BRB No. 09-0874

BERNARD D. BOROSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE	)	DATE ISSUED: 09/16/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting the Petition for Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Denty Cheatham (Cheatham, Palermo & Garrett), Nashville, Tennessee, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Relief

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand Granting the Petition for Section 8(f) Relief (2004-LHC-02359) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who began working for employer in Bosnia as a helicopter mechanic in January 2000, was exposed to chemical vapors while working in employer's blade shop. As a result of this exposure, claimant's eyes would become irritated and water. In April 2002, claimant's vision was reduced to distinguishing shapes and he lost color vision. His visual acuity at that time was measured at 20/400 in each eye. Claimant was diagnosed with atrophic maculopathy with reduced cone function and pigmentary dystrophy, or choroidal sclerosis.[1] Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a), from his last day of employment on April 19, 2002. The parties agreed that claimant is permanently totally disabled and that he would be entitled to benefits under the Act at the maximum compensation rate. Employer contested the cause of claimant's eye condition, and it submitted an application for Section 8(f) relief, 33 U.S.C. §908(f).

In his initial decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his eye impairment is work-related, and that employer established rebuttal thereof, and that based on the record as a whole, claimant's working conditions aggravated his underlying genetic eye impairment. The administrative law judge thus concluded that claimant established that his eye condition is work-related. He ordered employer to pay claimant benefits for permanent total disability from April 19, 2002, at the maximum compensation rate. The administrative

[1] Choroidal sclerosis, also known as choroideremia, is a genetic disorder of sight that usually affects males. Major symptoms of this disorder include a progressive loss of the peripheral field of vision and night blindness.

law judge found that employer is not entitled to Section 8(f) relief, as the evidence did not establish that claimant's pre-existing eye disorder was manifest to employer.

Employer appealed, challenging the administrative law judge's findings that claimant's genetic eye disorder was aggravated by his working conditions, and that it is not entitled to Section 8(f) relief. In its decision, the Board affirmed the administrative law judge's award of benefits, vacated the denial of Section 8(f) relief, and remanded the case for further consideration of that issue. *B.B. [Boroski] v. Dyncorp International*, BRB No. 08-0550 (Jan. 30, 2009) (unpub).[2] On remand, the administrative law judge found that employer established that claimant had a pre-existing visual disorder that was manifest to employer, and that claimant's current disability is not due solely to his work-related injury but rather was contributed to by his pre-existing visual disorder. Accordingly, the administrative law judge granted employer Section 8(f) relief.

On appeal, the Director asserts that the administrative law judge erred in granting employer's request for Section 8(f) relief. Specifically, the Director contends that the administrative law judge erred in finding that employer has satisfied the permanent partial disability and manifest elements for entitlement to Section 8(f) relief. Employer responds, urging affirmance of the administrative law judge's decision on remand. Claimant has filed a reply brief urging the Board to disregard employer's assertion that its challenge to the compensability of claimant's condition is preserved for purposes of appeal.[3] Claimant's co-counsel have each filed attorney's fee petitions for work performed before the Board in defending employer's prior appeal, BRB No. 08-0550.

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[2] Claimant's appeal of the Amended Supplemental Compensation Order of District Director Charles D. Lee, BRB No.08-0875, was consolidated with employer's appeal for purposes of decision. Specifically, claimant appealed the district director's conclusion that employer is not in default under Section 18(a), 33 U.S.C. §918(a). The Board affirmed the district director's finding that employer properly compensated claimant at the maximum compensation rate, and the district director's consequent declaration that employer is not in default under Section 18(a).

[3] Contrary to the position raised by claimant in his reply brief, employer is entitled to state its desire to preserve its Section 20(a) arguments for future appeal. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010) (employer may appeal the Board's initial decision remanding a case after the Board issues its final decision); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). We recognize that employer's arguments on this issue have been previously rejected and that the administrative law judge's findings have been affirmed. *See generally Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Section 8(f) of the Act shifts liability for compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that claimant had a manifest, pre-existing permanent partial disability and that his current permanent total disability is not due solely to the subsequent work injury. *See, e.g., C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

The Director argues that the administrative law judge erred in finding that the Board, in its prior decision, "resolved" the issue of whether claimant had a pre-existing permanent partial disability and thus, by concluding, without addressing any evidence, that employer established the pre-existing permanent partial disability element for purposes of Section 8(f) relief. The Board, in remanding this case, instructed the administrative law judge that he must "make an explicit finding as to the pre-existing permanent partial disability element." *Boroski*, slip op. at 7. Nonetheless, the administrative law judge concluded that since "the Board affirmed the finding that the claimant had a preexisting eye impairment that was aggravated by working conditions," the "question of a preexisting visual disorder has been resolved." *See* Decision and Order on Remand at 2, 4.

While the administrative law judge incorrectly interpreted the Board's prior decision to include a resolution of the pre-existing permanent partial disability element,[4] he also noted that Dr. Goldberg opined in 2006 that claimant had suffered from genetic eye abnormalities for some time. Decision and Order on Remand at 4. In particular, Dr. Goldberg stated that this condition was of a long-standing nature and that it pre-existed claimant's exposure to toxins and fumes while working for employer in Bosnia. HT at 682-83. Dr. Goldberg's *post-hoc* diagnosis is sufficient to establish the pre-existing permanent partial disability element for purposes of Section 8(f). *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989); *see also Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988). Thus, as claimant had a serious lasting physical condition, the pre-existing

[4] In reference to Section 20(a), the Board held that "the administrative law judge rationally found that claimant's eye condition is related, at least in part, to his workplace chemical solvent exposure," and thus, affirmed the administrative law judge's "conclusion claimant established that his eye condition is related to his employment in Bosnia." *Boroski*, slip op. at 6. This does not establish that claimant had a pre-existing permanent partial disability.

permanent partial disability element of Section 8(f) is satisfied in this case. *See generally Currie v. Cooper Stevedoring Co. Inc.*, 23 BRBS 420 (1990).

The Director next contends that the administrative law judge erred in finding that employer established that claimant's eye condition was manifest to employer prior to the work injury in 2002. The Director argues that the administrative law judge's reliance on the 2002 opinions of Drs. Gass and Sonkin, who "found substantial abnormalities of a genetic nature," and Dr. Goldberg's 2006 statement that claimant's genetic eye disorder would have been apparent to a specialist on an examination prior to 2002, to find that employer established the manifest element of the Section 8(f) is erroneous, as this evidence is legally insufficient to so establish.

A pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury employer had actual knowledge of the pre-existing condition or there were medical records in existence from which the condition was objectively determinable. *See C.G. Willis*, 31 F.3d 1112, 28 BRBS 84(CRT); *see also Ceres Marine Terminal v. Director, OWCP* [*Allred*], 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998); *Wiggins*, 31 BRBS 142; *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). The medical records pre-existing the injury need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem. *Wiggins*, 31 BRBS 142. Without a documented diagnosis there must be sufficient unambiguous information in the available record regarding a serious lasting physical condition. *Id.* However, it is not sufficient if the disabilities would have been "discoverable" by means of further testing. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987). Also insufficient are *post hoc* interpretations of pre-existing medical records. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

In its prior decision, the Board vacated the administrative law judge's conclusion that employer did not establish the manifest element for purposes of Section 8(f) relief, and instructed the administrative law judge that he should, on remand, "address, with reference to specific medical evidence, whether the manifest element is met with regard" to his pre-existing permanent disability finding. *Boroski*, slip op. at 7-8. On remand, the administrative law judge summarily concluded that employer met the manifest element because claimant's eye changes were increasing in severity prior to 2002, and because Dr. Goldberg "suggests that the disorder would have been apparent to a specialist on an examination prior to 2002." Decision and Order on Remand at 5.

We cannot affirm this finding. Dr. Goldberg, in September 2006, explained that claimant's medical records from 1988 through 2002, in conjunction with his present optical findings, establish that he has had a long-standing eye condition. This *post hoc* interpretation of claimant's pre-existing medical records cannot satisfy the manifest element as a matter of law.[5] *See B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007). Moreover, the administrative law judge improperly relied on Dr. Goldberg's 2006 statement that the disorder would have been apparent to a specialist on an examination prior to 2002. *White*, 812 F.2d 33, 19 BRBS 70(CRT); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983) (insufficient to contend that a medical condition would have been shown to exist had the proper medical tests been performed). Accordingly, we vacate the administrative law judge's finding that employer satisfied the manifest element. We remand the case to the administrative law judge to address the medical evidence pre-dating claimant's April 19, 2002, injury. The administrative law judge must address, with specificity, whether the pre-2002 evidence establishes that, at the time of the work injury, employer was constructively or actually aware of any serious and lasting physical condition, irrespective of whether the exact nature of claimant's condition was known.[6] *C.G. Willis*, 31 F.3d 1112, 28 BRBS 84(CRT).

Claimant's counsel, Mr. Cheatham, and appellate counsel, Mr. Gillelan, each request an attorney's fee for work performed before the Board in defense of employer's prior appeal of the administrative law judge's award of benefits. *Boroski*, BRB No. 08-0550 (Jan. 30, 2009). Specifically, Mr. Cheatham seeks an attorney's fee totaling $21,000, representing 60 hours of work at an hourly rate of $350, while Mr. Gillelan seeks an attorney's fee totaling $21,090, representing 44.4 hours of work at his now current hourly rate of $475. Employer objects to the fee petitions, arguing: (1) that the request for an attorney's fee is premature pending the final outcome of the litigation in this case; (2) that the requested hourly rates are unreasonable; and (3) that the amount of hours requested are excessive and likewise unreasonable.

[5] Similarly, the June and August 2002, opinions of Drs. Gass and Sonkin, as well as the March 23, 2006, deposition testimony by Dr. Routledge, cannot satisfy the manifest element. *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007).

[6] In the event that the administrative law judge finds that employer establishes the manifest element, the administrative law judge's finding that employer established the contribution element for purposes of Section 8(f) relief is affirmed as it is unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Employer contends that since there has been no final determination as to its ultimate liability for compensation and medical benefits, it cannot be held liable for any attorney's fees at this time. The Act provides that claimant's counsel is entitled to an attorney's fee for success in review proceedings before the Board, 33 U.S.C. §928(b); *Hole v. Miaimi Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), including instances where a claimant has been successful in defending against an employer's appeal. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988). The award of an attorney's fee, however, is not enforceable until such time as all appeals are exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987). Thus, the Board may enter a fee award at this time. *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

Employer next objects to the $350 and $475 hourly rates respectively requested by Mr. Cheatham and Mr. Gillelan. Specifically, employer argues that Mr. Cheatham has not put forth sufficient documentation to establish that his requested hourly rate of $350 represents "what is reasonable and necessary" in the Nashville, Tennessee area where his services were rendered. Employer contends that the Altman Weil 2008 Survey of Law Firm Economics establishes that for the relevant geographic area, *i.e.*, Tennessee, an hourly rate of $285 is more appropriate for Mr. Cheatham given his overall legal experience and limited exposure to Longshore Act or Defense Base Act cases. With regard to Mr. Gillelan's requested hourly rate of $475, employer maintains that it exceeds what is commonly awarded to attorneys of similar skill in the longshore community. Employer maintains that Mr. Gillelan's supporting documentation, *i.e.*, the *Laffey* Matrix and Altman Weil 2008 Survey of Law Firm Economics, is insufficient to establish Mr. Gillelan's entitlement to an hourly rate of $475. Rather, employer contends that an hourly rate of $300 more accurately reflects the prevailing market rate in the relevant legal community for similar services.

In support of his requested hourly rate of $350, Mr. Cheatham provided numerous examples that he has customarily charged and received an hourly rate of $350 for work he performed in 2008 and 2009, as well as affidavits from former Nashville Bar President Bill Harbison and "prominent" Nashville attorney George Barrett, wherein each opined, based on their knowledge of Mr. Cheatham and other practicing Nashville attorneys, that the requested hourly rate of $350 is reasonable. As noted above, employer counters with the Altman Weil 2008 Survey of Law Firm Economics which indicates a median hourly rate in Tennessee of $300. Employer, however, concedes that the Altman Weil Survey reflects an hourly rate of $350 for the "upper quartile" of attorneys practicing in Tennessee. As Mr. Cheatham has practiced law for 45 years and has documented that he has been regularly receiving an hourly rate of $350 in his practice, we award Mr.

Cheatham his requested hourly rate of $350 as it is supported by the documentation accompanying the fee petition.

As for Mr. Gillelan's hourly rate, the Board recently held that it will use the *Laffey* Matrix as a guide for setting counsel's hourly rate where "counsel has demonstrated the appropriateness of the use of the *Laffey* Matrix in fee-shifting statutes where the relevant geographic area is the District of Columbia." *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009); *see also Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS ___, BRB No. 06-0345 (Aug. 11, 2010). For the reasons stated in *Beckwith* and *Holiday*, the District of Columbia is the relevant geographic area for purposes of determining Mr. Gillelan's hourly rate in this case. *Id.*

Mr. Gillelan's services in this case consist of 17.3 hours of work performed from July 2008 through March 2009, and 27.1 hours of work performed from June 2009 through February 25, 2010. Counsel's claimed historic hourly rate for the period through May 2009 is $460,[7] a rate supported by the *Laffey* Matrix. *See Beckwith*, 43 BRBS at 159. Moreover, the *Laffey* Matrix for the period commencing June 1, 2009, is the same as the previous year. We thus award the hourly rate of $460 for all compensable services relating to Mr. Gillelan's work in defending employer's prior appeal. The delay in the award of a fee in this case does not warrant enhancement to current hourly rates. *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

Employer next argues that the hours requested by Mr. Cheatham and Mr. Gillelan in researching and writing the response brief should be significantly reduced as they are excessive and unreasonable given the circumstances of this case. As claimant's counsel note, this case involved an extensive record of over 4,000 pages consisting of expert testimony and other evidence relating to the relatively obscure issue of medical-toxicological causation. In addition, the record contains a 785-page hearing transcript, as well as six depositions of medical or scientific experts in the fields of optometry, ophthalmology and toxicology. The extensive record, combined with the unique facts and issues presented by employer's appeal, resulted in Mr. Cheatham having expended 30.6 hours in preparing an initial 145-page draft response brief. Mr. Cheatham,

[7] Mr. Gillelan maintains that he "has billed and been paid" at $350 per hour in 2005, $400 an hour in 2006, at $420 per hour "in early 2007," that he was awarded, in December 2008, "his then current rate of $460," and that his normal billing rate for longshore representation "as of June 1, 2009" is $475 per hour. Application for Award of Attorney Fee at 11-13.

thereafter, secured the services of appellate counsel, Mr. Gillelan.[8] Mr. Gillelan, in turn, spent 8.7 hours in revising Mr. Cheatham's initial efforts and Mr. Cheatham thereafter expended an additional 6.2 hours to edit the final work product which was submitted to the Board in response to employer's appeal. Given the extensive record in this case, and the complex issues involved with employer's appeal of the administrative law judge's causation finding, in conjunction with the fact that employer has not shown that co-counsel's work in this manner was unreasonable, we grant Mr. Cheatham a total of 37 hours and Mr. Gillelan a total of 11.9 hours for work they performed in preparing claimant's response brief as they are reasonably commensurate with the necessary work done on this task. 33 U.S.C. §928; 20 C.F.R. §802.203.

Employer also challenges 5.9 hours of work by Mr. Cheatham, and 5.3 hours of work by Mr. Gillelan, relating primarily to teleconferences held between co-counsel, as they are not reasonably related to work performed by counsel before the Board. The Board has held that there is nothing objectionable to several attorneys participating in the litigation of a single claim, especially in view of the complexity of the underlying issues. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). In this case, Mr. Cheatham has adequately demonstrated why he needed the appellate assistance of Mr. Gillelan, *e.g.*, the voluminous record, complex causation issue, coupled with Mr. Gillelan's experience in representing claimants before the Board. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *see also Parks*, 32 BRBS 90. Thus, we reject employer's objections, as these hours represent reasonable time expended in consultation by co-counsel in furtherance of claimant's defense of employer's appeal.

Employer also contends that 3.2 hours of time expended by Mr. Gillelan from July 2 through July 7, 2008, should be stricken as these entries occurred prior to the time that counsel filed his Notice of Appearance as co-counsel in this case, *i.e.*, July 15, 2009. We reject this contention. *See generally Christensen v. Director, OWCP*, 576 F.3d 976, 43 BRBS 37(CRT) (9th Cir. 2009). Mr. Gillelan is entitled to the 3.2 hours of work he performed prior to the time he filed his Notice of Appearance in this case, as the appeal was already pending with the Board at that time. 20 C.F.R. §802.203. However, for the reasons discussed in *Beckwith*, 43 BRBS at 158, we find that the 12 hours claimed by Mr. Cheatham, and 11.2 hours claimed by Mr. Gillelan, in their supplemental fee petitions, for filing responses to employer's objections to the fee petitions are excessive. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). In this case, counsels' initial fee petitions reflect that Mr. Cheatham spent 2.8 hours in the actual drafting of his fee application to the Board which included a 17-page

[8] This is supported by the fact that the time requested by Mr. Cheatham to draft claimant's response brief occurred prior to Mr. Gillelan's participation in the case.

brief, and that Mr. Gillelan spent 1.7 hours in the preparation of his initial fee application which included a 26-page brief. *See* n. 9, 10 *infra*. Nonetheless, Mr. Cheatham seeks an additional 12 hours and Mr. Gillelan an additional 11.2 hours for drafting replies to employer's objections. These replies address employer's specific objections, but nonetheless restate the positions raised by counsel in their briefs supporting the initial fee applications. Given this, the number of hours requested to reply to employer's objections are not reasonably commensurate with the necessary work performed in conjunction with the defense of employer's appeal. We thus reduce both Mr. Cheatham's and Mr. Gillelan's requests to reflect 6 hours each for their defense of the fee applications. *Beckwith*, 43 BRBS at 158. Additionally, we reduce Mr. Gillelan's fee request by 1.3 hours expended on March 23, 2009, with regard to claimant's unsuccessful cross-appeal of the district director's Amended Supplemental Compensation Order, as it is unrelated to work performed in defense of employer's appeal.

Lastly, we reject employer's argument that co-counsel are not entitled to any time spent in preparing their respective attorney fee petitions, since it is well-established that counsel are entitled to a reasonable fee for preparation of a fee petition. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *see generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 903 (7th Cir. 2003); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). We therefore grant Mr. Gillelan's request for a total of 3.2 hours for drafting his three fee petitions.[9] However, in light of the circumstances of this case, we reduce Mr. Cheatham's hours from 4.7 to 2.5, as the latter number represents a more reasonable fee for such work.[10] Consequently, we award Mr. Cheatham an attorney's fee totaling $18,130, representing 51.8 hours at an hourly rate of $350, and Mr. Gillelan an attorney's fee totaling $17,434, representing 37.9 hours at an hourly rate of $460.

[9] Mr. Gillelan sought 1.7 hours for the filing of his initial fee petition and an additional 1.5 hours for his filing of three separate supplemental fee petitions.

[10] Mr. Cheatham requested a total of 4.7 hours in preparation of his fee petition, which includes 1.4 hours in consultation with Mr. Gillelan on this topic, .5 hours in drafting a motion for extension of time to file the fee petition, and another 2.8 hours in the actual drafting of the fee petition.

Accordingly, the administrative law judge's finding that employer is entitled to Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. Claimant's counsel, Mr. Cheatham, is awarded an attorney's fee of $18,130, and Mr. Gillelan is awarded an attorney's fee of $17,434, payable directly to counsel by employer, for work performed before the Board in defense of employer's appeal in BRB No. 08-0550. 33 U.S.C. §928; 20 C.F.R. §802.203.

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