

KENT HEINZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOSS MARITIME	)	DATE ISSUED: 02/07/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Concerning Attorney's Fees and Costs of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Concerning Attorney's Fees and Costs (2004-LHC-746) of Administrative Law Judge Paul A. Mapes 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 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).

While claimant was working for employer on April 17, 1998, a steel plate struck his right arm and fractured his ulna and radius bones. Tr. at 27, 41-42; CX 4 at 1. Dr. Kretzler performed two surgeries. CX 4 at 1; CX 5 at 1-2. Employer voluntarily paid claimant disability benefits until March 2000, totaling \$56,070.35, and provided him with medical care. Claimant thereafter contended that he was entitled to additional benefits; specifically, claimant sought temporary total disability compensation from April 18, 1998, to February 24, 2003, and permanent partial disability compensation under the schedule for a nine percent impairment to the right upper extremity, or, in the alternative, an 18 percent impairment, based on an average weekly wage of \$602.13, if maximum medical improvement was found to have occurred earlier.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on February 16, 2000. Next, the administrative law judge determined that employer established the availability of suitable alternate employment on June 1, 2000, and that claimant's average weekly wage at the time of his work-injury was \$471.30. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from April 18, 1998, until February 15, 2000, permanent total disability compensation from February 16, 2000, until May 31, 2000, and permanent partial disability compensation for 43.68 weeks based on a 14 percent impairment rating starting on June 1, 2000. 33 U.S.C. §908(a), (b), (c)(1). In an Order Concerning Attorney's Fees and Costs, the administrative law judge denied claimant's counsel's request for an attorney's fee payable by employer.

On appeal, claimant contends that the administrative law judge erred in his determination regarding the nature of claimant's disability and the calculation of claimant's average weekly wage. Additionally, claimant challenges the administrative law judge's denial of his counsel's request for a fee payable by employer. Employer responds, urging affirmance of the administrative law judge's decision in all respects. Claimant has filed a reply brief, reiterating his arguments with respect to the date of maximum medical improvement and average weekly wage.<sup>1</sup>

## **MAXIMUM MEDICAL IMPROVEMENT**

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<sup>1</sup> Claimant additionally argues that the medical testing performed by Drs. Kretzler and Coletti was fraudulent since neither doctor really believed that the testing would reveal a way to improve claimant's condition. As claimant does not cite to any evidence supporting his summary assertions, we will not address them.

Claimant initially challenges the administrative law judge's finding that claimant reached maximum medical improvement on February 16, 2000. In support of his assertion of error, claimant contends that Dr. Kretzler's opinion supports a determination that claimant's condition did not reach maximum medical improvement until February 24, 2003, because Dr. Kretzler was exploring the possibility that additional treatment might improve claimant's condition.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5<sup>th</sup> Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In concluding that claimant's back condition reached maximum medical improvement on February 16, 2000, the administrative law judge relied upon the opinion of Dr. Button, a board-certified orthopedic surgeon, who pronounced in February 2000 that claimant was "medically stationary with no further medical treatment necessary," and rated claimant with a 14 percent upper extremity impairment. CX 18 at 5. In making this determination, the administrative law judge considered the two cases which claimant cited to support his position that special deference should be accorded to a treating physician's opinion. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 528 U.S. 809 (1999); *Magallanes v. Bowen*, 881 F.2d 747 (9<sup>th</sup> Cir. 1989). The administrative law judge explained that these cases do not mandate that in every instance a treating physician's opinion must be given deference.<sup>2</sup> Decision and Order at 8. The administrative law judge then provided multiple bases supporting his conclusion. He reasoned that even though Dr. Kretzler, claimant's treating physician, and Dr. Coletti deferred the date of maximum medical improvement until obtaining the results of nerve conduction studies, the delay in obtaining these studies did not affect claimant's recovery, as nerve conduction studies are tests, not a form of treatment. The administrative law judge inferred from this record that had Dr. Kretzler known that the studies would show the absence of nerve injuries, he would have found maximum medical improvement in the latter part of 1999 or early 2000, following claimant's second surgery. CX 9 at 3; Tr. at 101, 102. The administrative law judge also found that there is evidence that claimant intentionally

