BRB No. 92-1336

CHESTER COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUNGE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
INA/CIGNA	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (90-LHC-3250, 91-LHC-1437) of Administrative Law Judge Ben H. Walley 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).

On December 2, 1988, while in the course of his employment with employer, claimant injured his right hand while attempting to free a hose. Thereafter, on September 14, 1989, claimant again injured his right hand as well as his back while unlocking latches on the top of a barge. In his Decision and Order, the administrative law judge initially found that claimant established his *prima facie* case, and that causation had been established for the injuries to claimant's hand and back based

upon the record as a whole. Next, the administrative law judge determined that claimant was entitled to an award under Section 8(c)(1), 33 U.S.C. §908(c)(1), for the first injury to his right hand which resulted in a 15 percent impairment, to be followed by a period of temporary total disability compensation from April 20 to April 24, 1990, 33 U.S.C. §908(b). The administrative law judge further found that claimant was entitled to no compensation for the second injury to his right hand, as it had completely resolved without any loss of work, and that, as claimant remains temporarily totally disabled as a result of his back condition, he is entitled to temporary total disability compensation from April 25, 1990, and continuing. The administrative law judge further found that claimant's average weekly wage for compensation purposes was $413.41 at the time of his first injury and $432.40 at the time of his second injury, that claimant was entitled to reimbursement for the medical expenses of Drs. Stokes, Tamimie, Espenan, Adatto, Mimeles, Aprill, Beecher and Johnston, and that employer was not entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's findings regarding both the existence of a work-related back condition and causation. Additionally, employer contends that the administrative law judge erred in calculating claimant's average weekly wage for both injuries, in failing to address its evidence regarding the issue of suitable alternate employment, in holding employer liable for certain medical expenses, and in determining that employer is not entitled to relief pursuant to Section 8(f). Lastly, employer challenges the fee awarded to claimant's counsel by the administrative law judge. Claimant responds, urging affirmance.

I. Causation

Employer initially contends that the administrative law judge erred in finding that claimant established the existence of a back injury. We disagree. Claimant has the burden of proof to establish the existence of an injury or harm and that working conditions existed that could have caused the injury or harm in order to establish his *prima facie* case.[1] *See Volpe v. Northeast Marine Terminals*, 14 BRBS 17 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Claimant need not show that he has suffered a specific injury; rather, claimant need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In the instant case, the administrative law judge's finding that claimant established the existence of a low back condition is supported by substantial evidence. Specifically, the administrative law judge relied on claimant's testimony regarding the pain he experienced following the

[1]Employer does not challenge the occurrence of the two work-related incidents which precipitated claimant's claim for benefits under the Act.

work accident and the testimony of Drs. Phillips and Aprill that claimant's CT scan suggested a herniation of the L4-5 disc. Thus, as something has gone wrong within claimant's frame, we affirm the administrative law judge's finding that claimant has established the existence of an injury. *See id.*

Employer next challenges the administrative law judge's finding of causation. In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If employer meets its burden, the administrative law judge must then resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

In the instant case, the administrative law judge found that since claimant established his *prima facie* case he was entitled to the Section 20(a) presumption, that employer subsequently established rebuttal of the presumption, but that based upon the record as a whole claimant established that his low back condition is causally related to his September 14, 1989, work accident. Specifically, the administrative law judge relied on the medical opinions of Drs. Phillips, Aprill and Tamimie over the opinion of Dr. Espenan, who he found to be less qualified than the other physicians, and Drs. Mimeles and Johnston who, although asserting the lack of a back problem, recommended further testing to determine the condition of claimant's back. In challenging this determination, employer contends that the medical evidence and testimony provides substantial evidence that claimant's back condition is not related to his work accident. It is well-established, however, that, as the administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner, he may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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). In this case, the administrative law judge's decision to credit the opinions of Drs. Phillips, Aprill and Tamimie, in determining that claimant's back condition is related to his work accident, is rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Accordingly, we affirm the administrative law judge's determination that claimant has established a causal relationship between his back condition and his employment, as that finding is supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

II. Suitable Alternate Employment

Where claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See P & M Crane Co. v. Hayes,* 930 F. 2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985).

Employer contends that the administrative law judge erred in failing to address its evidence that suitable alternate employment existed within claimant's restrictions both at its facility and in the local area. Employer, in support of its position, submitted into evidence the testimony of Ms. Murrell, a vocational rehabilitation counselor, who opined that light duty work was available within claimant's restrictions both at employer's facility and in the local area. The administrative law judge, however, determined that claimant remained temporarily totally disabled based upon a finding that all of the physicians who examined claimant were in agreement that further diagnostic testing was needed so that an accurate determination could be rendered regarding claimant's back condition. Pursuant to this determination, the administrative law judge declined to address employer's evidence regarding the availability of suitable alternate employment. We hold that the administrative law judge committed no reversible error in this regard. Specifically, without a definitive diagnoses of claimant's back condition, the administrative law judge could not determine if claimant is physically capable of performing any positions established as available by employer. *See generally P & M Crane Co.,* 930 F.2d at 431, 24 BRBS at 122 (CRT); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). We therefore affirm the administrative law judge's determination that claimant remains temporarily totally disabled.

III. Average Weekly Wage

Employer next challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his first injury, contending that the administrative law judge, although citing to Section 10(c) of the Act, effectively used Section 10(a) when making that calculation. Additionally, employer asserts that the administrative law judge erred in accepting its LS-202 calculation of claimant's average weekly wage at the time of his second injury.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably

and fairly applied.

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores & Signal Administration, Inc. v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an 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 pert. part*, 600 F.2d 1288 (9th Cir. 1979). As actual earnings are not controlling, the administrative law judge may take into consideration in making his computation time lost due to a layoff. *See Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978). The Board will affirm an 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 Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

In the instant case, the administrative law judge, after initially noting that the calculation of claimant's average weekly wage as of the time of his first injury, December 2, 1988, should be made pursuant to Section 10(c), determined that claimant had earned an average daily wage of $82.68 in the year preceding his injury. Next, the administrative law judge multiplied this average daily wage by 260, and thereafter divided this sum, $21,497.23, by 52. *See* 33 U.S.C. §910(d). The administrative law judge, after specifically stating that this calculation best represented claimant's true earning capacity for his December 2, 1988 injury, thus found claimant's average weekly wage to be $413.41. *See* Decision and Order at 24-25. Although the calculation utilized by the administrative law judge mirrors the calculation contained in Section 10(a) of the Act, we note that the administrative law judge noted this similarity in specifically finding that the calculation used best reflected claimant's earning capacity. We hold that the result reached by the administrative law judge is reasonable, supported by substantial evidence, and is consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury. *See Gatlin*, 935 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). We therefore affirm the administrative law judge's determination of claimant's average weekly wage at the time of his December 2, 1988, injury.

In determining claimant's average weekly wage at the time of his second injury, September 14 1989, the administrative law judge found that the calculation submitted by employer in its LS-202 best reflected claimant's true earning capacity; thus, the administrative law judge concluded that claimant's average weekly wage as of September 14, 1989, was $432.40. Employer challenges the administrative law judge's decision to accept its calculation, contending that claimant bears the burden of establishing his earnings history and the average weekly wage applicable at the time of his injury. As employer has not challenged the accuracy of its calculation of claimant's average weekly wage as of September 14, 1989, we hold that the administrative law judge committed no error in finding that that calculation best reflected claimant's earning capacity at that time. Accordingly, we affirm the administrative law judge's determination of claimant's average weekly wage as of September 14, 1989.

IV. Medical Expenses

Section 7, 33 U.S.C. §907, of the Act generally requires that claimant receive authorization from employer prior to seeking medical help before employer will be held liable for claimant's medical expenses. Under Section 7(a) of the Act, 33 U.S.C. §907(a), employer is responsible for claimant's medical expenses that are related to his work injury. Once employer refuses to provide treatment or to satisfy claimant's request for treatment, claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). Claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for the injury in order to be entitled to such treatment at employer's expense. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Initially, we reject employer's contention that it should not be held liable for any treatment necessitated by claimant's back condition since that condition is not related to claimant's employment. As we have affirmed the administrative law judge's finding of a causal relationship between claimant's back condition and his employment, employer is responsible for claimant's medical expenses related to that injury.

Alternatively, employer asserts that it should not be held liable for the medical charges incurred by claimant as a result of treatment tendered by Drs. Phillips and Adatto.[2] In his decision, the administrative law judge did not address the requirements of Section 7; rather, without discussion, the administrative law judge summarily ordered employer to reimburse claimant for any past medical expenses which he had incurred as a result of his work-injuries, including the charges rendered by Drs. Phillips and Adatto. The administrative law judge's failure to discuss whether claimant complied with the requirements of Section 7 of the Act, however, makes it impossible for the Board to apply its standard of review. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Accordingly, we vacate the administrative law judge's determination that employer is liable for the medical charges of Drs. Phillips and Adatto, and we remand the case to the administrative law judge for consideration and discussion as to whether claimant complied with the specific requirements of Section 7 of the Act with regard to those two physicians.

[2]We note that employer does not contest its liability for the charges rendered by the remaining physicians of record.

V. Section 8(f)

Employer next contends that the administrative law judge erred in denying its request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). We disagree. In his decision, the administrative law judge awarded claimant continuing temporary total disability benefits. Section 8(f), however, does not apply to temporary disability benefits. *See Sizemore v. Seal and Co.*, 23 BRBS 101 (1989); 33 U.S.C. §908(f)(1); 20 C.F.R. §702.145(b). Accordingly, we affirm the administrative law judge's denial of Section 8(f) relief to employer.

VI. Attorney Fee Award

Lastly, employer appeals the attorney fee awarded by the administrative law judge to claimant's counsel. 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).

Subsequent to the administrative law judge's award of benefits, claimant filed a fee petition seeking $22,101.83, representing 159 hours of services at $125 per hour, plus expenses of $2,236.83. Employer filed objections to the fee request. After addressing employer's objections, the administrative law judge disallowed 34 of the hours requested by counsel, approved the hourly rate of $125 sought, and thereafter awarded counsel a fee of $15,625, plus expenses in the amount of $2,236.83.

Employer first contends that the lack of complexity of the instant case, as well as the hourly rates customarily awarded in the area where this case arose, mandates a reduction in the hourly rate awarded by the administrative law judge.[3] An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, the administrative law judge implicitly accepted the hourly rate requested as being reasonable; employer's mere assertion that the rate does not conform to reasonable and customary charges is insufficient to meet employer's burden of proving that the hourly rate awarded is excessive. Accordingly, we affirm the hourly rate awarded by the administrative law judge to claimant's counsel. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally challenges the number of hours requested by claimant's counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative

[3]We note that despite employer's contentions, this case involved numerous issues including, *inter alia*, the establishment of claimant's *prima facie* case, causation, nature and extent of disability, average weekly wage for two injuries, liability for medical expenses, suitable alternate employment and liability for attorney fees.

law judge set forth employer's specific objections to the number of hours requested by claimant's attorney and thereafter reduced the number of hours requested by counsel by 34, a reduction of over 21 percent. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Accordingly, we affirm the administrative law judge's award of attorney fees.

Accordingly, the administrative law judge's finding that employer is liable for the medical expenses for claimant's treatment by Drs. Phillips and Adatto is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge