

BRB No. 01-0147

STEVEN RICHARDSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONTINENTAL GRAIN COMPANY)	DATE ISSUED: <u>10/09/01</u>
)	
and)	
)	
CIGNA PROPERTY & CASUALTY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, and Supplemental Order Denying Attorney's Fee and Costs of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meagan Flynn (Preston Bunnell & Stone, L.L.P.), Portland, Oregon, for claimant.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Supplemental Order Denying Attorney's Fee and Costs (98-LHC-598,1458) of Administrative Law Judge Alexander Karst 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 if they 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 injured his left knee on May 24, 1996, during the course of his employment as a grain elevator operator. Claimant had previously injured his left knee during the course of his employment on June 8, 1992, for which employer voluntarily paid compensation for periods of temporary total disability, 33 U.S.C. §908(b), and for a seven percent impairment of the left knee, 33 U.S.C. §908(c)(2). Employer voluntarily paid compensation for temporary total disability due to the May 1996 left knee injury from October 22, 1997, to January 31, 1998. Claimant also alleged that he injured his back during the course of his employment on September 23, 1996, and on November 25, 1996. Employer controverted the work-relatedness of claimant's back condition at the formal hearing; however, prior to the hearing, employer voluntarily paid claimant compensation for temporary total disability for the back injuries from September 24 to October 27, 1996, for temporary partial disability, 33 U.S.C. §908(e), from October 28 to November 24, 1996, and for temporary total disability from December 10, 1996, to May 5, 1997, when employer suspended its voluntary payments because of claimant's refusal to meet with employer's vocational counselor. Claimant's treating physician for his left knee, Dr. Burgdorff, released claimant to return to work without restrictions on February 1, 1998. Employer demanded that claimant undergo a psychiatric evaluation before returning to work, which claimant refused. In April 1998, claimant commenced course work at a community college towards obtaining a degree in marine technology, which the Department of Labor (DOL), Office of Workers' Compensation Programs (OWCP), approved on May 11, 1998. Claimant's employment ended on April 14, 1998, pursuant to a Termination Agreement signed by claimant on June 5, 1998, whereby employer agreed to pay claimant back wages from February 1 to April 14, 1998, and 26 weeks' severance pay, to provide a favorable letter of recommendation, and to not oppose claimant's application for state unemployment benefits. On March 24, 1999, employer offered in writing to settle claimant's pending claims for \$5,000, which claimant rejected.

In his Decision and Order, the administrative law judge found that, after an arthroscopy on October 22, 1997, claimant's left knee is free of pain, swelling, and other symptoms present after the 1992 knee injury and that claimant is less impaired than he was after the 1992 injury. The administrative law judge concluded that claimant's current left knee impairment is no more than half of the seven percent impairment rating for which employer voluntarily compensated claimant after the 1992 left knee injury. Accordingly, the administrative law judge denied additional compensation for claimant's left knee condition. The administrative law judge determined that claimant is entitled to compensation for temporary total disability from October 22, 1997 to February 1, 1998, for the left knee injury while recuperating from surgery, but at a higher average weekly wage, \$531.57, than the average weekly wage of \$449.80 utilized by employer in voluntarily compensating claimant

for temporary total disability from October 22, 1997, to January 31, 1998. The administrative law judge found that claimant sustained a work-related back injury on September 23, 1996. The administrative law judge credited the opinion of claimant's treating physician for his back condition, Dr. Staeheli, and determined that claimant was capable of returning to his usual employment as a grain elevator operator on March 11, 1997. The administrative law judge found that employer is not liable for compensation benefits from March 11 to October 21, 1997, based on his finding that claimant was unwilling to return to work unless he was given light duty work, and that claimant refused to meet with employer's vocational counselor on May 5, 1997. The administrative law judge denied claimant's claim for compensation for temporary total disability while attending college since April 1998 under the rehabilitation program approved by OWCP. Employer's request for costs associated with claimant's refusal to cooperate at a psychiatric examination in January 1997 was denied. Finally, the administrative law judge found no evidence supporting claimant's allegation of a permanent back impairment and claimant's claim for nominal compensation for his back condition was therefore denied.

Claimant's attorney subsequently requested an attorney's fee of \$27,900 and costs of \$4,287.43. In his Supplemental Order Denying Attorney's Fee and Costs, the administrative law judge found that claimant was not a prevailing party with respect to his back injury claim because claimant did not obtain any compensation or medical benefits in addition to those employer had voluntarily paid prior to terminating claimant's compensation on May 5, 1997. The administrative law judge found that claimant obtained additional compensation of \$794, plus interest of \$138, pursuant to his prevailing on the applicable average weekly wage during the period of temporary total disability from October 22, 1997, to February 1, 1998. The administrative law judge found, however, that employer is not liable for a fee for the knee injury claim because the total recovery of \$932 as of March 24, 1999, was far less than employer's \$5000 written settlement offer on that date. The administrative law judge also denied claimant's petition for costs as employer was not liable for an attorney's fee.

On appeal, claimant challenges the administrative law judge's denial of additional compensation for his left knee injury, and the denial of compensation for temporary total disability for the back condition from May 5 to October 21, 1997, and continuing from April 15, 1998, while claimant is participating in an OWCP-approved rehabilitation program. Claimant also challenges the administrative law judge's Supplemental Order denying claimant an attorney's fee and costs payable by employer. Employer responds, urging affirmance in all respects.

We first address claimant's contention that the administrative law judge erred in finding that claimant currently has a three and one-half percent left knee impairment. The administrative law judge noted the impairment ratings, after the June 1992 injury, of Drs.

Pettee and Staeheli, who rated claimant's left knee under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Dr. Pettee opined that claimant had a loss of function of two percent, EX 6, and Dr. Staeheli rated claimant's left knee impairment at five percent, EX 7. The administrative law judge noted that Dr. Pedegana concurred with Dr. Staeheli's assessment, and that employer voluntarily paid claimant for a seven percent impairment. EX 9, 10. The administrative law judge credited evidence that, whereas claimant had pain, swelling, and other symptoms after the June 1992 injury, claimant's arthroscopic surgery after the May 1996 left knee injury relieved these symptoms. See CX 35 at 202-203; EX 31. Dr. Burgdorff stated that claimant's current impairment is "minimal" and that claimant's symptoms were "nicely controlled." CX 35 at 198, 203. As there is no explicit evidence of the extent of claimant's impairment following the surgery, the administrative law judge inferred from Dr. Burgdorff's report that claimant's knee impairment is no more than half of the previous seven percent impairment for which employer compensated claimant.¹

The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in assessing the extent of claimant's impairment to a scheduled member, in addition to claimant's description of symptoms and physical effects of his injury. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993); *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978). The fact that employer voluntarily compensated claimant for a seven percent impairment does not establish the degree of impairment for all time; claimant's condition can improve. Similarly, employer's payment of benefits for a seven percent impairment does not bind the administrative law judge to finding that percentage impairment when additional evidence is presented at a hearing. See generally *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136

¹The administrative law judge found that employer voluntarily paid claimant \$7,926.31 for the seven percent impairment, that claimant is entitled to compensation for temporary total disability from October 22, 1997, to February 1, 1998, while he recuperated from arthroscopic surgery, that claimant is entitled to \$3,572.15 for a three and a half percent impairment, and that the compensation to which claimant is entitled is fully offset by employer's credit for its prior payments for temporary total disability and permanent partial disability.

(1989); *Price v. Dravo Corp.*, 20 BRBS 94 (1987). Thus, as post-surgical evidence supports the administrative law judge's conclusion that claimant's condition improved, and claimant has not offered a basis for a higher award, we affirm the administrative law judge's finding that claimant has a three and one half percent left knee impairment after his May 24, 1996, work injury as it is rational and supported by substantial evidence.

Claimant next challenges that the administrative law judge's denial of compensation for temporary total disability for his September 23, 1996, back injury. Claimant initially asserts that the administrative law judge erred in finding that claimant is not entitled to any compensation between March 11 and October 22, 1997. Claimant bears the burden of establishing that he is unable to return to his usual employment. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge found that claimant was capable of returning to his usual employment on March 11, 1997. On appeal, claimant does not challenge the administrative law judge's crediting of the opinion of claimant's treating physician, Dr. Staeheli, CX 26, as supported by the opinion of Dr. Burgdorff, CX 23, and a February 28, 1997, physical capacities examination, which demonstrated that claimant could occasionally lift as much as 104 pounds and lift 62 pounds frequently, EX 30 at 53, to find that claimant was physically capable of returning to his usual employment as an elevator operator on March 11, 1997. Rather, claimant argues that the administrative law judge erred in finding that employer reasonably refused to return claimant to work for reasons unrelated to his work injury.

The administrative law judge found that claimant did not return to work after March 11, 1997, because claimant was unwilling to return unless he was assigned light duty work. In this regard, the administrative law judge credited the March 11, 1997, report of Dr. Burgdorff. Decision and Order at 10. Dr. Burgdorff noted that employer was willing to return claimant to work only if he could perform full duty work, that there are no significant physical findings nor is any additional medical treatment indicated, and that claimant appears unable or unwilling to return to full duty work involving bending and twisting. CX 23 at 61. The administrative law judge also credited the records of John Waterbrook, a vocational consultant, which note both claimant's October 16, 1997, statement that claimant believes he could return to full duty on the scales and claimant's unwillingness to return to more demanding full duty work.² Decision and Order at 8, 12 n.6. Moreover, the administrative

²Specifically, the administrative law judge noted a September 30, 1997, entry by Mr. Westerbrook stating, "[Claimant] believes he can do the job at Continental Grain if they would do what they did in the past and give the harder jobs to the younger men." EX 35 at 90; see also EX 35 at 92. The administrative law judge additionally noted Mr. Westerbrook's testimony that claimant wanted to work full time on the scales, which job claimant stated he was entitled to based on his seniority. Tr. at 117.

law judge credited evidence of continuing strife between claimant and his supervisors, which behavior the administrative law judge found was motivated in part by claimant's desire to manipulate employer into letting claimant work under his terms.³ *Id.* at 12. The administrative law judge concluded that although employer imposed conditions on claimant's return to work, such as a psychiatric examination, the conditions reflected employer's consideration of claimant's violent behavior and abuse of his position as a union steward, rather than his injury. The administrative law judge concluded that although claimant was physically capable of returning to his usual work, he chose not to comply with employer's reasonable pre-conditions, which were not related to any physical work restrictions.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge considered the record as a whole, and concluded that claimant chose not to return to work at his usual employment after he was physically able to do so on March 11, 1997. On the basis of the record before us, the administrative law judge's conclusion is rational and supported by substantial evidence. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Accordingly, we affirm the administrative law judge's denial of temporary total disability benefits from March 12 to

³Specifically, the administrative law judge credited evidence that claimant threatened to kill one supervisor and threatened another by brandishing a metal can in his face. EX 49 at 310, 312; EX 50 at 326. The administrative law judge found that two hours after this latter incident, which arose over a work assignment claimant believed was not within his light duty work restrictions from his September 23, 1996, back injury, claimant alleged an aggravation of his back condition and a psychiatric injury. *See* EX 42 at 247-248; EX 49 at 313; EX 50 at 332, 338.

October 21, 1997.⁴ *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990).

⁴Accordingly, we need not address the administrative law judge's alternate rationale for denying claimant compensation from March 11 to October 21, 1997, namely, that claimant refused to cooperate with employer's vocational consultant.

Claimant also challenges the administrative law judge's denial of compensation for temporary total disability while he was participating in an OWCP-approved rehabilitation program to obtain a degree in marine technology. The administrative law judge found that claimant was physically capable of returning to his usual employment as a grain elevator operator due to his back injury on March 11, 1997, and that he was physically capable of returning to his usual employment due to his knee injury on February 2, 1998. Thereafter, the administrative law judge found that claimant's employment ended for reasons unrelated to his work injuries, pursuant to the Termination Agreement claimant signed with the advice of counsel. The administrative law judge credited evidence of the scheduled closing of employer's grain elevator facility and claimant's voluntarily choosing to accept employer's termination offer of back pay from February 2 to April 14, 1998, 26 weeks' severance pay, unemployment compensation, and a job reference, over whatever rights he might retain under the union contract with the closing of employer's facility.⁵ The administrative law judge found that OWCP approved the program after claimant was released to return to work without permanent impairment or restrictions, and during the negotiation period over the Termination Agreement. The administrative law judge concluded that claimant is not entitled to compensation during his participation in a rehabilitation program because claimant is physically capable of returning to his former employment and claimant's unemployment after April 15, 1999, is for reasons unrelated to his work injuries.

Where claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden then shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. See *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Claimant also can establish total disability if claimant establishes suitable alternate employment is not reasonably available due to his participation in a DOL-sponsored rehabilitation program. See *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

⁵We note that employer's grain elevator facility was subsequently purchased by Cargill on July 12, 1999, and remains in operation. See EX 49 at 308-309.

In the instant case, claimant does not challenge the administrative law judge's finding that claimant was physically capable of returning to his usual employment on April 14, 1998, when claimant voluntarily ended his employment with employer for reasons unrelated to his work injury pursuant to the Termination Agreement. The administrative law judge found that employer's compensation liability ended on February 1, 1998, when claimant's treating physician for his knee condition, Dr. Burgdorff, released claimant to return to work without restrictions. CX 23; *see also* EX 31. The administrative law judge also found that claimant, although not actually working, was considered to be an employee on April 14, 1998, when he signed the Termination Agreement. As claimant was physically capable of performing his usual work on that date, the burden of establishing the availability of suitable alternate employment did not shift to employer after claimant's termination, and claimant was therefore not entitled to any compensation for his work injury after April 14, 1998. *See generally Gacki v. Sea-Land Services, Inc.*, 33 BRBS 127 (1998). The administrative law judge thus properly concluded that, as employer's compensation liability ended when claimant was able to return to work, claimant is not entitled to compensation while participating in a vocational rehabilitation program after April 14, 1998.⁶ *See generally Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968). Accordingly, we affirm the administrative law judge's denial of temporary total disability compensation after the termination of claimant's employment.

Claimant next challenges the administrative law judge's denial of an attorney's fee. Specifically, claimant asserts that counsel established that claimant's back condition is related to his employment and that employer's offer to settle did not include the knee injury, for which the administrative law judge awarded claimant additional compensation totaling \$932; therefore, claimant argues his counsel is entitled to a fee. Employer's liability for claimant's attorney's fee 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

⁶Moreover, we note that, in the absence of any allegation by claimant of permanent physical disability after March 11, 1997, due to claimant's work-related back injury, we reject claimant's contention that the administrative law judge erred in prematurely determining that claimant is not entitled to compensation for permanent partial disability due to his back condition. *See generally Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975).

the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. 33 U.S.C. §928(b); *see, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

In the instant case, employer made a written offer to settle both the knee and back claims for \$5,000, on March 24, 1999.⁷ Claimant rejected this offer. *See* Claimant's Petition for Review of Supplemental Decision and Order, Appendix A. In his Supplemental Order Denying Attorney's Fee and Costs, the administrative law judge found that claimant's counsel is not entitled to a fee payable by employer for establishing that claimant sustained a work-related back injury on September 23, 1996. The administrative law judge found that claimant was not awarded additional compensation or medical benefits over that which employer had voluntarily paid and claimant's claim for permanent disability for this injury, nominal or otherwise, was denied. Moreover, the administrative law judge found that employer's controversion of its liability for the back injury claim was provoked solely by claimant's refusal to meet with employer's vocational counselor on May 5, 1997, for which reason employer terminated its voluntary compensation payments. EX 20. The administrative law judge concluded that claimant's alleged "vindication" in establishing causation was related to his protracted feud with employer and irrelevant to his back injury, that claimant was not a prevailing party on the back injury claim, as no additional benefits were awarded, and claimant is therefore not entitled to a fee award payable by employer.

The administrative law judge next determined that the average weekly wage applicable to compensation payments for the knee injury was the sole issue on which claimant prevailed and that only a small fraction of claimant's counsel's services were related to this issue. Employer had voluntarily paid claimant \$7,926.31 for his knee impairment, which the administrative law judge found was in excess of the \$3,572.15 due for claimant's current three and a half percent impairment, and employer voluntarily paid claimant

⁷We reject claimant's contention, based on the dates of loss and OWCP numbers listed on employer's written settlement offer, that employer's offer extended to the back injury and stress injury claims and not to the knee injury. The administrative law judge credited substantial evidence that claimant had withdrawn the stress claims prior to the date of employer's settlement offer, EX 42 at 231, *see also* Tr. at 36; therefore, the administrative law judge rationally found that employer's offer to settle "claimant's pending claims," extended to the back injury and knee claims. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

compensation for the entire period he was unable to work due to his October 22, 1997, knee surgery. The administrative law judge also found that the resulting \$932 claimant was awarded, based on the higher applicable average weekly wage, was exceeded by employer's \$5,000 settlement offer, which also would have allowed for a reasonable attorney's fee. Accordingly, the administrative law judge concluded that claimant is not entitled to a fee for the knee injury claim payable by employer. Finally, the administrative law judge determined that costs may be assessed against employer only when a fee is awarded against employer; therefore, the administrative law judge denied claimant's petition for an award of costs.

We affirm the administrative law judge's conclusion that claimant is not entitled to a fee payable by employer for the back and knee injury claims. Prior to the hearing, employer voluntarily paid medical benefits and temporary total disability compensation for all periods of disability found by the administrative law judge and permanent partial disability compensation for claimant's left knee impairment in excess of that found due by the administrative law judge. CX 11, 12; EX 10. Accordingly, employer has no fee liability for the back injury claim as claimant did not succeed in obtaining any additional compensation or medical benefits for the back injury over those employer voluntarily paid. *See* 33 U.S.C. §928(b); *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). Moreover, claimant is not entitled to a fee payable by employer for the knee injury claim because claimant's total recovery of \$932 is less than the \$5,000 employer offered to settle both the knee and back injury claims. *See generally Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). Finally, the administrative law judge properly noted that employer is not liable for costs when it is not liable for claimant's attorney's fee. 33 U.S.C. §928(d); *see generally Love v. Potomac Iron Works*, 16 BRBS 249 (1984). Accordingly, we affirm the administrative law judge's denial of an attorney's fee and costs payable by employer.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Order Denying Attorney's Fee and Costs are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge