BRB Nos. 96-1785
and 96-1785A

RICHARD DUHAGON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent Cross-Respondent	)	
	)	
JOSEPH R. MEYERS, M.D.	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order - Denying Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

William Roman Gardner, San Francisco, California, for claimant.

Laura G. Bruyneel (Mullen & Filippi), San Francisco, California, for self-insured employer.

William C. Gordon (Law Office of William C. Gordon), Sausalito, California, for Dr. Meyers.

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

PER CURIAM:

Claimant appeals, and Dr. Joseph Meyers cross-appeals, the Decision and Order - Denying Benefits (93-LHC-2056) of Administrative Law Judge Alfred Lindeman 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 27, 1992, while working for employer as a holdman on a sugar ship, claimant slipped and fell, hitting his lip and the left side of his chest. Following this incident, claimant drove himself to the emergency room where he was diagnosed with a lip laceration and chest contusion. The attending physician, who noted that claimant experienced neither shortness of breath nor loss of consciousness, stitched claimant's lip, examined his chest, gave him a tetanus shot, and sent him home. Claimant worked the following day, but has not returned to work since October 28, 1992. Employer voluntarily paid claimant temporary total disability compensation for the injury to his lip and chest from October 28, 1992 until November 24, 1992, based on an average weekly wage of $584.16. 33 U.S.C. §908(b). Claimant subsequently sought permanent total disability compensation under the Act, contending that the injury he suffered on October 27, 1992 aggravated his pre-existing back condition.

Employer subsequently moved to depose claimant's treating physician, Dr. Meyers. After a dispute arose regarding the fee to be paid to Dr. Meyers for his deposition appearance, Administrative Law Judge Donald B. Jarvis, the initial administrative law judge in this matter, issued an Order dated September 9, 1994, wherein he determined that employer's tender of $300 per hour constituted reasonable compensation for Dr. Meyers, "provided that such testimony is limited to Dr. Meyers' knowledge as a non-party percipient witness to Claimant's medical condition." Judge Jarvis stated in his Order that if the deposition exceeded the scope of the matters observed and commented on by Dr. Meyers as claimant's treating physician, Dr. Meyers could file an appropriate motion for further consideration. Employer deposed Dr. Meyers on May 8, 1995, at which time Dr. Meyers was represented by his own counsel. Subsequently, Dr. Meyers filed a motion for additional payment for his appearance at the deposition, requesting a fee of $600 per hour, as well as reimbursement for his attorney's fee, and a sanction of $1,000 against employer for disobeying the Order of September 9, 1994.[1]

[1]According to employer, it paid Dr. Meyers $300 prior to the deposition. Subsequent to the deposition, Dr. Meyers sent employer a bill of $2,100 for his appearance, applying a rate of $600, not $300, per hour. Thereafter, employer paid Dr. Meyers the balance it owed, based on a rate of $300 per hour, pursuant to Judge Jarvis' Order.

In his Decision and Order, Administrative Law Judge Alfred Lindeman (the administrative law judge) found that since claimant's October 27, 1992, accident could have aggravated his underlying back condition, claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation. The administrative law judge found the presumption was rebutted based on the testimony of Dr. Bernstein, who opined that claimant's work accident did not involve any injury to claimant's back and did not worsen his underlying back condition. Considering the record as a whole, the administrative law judge thereafter credited the opinion of Dr. Bernstein over the contrary opinion of Dr. Meyers and concluded that claimant's work accident of October 27, 1992, did not cause any aggravation of his underlying back condition. Next, applying Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge determined claimant's average weekly wage to be $576.92, and further found that since employer's payment of temporary total disability was based on a higher average weekly wage, claimant was not entitled to any additional disability benefits. Inasmuch as claimant did not prevail in his claim, the administrative law judge denied claimant's request for attorneys' fees payable by employer under Section 28 of the Act, 33 U.S.C. §928.[2] Lastly, the administrative law judge found that Dr. Meyers was entitled to a witness fee of $1,575 for his appearance at the May 8, 1995, deposition, which lasted three and one-half hours, as payment for his time away from his office and the revenues that were foregone thereby; the administrative law judge denied, however, Dr. Meyers' requests for reimbursement of his attorney's fee and for sanctions against employer.

On appeal, claimant contends that the administrative law judge erred in finding that his accident on October 27, 1992, did not aggravate his underlying back condition and in denying him permanent total disability benefits. Claimant further asserts that the administrative law judge should have calculated claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a), and that, pursuant to that subsection, his average weekly wage was $980.10. Lastly, claimant challenges the administrative law judge's denial of an attorney's fee. BRB No. 96-1785. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Dr. Meyers also appeals, challenging the administrative law judge's denial of his requested hourly rate of $600 for his appearance at the May 8, 1995 deposition, as well as the administrative law judge's failure to award him an attorney's fee payable by employer. BRB No. 96-1785A. Employer responds, urging affirmance of the administrative law judge's denial of the higher hourly rate and an attorney's fee.

We first address claimant's contention that the administrative law judge erred in failing to find that claimant's present back condition is causally related to his October 27,

[2]Claimant was initially represented by Harvey Hereford, and then by William Roman Gardner.

1992, work accident. In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that an accident occurred which could have aggravated his pre-existing condition. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption the burden shifts to employer to present specific and comprehensive evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In finding that employer rebutted the presumption, the administrative law judge relied upon the opinion of Dr. Bernstein, an orthopedic surgeon, who, based on his two examinations of claimant and review of the medical records, opined that the October 27, 1992 accident did not involve any injury to claimant's back, did not cause any worsening of claimant's spondylolisthesis, and did not result in any different work restrictions attributable to claimant's back condition than were present for ten years. *See* Tr. at 228, 231-234, 239; Emp. Exs. 88, 89. As Dr. Bernstein's opinion severs the causal link between the October 27, 1992 work accident and claimant's back condition, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 94, 95-96 (1988).

Next, after considering all of the medical evidence of record, the administrative law judge credited Dr. Bernstein's opinion that claimant's work accident had no effect on his underlying back condition, over the contrary opinion of Dr. Meyers, since the objective evidence showed that claimant's spondylolisthesis had not progressed from 1982 through 1993, *see* Emp. Ex. 27; Cl. Ex. 1 at 26, 28-29, and that claimant's range of back motion, as measured by Dr. Meyers on November 10, 1982, was unchanged from what it was in April 1992. *See* Emp. Ex. 52 at 188, 205. Moreover, the administrative law judge discredited claimant's testimony that he complained of back pain soon after the incident, as, according to the contemporaneous medical records, claimant did not report any back complaints to either the emergency room on October 27, 1992, or to Dr. Meyers when the physician first saw claimant on November 2, 1992.[3] Emp. Exs. 52 at 189-191, 75.

[3]The administrative law judge also noted that Dr. Meyers, on November 11, 1992, found claimant's lumbar and thoracic back to be normal. Thus, the administrative law judge set forth six reasons why he credited Dr. Bernstein over Dr. Meyers.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's decision to credit the opinion of Dr. Bernstein over the contrary opinion of Dr. Meyers is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's present back condition is not causally related to his October 27, 1992, work accident. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

Claimant next contends that the administrative law judge incorrectly calculated his average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), arguing that since claimant worked 28 weeks in the year preceding the October 27, 1992 injury, Section 10(a) of the Act, 33 U.S.C. §910(a), should apply. We disagree. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[4] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson*, 14 BRBS at 855.

The administrative law judge found that claimant was unable to state his weekly earnings or the number of days he worked per week following his return to work in April 1992. *See* Emp. Exs. 82, 84. Since claimant could not establish that he was either a five- or six-day per week worker, the administrative law judge declined to utilize Section 10(a) and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). Our

[4]Claimant does not argue that Section 10(b) is applicable.

review of the record reveals that claimant's payroll records fail to apportion the number of hours worked by claimant during a pay period to specific days. We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that claimant's average weekly wage should be calculated pursuant to Section 10(c). Accordingly, as the administrative law judge's calculation of claimant's average weekly wage utilizing Section 10(c) is unchallenged, it is affirmed.

Lastly, claimant's contention that the administrative law judge erred in denying him an attorney's fee is without merit. The administrative law judge properly found that since claimant's counsel did not obtain additional benefits for claimant, he was not entitled to an attorney's fee payable by employer under Section 28(a) or (b), 33 U.S.C. §928(a), (b). The administrative law judge then found that claimant's counsel's fee petition, which requested an attorney's fee of "$3,000 if claimant is to pay," was inadequate and failed to comply with Section 702.132 of the regulations, 20 C.F.R. §702.132.[5] Accordingly, as claimant was not successful in obtaining additional benefits and counsel's fee petition does not conform with the requirements of Section 702.132 of the regulations, we affirm the administrative law judge's denial of an attorney's fee.

We now address Dr. Meyers' contentions raised in his appeal of the administrative law judge's denial of a higher rate for his appearance at a deposition, and reimbursement for his attorney's fee. BRB No. 96-1785A. In his Decision and Order, the administrative law judge found that Dr. Meyers was entitled to be paid by employer the sum of $1,575 for his appearance at the May 8, 1995 deposition. As the deposition lasted three and one-half hours, this amount represented an increase in Dr. Meyers' payment from Judge Jarvis' initial September 9, 1994 Order, from $300 per hour to $450 per hour. The administrative law judge determined that this increase in Dr. Meyers' hourly rate reasonably compensated Dr. Meyers for his time away from the office and lost revenues. In challenging the administrative law judge's decision, Dr. Meyers contends that he should be paid $600 per hour for his appearance at the deposition, as employer's counsel's questioning concerned Dr. Meyers' opinion as an expert, which was beyond the scope of Judge Jarvis' Order.

Dr. Meyers' contention of error is without merit. Judge Jarvis' September 9, 1994, Order stated that Dr. Meyers should be paid $300 per hour, "provided that such testimony is limited to Dr. Meyers' knowledge as a non-party percipient witness to Claimant's medical condition." Subsequently, this rate was increased to $450 per hour. A review of the May 8, 1995 deposition reveals that employer's counsel did not go beyond the scope of Judge Jarvis' Order. Aside from general questions regarding Dr. Meyers' background, counsel's queries concerned Dr. Meyers' observations and impressions of claimant's medical condition. *See* Emp. Ex. 96. While Dr. Meyers was asked to give his opinion with regard to the cause of claimant's back condition and his disability, these questions concerned Dr.

[5]Counsel's fee petition before the administrative law judge merely stated that "about" 3.5 hours of time was used to review the file, 8 hours in trial preparation, 12 hours in trial, 3 hours in deposition, and 4 hours in client consultation.

Meyers' perception with regard to claimant's condition and thus do not go beyond the scope of Judge Jarvis' Order. As the administrative law judge acted within his discretion in limiting Dr. Meyers' witness fee to a rate of $450 per hour, and this amount is reasonable, we affirm the administrative law judge's denial of any additional payment to Dr. Meyers for his appearance at the May 8, 1995, deposition.

Lastly, Dr. Meyers contends that the administrative law judge erred in failing to hold employer liable for his attorney's fee. Specifically, Dr. Meyers asserts that the holding of the United States Courts of Appeals for the Ninth Circuit in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), is dispositive of this issue and mandates that such an award be entered by the administrative law judge. We disagree. In *Hunt* the claimant's physicians, Drs. Hunt and DiPalma, intervened in claimant's claim for benefits, seeking payment for medical services they provided after the date the employer ceased paying benefits. The administrative law judge held the employer liable for disability and medical benefits; however, he denied the doctors both interest on their overdue medical charges, and reimbursement for their attorney's fee. The Board affirmed the administrative law judge's denial of both interest and an attorney's fee to the doctors. *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240, 243-244 (1991).

In reversing the Board's decision, the Ninth Circuit deferred to the Director's positions that interest is payable on sums owed for medical services, and that the claimant's physicians were entitled to recover an attorney's fee payable by employer. With regard to the attorney's fee issue, the court began its analysis with Section 28(a) of the Act, which provides that in cases where the employer controverts liability, an attorney's fee may be paid, "in addition to the award of compensation," to a "person seeking benefits" who successfully prosecutes a claim under the Act. 33 U.S.C. §928(a). The court adopted the Director's interpretation that Section 7(d)(3) of the Act, 33 U.S.C. §907(d)(3)(1988), grants medical providers standing to "seek benefits" on behalf of an employee where the benefits are owed to the provider for medical services rendered. Thus, the court held that medical providers suing for payment for treatment under Section 7(d)(3) of the Act are "person[s] seeking benefits for purposes of Section 28(a), and therefore, may be entitled to an attorney's fee." *Hunt*, 999 F.2d at 423-424, 27 BRBS at 90-91 (CRT).

We agree with the administrative law judge that the instant case is distinguishable from *Hunt.* Unlike the situation in *Hunt*, Dr. Meyers is not seeking the payment of benefits for his treatment of claimant; rather, he is seeking payment for his appearance at a deposition. Thus, Dr. Meyers' action to seek payment for his time is not a derivative claim for medical benefits under Section 7. This distinction is critical, as the Ninth Circuit in *Hunt* relied on the provision in Section 28 that an attorney's fee may be paid to a "person seeking benefits." However, Section 28 does not provide for an attorney's fee for a witness's attempt to obtain payment for an appearance at a deposition.[6] When interpreting a statute,

[6]Dr. Meyers' contention that allowing the administrative law judge's decision to stand would have a chilling effect on medical testimony in future cases is also without merit. If a treating physician refused to testify on behalf of his patient, the treating physician could

the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Souther Dist. of Iowa*, 490 U.S. 296 (1989); *see Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, inasmuch as Section 28 does not provide for employer to be liable for a witness's attorney's fee for work relating to representing the witness at a deposition and obtaining payment for his time, we affirm the administrative law judge's denial of an attorney's fee. Consequently, counsel's request for an additional three hours in preparation of the appeal is also denied.[7]

Accordingly, the Decision and Order - Denying Benefit of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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simply be subpoenaed to testify. In fact, Dr. Meyers himself testified at the formal hearing without the presence of his own counsel.

[7]We decline to address Dr. Meyers' request for sanctions as this issue was not adequately briefed. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990). *See also Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993).