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<sup>2</sup> These cases arise within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, where the instant case arises.

exaggerated his post-injury symptoms and that this exaggeration is what prompted Drs. Kretzler and Coletti to request the nerve conduction studies. Moreover, the administrative law judge stated that Dr. Coletti's opinion that claimant's condition could not be deemed stationary until it was determined whether the remaining titanium plate in claimant's arm was the cause of the alleged "locking sensation" in claimant's elbow is not supported by the other three physicians who examined claimant. He also found that although Dr. Coletti stated, after his June 18, 2004 examination of claimant, that his arm had improved substantially during the previous two years, the doctor actually increased his impairment rating, adding five percent to his prior impairment rating of nine percent. This addition resulted in a 14 percent impairment rating, which matches the rating imposed by Dr. Button on February 16, 2000. Lastly, the administrative law judge concluded that even if claimant's condition improved between 2002 and 2004 that fact alone would not preclude a finding of maximum medical improvement on February 16, 2000, based on Dr. Button's opinion. Decision and Order at 10. *See Watson*, 400 F.2d 649. Accordingly, as the administrative law judge addressed the totality of the medical evidence regarding this issue, and as the record contains substantial evidence to support the administrative law judge's determination, we affirm the administrative law judge's finding that claimant's condition reached permanency on February 16, 2000. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

#### AVERAGE WEEKLY WAGE

Claimant next challenges the administrative law judge's calculation of his average weekly wage at the time of his injury. Specifically, while acknowledging that the administrative law judge properly utilized Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate his average weekly wage at the time of his injury, claimant contends that his average weekly wage should be \$602.13, based on the \$31,310.85 he earned while working as a service writer and shop foreman at an automobile dealership during the 1996 calendar year.<sup>3</sup> It is well established, however, that 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 Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982), and that the administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9<sup>th</sup> Cir. 1979); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). Accordingly, the Board will affirm an

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<sup>3</sup> Claimant worked at an automobile dealership until July 1997. He then received unemployment benefits until February 9, 1998, at which time employer hired him as a maritime mechanic. The work-related injury in this case occurred on April 17, 1998.

administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Fox v. West State Inc.*, 31 BRBS 118 (1997).

In calculating claimant's average weekly wage, the administrative law judge found that claimant's earnings as a service writer and shop foreman in 1996, approximately two years prior to his work injury, should not be included as they do not represent claimant's annual earning capacity at the time of his injury.<sup>4</sup> Rather, the administrative law judge calculated claimant's average weekly wage by extrapolating it from claimant's earnings during the two and one-half month period that claimant worked as a marine mechanic for employer prior to his injury. Specifically, the administrative law judge found that, based upon an hourly rate of \$10.50 for the first 82.50 hours he worked for employer and \$11.27 thereafter, claimant earned a total of \$4,514.92 for 388 hours of work during this time. EX 12. Next, in order to reflect the increase in claimant's hourly rate over the last 305.5 hours that claimant worked for employer, the administrative law judge used that higher rate to conclude that claimant's average weekly wage at the time of his injury was \$471.30.<sup>5</sup>

The administrative law judge's determination is rational, is supported by substantial evidence, and represents a reasonable estimate of claimant's annual earning capacity at the time of his injury. *See Hicks*, 14 BRBS 549. While claimant correctly argues that the administrative law judge is not limited to the 52 weeks immediately preceding a work-related injury when calculating claimant's average weekly wage pursuant to Section 10(c), but rather may consider all of the employee's relevant work experience, *see Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5<sup>th</sup> Cir. 1991), the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity at the time of the injury. *Id.* In this case, the administrative law judge properly rejected claimant's 1996 earnings in an unrelated job in favor of extrapolating it from the wages claimant actually earned while working for

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<sup>4</sup> The administrative law judge also rejected employer's proposal that claimant's earnings should be based on a 40-hour work week, because this method overlooks the possibility that claimant could occasionally work more than 40 hours per week, as he did during the weeks preceding his injury. Tr. at 42; EX 12 at 69-71.

<sup>5</sup> In arriving at this sum, the administrative law judge calculated the earnings that claimant would have been paid over his two and one-half months of employment with employer in 1998 had claimant been paid at the higher hourly rate of \$11.27, \$4,578.44, and he divided this figure by the number of weeks claimant was employed by employer. While claimant challenges the administrative law judge's exclusion of wages earned by claimant in calendar year 1996, he does not assert error in the administrative law judge's specific calculation.

employer as a marine mechanic prior to his injury. Decision and Order at 11. As this result is reasonable and is supported by substantial evidence, the administrative law judge's determination of claimant's average weekly wage is affirmed.

### ATTORNEY'S FEE

Claimant also appeals the administrative law judge's denial of an attorney's fee payable by employer to his counsel. Claimant filed a fee application with the administrative law judge on January 31, 2005, requesting \$16,621.12 in fees and \$3,025.84 in costs. Employer filed objections to the fee petition.<sup>6</sup> In an Order Concerning Attorney's Fees and Costs, the administrative law judge denied the fee petition.

Claimant asserts that pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003), he is entitled to an attorney's fee under Section 28(a), because employer controverted the claim which he filed on June 26, 2000, and he prevailed on disputed issues at the hearing.<sup>7</sup> Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). See *Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002). Thus, under the plain language of Section 28(a), claimant must establish that his claim resulted in a "successful prosecution."

In *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), the United States Court of Appeals for the Ninth Circuit affirmed the Board's denial of a fee because of claimant's

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<sup>6</sup> Subsequent to the issuance of the administrative law judge's Decision and Order Awarding Benefits, the district director informed claimant that because the total value of the benefits which the administrative law judge awarded him, \$48,510.69, was \$7,559.66 less than the \$56,070.35 which employer had already paid, employer did not need to make any additional payments. Decision and Order Concerning Attorney's Fees and Costs at 1; Ex. A to Emp. Objections to Fee Application.

<sup>7</sup> Claimant states he is not seeking a fee pursuant to Section 28(b) of the Act, 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 in obtaining greater compensation than that which employer agreed to pay. Although employer made voluntary payments in this case, it terminated these benefits in March 2000, prior to the filing of the claim.

failure to successfully prosecute his claim for benefits for a back and a knee injury. Employer in that case voluntarily paid benefits for both injuries, terminating benefits for the knee injury upon completion of payments due under the schedule and ceasing payments for the back injury upon concluding that claimant was fabricating it. The claimant filed a claim for benefits and, nearly two years later, the employer offered to settle the claim for \$5,000. The claimant refused and sought a consolidated hearing on the claims for both injuries. Ultimately, the claimant was found entitled to \$932 more for his knee injury; the administrative law judge rejected the contention that the back injury was fabricated, but found that the back condition had resolved and claimant was entitled to nothing more for it. *Richardson*, 336 F.3d at 1104-1105, 37 BRBS at 81-82(CRT). Claimant's counsel thereafter sought a fee, and the fee was denied.

The Ninth Circuit determined that Section 28(a) of the Act applies to the back injury portion of the case before it, because, although the employer voluntarily paid compensation, it did not pay timely after receiving the claim for benefits, as the "relevant time period . . . begins with receiving notice of the claim, and ends thirty days after." *Id.*, 336 F.3d at 1105, 37 BRBS at 81(CRT) (citing *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001)). The court determined, however, that the claimant did not "successfully prosecute" his claim for benefits for his back injury. Specifically, in addressing whether or not there was a "successful prosecution," the court stated:

We are unaware of case law thoroughly discussing the "successful prosecution" requirement of section 928(a) and none was cited to us. We therefore look for guidance to similar fee-shifting statutes that require a party to "prevail," such as 42 U.S.C. §1988(b) [the Civil Rights Act]. While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9<sup>th</sup> Cir. 2000), he must obtain some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.' *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

*Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). The court concluded that the claimant in *Richardson* obtained only the "possibility of future relief." *Id.* Because he did not obtain any actual relief, "nominal, injunctive, or otherwise[.]" the court held claimant's counsel was not entitled to a fee for work on the back injury claim. *Id.* Thus, in order to have a "successful prosecution," there must be some "actual" relief. *See Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

In denying claimant's request for an attorney's fee payable by employer in the present case, the administrative law judge found that employer made voluntary payments to claimant which were \$7,559.66 more than the total amount which claimant was entitled to receive. Claimant argued below that he reached maximum medical

improvement on February 24, 2003; the administrative law judge found the date to be February 16, 2000. Therefore, claimant became entitled to permanent total disability compensation on February 16, 2000. Claimant then argued that employer did not establish the availability of suitable alternate employment and sought continuing permanent total disability compensation. The administrative law judge, however, found that employer established the availability of suitable alternate employment on June 1, 2000; consequently, claimant became entitled to a permanent partial disability award under the schedule at that time. 33 U.S.C. §908(c)(1). Claimant contended, in the alternative, that if he was found to have reached maximum medical improvement before February 24, 2003, his permanent partial disability rating should be 18 percent; the administrative law judge determined that it was 14 percent, the percentage employer had paid voluntarily. Finally, claimant alleged that his average weekly wage is \$602.13, which is the amount on which employer had based its voluntary payments of benefits to claimant; the administrative law judge, however, determined that claimant's average weekly wage at the time of his injury was \$471.30. Therefore, claimant was unsuccessful on all of the foregoing issues. Since employer had voluntarily paid temporary total disability benefits to claimant until March 8, 2000, as a result of the proceedings claimant obtained total disability benefits for an additional period, from March 9, 2000, to May 31, 2000. However, since employer was paying claimant benefits based on a \$602.13 average weekly wage, rather than the average weekly wage of \$471.30 which the administrative law judge found was warranted, any potential additional benefit was subsumed by employer's overpayment.

Contrary to the claimant's contention, he did not obtain "actual" relief as required by the Ninth Circuit's decision in *Richardson* and, accordingly, the holding in that case does not mandate the award of an attorney's fee payable by employer in the instant case. While claimant obtained an additional period of permanent total disability compensation, claimant received no actual additional benefits. In fact, employer made a substantial overpayment, and as claimant's entitlement is limited to permanent partial disability under the schedule, there are no continuing benefits which could one day overcome this credit. We also reject claimant's argument that he nonetheless prevailed because the \$471.30 average weekly wage which the administrative law judge awarded was higher than the \$450.80 which employer argued at the hearing was correct, as notwithstanding employer's position at the hearing, it voluntarily paid claimant compensation based on a higher average weekly wage of \$602.13. EX 1.

Therefore, because on these facts Claimant failed to obtain "some actual relief that 'materially alters the legal relationship between the parties by modifying [employer's] behavior in a way that directly benefits the plaintiff,'" *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT), we affirm the administrative law judge's conclusion that claimant has

not successfully prosecuted his claim under Section 28(a).<sup>8</sup> We therefore affirm the administrative law judge's determination that claimant's counsel is not entitled to an attorney's fee payable by employer. *See Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

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<sup>8</sup> In this case, the fact that there is no continuing award eliminates the possibility that claimant's entitlement could exceed employer's credit in the future. Claimant cites *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd in part on other grounds*, 1 F.3d 843, 27 BRBS 93(CRT) (9<sup>th</sup> Cir. 1993), for the proposition that an attorney may be entitled to an attorney's fee even though claimant might never receive additional benefits due to a large credit. *Cretan* is distinguishable because in that case claimant "successfully obtained an inchoate right to compensation," as he obtained a continuing award which could potentially exceed employer's credit. 24 BRBS at 44-45. Another case which claimant cites in support of his position, *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992), is distinguishable as well, because in that case, as a result of retaining counsel, claimant established employer's liability under the Act, thus "materially altering" the legal relationship between the parties. In this case, employer has no further legal liability toward claimant under the administrative law judge's Order, except possible future medical expenses, and claimant may seek a fee if medical expenses are ever necessary and contested by employer.

Accordingly, the Decision and Order Awarding Benefits and the Order Concerning Attorney's Fees and Costs of the administrative law judge are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge