BRB Nos. 08-0706
and 08-0852

C. C. (Widow of J. C.) Claimant-Respondent v. C & D PRODUCTION SERVICES and ZURICH NORTH AMERICA Employer/Carrier- Petitioners	)	DATE ISSUED: 04/28/2009 DECISION and ORDER

Appeals of the Decision and Order – Granting Benefits, Order Denying Employer and Carrier's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees and Costs of Larry W. Price, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Ross Diamond III (Diamond, Hasser & Frost, LLP), Mobile, Alabama, for claimant.

Sidney W. Degan III, Travis L. Bourgeois and Christopher J. Stahulak (Degan, Blanchard & Nash), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits, Order Denying Employer and Carrier's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees and Costs (2007-LHC-01359) of Administrative Law Judge Larry W. Price and the Compensation Order Award of Attorney's Fees (Case No. 07-178784) of District Director David A. Duhon 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.,* as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 will not be set aside unless shown by the challenging party 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).

Claimant's husband (decedent) went into cardiac arrest on September 8, 2006, while employed by employer as a crane mechanic on an offshore oil rig; efforts to revive him failed. Claimant thereafter sought death benefits and an award of funeral expenses under the Act. *See* 33 U.S.C. §909.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), based on evidence that stair climbing during the course of decedent's employment on the date of death precipitated cardiac arrest. After finding the Section 20(a) presumption rebutted, the administrative law judge credited the opinion of Dr. Lester over that of Dr. O'Meallie, and found that decedent's work contributed to his death. In denying employer's petition for reconsideration, the administrative law judge reiterated his rejection of Dr. O'Meallie's deposition testimony and his finding that decedent was engaged in work activities prior to the onset of chest pain that contributed to his death. Thus, the administrative law judge awarded death benefits.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $40,510.10, representing 108.5 hours of attorney services at a rate of $327 per hour, and costs of $5,105.10. In response to employer's objections to the fee petition, claimant's counsel reduced the hours claimed to 94.4 to account for work performed before the district director. In his supplemental decision, the administrative law judge found counsel entitled to the requested hours at an hourly rate of $250, and he approved the requested expenses. Accordingly, the administrative law judge awarded claimant's counsel a fee totaling $28,705.10. Claimant's counsel also submitted a fee petition to the district director requesting a fee of $5,850. Claimant's counsel subsequently reduced his requested hourly rate to the $250 rate awarded by the administrative law judge. In his compensation order, the district director disallowed time expended prior to the date that employer received notice of the claim and .6 of an hour for clerical activity. The district director approved the requested hourly rate of $250, and counsel was awarded a fee of $4,325.

On appeal, employer challenges the administrative law judge's finding that decedent's death is related to his employment. Employer also challenges the administrative law judge's fee award. BRB No. 08-0707. In addition, employer appeals the district director's fee award. BRB No. 08-0852. Claimant responds, urging affirmance of the administrative law judge's decisions awarding benefits and an attorney's fee, and the district director's order awarding an attorney's fee.

Employer first contends that the administrative law judge erred by finding claimant entitled to the Section 20(a) presumption. Employer asserts there is no evidence that decedent was actually working during the seven hours preceding his death. Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In establishing entitlement to benefits, claimant is aided by Section 20(a) of the Act, which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Under the aggravation rule, where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Therefore, in order to establish her *prima facie* case, and thus entitlement to invocation of the Section 20(a) presumption, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused, contributed to or accelerated decedent's death; rather, claimant must show only the existence of working conditions which could have caused, contributed to or hastened death. *See, e.g., Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The conditions of employment need not be unusually stressful or strenuous. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949).

It is uncontested that claimant established a harm, *i.e.*, her husband's death. EXs 12, 13. In finding the Section 20(a) presumption invoked, the administrative law judge credited the deposition testimony of decedent's co-workers that decedent assisted in the repair of a fuel gas compressor on the morning of September 8, 2008. Decision and Order at 4. This repair required that decedent twice walk up and down approximately 100 feet of stairs from the mechanics' office to the upper deck of the oil production platform where the compressor was located. CX 5; EXs 8 at 3-6; 9 at 3-4; 11 at 6, 9. The administrative law judge found that the compressor repair was completed sometime before noon and that it was a hot day. Tr. at 21; EX 8 at 9. While no employee testified

that they saw decedent later that day, the administrative law judge credited testimony that decedent would have gone back to his regular work. EXs 8 at 5; 9; 10 at 2-3; 11 at 3-4. The administrative law judge credited decedent's work schedule, which showed that decedent was scheduled to work four hours that day replacing a heater on a crane. CX 10. As decedent had performed other work in the morning, the administrative law judge inferred that during the afternoon of September 8, 2006, decedent climbed up and down stairs from the mechanics' office to the deck of the platform to work on the crane. Decision and Order at 4; *see* CX 5. The administrative law judge credited Dr. Lester's testimony that stair climbing precipitated an episode of ischemia prior to decedent's cardiac arrest to find that claimant established working conditions that could have caused her husband's death. Decision and Order at 7; *see* CX 14 at 4. On reconsideration, the administrative law judge recognized that there is no eyewitness testimony addressing decedent's activities during the afternoon of his death, but he reiterated his finding that the weight of the evidence established that decedent performed the scheduled crane repair. Order Denying Employer and Carrier's Motion for Reconsideration (Order on Reconsideration) at 1-2.

The administrative law judge acted within his discretion in crediting the deposition testimony of decedent's co-workers and Dr. Lester, the physical lay-out of employer's offshore oil production facility, and decedent's work schedule to find that claimant established the working conditions element of her *prima facie* case. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). This evidence is sufficient to establish that decedent's working conditions could have caused or contributed to his death. *Bell Helicopter Int'l, Inc. v. Jacobs,* 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984), *aff'g Darnell v. Bell Helicopter, Int'l,* 16 BRBS 98 (1984). As substantial evidence supports the administrative law judge's finding, his consequent invocation of the Section 20(a) presumption is affirmed. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Employer next challenges the administrative law judge's finding, based on the record as a whole, that decedent's death was related to his working conditions on September 8, 2006. Once the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that decedent's death was not caused by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where, as here, the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See*

Santoro v. Maher Terminals, Inc., 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer contends the administrative law judge erred by crediting the opinion of Dr. Lester over that of Dr. O'Meallie and in finding that decedent was engaged in strenuous work activity prior to the onset of chest pains that precipitated cardiac arrest. After finding the opinion of Dr. O'Meallie sufficient to rebut the Section 20(a) presumption, the administrative law judge found more persuasive Dr. Lester's opinion that decedent's work activities contributed to his death by precipitating an episode of ischemia. Decision and Order at 9. Dr. O'Meallie opined that, given decedent's cardiac health, he would have sustained a cardiac event regardless of his work activities. EX 17 at 4-5. The administrative law judge found that, in forming his opinion, Dr. O'Meallie assumed that decedent was inactive when he experienced chest pains. *See* EX 17 at 4. The administrative law judge, however, credited the deposition testimony of decedent's co-workers that decedent should have returned to his normal duties after finishing the compressor repair in the morning. The administrative law judge found that decedent was scheduled to spend four hours repairing a crane and he reasonably inferred that decedent did so. The administrative law judge rationally found that this work involved climbing stairs on a hot afternoon, and he found it unlikely that employer would pay decedent $23 per hour to rest when he was scheduled to work. On reconsideration, the administrative law judge rejected employer's assertion that decedent was relatively inactive when he first experienced chest pains. Specifically, employer relied on deposition testimony that decedent was standing in a hallway at approximately 3:30 in the afternoon talking to the Offshore Installation Manager before he was advised to see the medic, in whose office he went into cardiac arrest. EX 11 at 4. The administrative law judge found that decedent's chest pains began sometime prior to this conversation. Order on Reconsideration at 2. The administrative law judge also found that Dr. O'Meallie based his opinion that decedent's cardiac arrest was not triggered by exertion on the mistaken assumption that decedent's autopsy report showed plaque rupture. EXs 13; 17 at 3, 6. The administrative law judge found that Dr. O'Meallie agreed with Dr. Lester that the process of climbing one hundred feet of stairs several times a day could trigger cardiac arrest in a person with heart disease. Decision and Order at 10; *see* EX 17 at 6-7. The administrative law judge concluded that claimant established by a preponderance of the evidence that decedent's heart attack and death were related to his employment.

In adjudicating a claim, an administrative law judge is entitled to determine the weight to be accorded to the evidence of record. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection from among competing inferences must

be affirmed if it is supported by substantial evidence and in accordance with law. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp.*, 300 F.2d at 742. In this case, the administrative law judge thoroughly reviewed all the evidence, and his findings and inferences as to the sequence of decedent's work activities on September 8, 2006, and that decedent was engaged in strenuous activity prior to the onset of chest pain is rational and supported by substantial evidence. The law is clear that "to hasten death is to cause it." *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955); *Henderson*, 175 F.2d 863; *Fineman*, 27 BRBS 104. The administrative law judge rationally rejected the opinion of Dr. O'Meallie and credited the opinion of Dr. Lester that stair climbing precipitated decedent's cardiac arrest; Dr. Lester's opinion constitutes substantial evidence supporting the administrative law judge's finding that decedent's death was related to his employment. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). As the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, we affirm the administrative law judge's conclusion that decedent's death was work-related. *Gooden*, 135 F.3d at 1069, 32 BRBS at 61(CRT); *Henderson*, 175 F.2d 863; *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Accordingly, we affirm the award of death benefits.

We next address employer's appeal of the administrative law judge's and district director's fee awards. Employer contends that the awarded hourly rate of $250 is excessive. We reject employer's contention. Section 702.132, 20 C.F.R. §702.132, provides that the award of an attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues, and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Comm. of the Pacific Mar. Ass'n.*, 22 BRBS 434 (1989). The administrative law judge agreed with employer that the requested hourly rate of $327 was excessive. However, he found counsel entitled to a fee based on an hourly rate of $250, pursuant to the factors enumerated in Section 702.132. The administrative law judge found that the quality of the representation, the vigorousness of employer's defense, and the complexity of issues warranted such an award. The district director applied the regulatory criteria and found a rate of $250 per hour reasonable for this claim, as reflected by the rate awarded by the administrative law judge. As employer has not satisfied its burden of showing that the administrative law judge and district director abused their discretion in awarding a fee based on their determination as to appropriate hourly rate given the circumstances of this case, we affirm the rate awarded. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 251, 253 (1998) (decision on recon. *en banc*).

Employer objects to alleged block entry billing and also argues that the counsel's fee petitions improperly use a quarter-hour minimum billing rate, contrary to the criteria set forth in the decisions of the United States Courts of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished). *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).[1] The administrative law judge found that claimant's counsel's billing method is reasonable and in compliance with law. The district director also rejected employer's contention that claimant's billing method is prejudicial to it, as he found that counsel's listing of more than one service per entry does not prevent adequate review.[2] Upon review of claimant's counsel's fee petitions, the administrative law judge did not err in finding the fee petition conforms to the criteria set forth by the Fifth Circuit, *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT), nor did the district director abuse his discretion in approving the billing method in this case. We also reject employer's contention that certain entries on the fee petition fail to adequately describe the nature of the time expended. The entries in claimant's counsel's fee petitions are sufficiently specific to satisfy the regulatory criteria. *See Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132(a).

We reject employer's assertion that the administrative law judge's and district director's awards of an attorney's fee are premature. Fee awards do not become effective, and thus are not enforceable, until all appeals have been exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *see also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Williams v. Halter Marine Serv., Inc.* 19 BRBS 248 (1987). Thus, the administrative law judge and district director may enter a fee award while an appeal is pending.

Finally, employer challenges the district director's assessment of an attorney's fee against employer for services rendered from the date employer received notice of the employee's death from the district director's office on October 13, 2006.[3] Employer

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[1] In *Fairley* and *Biggs*, the Fifth Circuit, within whose jurisdiction this case arises, stated that, generally, attorneys should charge no more than one-quarter of an hour for preparation of a one-page letter, and one-eighth of an hour for review of a one-page letter.

[2] Employer did not raise its quarter-hour minimum billing objection before the district director.

[3] In its reply brief, employer states that it filed a notice of controversion on September 22, 2006. Therefore, employer's fee liability commences on the date that it

contends that it is not liable for a fee under Section 28(a), 33 U.S.C. §928(a), until November 27, 2007, when the district director's office provided it with notice of the claim for death benefits.[4] *See* EX 1 at 3. The Fifth Circuit and the Board have held that employer's receipt of written notice of a claim from the district director is the earliest date from which employer can be liable for an attorney's fee pursuant to Section 28(a). *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). In this case, Section 28(a) is applicable since employer did not voluntarily pay any compensation prior to the administrative law judge's award of death benefits. The Act specifically commences employer's fee liability as of the date employer receives from the district director a notice that "a claim for compensation" has been filed. On October 13, 2006, the date the district director commenced employer's fee liability, employer contends it received only Form LS-201, Notice of Employee's Injury or Death. The record before us does not contain the LS-201 Form or any documents in the administrative file that the district director's office may have forwarded to employer on October 13, 2006. Thus, we cannot ascertain whether this form contains sufficient information to constitute a claim for compensation under the Act. *See Alario*, 355 F.3d 848, 37 BRBS 116(CRT); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). Therefore, we must remand this case to the district director for further explanation

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received notice of the claim. *See Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

[4] Section 28(a) provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. §928(a)(emphasis added).

as to date employer received notice from his office of a claim for compensation. Employer's liability commences on this date. Accordingly, we vacate the district director's Order commencing employer's fee liability as of October 13, 2006. We remand for the district director to determine the date that employer received written notice of the claim for compensation and thus the date of the onset of employer's fee liability under Section 28(a).

Accordingly, the administrative law judge's Decision and Order – Granting Benefits, Order Denying Employer and Carrier's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees and Costs are affirmed. The district director's Compensation Order Award of Attorney's Fees is vacated, and the case remanded to determine the date employer's liability for a fee commenced. In all other respects, the district director's fee order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge