BRB No. 00-0263

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| THEODORE GARRIS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: Nov. 3, 2000 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees (93-LHC-1662, 98-LHC-2411) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right knee on June 17, 1988, during the course of his employment as a welder. Claimant also sustained a work-related back injury on January 24, 1989.

Employer voluntarily paid claimant compensation for various periods of temporary total disability, 33 U.S.C. §908(b), caused by each injury. Claimant stopped working for employer in 1992 due to his knee injury. Thereafter, employer paid claimant compensation for a 20 percent permanent partial knee impairment. 33 U.S.C. §908(c)(2).

In 1993, claimant began working at Heritage Hall Nursing Home (Heritage) as a maintenance worker; he was working in this capacity at the time of the hearing. Claimant stated that the job is within the work restrictions imposed due to his knee impairment. Tr. at 22. Claimant also testified that he had no back problems when he stopped working for employer; however, in 1997 he developed back and left leg pain as a result of shifting his weight from his right leg. Tr. at 23, 32, 35. He reported this back pain to his treating physician, Dr. Archer, on July 10, 1997. EX 1(f),(g). During the course of his treatment for claimant's right knee injury, Dr. Archer also provided treatment for claimant's back pain. Specifically, he imposed additional work restrictions of no pushing or pulling, and he reduced from three to two the number of hours claimant could engage in bending. EX 1(f). Moreover, Dr. Archer opined that these restrictions, as well as those of no stooping and lifting over ten pounds, applied both to claimant's right knee and back conditions. EX 3. Claimant filed the instant claim for compensation based on his back pain, which he alleged is the natural and unavoidable result of his work-related right knee injury. Claimant also sought medical benefits for the left leg pain.

In his decision, the administrative law judge determined that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the back and left leg conditions, and that employer could not establish rebuttal thereof. Accordingly, the administrative law judge found claimant entitled to medical treatment for his left leg condition.[1] The administrative law judge then determined that, after claimant stopped working for employer and began working for Heritage, any decrease in claimant's wage-earning capacity was solely due to his right knee injury. Moreover, the administrative law judge found that claimant had no reduction in his wage-earning capacity since the onset of his back symptomatology in 1997. The administrative law judge therefore concluded that claimant is not entitled to permanent partial disability compensation for his back condition, pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), because he has been compensated under the schedule for his right knee condition and he has not had a reduction in wage-earning capacity due to his back condition. Claimant appeals the administrative law judge's finding that he does not have a loss in wage-earning capacity due to his back condition. Employer responds, urging affirmance.

[1]Employer did not challenge claimant's entitlement to medical benefits for his back condition.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $4,097.20, representing 27.46 hours at $200 per hour for counsel and $75 per hour for paralegal assistance, plus costs of $135.50. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel $1,410.90, representing a two-thirds reduction from the requested total of $4,232.90. Claimant appeals this reduction. Employer urges affirmance.

Claimant contends that the administrative law judge erred in finding that he has no loss in his wage-earning capacity due to his back injury, which occurred as the natural and unavoidable consequence of his work-related right knee injury. Claimant relies on *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), as support for his contention. In *Bass*, the Board held that if a claimant sustains a harm to a body part not specified in the schedule as a result of an injury to a scheduled member, he may also receive benefits under Section 8(c)(21) for the consequential injury in addition to the benefits under the schedule for the initial injury, if he establishes a loss in wage-earning capacity due to the consequential injury. *Bass*, 28 BRBS at 17-18. If two injuries are then being compensated separately, any loss of wage-earning capacity due to the scheduled injury must be "factored out" of the Section 8(c)(21) award.[2] *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th

[2]This inquiry requires simply that restrictions due to the knee not be considered in addressing any limitations on claimant's employability due to the back condition. For example, if a claimant has limitations due to a back injury which preclude some types of jobs and restrictions due to a knee injury which eliminate others, the job limitations due to the knee injury should not be considered. There is no danger of double recovery, however, if claimant's back injury alone could cause the entire loss in wage-earning capacity; claimant is entitled to benefits for the full loss in wage-earning capacity due to his back condition even if his right knee injury alone also resulted in restrictions. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 69 (1998), *modified in part*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). A schedule award for the knee alone cannot fully compensate claimant for the loss in earning capacity due to his back condition.

Cir. 1999), *modifying in part* 32 BRBS 67 (1998*); Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

We remand the case for the administrative law judge to reconsider whether claimant has a loss in wage-earning capacity due to his back injury. Section 8(c)(21), (e) of the Act, 33 U.S.C. §908(c)(21), (e), provides for award of partial disability benefits based on the difference between the claimant's pre-injury average weekly wage and post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 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. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the instant case, the administrative law judge summarily stated that claimant has not had any reduction in his wage-earning capacity since the onset of his back symptomatology. Decision and Order at 9. The administrative law judge, however, did not discuss the Section 8(h) factors to determine whether claimant's actual post-injury wages fairly and reasonably represent his wage-earning capacity, nor did he compare claimant's wage-earning capacity with his average weekly wage as required by Section 8(c)(21). Contrary to the administrative law judge's statement, the fact that claimant's back problems did not occur simultaneously with his knee condition, but arose later, does not affect this analysis; claimant is entitled to a determination of his wage-earning capacity given his restrictions due to his back condition and compensation for any resulting loss in wage-earning capacity. Further, the fact that claimant's actual wages have not decreased since the onset of his back symptomatology does not end the inquiry into whether claimant has a loss in wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); Tr. at 23. In addition, the administrative law judge did not discuss claimant's testimony regarding the limitations imposed by his back condition or Dr. Archer's opinion concerning the imposition of work restrictions due to claimant's back condition. *See* CX 6 at 6; EX 1(f); *see generally Cooper v. Offshore Pipelines, Inc.*, 33 BRBS 46 (1999).

On remand, therefore, the administrative law judge must apply Section 8(h) to determine if claimant has a loss in wage-earning capacity due to his consequential back

injury.[3] *Frye*, 21 BRBS at 197. If the administrative law judge determines that claimant has no present loss in wage-earning capacity, he may then consider claimant's entitlement to a nominal award. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). Nominal awards are appropriate where claimant has not established a present loss in wage-earning capacity, but has established that there is a significant possibility of future economic harm as a result of the injury. *Id.*

Claimant's counsel also appeals the fee award, contending the administrative law judge erred in awarding an attorney's fee which is substantially less than the requested fee. Based on the award of medical benefits for the left knee condition, the administrative law judge awarded claimant's counsel an attorney's fee and costs of $1,410.90, instead of the requested fee and costs of $4,232.70.

In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge considered the fact that claimant had not succeeded in obtaining disability compensation, acknowledged that counsel had succeeded in obtaining medical benefits, and thereafter made a percentage reduction in the requested fee based on claimant's limited success in pursuing his claim. The administrative law judge's reduction is consistent with the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), and we reject claimant's assertions of error in this regard. Specifically, the Supreme Court held in *Hensley* that an attorney's fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436; *see also Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). Moreover, we reject claimant's contention that employer must object to the fee petition before the administrative law judge may reduce the requested fee as the administrative law judge must apply the regulatory criteria and relevant case law in reviewing a fee petition. *See* 20 C.F.R. §702.132; *see also Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Thus, if no additional benefits are awarded

[3]On remand, the administrative law judge should also address the parties' apparent stipulation that claimant sustained a loss of wage-earning capacity of $307.72 per week in the event that claimant establishes that his back condition arose out of the injury to his right knee. Tr. at 7-8. Should claimant be found entitled to a permanent partial disability award for a loss of wage-earning capacity, the administrative law judge must then address employer's request for Section 8(f) relief. 33 U.S.C. §908(f).

on remand, the fee award is affirmed. If claimant is awarded additional compensation on remand, the administrative law judge must re-evaluate his fee award.

Accordingly, the administrative law judge's denial of disability compensation for claimant's back injury is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge