BRB Nos. 92-585
and 92-585A

ALVIN NELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order- Denying Benefits, Decision and Order On Motion for Reconsideration and the Supplemental Decision and Order Awarding Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Howard D. Sacks, San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelson, Gonzalez & Valenzuela), San Pedro, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denying Benefits, the Decision and Order On Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (90-LHC-1945) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). An attorney's fee award will not be disturbed on appeal unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for Marine Terminals Company as a crane driver since 1970. He often obtained extra jobs on the waterfront through the union hall. On October 30, 1989, while performing one such job as a signal man for Container Stevedoring, claimant injured his low back when he stepped off the company-provided bus which ran between the parking lot and the job site. Thereafter, claimant attempted to work, but asked for relief a short time later; the union business agent drove him to his car. The next day claimant was admitted to the hospital where he remained for about a week. Claimant was released for work on February 1, 1990, with light duty restrictions which were subsequently removed on February 7, 1990.[1] Dr. Lawrence's discharge diagnosis was "acute lumbar strain superimposed on chronic lumbar disk disease," and claimant was provided prescriptions for Robaxin and Darvocet. Claimant returned to work in February 1990 in a slightly modified version of his prior position and sought permanent partial disability compensation under the Act as of the time he returned to work. Claimant argued that despite his higher post-injury earnings he sustained a loss in his wage-earning capacity because he now works in pain and is unable to perform the extra jobs he previously performed.

The administrative law judge denied the claim, finding that claimant had not sustained a loss of wage-earning capacity as he was able to resume his usual job as a crane operator, his post-injury average weekly wage was higher than his pre-injury average weekly wage, and the record did not support claimant's assertion that he no longer performs extra work. The administrative law judge also denied claimant's claim for reimbursement of $115.80 for two Tagamet prescriptions and for continued physical therapy authorization subsequent to the time claimant returned to work, and determined that employer was liable for a Section 14(e) assessment on temporary total disability compensation due from November 14, 1989 to November 28, 1989. The administrative law judge denied claimant's motion for reconsideration.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in finding that he sustained no residual permanent physical impairment or loss of wage-earning capacity and in denying him reimbursement for the Tagamet prescriptions and for further physical therapy. Claimant further asserts that if he prevails on appeal with regard to the disability and medical benefits claims, he is entitled to a higher fee than the $2,500 fee awarded by the administrative law judge. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. Claimant replies, reiterating his arguments on appeal. On cross-appeal, employer argues that the administrative law judge erred in holding it liable for a Section 14(e) penalty.

[1]Claimant testified that as Marine Terminals did not have a "light duty" classification and he wanted to continue to work, he asked Dr. Lawrence's associates to remove the light duty restriction.

Claimant first contends that the administrative law judge's findings that he sustained no residual permanent impairment and no loss in his wage-earning capacity are patently erroneous because employer has sheltered him from jobs involving the use of certain cranes and because he works in pain, which has caused him to give up performing extra jobs. After review of the administrative law judge's Decision and Order and Decision and Order On Reconsideration, we affirm his denial of permanent partial disability compensation. The administrative law judge's findings that claimant sustained no permanent residual physical impairment or loss in his wage-earning capacity attributable to the work injury are rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359.

Section 8(h) provides that claimant's wage-earning capacity will be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. Higher post-injury wages do not preclude compensation if the claimant actually suffered a loss of wage-earning capacity. *Container Stevedoring Company v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153 (CRT) (9th Cir. 1985). In concluding that claimant's post-injury job for employer reasonably represented his post-injury wage-earning capacity, the administrative law judge initially credited Dr. London's opinion that claimant was physically capable of performing his pre-injury crane operator work, noting that this opinion was corroborated by the fact that claimant had resumed this work in February 1990 without requiring further care or treatment from Dr. Lawrence.

Claimant argues on appeal that due to the work injury, he now works in pain. We affirm the administrative law judge's finding that claimant's pain was not disabling, as it is supported by Dr. London's opinion that the physical effects of claimant's work-related injury had resolved by February 1990, when claimant returned to work, and that his only ongoing symptoms, chronic muscle spasms and stiffness due to his underlying degenerative changes, would not interfere with his ability to perform his usual work. *See* Decision and Order at 3; Decision and Order on Reconsideration at 2. Moreover, contrary to claimant's assertions on appeal, the administrative law judge's decision to credit Dr. London's opinion that claimant has no residual permanent impairment[2] over the contrary opinion of claimant's treating physician, Dr. Lawrence, did not involve an abuse of his discretion; the administrative law judge is free to accept or reject any part of any testimony as he sees fit.[3] *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). As the administrative law judge's finding that claimant has no residual permanent

[2]Claimant alleges bias on the part of Dr. London. As the administrative law judge pointed out, however, claimant was given the opportunity to depose Dr. London and declined to do so. *See* Tr. at 26-27, 91.

[3]Claimant also asserts that in finding no residual impairment, the administrative law judge erred in failing to resolve factual doubt in his favor. The United States Supreme Court has recently determined, however, that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Colliers*, ___ U.S. ___, 114 S.Ct. 2251 (1994).

impairment from the work injury which would preclude him from performing his post-injury crane operator work is rational and supported by the record and claimant has failed to establish any reversible error made by the administrative law judge in weighing the conflicting evidence and making credibility determinations, we affirm this finding.

We next address claimant's arguments regarding the alleged economic effects of his injury. Claimant argues initially that his post-injury crane operator work does not reasonably represent his post-injury wage-earning capacity because it is sheltered employment in that he has an agreement with employer that he will not be assigned to use two cranes which cause him back problems. We reject this argument, as claimant testified that he is fully employed performing work with the other cranes. Tr. at 68-69. As this work is necessary work for employer, it cannot be said to constitute sheltered employment. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co*, 18 BRBS 224 (1986). Moreover, given that claimant had been performing this job for over a year as of the time of the hearing and testified that his continued employment in this position was not in jeopardy, the administrative law judge reasonably found that claimant's post-injury earnings in this work were indicative of his post-injury wage-earning capacity. *See Long*, 767 F.2d at 1578, 17 BRBS at 153 (CRT).[4]

Claimant also asserts that he has sustained economic injury because his higher post-injury earnings are attributable to an increase in the contract rate and he is no longer able to perform the extra jobs he was able to perform prior to his injury. After considering this argument, the administrative law judge reasonably rejected it, finding that claimant's post-injury average weekly wage of $1,965 per week was virtually the same or slightly higher than his pre-injury average weekly wage of $1,938, and that claimant's higher earnings were not due solely to a July 1990 contract rate increase.[5] In so concluding, the administrative law judge initially noted that under the pay guarantee provisions of claimant's union contract, both before and since the injury, his pay was not based on the actual numbers of hours he worked as a crane operator. The administrative law judge further found based on the earning records submitted that claimant's hourly wages in his crane

[4]Claimant testified that he carries an A-card and has five years in the hold, which previously entitled him to priority to choose union hall jobs; he stated that although the priority rules have changed somewhat, he still has the same opportunities to obtain a less strenuous job as before, because there is more work available. Tr. at 58-60.

[5]The administrative law judge stated in his Decision and Order that while claimant has earned $2,039.15 per week since returning to work in 1990, his average weekly wage is somewhat lower, because he was paid $3,424 for the pay period ending April 13, 1990, though no hours were worked, and he inferred that this was for some health and welfare or vacation benefit from the previous year. In his Decision and Order on Reconsideration, however, the administrative law judge found that based on *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *aff'd in part and rev'd in part on recon.*, 28 BRBS 271 (1994) (*en banc*), claimant's weekly post-injury wage-earning capacity is in fact $2,039.15, or even higher than he originally determined.

operator job had remained at about $39 both before and after his injury. The administrative law judge also found claimant's assertion that his opportunities for extra work had diminished was suspect in view of the fact that his earning records indicated that he worked beyond the guaranteed 42.5 hours provided in the union contract post-injury and the absence of any medical evidence contraindicating such work.[6] *See* Cl. Ex. 8. Inasmuch as the record supports the administrative law judge's finding that claimant worked more than the guaranteed 42.5 hours post-injury,[7] and earned higher wages despite a reduction in the guaranteed pay basis from 45 hours at the time of his injury to 42.5 hours post-injury, we reject claimant's assertion that the administrative law judge erred in finding that he was still capable of performing extra work.[8]

Claimant finally alleges that in finding no economic disability, the administrative law judge erred by failing to reduce claimant's post-injury wages to pre-injury levels to account for the effects of inflation. We disagree. While the Board has held that the wage rates paid by a post-injury job at the time of injury be compared with claimant's pre-injury earnings to account for the effects of inflation, *see generally Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1985), we hold that the administrative law judge's failure to do so on the facts presented is harmless. Where, as here, the administrative law judge finds that claimant's actual post-injury earnings are representative of his post-injury wage-earning capacity, and claimant has returned to work in the same department and the same job classification as he held pre-injury and is earning higher wages on the same union scale, it is apparent that his post-injury job would have paid the same wage at the time of his injury. Accordingly, the administrative law judge's finding that claimant sustained no loss in his wage-earning capacity is affirmed.

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[6]Although claimant testified that there could be other reasons why he was paid for more than 42.5 hours, claimant gave no explanation for these hours, other than saying that he kept a log which he did not have with him. Tr. at 79. Claimant also conceded that he worked extra jobs after his injury.

[7]The administrative law judge essentially found that claimant is being paid more money for fewer hours, as the July 1990 contract change guaranteed pay for 42.5 hours rather than 45 hours, notwithstanding that the actual hours claimant worked as a crane operator, four hours per day, or 20 hours per week, remained unchanged. At the time of the injury claimant's guaranteed pay based on 45 hours was $1,788.40. As of the July 1990 contract change, based on 42.5 hours, the guaranteed basis was $1,688.53, or about $100 less. Yet claimant's pre-injury average weekly wage was $1,938.22, while his post-injury average weekly wage was $2,039.15.

[8]Claimant asserts that he lost $236.90 weekly due to his inability to perform extra work. Cl. Br. at 19. Claimant arrives at this figure by comparing the average hours he worked at extra jobs prior to the accident, which he claims was 6.15, with extra hours worked after December 1, 1990, which he claims is 2.7. Claimant concedes, however, that once he was released for work following the accident, between February 10, 1990, and December 1, 1990, he averaged an extra 9 hours of work per week. Claimant's choice of the time period is arbitrary and the administrative law judge is not required to follow it. Moreover, the figures claimant cites at p.9 n.3 of his brief on appeal are inconsistent with figures in Appendix I to his brief.

Claimant's arguments that the administrative law judge erred in denying him reimbursement of $115.80 for two Tagamet prescriptions which claimant filled in February and December 1990, and in denying authorization for physical therapy after claimant's return to work also must fail. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

The administrative law judge found that although employer had previously paid for two other Tagamet prescriptions prescribed by Dr. Lawrence in November and December of 1989, employer was not liable for the prescriptions purchased by claimant in February and June 1990. In so concluding, the administrative law judge noted that at the time of claimant's hospital admission on October 31, 1989, Dr. Lawrence stated that claimant had a pre-existing history of peptic ulcer disease for which he took Tagamet on a regular basis. Crediting Dr. London's opinion that claimant fully recovered from the temporary effects of the work-injury by February 1990 and Dr. Lawrence's March 30, 1990 statement that he should not have prescribed Tagamet under worker's compensation, the administrative law judge found that employer was not liable for the disputed $115.80 in prescription costs because by the time these costs were incurred the work-related aspect of claimant's condition had subsided and his symptoms were attributable to his pre-existing stomach condition.

With regard to the denial of authorization for physical therapy after claimant's return to work, the administrative law judge discounted the opinion of Dr. Kent regarding the need for such treatment based on claimant's demonstrated ability to continue working after February 1990 without returning to see Dr. Lawrence and Dr. London's opinion that claimant fully recovered from the temporary effects of the work injury without any need for additional medical treatment. Inasmuch as we have previously affirmed the administrative law judge's finding that claimant had fully recovery from the effects of the work injury by February 1990, his denial of the disputed medical benefits is also affirmed as it is supported by substantial evidence. *See Brooks v. Newport News Shipbuilding & Dry Dock Co*, 27 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

We next address employer's contention on cross-appeal that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Section 14(e) of the Act provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which it had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after the employer has been notified of an injury pursuant to

Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

The administrative law judge found that employer had notice of claimant's injury on October 31, 1989, inasmuch as employer had authorized claimant's hospitalization on that date. He further found that although employer began payment of compensation benefits on November 28, 1989, it did not make payment for the period between October 31, 1989 and November 28, 1989 until December 29, 1989. Employer was therefore held liable for a Section 14(e) assessment on the compensation due from November 14, 1989, until November 28, 1989. Employer argues on appeal that the administrative law judge's conclusion that employer had notice of claimant's injury on October 31, 1989, is not supported by substantial evidence and that it did not have notice of claimant's injury until November 20, 1989. Moreover, employer argues that even if it did have notice of claimant's injury as of October 31, 1989, inasmuch as it began paying benefits on November 28, 1989, *i.e.*, within 28 days of this date, it is not liable for an assessment under Section 14(e).

The record reflects that employer began paying claimant benefits prospectively as of November 28, 1989, and did not pay the benefits owed for the period from October 31, 1989, to November 28, 1989, until December 29, 1989. Employer's argument that the administrative law judge's finding that employer had notice of claimant's injury on October 31, 1989, is not supported by substantial evidence and that it did not have notice until it received formal notice of the claim from the district director on November 20, 1989, need not be addressed. Regardless of which date is employed, a Section 14(e) assessment is owed in this case inasmuch as payment for the period in question was not made until December 29, 1989, which was more than 28 days from either date. The Section 14(e) penalty moreover, applies to all benefits from the date of injury which are due and unpaid on the 28th day after employer received notice. The administrative law judge's finding that the Section 14(e) assessment applies to compensation owed for the period between November 14, 1989 and November 28, 1989, must therefore be modified to reflect that employer is liable for a Section 14(e) assessment on the compensation due for the period from October 31, 1989 until November 28, 1989. *See Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991)(Decision and Order on Recon.).

Finally, we consider claimant's arguments regarding the administrative law judge's award of attorney's fees. Claimant requested an attorney's fee of $11,700 for 58.5 hours at $200 per hour plus $706.78 in costs, based on his obtaining a Section 14(e) assessment. Employer objected that as the amount obtained was so small, a $2,500 fee was reasonable. Alternatively, employer objected to specific items and the requested hourly rate. In a Supplemental Decision and Order, after considering the "result achieved" and various other factors, including the quality of representation, the nature of the case, the risk of loss and employer's "eminently fair" objections, the administrative law judge awarded claimant's counsel a fee of $2,500. On appeal, claimant argues that if he should prevail on the disability and medical benefits issues which are the subject of his appeal, his counsel is entitled to a greater attorney's fee than that awarded by the administrative law judge. As claimant did not prevail on these issues on appeal, and claimant does not otherwise contest the

reasonableness of the administrative law judge's fee award, the $2,500 fee awarded by the administrative law judge is affirmed. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits, and Decision and Order on Motion for Reconsideration are modified to reflect that the claimant is entitled to Section 14(e) assessment on the compensation owed for the period between October 31, 1989 and November 28, 1989. In all other respects, the administrative law judge's Decision and Order-Denying Benefits, and Decision and Order on Motion for Reconsideration are affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is also affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge