The offer is the offer. It is an Armour offer. *I did not withdraw.*" (10/4/2010) (emphasis added).
- Claimant's counsel confirmed that he understood this as a shift in Employer/Carrier's position. He stopped asserting a conflict. Instead, he shifted his argument to meet Employer/Carrier's new (or clarified) position. He argued that he could not provide a fee petition because his work on the case was not complete until the stipulations were drafted, submitted, and approved. For example, the judge might want a conference with the attorneys and require that portions of the stipulations be rewritten. As Claimant's counsel wrote: "Your position [in the email] below is different than your position at the end of our call on Friday and different than your emails of last night. How can I submit a petition at this time since we haven't finished our work on the TTD issue or should I work for free on that portion of the case? Let's get our stips hammered out, executed, and submitted for approval. The judge may have issues with our language and we may need to modify or clarify. When the judge is satisfied . . . and we have an order, I'm prepared to submit a detail[ed] description of our time and work in the case for your consideration within ten days thereafter. If we reach an agreement as to the amount, we submit it for approval. If we don't [agree on the amount, we will litigate it.]" (10/4/2010)

No agreement followed.

Instead, four days later, on October 8, 2010, Employer/Carrier voluntarily paid the full amount of temporary total disability that it had offered ($45,054.51) plus interest ($1,000).[12] E.Opp. Ex. 23.

At the time of the offer, no medical doctor had found Claimant to be at maximum medical improvement, and the only issue for resolution was temporary disability for both the scheduled and unscheduled injuries.[13] It was not until Dr. von Rogov issued a report on October 3, 2010 that there was evidence that Claimant had reached maximum medical improvement. At that time, Dr. von Rogov gave Claimant an impairment rating. Employer/ Carrier voluntarily began paying Claimant compensation for scheduled permanent partial disability consistent with Dr. von Rogov's rating.

Ultimately, Claimant settled and received nothing more than what Employer/Carrier had paid him voluntarily. Employer/Carrier asserted that its obligation to pay Claimant's attorney's fees ended with the date of its offer. *See Armor v. Maryland Shipbuilding and Dry Dock Co*, 19 BRBS 119 (1986).

In the initial order, I rejected this argument. After receiving the parties' cross-motions for reconsideration, I reviewed the interchange between counsel described above and re-examined the chronology. I concluded that there was merit to some of Employer/Carrier's arguments and therefore now adopt the following conclusions and modify the previous order.

> "The purpose of section 928 is to authorize attorney's fees against employers when the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation."

Matulic v. Director, OWCP, 154 F.3d 1052, 1060 (9th Cir. 1998), quoting *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354 (9th Cir. 1993). Generally, section 28(a) controls cases where the employer or carrier declines compensation and controverts the claim on the ground that there is no liability. Section 28(b) controls cases where the employer or carrier voluntarily tenders payment or pays compensation without an award, but the employee contends that the carrier owes more compensation, litigates, and ultimately succeeds in obtaining more. "An offer to settle a claim is a tender of compensation under Section 28(b), and a 'tender' demonstrates the employer's 'readiness, willingness and ability . . . expressed in writing,' to make the payment of compensation." *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (en banc), *decision after remand*, 22 BRBS 316 (1989).[14]

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[12] According to Employer/Carrier's counsel, Employer/Carrier had decided on October 1, 2010 to make the payment voluntarily.

[13] Claimant did not become eligible for additional compensation for the scheduled injury until his condition became permanent. *See* 33 U.S.C. §908(c).

[14] "The claimant is entitled to attorney's fees where the extent of liability is controverted and the claimant successfully obtains increased compensation, 'whether or not the employer had actually rejected an administrative recommendation.'" *Matullic* at 1061, quoting *National Steel & Shipbuilding Co. v. U.S. Department of Labor*, 606

In the present case, Employer/Carrier controverted the claim while it was pending before the Office of Workers' Compensation Programs; it asserted that there was no liability. Based on that, Claimant's counsel argues that section 28(a) controls. He cites no authority beyond the language of the statute. Employer/Carrier argues that, once it tendered payment as part of its offer to settle the dispute, section 28(b) applied; or at the least, when it actually paid Claimant, section 28(b) began to control at that point.

In a series of unpublished decisions, the Board has endorsed the rule that Employer/Carrier advocates. The Board expressly adopts this view in *Vessell v. Todd Corp.*, BRB No. 97-1515, 1998 WL 35423432 (July 22, 1998) (unpub.). *Vessel* involves a serious facial scar, for which the claimant sought compensation under section 8(c)(20). The carrier initially controverted the claim and declined the claim examiner's recommendation following an informal conference that the carrier pay $3,000. Claimant retained counsel, and the matter was referred for adjudication before an administrative law judge. Four months later, with the matter already pending in formal litigation, employer/carrier offered to settle for $4,000. Claimant refused the offer, and the matter went to hearing. The administrative law judge awarded the claimant $2,250. Applying section 28(b), the administrative law judge denied claimant's counsel's fee petition.

On appeal, the Board affirmed in part and reversed it part. It acknowledged that section 28(b) requires that the tender or payment of compensation must be within 14 days after the employer or carrier receives the claims examiner's written recommendation following the informal conference. This failure to tender or pay timely rendered the employer/carrier liable for fees "during the period in which employer had neither accepted the district director's recommendation nor made any tender of compensation." *Id.* at 3.

But as to the time following the employer/carrier's offer, the Board relied on policy considerations in *Armor v. Maryland Shipbuilding and Dry Dock Co*, 19 BRBS 119 (1986), and held:

> We disagree, however, with claimant's contention that employer's lack of timely compliance renders employer indefinitely liable for payment in full of claimant's attorney's fees. Although employer did not comply with Section 28(b) in a timely manner, employer's subsequent $4,000 settlement offer made by letter dated January 8, 1997, constitutes a tender of compensation within the meaning of Section 28(b). *See Armor*, 19 BRBS at 122. As claimant ultimately was awarded an amount less than the amount offered by employer on January 8, 1997, employer's liability for claimant's attorney's fees ended as of the date of employer's tender. To accept claimant's argument that employer's failure to tender within the requisite 14-day period renders employer liable for *all* attorney's fees incurred thereafter would mean that an employer could not tender beyond the 14-day period without remaining liable in full for claimant's attorney's fees even if claimant ultimately received a nominal amount substantially less than the

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F.2d 875, 882 (9th Cir. 1979). "A claimant is not entitled to attorney's fees if after the informal conference there is no issue in dispute other than his entitlement to such fees." *Matullic* at 1060, citing *Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 611 (9th Cir. 1991).

> tendered settlement amount. This position is contrary to the Act's policy of encouraging settlements. *Id.*

Vessel at 4 (fn. omitted). The Board has reached similar results in other unpublished decisions. *See, e.g., Usher v. Jones Oregon Stevedoring Co.*, BRB No. 99-605, 2000 WL 35928572 (Mar. 9, 2000) (unpub.) (§28(b) controls when offer was made while case was before administrative law judge and one month before the hearing); *Trusty v. Ceres Marine Terminals, Inc.*, BRB No. 03-0311, 2004 WL 6045871 (Jan. 16, 2004) (unpub.) (after carrier accepted an initial claim, it denied a subsequent claim; §28(b) controls after offer was made approximately two weeks before the ALJ hearing).

The Board generally has limited the controlling effect of its unpublished decisions. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).[15] But controlling or not, the Board has clearly opined that an employer or carrier's initial failure to come within the specific requirements of section 28(b) does not preclude its later coming within that provision by tendering a payment of compensation (in a written settlement offer) or by actually paying the compensation. As the Board explained, any other rule would be inconsistent with the Act's policy to foster voluntary payments and settlements. *See Armor.*

I turn then to the question of whether Employer/Carrier tendered a payment of compensation – or actually paid compensation – at least as great as Claimant ultimately received in the litigation. Employer/Carrier's contentions notwithstanding, its counsel's letter of on July 12, 2010 asking if Claimant can agree to a compensation rate of $790.43 is not a tender of compensation. It is a part of a settlement negotiation and nothing more.

Much more difficult is the exchange of correspondence that Employer/Carrier's counsel initiated on September 21, 2010. In this exchange, Employer/Carrier made an offer to pay compensation at the rate of $790.43 plus "reasonable attorney's fees and costs to be agreed to by the parties and if no agreement can be reached to be determined by the OWCP and OALJ." The complication occurred when Claimant's counsel called defense counsel ten days later to accept the offer. I find that defense counsel refused to draft the settlement papers for submission to the administrative law judge unless she could first review Claimant's counsel's fees to date. From this, Claimant's counsel reasonably inferred that Employer/Carrier's offer to pay compensation to Claimant was contingent on what defense counsel found when she read Claimant's counsel's bill. In Claimant's counsel's view, this created a conflict of interest because he'd have to balance his own desire to be paid what he saw as reasonable fees against his client's interest in receiving compensation. Essentially, Claimant's counsel saw this as a withdrawal of the written offer and the substitution of a different offer, one that for ethical reasons he could not consider.[16]

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[15] *See also, Day v. Eastern Associated Coal Corp.*, BRB No. 10-0115 BLA, 2010 WL 4539414 (Oct. 14, 2010) at 3 (Black Lung Act) ("Unpublished decisions typically possess diminished value as legal precedent"). Irrespective of this rule, it appears that parties routinely cite unpublished decisions to the Board, and the Board addresses those decisions as carrying at least some weight.

[16] Claimant's counsel's concern about a conflict of interest appears to be ungrounded. An administrative law judge must review and approve the settlement to be certain that it is in the claimant's best interest; the judge may adjust the apportionment if the circumstances call for it. *See Carswell v. Will Trucking*, 13 BRBS 340, 346-47 (1981) (if possible, "claimant's attorney's fee should be resolved at the same time a settlement of compensation is reached between the parties"; both compensation and fees may be settled in the same agreement so long as a minimum

As became clear in later conversation between the two attorneys, I doubt that it was Employer/ Carrier's counsel's subjective purpose to make the offer contingent when she asked Claimant's counsel for his fee bill before she drafted the settlement papers. Rather, Employer/Carrier's counsel meant only that, if it so happened that after Employer/Carrier reviewed the fee bill, the parties could agree on the fees, Employer/Carrier's counsel could then draft a single document that would address both compensation and fees: It would save her client the expense of preparing a settlement agreement limited to the merits and then revising that agreement to include fees.

But I find that Claimant's counsel could and did reasonably understand the conversation with defense counsel to be a modification of the offer, making it contingent in some manner on what was in his fee bill. Claimant could not accept an offer that he understood had been withdrawn. It thus serves no purpose to cut off the fees while Claimant's counsel thought that's what had happened.

The attorneys' respective understandings of the proposed settlement came into alignment again on October 4, 2010. Claimant's counsel understood that defense counsel simply wanted to be able to draft a single document addressed to all issues if that were possible. He understood that there was no conflict. At this point, Claimant's counsel offered a new reason to decline the offer: He didn't want to discuss his fees (and possibly settle them) while he would still be generating more fees (to review the draft settlement agreement and arrange any modifications the judge might require).

I need not decide whether Claimant's counsel view was reasonable.[17] For, irrespective of Claimant's counsel's reasoning, Employer/Carrier's offer was not unconditional. To the contrary, it was conditioned on Claimant's counsel's willingness to explore a potential settlement of his fee claim prior to drafting and submitting for approval the settlement on the merits. To be effective, an *Armor* offer cannot be contingent on a condition.

Nonetheless, I find that Employer/Carrier acted effectively four days later on October 8, 2010, when it paid Claimant in full (including interest) for all amounts owing, assuming a compensation rate of $790.43 per week. *See Armor, supra*; *Woods v. Louis Dreyfus Corp.*, BRB No. 01-0237, 2001 WL 36400431 (Oct. 29, 2001) (unpub.) at 3 (attorney's fees cut off when carrier actually paid claimant, despite the payment not coming within 14 days of notice of the claim). Employer/Carrier followed up with a timely payment of the scheduled award as soon as there was a medical finding that Claimant was at maximum medical improvement along with a rating. Claimant achieved nothing more in the settlement to which he finally agreed.

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amount of compensation is set: the administrative law judge will review the apportionment to protect the claimant). Moreover, there is no ethical dilemma because an attorney is not required to seek fees but does have an ethical obligation to serve clients competently. *See Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986) (Title VII); *Wakefiled v. Mathews*, 852 F.2d 482, 483 (9th Cir. 1988) (permissible to negotiate both merits and fees simultaneously).

[17] Most claimants' attorneys in my experience are willing to settle fees with an estimate of the additional time that will be required to wind up (or by foregoing wind up fees). Claimant's counsel's uncompromising position on this issue is consistent with my comments in the initial fee order about his "hardball" tactics and lack of modulation.

I therefore find that Claimant is entitled to an award of reasonable attorney's fees for his attorneys' efforts before this Office up until October 8, 2010, the date Employer/Carrier paid all compensation owing (with interest). *See Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981); *Brown v. Rothschild-Washington Stevedore Co*., 8 BRBS 539 (1978) (counsel is entitled to fees until the date of receipt of the employer/carrier's offer). Claimant's counsel is also entitled to wind-up fees. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Beyond that, if Claimant's counsel seeks fees for work performed for Claimant on or after October 8, 2010, he must petition for an award against Claimant. *See* 33 U.S.C. §928(c). Based on this, I make the following adjustments.

- On and after October 8, 2010, Mr. Dupree billed 16.3 hours, excluding time billed on fee litigation. Of this, I had already disallowed 1.7 hours, and 4.8 hours were for winding up. I therefore disallow an additional 9.8 hours. This reduces fees based on Mr. Dupree's work by $3,773.00.

- Mr. Myers billed 4.2 hours, excluding time billed on fee litigation. I had already disallowed 1.1 of these. Wind up time was 1.5 hours. I therefore disallow an additional 1.6 hours. This reduces fees based on Mr. Myers' work by $360.00.

- Paralegal time billed 7.0 hours, excluding time billed on fee litigation. I had already disallowed 1.2 of these. Wind up time was 3.4 hours. I therefore disallow an additional 2.4 hours. This reduces paralegal fees by $300.00.

The fees generated for fee litigation are wind-up fees. They were necessary irrespective of the settlement on the merits. They remain chargeable.

Together, this reduces the fee award by $4,433.00. I also disallow costs for a telephone conference with an expert on October 27, 2010, in the amount of $300. This produces a total reduction in fees and costs of $4,733.00.

Finally, I turn to Employer/Carrier's argument that Claimant's counsel's fees generated on litigating the fees must be cut off as of February 10, 2011, when it offered to settle the fee dispute for $20,000. To achieve this relief under *Armor*, Employer/Carrier must show that Claimant's counsel was entitled to a fee award as of the date of the order no greater than the $20,000 Employer/Carrier offered. Having performed the necessary calculations, I find that Claimant's chargeable fees (*i.e.*, the fees allowed after consideration of Employer/Carrier's objections and excluding fees on the fee litigation) through February 9, 2011, were $21,159.50.[18]

[18] To calculate the chargeable fees accrued through February 9, 2011, I relied on my calculations from the initial order. I excluded from the total award all work performed from February 10, 2011 onward. During that period, I allowed Mr. Dupree the 14.5 hours he had billed; I allowed Mr. Myers 35.0 of the billed 47.6 hours he had billed; and I allowed the 4.6 hours of paralegal time that had been billed. (I had denied all fees on Claimant's reply on his supplemental request and thus did not need to reduce the previous calculation to account for this time.) Mr. Dupree's time calculates to $5,582.50; Mr. Myers' was $7,875; and paralegal time was $575. The fees I allowed in the initial order for work performed on or after February 10, 2011 total $14,032.50.

Although the difference between this amount and the sum that Employer/Carrier offered is relatively small, I cannot find that Employer/Carrier's offer was sufficient under *Armor*. As of February 10, 2011, Claimant's counsel was entitled to more than the $20,000 in fees that Employer/Carrier offered. Thus, *Armor* does not apply.[19]

Conclusion and Order

The fee award previously issued on April 23, 2012 is modified consistent with the discussion above. Employer/Carrier will pay Claimant's counsel $34,372.00 in fees and costs. 33 U.S.C. §928. This Order is without prejudice to Claimant's counsel's pursuing additional fees and costs for work performed before the Office of Workers' Compensation Programs.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

To determine the fees allowed for work prior to February 10, 2011, I began with the total awarded in the initial order and subtracted the fees for work done from that date onward. In the initial order, I allowed Claimant's counsel a total for all fees of $37,592.00, plus costs of $1,513, for an aggregate total of $39,105.00. That amount must be reduced for (non-wind up) work done between October 8, 2010 and February 9, 2011 (*see* discussion above) and all non-wind up work done from February 10, 2011 onward. (I cannot consider the fees generated during this last period on the fee litigation; that would have been unnecessary for wind up had Claimant's counsel accepted the offer to settle the fees on February 10, 2011.)

I also must exclude from the fees to which Claimant's counsel would have been included the amounts I disallowed on account of Employer/Carrier's payment of the full compensation owed, beginning October 8, 2010. Of the total disallowed, $3,913.00 was for work performed between October 8, 2010 and February 9, 2011. (I have already included the time from February 10, 2011 onward in the calculation described above in this paragraph.) This leaves $35,192.00. From this, I deduct the fees generated after Employer/Carrier's offer on February 10, 2011 to settle the fee dispute ($14,032.50). Counsel would not have engaged in this fee litigation had he settled his fees. Claimant's counsel's chargeable fees and costs generated prior to the February 10, 2011 offer thus amounted to $21,159.50.

[19] It is not altogether certain whether *Armor* applies to a tender of attorney's fees. But as Employer/Carrier has not established a factual predicate that *Armor* requires, I do not reach this question.