BRB No. 02-0182

HERBERT ZENON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORT COOPER/T. SMITH STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED: Oct. 29, 2002
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Upon Second Remand from the Benefits Review Board of Ainsworth H. Brown, and the Supplemental Decision and Order Awarding Attorney=s Fees of Robert D. Kaplan, Administrative Law Judges, United States Department of Labor.

Dennis L. Brown (Law Office of Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Kenneth G. Engerrand and Michael D. Williams (Brown Sims, P.C.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Second Remand from the Benefits Review Board (93-LHC-0645) of Administrative Law Judge Ainsworth H. Brown and the and Supplemental Decision and Order Awarding Attorney=s Fees of Administrative Law Judge Robert D. Kaplan 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 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).

This case is before the Board for the third time. To recapitulate, on October 2, 1988, claimant fell and injured his left shoulder during the course of his employment for employer as a walking foreman. Claimant=s shoulder injury required surgery in April 1991 and September 1991. The parties stipulated that claimant=s subsequent release to light duty work would allow claimant=s return to his usual employment as a walking foreman under normal circumstances. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. ' 908(b), from October 10, 1988, to April 23, 1989, and from April 15, 1991, to February 17, 1992, when employer terminated its compensation payments. Claimant has not returned to work.

In September 1992, claimant=s treating physician, Dr. Bryan, opined that claimant could return to work as a walking foreman with the restriction, *inter alia*, that he not climb or descend a ladder with more than eight rungs. In his initial decision issued on October 28, 1993, Administrative Law Judge Brown interpreted the meaning of Aunder normal circumstances,@ pursuant to the parties= stipulation. The administrative law judge found that claimant is unable to perform the usual duties of a walking foreman, which occasionally requires climbing ladders with more than eight rungs, and that employer did not establish the availability of suitable alternate employment until April 22, 1993, when employer offered claimant a position as a walking foreman tailored to Dr. Bryan=s work restrictions. The administrative law judge next determined that claimant=s condition reached maximum medical improvement on September 30, 1992. The administrative law judge rejected employer=s evidence of suitable alternate employment before April 22, 1993, on the basis that the positions required climbing more than eight ladder rungs. Finally, claimant was awarded compensation under the schedule for a 20 percent arm impairment. 33 U.S.C. ' 908(c)(1).

Employer appealed and claimant cross-appealed the administrative law judge=s decision to the Board, BRB Nos. 94-0450/A. The administrative law judge=s decision was administratively affirmed on September 12, 1996, pursuant to Pub. L. No. 104-134, 110 Stat. 1321 (1996). Both parties appealed the administrative law judge=s decision to the United States Court of Appeals for the Fifth Circuit. In its decision, *Zenon v. Port Cooper/T. Smith Stevedoring Co., Inc*.,

No. 96-60788 (5th Cir. May 24, 1999), the court interpreted Aunder normal circumstances@ in the parties= stipulation as modifying Awalking foreman@ and held that the administrative law judge appeared to misinterpret the phrase as modifying Arelease.@ The court therefore reversed the administrative law judge=s finding that a release to light duty would not *per se* establish that claimant could return to work as a walking foreman. The Fifth Circuit remanded the case for the administrative law judge to determine the date claimant was released for light duty, at which time, the court held, compensation for temporary total disability ends, pursuant to the terms of the parties= stipulation. The court also held that claimant=s temporary disability compensation would otherwise end on the date of maximum medical improvement, September 30, 1992, should the administrative law judge find on remand that claimant was never released to perform light duty work.

The Fifth Circuit also vacated the administrative law judge=s award of permanent total disability benefits, 33 U.S.C. ' 908(a), from the date of maximum medical improvement to the date employer established the availability of suitable alternate improvement, April 22, 1993. The court held that the parties stipulated only to claimant=s entitlement to compensation for temporary total disability until claimant is able to return to work. The court held that claimant must, therefore, establish his entitlement to permanent disability benefits; specifically, the court held that the administrative law judge must address employer=s contention that claimant=s shoulder impairment is not related to his work injury. If the administrative law judge were to find the shoulder impairment work-related, the court affirmed the administrative law judge=s finding that employer=s April 22, 1993, offer of a job as a walking foreman tailored to Dr. Bryan=s restrictions establishes the availability of suitable alternate employment. Finally, the court noted the parties= agreement on appeal that the administrative law judge erred in finding claimant entitled to a scheduled award for his shoulder impairment, which would be compensated under the Act as an unscheduled injury. *See* 33 U.S.C. ' 908(c)(21).

In his decision on remand, the administrative law judge found that claimant=s shoulder injury is work-related. He found that claimant was never released to return to work as a walking foreman Aunder normal circumstances@ as that phrase was interpreted by the Fifth Circuit. Thus, the administrative law judge found claimant entitled to compensation for temporary total and permanent total disability until April 23, 1993, when employer established the availability of suitable alternate employment. In lieu of the scheduled award for claimant=s shoulder impairment, the administrative law judge found claimant entitled to a continuing award for permanent

partial disability from April 23, 1993, based on the difference between the parties= stipulated average weekly wage of $623.19 and the wage offered to claimant by employer on April 22, 1993.[1] *See* 33 U.S.C. ' 908(c)(21), (h).

On claimant=s motion for reconsideration, the administrative law judge vacated the award of permanent partial disability benefits, and awarded claimant continuing compensation for permanent total disability from October 1, 1992, the day after claimant=s shoulder condition reached maximum medical improvement. The administrative law judge found there is no record evidence establishing the exact availability of work pursuant employer=s April 22, 1993, job offer or of its pay rate. Employer=s motion for reconsideration of the administrative law judge=s order granting reconsideration was summarily denied.

In a supplemental decision, the administrative law judge awarded claimant=s attorney a fee of $5,845 for work performed before him after the case was remanded by the Fifth Circuit, representing 29.225 hours at $200 per hour. Moreover, the administrative law judge granted claimant=s motion to enhance the prior fee award due to the delay in payment. The administrative law judge augmented the previous award to reflect counsel=s current rate of $200.[2]

Employer appealed the administrative law judge=s decision on remand to the Board. In its decision, *Zenon v. Port Cooper/T. Smith Stevedoring Co., Inc.*, BRB No. 00-0798 (March 30, 2001)(unpub.), the Board held that the administrative law judge properly construed employer=s job offer as a walking foreman with job duties tailored to claimant=s work restrictions as suitable alternate employment, and that, pursuant to the affirmance of this finding in the administrative law judge=s initial decision by the Fifth Circuit, it constitutes the law of the case. *Id.,* slip op. at 45. The Board rejected employer=s contentions that the decision of Fifth Circuit also established that claimant is not entitled to compensation for permanent partial disability based on a loss of wage-earning capacity and that the administrative law judge erred by placing on employer the burden to establish claimant=s post-injury

[1]The administrative law judge, however, did not state the amount of this wage.

[2]The prior fee award, entered in February 1994, was for 176.25 hours at $160 per hour.

wage-earning capacity, based on its offer of suitable alternate employment. *Id.* at 5-6. The Board, however, vacated the administrative law judge=s finding that there is no record evidence from which the administrative law judge may determine the exact availability of work pursuant to employer=s job offer or its pay rate. Specifically, the Board remanded for the administrative law judge to consider claimant=s post-injury wage-earning capacity in light of evidence of a pay rate of $17.35 per hour for a walking foreman at the Port of Houston, effective January 15, 1993, the testimony of a former walking foreman for employer, O.R. Emanuel, the number of hours Mr. Emanuel was employed yearly through 1992, and the factors enumerated in Section 8(h) of the Act. *Id.,* at 6-7. Finally, the Board held that the administrative law judge properly considered under Section 28 of the Act, 33 U.S.C. ' 928, enhancement for delay in payment of claimant=s attorney=s fee award for services rendered between October 1990 and November 1993. The Board agreed with employer that the augmented hourly rate must be reconsidered on remand after the administrative law judge has determined claimant=s post-injury wage-earning capacity and, therefore, the extent of claimant=s success on remand. *Id.* at 7-8.

In his decision on second remand, the administrative law judge rejected employer=s contention that claimant=s refusal to accept employer=s job offer of a position as a walking foreman with job duties tailored to claimant=s work restrictions precludes claimant=s eligibility for compensation based on a loss of wage-earning capacity. The administrative law judge found that, while evidence establishes a pay rate of $17.35 per hour for a walking foreman, employer failed to establish how much work would actually be available for claimant; thus, he concluded that employer=s job offer failed to establish claimant=s post-injury wage-earning capacity. The administrative law judge also credited evidence that claimant is not physically capable of performing the duties of a walking foreman. The administrative law judge credited the testimony of employer=s vocational consultant, Lorie McQuade-Johnson, and evidence that claimant has only a minimal ability to read, write, add, and subtract, to find that claimant could obtain only full-time suitable employment performing unskilled labor paying the minimum wage of $5 per hour. The administrative law judge found that employer identified such employment, and that claimant, therefore, has a post-injury wage-earning capacity of $200 per week. Accordingly, the administrative law judge awarded claimant compensation for permanent total disability from October 1, 1992, when claimant=s shoulder condition reached maximum medical improvement, to July 13, 1993, when employer established the availability of suitable alternate employment, and for permanent partial disability based on the difference between claimant=s average weekly wage

of $623.19 and his post-injury wage-earning capacity of $200 per week. Finally, based on his award of benefits of $282.10 per week and the ten-year delay in resolving claimant=s entitlement to compensation, the administrative law judge again found it appropriate to augment claimant=s attorney=s fee award for services rendered between October 1990 and November 1993 to reflect an increased hourly rate of $200.

In the Supplemental Decision and Order Awarding Attorney=s Fees issued by Administrative Law Judge Kaplan, claimant=s attorney was awarded $2,693.25, for work performed after the second remand from the Board, representing 15.39 hours at $175 per hour.[3] The administrative law judge rejected employer=s contentions that the fee petition should be denied because it was untimely filed and, alternatively, because claimant=s attorney did not engage in a successful prosecution of the claim after the second remand from the Board. The administrative law judge addressed employer=s objections to specific items in the fee petition, and he disallowed 3.31 hours of the requested 18.7 hours of attorney services.

On appeal, employer challenges the award of permanent partial disability benefits after its offer of employment on April 22, 1993 as a walking foreman tailored to claimant=s work restrictions, and the administrative law judge=s enhancing claimant=s initial attorney=s fee award to account for delay in payment of the fee. Employer also challenges the attorney=s fee award, contending that claimant did not successfully prosecute the claim after the Board remanded the case for the second time. Claimant responds, urging affirmance in all respects.

In challenging the administrative law judge=s award of compensation subsequent to April 22, 1993, employer argues that the administrative law judge erred by not applying his prior finding that employer=s offer established the availability of suitable alternate employment, and the holding of the Fifth Circuit that employer=s offer of suitable alternate employment precludes claimant from recovering permanent partial disability benefits for his shoulder injury. Moreover, employer argues the administrative law judge erred by placing the burden of proof

[3]The case was assigned to Administrative Law Judge Kaplan after the death of Administrative Law Judge Brown on April 18, 2002.

on employer to establish the wages paid by the walking foreman position it offered claimant. In its Decision and Order, the Board rejected employer=s contention that the Fifth Circuit=s decision in this case definitively establishes that claimant is not entitled to permanent partial disability benefits based on a loss of wage-earning capacity, inasmuch as the court acknowledged that claimant may be entitled to such an award upon a finding that his shoulder condition is related to his employment. The Board noted that the court did not discuss the wages paid by the position offered by employer or analyze claimant=s wage-earning capacity pursuant to Section 8(h). *See Zenon*, slip op. at 5. The Board also rejected employer=s contention that the administrative law judge erred by placing the burden of proof on employer to establish claimant=s wage-earning capacity. The Board held that it is employer=s burden, co-extensive with its burden of establishing suitable alternate employment, to Aestablish the general number of hours claimant would be expected to work and a general rate of pay for the position.@ *Id.* at 6; *see generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). As the Board=s decision on these issues is the law of the case, the Board will not re-address these issues in this appeal. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff=d on recon.,* 35 BRBS 190 (2002); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

We also reject employer=s contention on appeal that it was claimant=s burden to accept employer=s job offer as a walking foreman and thereby establish the actual post-injury wages it paid, pursuant to claimant=s burden of demonstrating reasonable diligence in attempting to secure alternate employment. The administrative law judge is not obligated to find that claimant=s wage-earning capacity is determined by the wages paid by the job in which claimant is working. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). It is well established, moreover, that the party seeking to prove that claimant=s actual post-injury wages are not representative of claimant=s post-injury wage-earning capacity has the burden of showing an alternate reasonable wage-earning capacity. *See Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff=d sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990). In this case, claimant has no actual wages as he never returned to work after undergoing shoulder surgery in 1991. Thus, in order to demonstrate that claimant has a residual wage-earning capacity, and perhaps no loss thereof, it is employer=s burden to convince the administrative law judge that its evidence regarding the wages claimant could earn as a walking foreman is entitled to determinative weight.

See Guidry, 967 F.2d 1039, 26 BRBS 30(CRT). The objective of the inquiry concerning claimant=s wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Section 8(h) provides the framework for the inquiry into claimant=s post-injury wage-earning capacity. Factors relevant to this consideration include the nature of claimant=s injury, the degree of physical impairment, claimant=s usual employment, and any other relevant factors. 33 U.S.C. ' 908(h).

In this regard, employer contends that it submitted substantial evidence establishing claimant=s post-injury wage-earning capacity as a walking foreman with duties modified to claimant=s work restrictions. In his decision, the administrative law judge found that the rate of pay for a walking foreman is $17.35 per hour. The administrative law judge then addressed the evidence that Mr. Emanuel averaged 2,419 hours per year between 1986 and1992, that claimant averaged 1,287 hours per year during the same years, and the testimony of employer=s vice-president, Mr. Atkinson, that claimant would at least be able to work the same number of hours that he had in the past. The administrative law judge rejected Mr. Emanuel=s work history as representative of claimant=s potential earning capacity, due to claimant=s restriction against climbing ladders with more than eight rungs, whereas Mr. Emanuel=s job duties regularly required using a ladder to climb into and out of the hold of a ship. *Compare* CX 1 at 26, 35 *with* Tr. at 185-191, 195-197. In finding that employer did not establish claimant=s post-injury wage-earning capacity as a walking foreman, the administrative law judge relied on the testimony of Mr. Atkinson that employer=s offer of permanent employment as a walking foreman was contingent on claimant=s performance and on the availability of sufficient work in the future. Tr. at 282. Mr. Atkinson could not state how much work would be available to claimant, and he testified that claimant would not be hired to replace one of the current foreman. Tr. at 285-291.

In adjudicating a claim, it is well established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, the administrative law judge=s comparison of Mr. Emanuel=s description of his job duties as a walking foreman with claimant=s work restrictions supports the administrative law judge=s rejection of Mr. Emanuel=s work history as a basis for

claimant=s post-injury wage-earning capacity. Moreover, the administrative law judge acted within his discretion in finding that the testimony of Mr. Atkinson also fails to establish the general number of hours claimant could be expected to work. *See generally Mangaliman v. Lockheed Shipbuilding Co.,* 30 BRBS 39 (1996). Thus, the administrative law judge=s finding that employer failed to establish claimant=s post-injury wage-earning capacity based on its offer of employment as a walking foreman tailored to claimant=s work restrictions is rational, is supported by substantial evidence, and is affirmed.[4] *See generally Louisiana Ins. Guaranty Ass=n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); We therefore affirm the administrative law judge=s finding that claimant is entitled to compensation for permanent total disability from October 1, 1992, to July 13, 1993, and to continuing compensation from July 13, 1993, for permanent partial disability based on a $5 per hour, or $200 per week, post-injury wage-earning capacity based on jobs available on the open market. *See id.; Penrod Drilling,* 905 F.2d 84, 23 BRBS 108(CRT).

Employer next argues that Administrative Law Judge Brown erred in granting counsel=s request for augmentation of the hourly rate charged for work performed between October 1990 and November 1993, while the case was initially pending before the Office of Administrative Law Judges. Employer asserts that augmentation is inappropriate given claimant=s limited success in the instant case.[5] Specifically, on second remand from the Board, claimant=s compensation was reduced from a continuing award of permanent total disability benefits of $415.42 per week from October 1, 1992, to compensation for permanent total disability from October 1,

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[4]Thus, any error in the administrative law judge finding on second remand, contrary to the finding in his initial decision, as affirmed by the Fifth Circuit, that claimant is physically incapable of performing the walking foreman position, is harmless. *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

[5]The Board will not re-address in this appeal employer=s contention that augmentation of attorney=s fees is not authorized under the Act. This argument was rejected in our prior decision, *Zenon*, slip op. at 7, and that disposition is the law of the case. *See Ion*, 32 BRBS 268.

1992, to July 13, 1993, and continuing compensation thereafter of $282.10 per week for permanent partial disability. For the same reason, employer also challenges the award of any fee by Administrative Law Judge Kaplan in his Supplemental Decision and Order Awarding Attorney=s Fees for attorney time expended after the second remand, contending that claimant did not successfully prosecute the claim on remand.

Regarding the augmented fee awarded by Judge Brown, if enhancement of the fee for delay is warranted, the fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates or employ any other reasonable means to compensate claimant=s counsel for the delay. *See Missouri v. Jenkins*, 491 U.S. 274 (1989); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff=d mem.*, 202 F.3d 259 (4th Cir. 1999) (table). The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel=s services and the payment of his fee. *Allen v. Bludworth Bond Shipyard,* 31 BRBS 95 (1997). In the present case, the administrative law judge found in his decision on second remand, issued on October 4, 2001, that augmentation of the hourly rate was warranted for the services rendered between October 1990 and November 1993, which were the subject of the administrative law judge=s initial fee award in February 1994. The administrative law judge reasoned that, while employer contested claimant=s entitlement to compensation for disability after it suspended payments for temporary total disability on February 17, 1992, claimant prevailed after over ten years of litigation in securing a continuing award of compensation for permanent partial disability commencing July 13, 1993; this award amounts to over $14,000 in annual compensation.[6] The administrative law judge found claimant=s obtaining an award of $282.10 per week in this context more significant than his losing on second remand the previous award of continuing permanent total disability benefits. The administrative law judge also credited the quality of claimant=s attorney=s representation. As the administrative law judge rationally concluded that the augmented rate of $200 per hour is appropriate in determining the fee awarded to claimant=s counsel for work performed for services rendered between October 1990 and November 1993 in pursuing claimant=s entitlement to compensation, this augmented attorney fee=s award is affirmed. *See Anderson v. Director, OWCP*, 91

[6]Claimant also was awarded compensation for temporary total disability from February 18, to September 30, 1992, and for permanent total disability from October 1, 1992, to July 13, 1993.

F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Allen*, 31 BRBS at 97.

Addressing employer=s appeal of the attorney=s fee award of Administrative Law Judge Kaplan, 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 the claimant succeeds before the administrative law judge in obtaining greater compensation than that paid or tendered by employer. 33 U.S.C. ' 928(b); *see*, *e.g.*, *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In his supplemental decision, the administrative law judge rejected employer=s contention that claimant=s counsel should be denied a fee for work performed after the second remand from the Board. The administrative law judge found that claimant=s counsel has successfully prosecuted the claim since, on second remand, claimant received a compensation award for permanent partial disability. As employer initially challenged claimant=s entitlement to any compensation after it terminated voluntary payments on February 17, 1992, and has continued to do so throughout these proceedings, the administrative law judge=s rationale is in accordance with law, and we affirm his award of an attorney=s fee to claimant=s counsel. *See generally Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

Accordingly, the Decision and Order Upon Second Remand from the Benefits Review Board of Administrative Law Judge Brown and the Supplemental Decision and Order Awarding Attorney=s Fees of Administrative Law Judge Kaplan are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge