

BRB Nos. 02-0157 and 02-0157A

RUSSELL P. EVERITT )  
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 Claimant-Respondent )  
 Cross-Petitioner )  
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 v. )  
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 STEVEDORING SERVICES OF AMERICA )  
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 and )  
 )  
 HOMEPORT INSURANCE COMPANY ) DATE ISSUED: Oct. 30, 2002  
 )  
 Employer/Carrier-Petitioners )  
 Cross-Respondents )  
 )  
 MARINE TERMINALS CORPORATION )  
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 and )  
 )  
 MAJESTIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 Cross-Respondents )  
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 RUSSELL P. EVERITT ) BRB Nos. 02-0615 and  
 ) 02-0615A  
 Claimant-Cross-Respondent )  
 )  
 v. )  
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 STEVEDORING SERVICES OF AMERICA )  
 )  
 and )



Stevedoring Services of America (SSA) appeals, and claimant cross-appeals, the Decision and Order, Decisions on Motions for Reconsideration, Second Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order - Awarding Attorney Fees (2000-LHC-231, 2000-LHC-1170, and 2000-LHC-1171) of Administrative Law Judge David W. Di Nardi rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). Marine Terminals Corporation (MTC) appeals, and SSA cross-appeals, the Compensation Order Approval of Attorney Fee (OWCP Nos. 14-116045, 14-123192, 14-126650) of District Director Karen P. Staats. We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 sustained work-related injuries as a result of three separate accidents occurring on March 25, 1994, August 5, 1996, and October 14, 1997. The March 25, 1994, and October 14, 1997, accidents occurred while claimant was working for SSA. At the time of the August 5, 1996, accident claimant worked for MTC. Claimant was diagnosed with lumbar disc syndrome and psychological problems, all of which were related to one or more of his work accidents. The record reflects that each employer voluntarily paid periods of compensation with regard to the injuries sustained while claimant was in its employ, and that SSA was voluntarily paying claimant temporary total disability benefits at the maximum statutory rate for the October 14, 1997, work injury.

In his Decision and Order Awarding Benefits dated April 4, 2001 (ALJ Decision I), the administrative law judge determined that claimant was entitled to various periods of temporary total and permanent partial disability benefits, as well as all reasonable and necessary medical benefits required as a result of the work-related injuries sustained on August 5, 1996 and October 14, 1997. SSA, as claimant's last employer, was held liable for medical benefits for claimant's psychological condition, which was determined to be in part work-related. Claimant, SSA and MTC each filed timely motions for reconsideration before the administrative law judge.

In his Decisions on Motions for Reconsideration dated August 7, 2001 (ALJ Decision II), the administrative law judge initially decreased claimant's post-injury wage-earning capacity for the period between March 18, 1997, and October 13, 1997, from \$1,476.12 to \$1,259.16, thereby increasing the amount of claimant's award of permanent partial disability benefits, payable by MTC, for that period of time. The administrative law judge added that the permanent partial disability award would continue beyond the date of the work-related injury sustained on October 14,

1997, and thus run concurrently with the award of temporary total disability benefits payable by SSA for that subsequent work injury, so long as the total amount of the concurrent awards did not exceed the statutory maximum amount. The administrative law judge also modified his award of temporary total disability benefits for the work injury sustained on October 14, 1997, to reflect that claimant is not entitled to these benefits for those weeks during which he was able to return to work, and added that upon his return to work, claimant may be entitled to an ongoing award of temporary partial disability benefits related to the injuries sustained as a result of the October 14, 1997, work accident. Lastly, the administrative law judge added that MTC is entitled to Section 8(f) relief, 33 U.S.C. § 908(f), for its payment of permanent partial disability benefits related to the August 6, 1996, work injury. MTC and SSA again sought reconsideration of the administrative law judge's decisions.

In his Second Decision on Motion for Reconsideration dated October 12, 2001 (ALJ Decision III), the administrative law judge modified his prior decisions to reflect claimant's entitlement to temporary partial disability benefits between September 20, 1996, and March 17, 1997, and then permanent partial disability benefits from March 18, 1997, until October 13, 1997, based on a post-injury wage-earning capacity of \$1,328.51. Additionally, the administrative law judge found, based upon an application of the "last employer rule," that SSA is solely liable for any and all benefits due claimant subsequent to the work-related injury sustained on October 14, 1997, *i.e.*, an award of temporary total disability benefits, now based on an average weekly wage of \$1,936.04, until claimant returns to work. Accordingly, the administrative law judge modified his decisions to reflect that claimant is not entitled to permanent partial disability benefits payable by MTC subsequent to the October 14, 1997, work injury.<sup>1</sup>

Claimant thereafter submitted a petition before the administrative law judge requesting an attorney's fee of \$53,288.15. MTC and SSA each filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney Fees (ALJ Decision IV), the administrative law judge awarded claimant an attorney's fee totaling \$38,752.26, finding SSA liable for \$27,253.47, and MTC liable for \$11,498.79.

Claimant's counsel also filed an attorney's fee petition with the district director for work performed between December 23, 1996, and October 22, 1999, seeking a fee totaling \$17,139.66. In her Compensation Order Approval of Attorney Fee, the district director reduced the hourly rates for attorney work and paralegal work, as well as the number of total hours of work performed. The district director awarded

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<sup>1</sup>The administrative law judge also found that Section 8(f) is not applicable since MTC's liability for permanent partial disability benefits did not exceed the requisite 104 weeks.

claimant an attorney's fee of \$3,902.76, to be paid by MTC, and of \$6,700.51, to be paid by SSA.

SSA and claimant appeal the administrative law judge's three decisions on the merits, BRB Nos. 02-0157/A respectively, and SSA additionally appeals the administrative law judge's supplemental award of an attorney's fee. MTC and SSA appeal the district director's Compensation Order Approval of Attorney Fees, BRB Nos. 02-0615/A. In an Order dated June 12, 2002, the Board consolidated these appeals for purposes of decision.

On appeal, SSA challenges the administrative law judge's findings regarding claimant's post-injury wage-earning capacity following the August 6, 1996, injury in MTC's employ, claimant's average weekly wage following the October 14, 1997, SSA injury, the award of temporary total disability benefits commencing October 14, 1997, his application of the "last employer rule," and his award of an attorney's fee and costs. On cross-appeal, claimant challenges the administrative law judge's conditional award of temporary total disability benefits. On appeal of the district director's attorney's fee award, MTC challenges the equal apportionment of an attorney's fee against it and SSA. On cross-appeal, SSA challenges the district director's attorney's fee award on various grounds. SSA, MTC, and claimant have filed response briefs with regard to all of the appeals in this case.

### **Administrative Law Judge's Decisions on the Merits**

SSA asserts that the administrative law judge erred in calculating claimant's average weekly wage for the 1997 injury pursuant to Section 10(a), 33 U.S.C. '910(a), rather than Section 10(c), 33 U.S.C. '910(c). SSA maintains that the administrative law judge's reliance on the decision by the United States Court of Appeals for the Ninth Circuit in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), to apply Section 10(a) in calculating claimant's average weekly wage for the 1997 injury, and his classification of claimant as a six-day a week worker, are incorrect.<sup>2</sup>

Section 10(a) applies where an employee worked substantially the whole of

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<sup>2</sup>We decline to address SSA's contention that the administrative law judge committed a mathematical error in calculating the rate of payment of permanent partial disability benefits following the injury sustained on August 5, 1996, since the administrative law judge terminated that award following the occurrence of the 1997 SSA injury, and neither claimant nor MTC has appealed the administrative law judge's wage-earning capacity finding following the 1996 injury. To the extent that claimant's post-injury wage-earning capacity after the 1996 injury affects claimant's entitlement to concurrent awards, this issue will be addressed *infra*.

the year preceding the injury and looks to the actual wages of the injured worker as the monetary base for a determination of the amount of compensation. 33 U.S.C. ' 910(a); see *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). To calculate average weekly wage under this section, the employee' s actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine an average daily wage. 33 U.S.C. ' 910(a). The average daily wage is then multiplied by 260 for a five-day per week worker and 300 for a six-day per week worker, 33 U.S.C. §910(a), and the quotient is divided by 52 pursuant to Section 10(d), 33 U.S.C. ' 910(d), to determine the employee' s average weekly wage.

With regard to the average weekly wage for the October 14, 1997, injury, the administrative law judge, citing *Matulic* and using Section 10(a), divided claimant' s total earnings of \$78,518.06 for the one year period immediately preceding the October 14, 1997, injury, by 284 actual working days<sup>3</sup> to arrive at a daily wage of \$335.58, which he then multiplied by 300, to get average annual earnings of \$100,674.00, which he in turn divided by 52 to arrive at an average weekly wage of \$1,936.04. In *Matulic*, the court held that the use of Section 10(a) is required if the employee worked at least 75 percent of the available workdays and the number of days the employee worked is a known factor. *Matulic*, 154 F.3d at 1058, 32 BRBS at 151(CRT). In addition, the Ninth Circuit stated that Section 10(c) may not be invoked merely because a calculation under Section 10(a) would inflate claimant' s actual earnings. *Id.*

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<sup>3</sup>We note that this appears to be a typographical error as the administrative law judge' s decision indicates he used 234 as the number representing the actual work days (248 days minus 14 vacation/holiday days).

In the instant case, the PMA records support the administrative law judge's findings with regard to the one-year period immediately preceding claimant's October 14, 1997, work injury, *i.e.*, that claimant's employment was continuous and regular and that he was employed for "substantially the whole of the year," as he worked more than 75 percent of the available number of work days in that period. See SSA X 1; CX 49. Thus the administrative law judge's use of Section 10(a) to calculate claimant's average weekly wage for the October 14, 1997, injury is affirmed as it is supported by substantial evidence and in accordance with law. *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT); *Duncan*, 24 BRBS 133. We hold, however, that the administrative law judge's characterization of claimant as a six-day per week worker is not supported by the evidence of record. In discussing claimant's average weekly wage for purposes of the October 14, 1997, injury, the administrative law judge found that "claimant is a six day a week worker." ALJ Decision III at 3. The administrative law judge provided no basis for this finding.<sup>4</sup> *Id.* The PMA records establish that claimant worked, at most, a total of 249 days in the one-year period immediately preceding the October 14, 1997, work injury. The records indicate that claimant worked six days or more a week in 22 weeks, five days per week in 14 weeks, four days per week in 8 weeks, and three days per week or fewer in six weeks. CX 49. This evidence demonstrates an average number of 4.8 days of work per week, and the administrative law judge therefore erred in summarily finding that claimant was a six-day per week worker. Accordingly, we modify the administrative law judge's decision on this issue to hold that claimant must be considered a five-day per week worker at the time of his October 1997 injury. We thus modify his calculation of claimant's average weekly wage for purposes of the October 14, 1997, work injury to \$1,677.74.<sup>5</sup>

SSA further avers that the administrative law judge erred by applying the "last employer rule" in this case and in not providing for concurrent awards of permanent partial and temporary total disability benefits to be paid respectively by MTC and SSA, as discussed by the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995). SSA also requests that the Board direct MTC to reimburse SSA, with interest, to the extent that SSA paid compensation to claimant for which MTC is responsible.

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<sup>4</sup>In his first decision, the administrative law judge found that "claimant worked steadily from September 20, 1996, through March 17, 1997, (CX 49 at 307-311), [and] that he worked six days during most of those weeks (thereby establishing that he is a six-day-a-week worker . . .)." ALJ Decision I at 44.

<sup>5</sup>Claimant's actual earnings of \$78,518.06 divided by 234 yields an average daily wage of \$335.55. This figure multiplied by 260 for a five-day worker totals \$87,242.29, which divided by 52 establishes an average weekly wage for the October 14, 1997, work injury of \$1,677.74.

In his last decision on the merits, the administrative law judge concluded, based on the Ninth Circuit's decision in *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9<sup>th</sup> Cir. 1991), that SSA is responsible for an award of temporary total disability benefits from October 14, 1997, and that the award of permanent partial disability benefits payable by MTC ceased as of that date. ALJ Decision III at 6. In so finding, he stated that the record does not support SSA's contention that claimant's wage loss after the August 5, 1996, injury was due to any medical condition related to that injury.<sup>6</sup> ALJ Decision III at 5. The Ninth Circuit has held that, in cases of multiple traumatic injuries, if the disability resulted from the natural progression of the prior injury, and would have occurred notwithstanding the subsequent injury, then the responsible employer is the one at the time of the initial injury. *Foundation Constructors, Inc.*, 950 F.2d at 624, 25 BRBS at 75(CRT), citing *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986). However, if the second injury aggravated, accelerated or combined with the earlier injury, resulting in claimant's disability, the employer for whom claimant worked at the time of the second injury is the responsible employer. *Id.*; see also *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon.*, 32 BRBS 251 (1998); *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997).

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<sup>6</sup>This statement prompted MTC to challenge, in its response brief, its liability for any permanent partial disability benefits. We decline to address this contention. MTC's response brief seeks to alter the administrative law judge's decision, and thus the issue should have been raised in an appeal to the Board rather than in a response brief. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991); *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

We hold that the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, see *Foundation Constructors, Inc*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311, and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue. *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631 (9<sup>th</sup> Cir. Feb. 26, 2001). Specifically, the administrative law judge considered whether claimant's current disability is due to the injury sustained with MTC in 1996, or is due instead to the effects of the subsequent injury sustained on October 14, 1997, while working for SSA. See *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311. In this regard, the record does not contain any medical opinions linking claimant's post-October 1997 disability to the 1996 injury with MTC.<sup>7</sup> Moreover, the opinion of Dr. Phillips supports the administrative law judge's conclusion that the 1997 injury aggravated claimant's pre-existing back condition.<sup>8</sup> As the administrative law judge's finding that SSA is liable for the full extent of claimant's disability following the October 1997 injury is supported by substantial evidence, it is affirmed *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311.

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<sup>7</sup>Dr. Dunn, who treated claimant following his August 5, 1996, work injury, released claimant to return to work without any restrictions as of September 20, 1996. MTC X 10. Drs. Wilson and Remington attributed claimant's condition to his 1994 injury. MTC Xs 16, 19. Moreover, claimant testified at the hearing that up until the October 14, 1997, work injury, he was not limited with regard to the kind of work which he could perform, Tr. at 91, and his wage records regarding his earnings in the year prior to the injury support this testimony. CX 49.

<sup>8</sup>Dr. Phillips performed surgery on claimant's back after the October 1997 injury. He stated that claimant "is disabled following an injury sustained on October 17, 1997, for which he underwent surgery." MTC X 10 at 127. Dr. Phillips stated that claimant is disabled primarily due to this injury. *Id.*

Moreover, in his last decision, the administrative law judge terminated claimant's permanent partial disability award for the 1996 MTC injury, and held SSA liable for temporary total disability benefits based on claimant's higher average weekly wage at the time of the 1997 injury. As we have discussed, there is no medical evidence linking claimant's condition after the 1997 injury to the 1996 injury. Furthermore, implicit in the administrative law judge's decision is a finding that claimant's wage-earning capacity after the 1996 injury had increased such that he was no longer disabled by the time of the 1997 injury. The administrative law judge found that claimant's wage-earning capacity after the 1996 injury was \$1,328.51,<sup>9</sup> and we have held that claimant's average weekly wage at the time of the 1997 injury was \$1,677.74. Where claimant suffers an injury which results in partial disability and subsequently suffers a second injury which results in total disability, claimant may receive concurrent awards for the two disabilities. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). The combined awards, however, may not exceed the amount of compensation to which claimant would be entitled for total disability. See 33 U.S.C. §908(a); *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995). It is appropriate, however, to terminate the first award if, as here, the evidence at the time of the second injury indicates that claimant's earnings increased such that he no longer had a loss in wage-earning capacity. See *Brady-Hamilton Stevedore Co.*, 58 F.3d 419, 29 BRBS 101(CRT); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9<sup>th</sup> Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). As the administrative law judge's finding that claimant no longer had a loss in wage-earning capacity due to the 1996 injury at the time of the 1997 injury is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that the permanent partial disability award terminates and that SSA is fully liable for temporary total disability benefits based on claimant's average weekly wage at the time of the 1997 injury.<sup>10</sup>

Lastly, SSA argues that since it was voluntarily paying temporary total disability benefits to claimant without an award, it was inappropriate for the administrative law judge to enter an indefinite award of temporary total disability benefits. In contrast, claimant, in his cross-appeal, argues that the administrative law judge erred by explicitly limiting claimant's entitlement to temporary total

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<sup>9</sup>SSA contends claimant's wage-earning capacity following the 1996 injury was \$1,254.66. See n. 2, *supra*. Whether the actual number is as stated in the administrative law judge's last decision, or is as SSA suggests on appeal, does not affect our analysis of this issue.

<sup>10</sup>Thus, as there are no concurrent awards, MTC does not have to reimburse SSA for any payments made to claimant after the October 1997 injury.

disability benefits to the period until he returns to work.

In his two decisions on reconsideration, the administrative law judge ordered, with regard to the payment of temporary total disability benefits by SSA, that: “[t]his award shall continue until claimant returns to work, at which time he may be entitled to an award of temporary partial disability benefits . . . .” ALJ Decision II at 20; ALJ Decision III at 7. The administrative law judge viewed this as a “reasonable compromise” between the parties’ respective positions on the propriety of a continuing award of temporary total disability benefits *in futuro*. ALJ Decision II at 14.

We hold that the administrative law judge’s conditional award of temporary total disability benefits in the instant case is not rational or supported by substantial evidence. In the absence of evidence that claimant is no longer impaired and can return to his usual work or that he retains a residual wage-earning capacity in his injured condition, claimant is entitled to an ongoing award of total disability benefits.<sup>11</sup>

See *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4<sup>th</sup> Cir. 2000). If SSA believes claimant is no longer totally disabled, the appropriate action is to file a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. See *id.*<sup>12</sup> Claimant’s entitlement to temporary total disability therefore does not automatically cease at the time he returns to work. Therefore, we strike the administrative law judge’s conditional language regarding claimant’s continued entitlement to temporary total disability benefits, *i.e.*, “this award shall continue until claimant returns to work. . . .,” and modify his decision to reflect claimant’s entitlement to an ongoing award of temporary total disability benefits commencing October 14, 1997.

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<sup>11</sup>Moreover, we observe that an employee may be found to be totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer’s beneficence. See *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1<sup>st</sup> Cir. 1991).

<sup>12</sup>We note that in its brief in support of its appeal of the attorney’s fee award, SSA states that since November 1, 2001, it has been paying claimant permanent partial disability benefits at the rate of \$417.69 per week, pursuant to an agreement with claimant.

## Appeals of the Attorney's Fee Awards

SSA asserts that the administrative law judge erred in finding it liable for 70 percent of the attorney's fees awarded in this case. SSA concedes its liability for an attorney's fee for work performed before the administrative law judge based on claimant's successful recovery of medical benefits for his psychological condition.<sup>13</sup> SSA contends, however, that the amount of the fee is excessive given that it was voluntarily paying claimant compensation at the maximum rate and that the administrative law judge's decisions did not result in claimant's obtaining additional compensation.

In his Supplemental Decision and Order – Awarding Attorney Fees, the administrative law judge initially reduced the requested fee based on a number of specific objections raised by MTC and SSA. He then concluded that SSA “not only vigorously litigated causation and the claimant's entitlement to psychiatric treatment, but also disputed the responsible employer and the average weekly wage.” ALJ Decision IV at 15. The administrative law judge then determined, based on the principles of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that a ten percent reduction of claimant's counsel's requested fee is reasonable given that claimant was not wholly successful in prosecuting the claim. With regard to apportionment of the common fees and costs, the administrative law judge determined that a seventy/thirty split respectively between SSA/MTC was reasonable and appropriate “in light of [his] Second Decision [and Order] on Motion for Reconsideration.” ALJ Decision IV at 17.

In his initial decision, the administrative law judge observed that claimant sought “an order awarding temporary total disability benefits (currently being paid voluntarily) for the October 14, 1997, injury and related medical benefits,” against SSA based on an average weekly wage of \$1,259.16, as well as a concurrent award payable by MTC. SSA countered by arguing that claimant's residual wage-earning capacity at the time of his October 14, 1997, injury and thus his average weekly wage for determining compensation due to that injury was \$880.40. In this regard employer sought to limit claimant's recovery for total disability benefits to \$586.96 (two-thirds of \$880.40). Thus, contrary to SSA's contention on appeal, the average weekly wage issue was not first raised by MTC in a motion for reconsideration. In the instant case, the administrative law judge ultimately awarded claimant temporary total disability benefits based on an average weekly wage of \$1,936.04, herein modified to \$1,677.74, which means that claimant is entitled to benefits at the maximum statutory rate. ALJ Decision III at 7. Although SSA was paying claimant at the maximum statutory compensation rate, by virtue of the administrative law judge's decision, claimant obtained an inchoate right to greater compensation. *E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993); *Kinnes*

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<sup>13</sup>Thus, we need not address SSA's contentions that pertain to the applicability of Section 28(b) of the Act, 33 U.S.C. §928(b).

*v. General Dynamics Corp.*, 25 BRBS 311 (1992).

Furthermore, we hold that SSA has not demonstrated that the administrative law judge's fee award is arbitrary or contrary to law. The administrative law judge appropriately recognized the applicability of *Hensley*, 461 U.S. 424, given that claimant was not fully successful in pursuing his claims, and reduced the total fee by 10 percent. See *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3<sup>d</sup> Cir. 2001). The issues in this case, moreover, involve a "common core of facts" and are based on related legal theories. See *Hensley*, 461 U.S. at 435-436. The issues of responsible employer and average weekly wage turn on the same findings of fact regarding whether claimant's disability was due to the aggravation of his pre-existing condition or to the natural progression of the pre-existing condition. See, e.g., *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). In turn, the average weekly wage and wage-earning capacity findings are interrelated with each other and with claimant's entitlement to concurrent awards. Under these circumstances, we cannot say that the administrative law judge's decision to reduce the fee by only ten percent is unreasonable. Cf. *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1<sup>st</sup> Cir.), *cert. denied*, 488 U.S. 992 (1988) (on facts of this case, claim for disability benefits and claim of discrimination under Section 49 are not interrelated or based on a common core of facts). Therefore, we affirm the administrative law judge's attorney's fee award.

SSA next contends that the administrative law judge erred in awarding the costs requested by claimant's counsel in this case as neither counsel, in her fee petition, nor the administrative law judge, in awarding these costs, provided a sufficient explanation or rationale as to why the requested costs were reasonable and necessary to the litigation of claimant's claims. SSA specifically challenges the administrative law judge's award as to the cost for the transcripts of Drs. Dickson and Hamm, particularly since the administrative law judge recognized that claimant had inadvertently double-billed for this work. SSA also avers that a number of the office expenses, such as fax, photocopying and long distance telephone charges,

were not adequately explained in the fee petition.<sup>14</sup>

Claimant's petition for an attorney's fee contains a general itemized Statement of Costs, wherein each expense is briefly defined and assigned an individual dollar figure representing its cost. With regard to the double billing for the depositions of Drs. Dickson and Hamm, the administrative law judge specifically disallowed "one of these charges in the amount of \$270.80." ALJ Decision IV at 18. However, the administrative law judge reduced the total cost request by only \$137.70. Thus, consistent with the administrative law judge's findings, we modify the award of costs to reflect a further reduction of \$133.10. The administrative law judge otherwise concluded that the remainder of the costs are reimbursable as necessary for the successful prosecution of the claim. *Id.* SSA has not established that the administrative law judge abused his discretion in awarding these costs. See generally *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order). Therefore, the administrative law judge's grant of these costs is affirmed. *Id.*

Turning now to the appeals of the district director's fee award, MTC argues that the district director's decision to apportion liability for certain attorney's fees evenly between it and SSA is flawed, as it is not commensurate with the limited liability for compensation which, as determined by the administrative law judge, is owed by MTC in this case. In its appeal, SSA asserts that it should not be assessed an attorney's fee for work performed prior to October 14, 1997, the date of the accident for which it is liable for compensation. SSA additionally argues that it should not be assessed an attorney's fee for issues that were not in controversy before the district director. In particular, SSA avers that no informal conference was held with regard to the payment of compensation and/or medical benefits related to the October 14, 1997, work accident and that no controversy existed until after June 25, 1999, at which time SSA controverted payment of Dr. Walker's bill for psychiatric services.

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<sup>14</sup>SSA further maintains that certain office expenses associated with copying and fax fees should be denied as they were undated and thus it is unclear as to whether these expenses were incurred while the case was pending before the Office of Administrative Law Judges. We decline to address this specific contention on appeal as it was not sufficiently raised before the administrative law judge below. See *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). In its objections to counsel's petition for an attorney's fee, SSA stated that it "will assume that all of the requested costs were incurred before the OALJ, and none were incurred before the OWCP so that all are subject to consideration of the ALJ." SSA Objections at 11. SSA added however that it "will object to an award of any costs before the OWCP." *Id.* This latter argument made by SSA before the administrative law judge is insufficient for SSA to argue, on appeal, that a number of expenses should be rejected because they represent costs incurred at the district director, rather than the administrative law judge, level. *Id.*

In her Compensation Order, the district director considered each of the objections raised by MTC and SSA with regard to claimant's counsel's application for attorney's fees. With regard to MTC's argument regarding apportionment of the joint fees incurred by claimant's counsel, the district director determined that "based on the contentiousness of the parties in these consolidated claims as reflected in the available record throughout the years-long period they were each at the OWCP level and thus before the ALJ assessed proportionate liability, it is reasonable to assess liability for attorney fees in equal portions (50% and 50%) to MTC and SSA for those services claimant's counsel has described as having pertained to both employers." Compensation Order at 3 (unpaginated). We hold that this is a rational basis for apportionment in this case. As the district director aptly noted, the employers in this case have vigorously and equally pursued their positions regarding the liability for benefits in this case. Contrary to MTC's contention, the district director is not bound to apportion fee liability in direct proportion to the award of benefits entered by the administrative law judge. Thus, the district director's decision to equally apportion those fees identified as pertaining to both employers is affirmed. See generally *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

We reject SSA's contention that it cannot be held liable for attorney's fees incurred on issues on which no informal conference was held. This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, which has held that a written recommendation by the district director is not required before liability attaches to an employer pursuant to Section 28(b). See *National Steel & Shipbuilding Co. v. United States Dept. of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9<sup>th</sup> Cir. 1979); see also *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986), citing *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986) (holding that an informal conference is not a prerequisite to employer's liability for claimant's attorney's fee, as the convening of an informal conference is an act within the district director's discretion). As claimant obtained a greater award by virtue of the proceedings before the administrative law judge than SSA paid voluntarily, SSA is liable for a fee for all reasonable and necessary services performed before the district director. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5<sup>th</sup> Cir. 1981); 20 C.F.R. §702.132.

In this regard, we reject SSA's contention that the district director erred in holding it liable for fees incurred prior to the occurrence of the October 1997 accident. SSA was claimant's last employer prior to the occurrence of the 1994 accident, for which, in connection with the MTC accident in 1996, informal conferences were held. Thus, SSA was not a disinterested bystander in these proceedings. Moreover, the district director found that, with regard to the October 1997 injury, while SSA initially contested only the issue regarding claimant's psychological condition, SSA ultimately contested all the interrelated issues presented to the administrative law judge, namely, responsible employer, average weekly wage, and wage-earning capacity. Under the facts of this case, SSA has not

demonstrated that the district director's determination that SSA is liable in the manner assessed is arbitrary or contrary to law. See generally *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Therefore, the district director's attorney's fee award is affirmed.

Accordingly, the administrative law judge's finding of claimant's average weekly wage for the October 14, 1997, injury is modified from \$1,936.04 to \$1,677.74 to reflect that claimant was, during the pertinent time period, a five-day per week worker. Additionally, the administrative law judge's "conditional" award of temporary total disability benefits is vacated, and the decision is modified to reflect that claimant is entitled to a continuing award of temporary total disability benefits as a result of the October 14, 1997, injury. In all other respects, the administrative law judge's decisions on the merits are affirmed. The administrative law judge's Supplemental Decision and Order - Awarding Attorney Fees is modified to reflect a further reduction of \$133.10 in

the awarded costs, consistent with his denial of a double recovery for the costs associated with the depositions of Drs. Dickson and Hamm. In all other aspects, the administrative law judge's award of an attorney's fee is affirmed. Lastly, the district director's Compensation Order Approval of Attorney Fee is 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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BETTY JEAN HALL  
Administrative Appeals Judge