BRB Nos. 99-0809
and 99-1315

CHAD HOUGHTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARCOM, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order Denying Petition for Attorney's Fees and Costs of Paul A. Mapes, Administrative Law Judge, and the Compensation Order Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Petition for Attorney's Fees and Costs (95-LHC-2142) of Administrative Law Judge Paul A. Mapes and the Compensation Order Approval of Attorney Fee Application (Case No. 14-115673) of District Director Karen P. Staats 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). 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, 20 years old, sustained severe lacerations to his neck and chin on February 17, 1994, from a high pressure stream of water coming from a hydroblaster he was using to clean pipes inside a heating tank aboard the S.S. DENALI. He underwent several surgeries and has remaining scars. Claimant was referred to Dr. Henderson, a psychiatrist, by Dr. Thomas, who was treating him for his physical problems. Dr. Henderson diagnosed work-related post-traumatic stress syndrome based on claimant's recitation of his nightmares and fears related to hoses and water following his work accident. Claimant was released to return to work from a physical standpoint on July 20, 1994. Employer paid for medical care and temporary total disability compensation benefits, including care and treatment for claimant's alleged psychiatric condition.

A dispute developed over the amount of the average weekly wage upon which employer's payments of compensation were based. In addition, the parties agreed that claimant has no physical restrictions preventing him from returning to his usual work, but disagreed regarding whether claimant is prevented from returning to work due to a residual psychiatric condition. A hearing was held on March 11 and 12, 1998. While the case was still under submission, employer filed a Motion to Reopen the Record for the purpose of offering newly obtained evidence suggesting fraud by claimant. On November 17, 1998, a supplemental hearing was held.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from February 27, 1994, through October 15, 1995, at a compensation rate of $262.35 per week; $3,750 in compensation for facial and neck scarring; $858 for medical related travel expenses; and any necessary future medical care related to treatment of the work-related injury. He denied payment for claimant's psychiatric treatment after February 20, 1996, and costs for arm, hand and foot problems as well as treatment for hemorrhoids. He also declined to award claimant a nominal award, finding that claimant did not establish a significant possibility of future disability.

On appeal, claimant challenges the administrative law judge's admission into evidence of certain exhibits, alleging that their prejudicial effect outweighs their relevance. Claimant further argues that the administrative law judge erred in finding that claimant had no residual disability related to his psychiatric condition, in his average weekly wage determination and in finding that claimant did not establish causation with respect to certain medical conditions entitling him to reimbursement from employer for related medical expenses. Claimant also

appeals the Orders denying attorney's fees of the district director and administrative law judge and employer responds, urging affirmance. Claimant replies, reiterating his arguments on appeal.

Claimant first argues that the administrative law judge erred in admitting Employer Exhibits 16 and 17 into evidence. Employer's Exhibit 16 consists of records of claimant's Washington State unemployment hearings in which a state administrative law judge found he lied under oath regarding his whereabouts at a previously scheduled hearing; specifically, claimant, although initially asserting that he was working in another state at the time of an unemployment insurance proceeding, ultimately admitted that this assertion was false. Employer's Exhibit 17 contains records relating to claimant's conviction in juvenile court for theft and a subsequent action while on parole which involved lying to police. Claimant argues that records of claimant's criminal past and unemployment proceedings are not relevant to the injury in this case and their admission violates principles of fairness and due process.

Under Section 23(a), 33 U.S.C. §923(a), the administrative law judge is not bound by common law or statutory rules of evidence or technical or formal rules of procedure, but must conduct hearings in a manner which will best ascertain the rights of the parties. *See* 20 C.F.R. §§702.338,702.339. *See also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997). Thus, the administrative law judge possesses broad discretion in conducting the formal hearing. *See Wayland v. Moore Dry Dock,* 21 BRBS 177 (1988). His rulings regarding the admissibility of evidence are reversible only it they are arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Ramirez v. Southern Stevedores,* 25 BRBS 260, 264 (1992). The administrative law judge stated at the hearing that claimant's criminal record and history of lying are relevant to his claim of stress disorder, because in diagnosing claimant's psychiatric conditions the doctors relied on what claimant told them.[1] The administrative law judge also found the evidence relevant to claimant's trustworthiness as a witness. Decision and Order at 19 and n.10. As the administrative law judge rationally found this evidence to be relevant, the administrative law judge did not error in admitting it. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999)

Claimant, however, further contends that even if the administrative law judge is not

[1]The administrative law judge addressed claimant's contentions in this regard at the hearing, Tr. at 49-58, and in a footnote in the Decision and Order. *See* Decision and Order at 19 n.10.

bound by formal rules of evidence, he is still bound by principles of fairness and due process. Due process requires that a party have the opportunity to present evidence and cross-examine witnesses. *See generally Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). Claimant does not argue that he was deprived of an opportunity to refute the material in Employer's Exhibits 16 and 17, but asserts that it "was impossible for [him] to explain all of the charges, pleas and statements in the record without making them major issues in the case and spending an exorbitant amount of time and expenses having his defense attorneys testify." This argument does not state a basis for a finding that due process was denied, as the fact that evidence may be difficult to rebut does not deprive claimant of the opportunity to do so. Similarly, the fact that the administrative law judge and Dr. Goranson drew negative inferences from this evidence does not mean its admission violated claimant's due process rights or was not fair. Claimant's challenge to the admissibility of this evidence is therefore rejected.

We also affirm the administrative law judge's determination that claimant is not prevented from returning to his usual employment after October 15, 1995, by post-traumatic stress syndrome. Claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of his work-related injury. *See Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290, 292 (1994); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). In order to establish a *prima facie* case of total disability, claimant must demonstrate that he is unable to return to his usual employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5 (CRT)(2d Cir. 1991); *see Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). The administrative law judge found that claimant was not prevented from returning to his former longshore employment by any psychiatric condition, and his finding is supported by substantial evidence.

In making his determination, the administrative law judge relied on the photographs showing claimant cleaning rain gutters using a hose with a trigger-operated pressure nozzle, which contradicted his testimony that three-quarter inch black hoses scare him, Tr. at 314, as well as similar statements made to his doctors which formed the basis for a diagnosis of post-traumatic stress disorder. Claimant was photographed using a pressure-washing hose to clean the roof of a garage while standing on an unsecured ladder.[2] Based on these photographs, and the evidence discussed above regarding claimant's truthfulness in the state unemployment proceedings, the administrative law judge concluded that claimant was not a trustworthy witness and has a history of dishonest behavior. Further, he found the medical opinions of Drs. Goranson and Turco that claimant has an antisocial personality disorder far

[2]The pictures were provide by Ms. Hobson, claimant's ex-girlfriend and mother of his two children.

more credible than that of Dr. Henderson, who diagnosed post-traumatic stress disorder, observing that Dr. Henderson's testimony and report disclose "an astounding lack of objectivity," and show that he does not grasp the full extent of claimant's history of antisocial behavior. The administrative law judge noted that Dr. Goranson was initially reluctant to state that claimant could return to work as a hydroblaster, but changed his mind after seeing the photographs of claimant, observing that he does not seem to be in any distress whatsoever, Tr. at 365, and demonstrates no anxiety about being on a ladder. Tr. at 366-367.

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); *Duhagon v. Metropolitan Stevedore Co.*,31 BRBS 98, *aff'd* 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999). In the instant case, the administrative law judge's decision to credit the opinions of Drs. Goranson and Turco, rather than the contrary opinion of Dr. Henderson, is rational and supported by the evidence. In this regard, his determination that claimant is not a credible witness is neither inherently incredible not patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).[3] We therefore affirm the administrative law

[3]Claimant appears to argue that the administrative law judge erred in not awarding a nominal award given the possibility that claimant's symptoms could recur. A worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant possibility of future economic harm. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)

judge's determination, based on the record as a whole, that claimant did not establish any continuing inability to return to his usual work due to post-traumatic stress disorder.[4]

Applying Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge found claimant's average weekly wage was $393.53, based on the income claimant earned in the 52 weeks prior to the injury for which there are contemporaneous written records. Claimant argues that his average weekly wage should be higher, based on $7,775 in alleged cash earnings unreported to the IRS until he filed an amended tax return on January 3, 1997. Claimant contends, in the alternative, that his average weekly wage should be based on an extrapolation of earnings between December 1, 1993, and February 27, 1994.

(1997). Claimant provides no arguments in this regard, and the evidence does not support a conclusion that he established a significant possibility of future economic harm.

[4]While claimant alleges that Dr. Goranson is prejudiced and in collusion with employer's insurer, he does not support the allegation with any evidence. That Dr. Goranson charged $2,600 for an examination and report, did not believe claimant to be credible, diagnosed claimant with an antisocial personality disorder, and was on a first-name basis with insurer's representative do not, contrary to claimant's assertion, establish prejudice or collusion.

We affirm the administrative law judge's determination of claimant's average weekly wage. Section 10(c) is a catch-all provision to be used in instances when neither Section 10(a) nor 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.[5] *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.

Claimant alleged that, in addition to his hydroblasting job, he worked for two friends when regular work was not available, that these friends paid him in cash, and that Mr. Weaville, who prepared his tax return, advised him not to declare his cash earnings. The administrative law judge discredited this assertion because it was uncorroborated by contemporaneous documents and inconsistent with claimant's 1993-1994 tax returns and representations in the unemployment insurance reports. The administrative law judge found that the testimony of Mr. Housiaux and Mr. Heminger, for whom claimant allegedly worked, was implausible and materially and /or internally inconsistent with claimant's testimony.[6] He reasoned that claimant was not a trustworthy witness and that his testimony concerning the alleged extra income cannot be relied upon unless corroborated by reliable evidence. He noted that while the amended tax return supported claimant's contention, Ms. Hobson's testimony contradicted claimant's statements, and the tax preparer denied that he advised claimant not to report cash income. These credibility determinations are affirmed. *Cordero*, 580 F.2d at 1333, 8 BRBS at 747.

The administrative law judge also declined to extrapolate the average weekly wage

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[5]Claimant does not argue that either subsection (a) or (b) is applicable.

[6]Ms. Hobson, with whom claimant lived for nine and one-half years, alleged that claimant paid Mr. Housiaux and Mr. Heminger to provide false testimony as to his extra work and income. Tr. at 378-379. As a result of this allegation, the record was opened for admission of additional evidence and a supplemental hearing was held.

based on claimant's income from December 1, 1993, to February 27, 1994, because he found it inappropriate on these facts, as the evidence did not support claimant's argument that but for the injury his wages following the injury would be materially greater that prior to it; the administrative law judge reasoned that claimant had been in the same position for approximately two years and the evidence did not support his allegation that his reputation would lead to more work. We affirm the administrative law judge's determination of claimant's average weekly wage as it is supported by substantial evidence and in accordance with law.

Claimant next contends that the administrative law judge erred in not applying the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), to link his foot, hand, arm and hemorrhoid condition to his work, asserting that his testimony alone is sufficient to invoke the presumption. Claimant's arguments concern payment by employer of medical bills related to these problems.

Claimant is incorrect in stating that the administrative law judge did not find the Section 20(a) presumption invoked as to claimant's hemorrhoid treatment. The administrative law judge relied on Dr. Zook's report conveying Dr. Henderson's opinion that it is possible that claimant could have "stress related thrombolytic activity," Cl. Ex. 54, to invoke the Section 20(a) presumption that this condition is causally related to his employment. However, he also found the presumption rebutted by Dr. Zook's statement that such a causal relationship was "quite unlikely." *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990)*; Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In weighing the evidence and finding claimant's hemorrhoids unrelated to the work injury, the administrative law judge properly gave greater weight to the opinion of Dr. Zook, in light of his greater expertise in this area, than to that of Dr. Henderson. His finding regarding this condition is therefore affirmed.

We also affirm the administrative law judge's determination that claimant did not produce sufficient evidence to warrant invocation of the Section 20(a) presumption. The administrative law judge found claimant did not establish that his accident at work could have caused his hand, arm or foot conditions, as the medical evidence does not contain any indication that a condition related to these problems could have even been possibly caused by claimant's work injury. Cl. Exs. 52, 53.[7] This finding is supported by the medical

[7]Claimant argues that if employer suspected no causation, it could have asked claimant's doctors or conducted its own medical evaluation. The burden is, however, initially on claimant to establish a *prima facie* case.

evidence. While a claimant's credible testimony may be relevant in invoking Section 20(a), *see Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT) (9th Cir. 1998), we have affirmed the finding that claimant lacked credibility. Accordingly, the administrative law judge's determination, based on the record as a whole, that claimant's hemorrhoid condition, as well as his hand, arm, and foot problems, are not causally related to his work accident, is affirmed.

Subsequent to the issuance of the administrative law judge's decision, claimant's attorney submitted fee petitions for services rendered at the administrative law judge and district director levels. Both fee petitions were denied. On appeal, claimant challenges these denials. Claimant filed a final fee application on June 30, 1999,[8] requesting $18,768.75 in fees and $3,188.88 in costs accrued from June 2, 1995, when this matter was referred to the Office of Administrative Law Judges, to March 19, 1997, when claimant declined to accept a January 15, 1997, settlement agreement, and $11,387.50 in fees for time he estimated he expended on those issues which were resolved in claimant's favor; he also requested $2,050 for preparing and defending his petition for fees and costs. Employer filed objections. The administrative law judge denied the final fee petition, finding that claimant obtained no net benefits and, alternatively, that counsel's efforts leading to an unexecuted settlement agreement containing terms favorable to claimant is not in itself a sufficient basis for awarding a fee.

[8]An initial application seeking $65,518.75 was superseded by this application.

We affirm the administrative law judge's determination that claimant is not entitled to any fees or costs payable by employer. First, inasmuch as employer initiated the voluntary payment of compensation in this case, the issue of employer's liability is governed by Section 28(b), 33 U.S.C. §928(b). Under Section 28(b), 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 which employer agreed to pay. *See, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir.1998). Claimant argues that he prevailed in this matter based on obtaining a higher average weekly wage,[9] an award of $3,750 for facial scars, and payment of some unpaid medical expenses. In the present case, employer paid claimant $47,092 in compensation and costs of medical treatment between February 28, 1994, and April 18, 1996. Based on calculations by the Office of Workers' Compensation Programs, employer overpaid the claimant by $19,715.35. Decision and Order Denying Fees at 3; Ex. 22 to Emp. Objections to Fee Application (Objections).[10]

We agree that claimant is not entitled to payment of his fees under Section 28(b) based on the additional amounts awarded, on these facts, as there is no potential for claimant to recover compensation in excess of the existing credit, as he did not obtain an ongoing disability award.[11] Claimant argues that as he prevailed in his third-party lawsuit, the increased benefits he received below will benefit him by reducing employer's third party credit. The fact claimant may receive more money from that action does not, however, provide a basis for success under Section 28(b).

Claimant also contends his efforts led to an unexecuted settlement agreement with

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[9]The administrative law judge found that the increased average weekly wage was not the result of successful efforts by counsel. The increase from $369.89 to $393.53 resulted from a request for clarification by the administrative law judge, rather than any argument claimant made in this regard. *See George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

[10]This exhibit, the Affidavit of Counsel, was filed with the administrative law judge as part of Employer/Carrier's Objections to Claimant's Fee Applications.

[11]Claimant cites *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd in part on other grounds*, 1 F.3d 843, 27 BRBS 93 (9th Cir. 1993), for the proposition that an attorney may be entitled to an attorney's fee even though claimant might never receive additional benefits due to large third-party credit. *Cretan* is distinguishable because there claimant "successfully obtained an inchoate right to compensation," as he obtained a continuing award which potentially exceeded employer's credit. 24 BRBS at 44-45.

employer which contained terms favorable to claimant. The administrative law judge rejected this contention, reasoning that as the agreement had not been memorialized, signed by the parties, or submitted to an administrative law judge for formal approval, it was not enforceable under the Act. While claimant argues that the reason the settlement agreement was not executed was employer's fault, the reason is not dispositive; moreover, the administrative law judge found that it was claimant, not employer, who acted unreasonably in rejecting the agreement. In any event, the proposed agreement establishes that employer tendered compensation exceeding claimant's recovery, and under such circumstances employer is also not liable under Section 28(b). *Armor v. Maryland Shipbuilding & Dry Dock Co.,* 19 BRBS 119 (1986) (Decision and Order *En Banc*). The administrative law judge thus properly found that as claimant refused the settlement agreement stipulating to a $500 average weekly wage, even if the slight increase in average weekly wage he obtained was due to his efforts, he ultimately obtained less than offered under the agreement.

Claimant argues that he has already had several inner mouth surgeries and may require additional treatment for scar tissue irritation and infection and additional time loss for this.[12] While obtaining payment of contested medical treatment can provide a basis for a fee award against employer, *see, e.g., Ingalls Shipbuilding v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993), in this case employer did not controvert its liability for medical expenses due to claimant's work-related injury. In fact, all expenses have been paid. If a dispute over treatment arises in the future, related fees can be addressed at that time. Accordingly, as claimant obtained no additional benefits over those voluntarily paid by employer, employer is not liable for a fee under Section 28(b). The administrative law judge's Order is therefore affirmed.

With regard to his services performed before the district director between May 2, 1994, and May 31, 1995, claimant requested $7,393.75, representing 36.5 hours at $200 per hour of attorney's services, 1.25 legal assistant time at $75 per hour, and $272.78 in costs. Employer filed objections. The district director awarded claimant's counsel a nominal fee of $500 plus costs of $207.78, to be paid by claimant. In determining that no further fee is warranted, the district director noted that the proceedings resulted in a net loss of benefits and that there was no successful prosecution under Section 28(a).

Claimant argues that the district director erred in finding that claimant had a net loss in benefits and that claimant did not obtain a higher average weekly wage than employer had

[12]Claimant cites *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992), in support of his position that he is entitled to an attorney's fee for prevailing on some issues even without obtaining additional benefits. That case can be distinguished because there employer never paid benefits under the Longshore Act, but rather under a state act.

paid prior to the hearing. We reject claimant's contentions and find no error by the district director in not holding employer liable for claimant's attorney's fee. As employer voluntarily paid compensation and medical benefits, this case is governed by Section 28(b), rather that Section 28(a), as referenced by the district director. Any error in this regard is harmless, however, as the district director properly concluded that employer is not liable for a fee under Section 28(b). As counsel raises the same arguments that we addressed in considering claimant's appeal of the the administrative law judge's fee decision, we affirm the district director's order on that reasoning.

Accordingly, the Decision and Order Awarding Benefits and Decision and Order Denying Petition for Attorney's Fees and Costs of the administrative law judge and the Compensation Order Approval of Attorney Fee Application of the district director are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge