BRB Nos. 01-0367
and 01-0367S

JOHN R. GILLIO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER INCORPORATED	)	DATE ISSUED: Jan. 3, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Order Denying Motion for Reconsideration, the Supplemental Decision and Order Awarding Attorney's Fees, and the Order Denying Employer's Request for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Larry Bronson (Bronson & Bronson, LLP), New York, New York, claimant's former attorney.

Francis M. Womack, III (Field, Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration, and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Employer's Request for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees (99-LHC-671) of Administrative Law Judge Daniel F. Sutton 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).

Claimant worked as a chief clerk and checker at the Military Ocean Terminal. He injured his left ankle in a crane accident on July 27, 1997. Claimant was taken to the emergency room, where he was referred to Dr. Warshauer for treatment. Dr. Warshauer diagnosed that claimant had suffered an avulsion fracture of the left navicula and left talus, and recommended claimant be off from work for six to eight weeks. Claimant continued conservative treatment for pain and swelling of his left ankle with Dr. Warshauer, but, in December 1997, Dr. Warshauer recommended that claimant consider undergoing arthroscopic surgery on his ankle as the conservative treatment was not effective. Claimant has not returned to work since the date of the injury and sought total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish that he was unable to return to work as of June 28, 1998, and that claimant had reached maximum medical improvement on that date. Therefore, the administrative law judge awarded claimant permanent partial disability for a one percent impairment of his left ankle pursuant to Section 8(c)(4), (19) of the Act, 33 U.S.C. §908(c)(4), (19). The administrative law judge also found that claimant's visits to Dr. Warshauer after June 1998 and the recommended arthroscopic procedure were reasonable and necessary. Therefore, the administrative law judge found employer liable for these expenses pursuant to Section 7 of the Act, 33 U.S.C. §907.[1]

[1]The administrative law judge denied claimant's summary motion for reconsideration. *See* Order Denying Motion for Reconsideration.

Subsequently, claimant's attorney submitted a petition for an attorney's fee of $18,712.50, representing 57.5 hours of legal services at the hourly rate of $300 for Attorneys Bronson and Leemon, .25 hour at $150 for attorney Franz, and a $1,500 expert witness fee for Dr. Warshauer. After considering employer's objections, the administrative law judge awarded a fee in the amount of $10,437.50, representing 35.75 hours of legal services at the hourly rate of $250, and $1,500 in expenses for Dr. Warshauer's deposition.[2]

On appeal, claimant contends that the administrative law judge erred in precluding claimant's entitlement to benefits during his recovery period should he undergo surgery in the future. In addition, claimant contends the administrative law judge erred in finding that claimant reached maximum medical improvement and that claimant failed to establish that he cannot return to his former duties. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In its appeal, employer contends that the administrative law judge erred in his award of an attorney's fee.[3] Initially, employer contends that it cannot be held liable for an attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), in this case as there was no informal conference. Employer also contends the administrative law judge erred in failing to reduce the amount of the attorney's fee due to claimant's limited success. Finally, employer contends that the administrative law judge erred in awarding an hourly rate of $250. Claimant's former attorney responds, urging affirmance of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees as it is rational and within a proper exercise of his discretion.

We first address claimant's contentions regarding the nature and extent of his disability. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines*,

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[2]After reviewing employer's contentions, the administrative law judge denied employer's request for reconsideration. *See* Order Denying Employer's Request for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees.

[3]By Order dated August 1, 2001, the Board granted employer's motion to withdraw its appeal of the administrative law judge's decision on the merits, BRB No. 01-0367A.

G.I.E., 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 61 (1985). Claimant has the burden of establishing the nature and extent of his disability. *Id.* A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Abbott v. Louisiana Ins. Guaranty Assn.*, 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992). If the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982). After review of the record, we affirm the administrative law judge's finding that claimant's condition is permanent as it is supported by substantial evidence.

In concluding that claimant's partial disability is permanent, the administrative law judge considered the opinions of Drs. Gallick and Koval. In a report dated June 24, 1998, Dr. Gallick opined that claimant had reached maximum medical benefit and has a one percent permanent partial impairment of his left ankle. Emp. Ex. 6. After an examination on December 14, 1998, Dr. Koval opined that claimant could return to work with no restrictions and concluded that claimant needs no further care or treatment. Emp. Ex. 8. Although Dr. Warshauer has recommended that claimant undergo arthroscopic surgery, he also stated that claimant may not be helped or improved by the surgery; he stated that the arthroscopic surgery may be used as a tool to diagnose the problem but once found, he "may not [be] able to do a whole lot about it." Cl. Ex. 5 at 35. Therefore, although arthroscopic surgery may be anticipated in the instant case, the evidence does not establish that the surgery will improve claimant's current condition. *McCaskie,* 34 BRBS at 12-13. Inasmuch as the Board has held that the date that a physician assesses claimant with a disability rating may suffice to determine the date of permanency, and the success of the anticipated surgery in this case is not ensured, we affirm the administrative law judge's finding that maximum medical improvement was reached as of June 24, 1998, based on Dr. Gallick's opinion of that date.[4] *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

Claimant also contends that the administrative law judge erred in finding that claimant could return to his usual work. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g.*,

[4]Although the administrative law judge found that claimant reached maximum medical improvement by June 28, 1998, he based this finding on the date Dr. Gallick opined claimant suffers a one percent permanent impairment of his left ankle, which appears to be June 24, 1998. *See* Cl. Ex. 6.

Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001). Claimant's credible complaints of pain alone may be enough to meet the employee's burden. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

In the present case, the administrative law judge reviewed the medical evidence of record and concluded that claimant failed to establish that he could not return to his former duties as a checker because of persistent pain. The administrative law judge noted that Dr. Gallick examined claimant and concluded that he could return to his normal working activities. In addition, Dr. Koval, the independent examiner chosen by the district director, opined that claimant can return to work as a checker without restrictions and requires no further medical treatment.[5] Emp. Ex. 8. The administrative law judge also found that Dr. Warshauer did not repeat his initial recommendation that claimant stay off from work after June 1998, and thus, the administrative law judge concluded that the medical evidence contraindicates claimant's complaints of pain. Moreover, the administrative law judge noted that Dr. Warshauer did not identify any functional limitations which would prevent claimant from returning to his duties as a checker or a clerk. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988)(administrative law judge must compare claimant's physical limitations with the requirements of his usual work in order to determine whether a claimant is disabled). Therefore, the administrative law judge found that claimant failed to establish that he could not return to his former duties after June 24, 1998, and is not entitled to compensation under the Act for a loss in wage-earning capacity after that date. We affirm this finding as it is rational and supported by substantial evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, as claimant has not met his burden of establishing a *prima facie* case of total disability, we affirm the administrative law judge's finding that claimant is limited to an award of benefits for permanent partial disability under the schedule pursuant to Section 8(c)(4) of the Act. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Contrary to claimant's contention, however, this finding does not preclude his recovery of benefits for loss of wages in the future should he undergo surgery. The Act does not require that a claim be filed until a claimant is disabled. *See generally Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th

[5]Claimant also was seen by Dr. Mastromonaco, who did not mention any functional impairment but noted that claimant might consider an arthroscopic procedure if his condition deteriorates. Cl. Ex. 1.

Cir. 1994); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). If claimant sustains additional disability within one year of the last payment of benefits or of a final decision on his claim, he may seek modification based on a change in condition pursuant to Section 22 of the Act, 33 U.S.C. §922. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). After that period, claimant may file a new claim for disability occurring within one year of the time he becomes aware that his wage-earning capacity has been affected by his work-related disability. 33 U.S.C. §913; *see McKnight*, 32 BRBS at 169; *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985).

Employer appeals the administrative law judge's award of an attorney's fee, contending that the administrative law judge erred in finding it liable for an attorney's fee under Section 28(b) of the Act, in failing to reduce the amount of the attorney's fee in light of claimant's limited success, and in awarding claimant's counsel an hourly rate of $250. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

We first address employer's contention that it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b), pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). Section 28(b) of the Act states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b). In *Staftex Staffing*, the Fifth Circuit stated that Section 28(b)

> permits claimants to obtain attorney's fees only where: (1) the [district director] has held an informal conference on the disputed issue; (2) the [district director] issues a written recommendation on that issue; and (3) the employer refuses to accept the recommendation.

Staftex Staffing, 237 F.3d at 409, 34 BRBS at 47(CRT). On rehearing, the court found that the employer did not accept the recommendation of the district director regarding the claimant's average weekly wage, and as claimant obtained greater compensation through resort to formal proceedings, employer was properly held liable for claimant's attorney's fee pursuant to Section 28(b).[6] *Staftex Staffing*, 237 F.3d 409, 34 BRBS 105(CRT). Employer thus contends that, in this case, the absence of an informal conference precludes its liability for claimant's attorney's fee.

The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has not addressed the specific issue of whether an informal conference

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[6]In *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), the employer conceded that an informal conference was held, but contended that the issues on which claimant prevailed before the administrative law judge were not addressed at the informal conference. As employer did not offer any evidence of the substance of the district director's recommendation, and claimant obtained greater compensation than employer paid by virtue of the administrative law judge's decision, the Fifth Circuit held that employer is liable for claimant's attorney's fee pursuant to Section 28(b). In *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001), the Board held that the Fifth Circuit's decisions did not unequivocally hold that a written recommendation by the district director is required in order for an employer to be held liable for an attorney's fee pursuant to Section 28(b). Recently, however, the Fifth Circuit stated that "[u]nder the law of our Circuit, [the lack of an informal conference] poses an absolute bar to an award of attorney's fees under § 28(b)." *Pool Co. v. Cooper*, F.3d , Nos. 99-60615, 00-60093, 2001 WL 1485627 (5th Cir. Nov. 20, 2001). The court declined to address the claimant's contentions that *Staftex Staffing* applied an unduly strict construction of Section 28(b), that *Flanagan Stevedores* was factually distinguishable, and that, in any event, an informal conference would have served no purpose, because it held employer liable for claimant's attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a). The court found Section 28(a) applicable because, while employer initially paid benefits voluntarily, it ceased all payments and thereafter claimant claimed further benefits which he successfully obtained. Similarly, in the present case, employer controverted liability in June 1998, ceasing payment of any compensation, and claimant thereafter sought and obtained benefits. Thus, under the Fifth Circuit's view, employer may be liable for a fee under Section 28(a), if not under Section 28(b).

must be held in order for employer to be held liable for claimant's attorney's fee pursuant to Section 28(b). In *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the employer contended it could not be liable for claimant's attorney's fee because the district director did not make a written recommendation as to the disposition of the case following the informal conference. The United States Court of Appeals for the Ninth Circuit stated that,

> The purpose of the statute is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel.

606 F.2d at 882, 11 BRBS at 73. The court stated further that

> We do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees. The congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, whether or not the employer had actually rejected an administrative recommendation.

Id. The court went on to note that "the recommendation following the informal conference in this case was for the matter to 'be referred to the Office of Administrative Law Judges for formal hearing at the request of both parties,'" and thus it was evident "that any explicit recommendation would have been rejected by one of the parties." *Id.*

The Board has generally followed the approach of the Ninth Circuit, specifically holding that an informal conference is not a prerequisite to employer's liability for claimant's attorney's fee, as the convening of an informal conference is an act within the discretion of the district director. *See Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986), citing *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); *see* 20 C.F.R. §§702.301 - 702.316. Indeed, there are cases in which one or both of the parties request that the case be forwarded to the Office of Administrative Law Judges without an informal conference, as such is deemed to be of no use in resolving the case or narrowing the issues. Thus, the Board has held that an employer is liable for an attorney's fee under Section 28(b) if employer voluntarily pays or tenders benefits, and claimant thereafter obtains greater compensation than employer paid or tendered. *See, e.g., Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001). As this case arises within the jurisdiction of the Third Circuit, which has not addressed whether an informal conference must be held before employer may be held liable for claimant's attorney's fee pursuant to Section 28(b), and on the facts of this case, the law of the Fifth Circuit is not controlling precedent, and we will continue to follow the holding of the Ninth Circuit in *National Steel*. Therefore, we reject employer's contention

that it cannot be held liable for claimant's attorney's fee. It is clear from the record that employer voluntarily paid claimant temporary total disability benefits until June 1998 when it controverted claimant's entitlement to any further benefits and continuing medical treatment. In his Decision and Order Awarding Benefits, the administrative law judge found that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(4) of the Act, as well as continuing medical treatment. Thus, as claimant resorted to formal proceedings to successfully establish his entitlement to additional benefits under the Act, we affirm the administrative law judge's finding that claimant's counsel is entitled to an attorney's fee to be paid by employer pursuant to Section 28(b). *See generally* *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

Employer also contends that the administrative law judge erred in failing to reduce the fee award in light of claimant's limited success. Employer notes that claimant sought ongoing total disability benefits under the Act, but that the administrative law judge found that claimant was capable of returning to his former duties. Thus, claimant's compensation award was limited to compensation benefits for a one percent permanent partial disability of his left ankle. Employer contends that an attorney's fee award of $10,437.50 is excessive in light of this proportionately small award.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court stated that a fee award under a fee-shifting statute should be for an amount that is reasonable in relation to the results obtained. *See also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). The Third Circuit recently discussed *Hensley* in *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). The court emphasized that the presiding administrative law judge is in the best position to "observe firsthand the factors affecting [the] analysis of counsel's fee award." *Id.*, 245 F.3d at 289, 35 BRBS at 32(CRT). Thus, the court reversed the Board's decision remanding the case to the administrative law judge for consideration of a lower attorney's fee given claimant's limited monetary success.[7]

In this case, the administrative law judge fully considered employer's contention that the fee should be reduced due to claimant's limited success. Supplemental Decision and

[7]The court stated that claimant prevailed against employer's strong contestation of jurisdiction, on the extent of disability (in establishing entitlement to a nominal award), and on his entitlement to future medical benefits, which the court stated is a "substantial benefit." *Barbera*, 245 F.3d at 290, 25 BRBS at 32(CRT).

Order at 5-7. The administrative law judge made a specific finding that, although the amount of benefits awarded is small in comparison to the continuing temporary total disability benefits sought, "a reduction of [claimant's] attorneys' fees is not warranted because the relief awarded is not significantly limited in comparison to the scope of the litigation as a whole." *Id.* at 6. The administrative law judge stated that employer denied all liability after June 28, 1998, and that the issue of claimant's entitlement to ongoing medical care was "a substantial, if not predominant" issue at the hearing, an issue on which claimant prevailed. The administrative law judge then awarded a fee, after consideration of employer's remaining objections, based on the number of hours he found reasonably expended and a reasonable hourly rate, reducing both the rate and number of hours requested. In so doing, the administrative law judge substantially reduced the fee from the $18,712.50 claimant sought. As the administrative law judge considered the issue of the amount of benefits awarded in relation to the fee requested, we reject employer's request that the attorney's fee award be reversed or reduced, as no abuse of discretion has been shown. *See* *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

Finally, employer contends that the administrative law judge erred in awarding an hourly rate of $250. After considering employer's contentions and the customary rates awarded in the New York City area, the administrative law judge considered claimant's request for $300 per hour too high, and found that the appropriate rate for the area was $250 per hour. As the administrative law judge specifically considered the hourly rate that was reasonable and customary in the geographic area, and reduced the hourly rate requested from $300 to $250 per hour, we hold that the employer has not met his burden of showing the hourly rate awarded is unreasonable, and thus affirm the administrative law judge's hourly rate determination in this case.

Accordingly, the Decision and Order awarding permanent partial disability benefits pursuant to Section 8(c)(4) of the Act and continuing medical treatment is affirmed. In addition, the Supplemental Decision and Order Awarding Attorney's Fees to be paid by employer is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge