

BRB No. 99-0667

CURTIS JENKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PUERTO RICO MARINE,	)	DATE ISSUED:
INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Mark K. Eckels (Byrd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-LHC-1522) of Administrative Law Judge John C. Holmes awarding benefits 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). This is the second time this case is before the Board.

Claimant, a refrigerator mechanic, suffered injuries to his left shoulder on April 5, 1994, during the course of his employment. Prior to returning to work, claimant slipped and fell in his bathtub at home fracturing a rib. Subsequently, claimant was hospitalized from April 14 to 18, 1994, for alcohol withdrawal hallucinosis. Surgery was performed to repair a rotator cuff tear of his

left shoulder on September 23, 1994.

In his first decision, the administrative law judge denied claimant's claim for benefits after April 10, 1994, finding that the slip and fall in the bathtub at home was the intervening cause of claimant's need for surgery. Claimant appealed to the Board, alleging that the administrative law judge erred in denying him benefits.

In its decision, the Board held that although the administrative law judge properly invoked the Section 20(a), 33 U.S.C. §920(a), presumption to causally connect claimant's disabling shoulder condition and his need for surgery with his work accident, the judge erred in relying on circumstantial evidence to find it rebutted. *Jenkins v. Puerto Rico Marine, Inc.*, BRB No. 96-1635 (June 23, 1997)(unpublished). Holding that a causal relationship was established as a matter of law, the Board reversed the administrative law judge's finding that claimant's surgery and resulting disability involving his shoulder were not work-related, vacated the administrative law judge's denial of benefits and remanded the case for consideration of the remaining issues.

On remand, the administrative law judge found that claimant was temporarily totally disabled from the date of injury until reaching maximum medical improvement on February 9, 1995, following his surgery, and permanently partially disabled thereafter. Further, he held that claimant's fall at home was unrelated to his work injury and therefore employer is not responsible for his medical treatment other than that in connection with the surgery on his shoulder. Finally, he awarded claimant's attorney a fee of \$6,335.

Claimant now appeals contending that the administrative law judge erred in determining his average weekly wage, in his denial of medical benefits, and in his award of an attorney's fee. Employer responds, urging affirmance.

Claimant first argues 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 43 weeks in the year preceding his injury, Section 10(a) of the Act, 33 U.S.C. §910(a), should apply. We disagree.

In reaching his determination under Section 10(c), the administrative law judge relied upon claimant's wage report, CX 26; EX 6, and added claimant's total wages for the 52 weeks prior to his injury (\$32,655.25), his vacation pay (\$3,360), and the workers' compensation benefits claimant received for an unrelated injury (\$2,177.01), for a total of \$38,192.26, which he divided by 52 to find an average weekly wage of \$734.47. Claimant argues that his average weekly wage should be \$977.09 under Section 10(a). In making his argument, claimant initially contends that the administrative law judge should have relied upon the work sheet he submitted, *i.e.*, CX 27, in support of his position. Although the administrative law judge accepted this work sheet as claimant's attorney's "work effort, bearing on average weekly wage," HT at 18, he relied upon the documentation provided from employer's records which was submitted into evidence by both employer and claimant. *See* CX 26; EX 6. It was within the administrative law judge's discretion to rely upon this evidence rather than that submitted by claimant's attorney which was without

documentation supporting its authenticity. *See generally Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 26 BRBS 111(CRT) (5th Cir. 1992); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Moreover, the administrative law judge properly determined claimant's average weekly wage under Section 10(c). Section 10(a) is to be applied when an employee has worked substantially the entire 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). This average daily wage is then multiplied by 260 if claimant was a five-day worker, or 300 if claimant was a six-day 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. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Section 10(c) is 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.¹ 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 Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

In the instant case, the administrative law judge determined that claimant's work week had declined to fewer than five days in 27 of the 43 full weeks that claimant was available for work prior to his injury. Decision and Order on Remand at 4. Because claimant was not a five- or six-day per week worker for more than 62 percent of his time prior to the work injury, the administrative law judge properly declined to utilize Section 10(a) and instead calculated claimant's average weekly wage pursuant to Section 10(c). We affirm the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c) on these facts. Given claimant's declining work week, calculation of his average weekly wage under Section 10(a), which presupposes that work would be available on a five or six day basis, would distort the projection of what claimant could have earned had he continued to work in the same job beyond his date of injury. *See Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Accordingly, as the administrative law judge's mathematical calculation of claimant's average weekly wage utilizing Section 10(c) is unchallenged, it is affirmed.

Claimant next contends that the administrative law judge erred in finding that

¹Claimant does not argue that Section 10(b) is applicable.

employer is not liable for the medical expenses associated with his fall in the bathtub, asserting that the fall was the natural and/or unavoidable result of the original injury. When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural consequence or unavoidable result of the original work injury. If the subsequent event is not the natural consequence or unavoidable result of the work injury, employer is relieved of liability for disability and medical benefits due to the intervening cause. See generally *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997). Claimant testified that while he was climbing into the shower, a reasonable and expected life activity, he braced himself with his injured left shoulder which unexpectedly gave way, causing him to fall and injure his right ribs, HT at 23-24. Based on this testimony, claimant contends that the injuries resulting from the fall are the unavoidable result of his work injury and that employer is liable for the associated medical expenses.

In reaching his conclusion that the fall was not the result of claimant's work injury, the administrative law judge relied upon his analysis of claimant's credibility, notations on claimant's medical records that he was not an accurate historian, see, e.g., EX 2 at 108; C2 - Jones Dep; CX 6; CX7A, and contemporaneous medical records, CX 6, CX 7A, relating the cause of the fall to claimant's drinking and inebriation. We hold that it was within the administrative law judge's discretion to interpret this evidence to find that the bathtub fall and related injuries were not causally related to claimant's work injury. We therefore affirm the administrative law judge's finding that the injuries sustained in the fall were not the natural consequence or unavoidable result of his work injury and thus that employer is not liable for any medical expenses arising out of this fall as it is rational and supported by substantial evidence. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); see also *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954).

Finally, claimant contends that the administrative law judge erred in his award of an attorney's fee. The administrative law judge awarded a fee of \$6,335, as originally requested, rejecting counsel's amended fee petition which reflected a rise in his hourly rate and time for preparation of his fee petition. An award of an attorney's fee is discretionary and may be set aside only if the challenging party shows the award is arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Initially, claimant seeks an enhancement of his fee to reflect the increase in his hourly fee from \$175 per hour to \$190 per hour as of 1997. The administrative law

judge, however, found that as none of the awarded services were performed in 1997, the fee increase was inapplicable in this case. In so doing, the administrative law judge failed to address whether counsel was entitled to an augmentation of his fee due to the time delay between the rendering of services and payment for the same. The Board has held that in light of the United States Supreme Court's decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act. 33 U.S.C. §928. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). In the case at hand, counsel timely raised his entitlement to an enhanced fee, see *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998), and the administrative law judge's failure to address whether the fee should be augmented to account for the delay between the performance of counsel's services and the payment of his fee requires remand. Moreover, we agree with claimant that the administrative law judge erred in denying counsel a fee for time spent in preparing his fee petition. Decision and Order on Remand at 6. Attorneys are entitled to a reasonable fee for time spent preparing fee applications under the Act. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). Accordingly, on remand the administrative law judge may award an appropriate fee for time spent in preparation of claimant's fee petition. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999).

Accordingly, the administrative law judge's fee attorney's award is remanded for consideration of an additional fee consistent with this opinion. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge