BRB No. 98-1597

SAMSON MERISIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: 9/7/99
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum), Savannah, Georgia, for claimant.

Bert G. Utsey, III (Sinkler & Boyd), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees (97-LHC-2017) of Administrative Law Judge Vivian Schreter-Murray 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 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). .

Claimant alleged that he sustained an injury to his back on July 24, 1996, during the course of his employment when the loading of a container jostled the hustler he was driving. Claimant was taken to the emergency room at Trident Regional Hospital and was diagnosed with a back contusion; he has not worked since the day of this incident. An MRI taken on August 20, 1996, showed herniation at L3-4 and L5-S1, as well as evidence of degenerative disc disease. Employer voluntarily paid benefits for total disability from the date of injury to March 19, 1997. Claimant filed for benefits under the Act for continuing permanent total disability.

In her Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer failed to rebut it; therefore, the administrative law judge determined that claimant's back condition was causally related to his work accident. The administrative law judge next found that claimant is unable to return to his usual employment duties as a longshoreman. However, she found that employer established the availability of suitable alternate employment based on the February 10, 1997, labor market survey of Ms. Woodward. Accordingly, claimant was awarded total disability compensation from the date of injury to February 10, 1997, and continuing benefits of $687.41 for permanent partial disability based on his loss of wage-earning capacity, 33 U.S.C. §908(c)(21), thereafter. Lastly, employer was granted relief from continuing compensation liability pursuant to Section 8(f) of the Act. 33 U.S.C. §908(f). In her Decision and Order on Reconsideration, the administrative law judge rejected employer's contentions that she erred in finding claimant entitled to the Section 20(a) presumption, and in finding that employer failed to rebut the presumption. Employer's contention regarding error in the commencement date for second injury fund relief was granted. Claimant's attorney requested an attorney's fee of $20,396.87, representing 65.375 hours at an hourly rate of $300. In her Supplementary Decision and Order Awarding Attorney Fees, the administrative law judge reduced the hourly rate to $250,

reduced the number of compensable hours to 48, and awarded a fee of $12,000 and costs of $343.

On appeal, employer contends the administrative law judge erred by invoking the Section 20(a) presumption; alternatively, employer asserts that the administrative law judge erred in finding that employer failed to rebut it. Employer also challenges the administrative law judge's finding that claimant cannot return to work as a longshoreman. Finally, employer argues that the awarded hourly rate of $250 is excessive and that the administrative law judge also erred in awarding five hours for travel time between Savannah, Georgia, and Charleston, South Carolina. Claimant responds, urging affirmance in all respects.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption. Specifically, employer asserts that the administrative law judge erred in finding that claimant sustained an injury since the administrative law judge found that claimant's testimony was not credible. We reject this contention. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals,* 14 BRBS 17 (1981), *rev'd on other grounds,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Contrary to employer's assertion, claimant, in establishing his *prima facie* case, is not required to prove by affirmative medical evidence that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions which could conceivably cause the harm alleged. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

In the instant case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as she found that claimant suffered a harm and that an accident occurred which could have caused the harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). In this regard, the administrative law judge credited a comparison of an MRI performed in 1990, which showed degenerative disc disease but no disc herniation, with an MRI performed in August 1996 which showed herniation at L3-4 and L5-S1 as well as degenerative disc disease, and a second MRI performed in June 1997, which replicated the results obtained from the August 1996 MRI. Moreover, in her Decision and Order on Reconsideration, the administrative law judge credited the July 24, 1996, emergency room report which diagnosed a back contusion. As the administrative law judge rationally relied upon the contemporaneous medical records, her finding that claimant sustained a harm to his back is supported by substantial evidence. In addition, the administrative law judge properly relied upon the parties' stipulation that an accident occurred at work on July 24, 1996. As the administrative law judge thus did not err in finding that claimant established both elements of his *prima facie* case, we affirm the

administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair,* 23 BRBS at 148.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut that presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.,* 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between claimant's injury and his employment. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In the instant case, employer contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. Employer argues, in essence, that claimant's present back condition is due to his pre-existing degenerative back condition, noting that claimant's complaints post-injury were consistent with his long history of back ailments. The administrative law judge found, however, that while claimant's post-injury multiple herniated discs could be due to the natural progression of his degenerative disc disease, employer presented no specific evidence to that effect. Evidence that claimant had a pre-existing degenerative back condition alone is insufficient to rebut Section 20(a), particularly in light of the aggravation rule. *See, e.g., Brown,* 893 F.2d at 294, 23 BRBS at 22 (CRT). We therefore affirm the administrative law judge's finding that employer failed to submit evidence sufficient to rebut the presumed causal link between claimant's back condition and his July 1996 work accident.

Employer next challenges the administrative law judge's determination that claimant is incapable of performing his pre-injury employment duties as a hustler driver with employer. Specifically, employer contends the administrative law judge erred by discrediting evidence of eight longshore positions within claimant's work restrictions which, employer asserts, establishes claimant's ability to resume his usual employment. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997); *Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988).

In her Decision and Order, the administrative law judge credited the testimony of Kenneth Riley, president of claimant's union local, that there are no longshore jobs claimant could perform when claimant's lifting, bending and standing restrictions are taken into consideration, over the report and testimony of Lee Woodward, a vocational consultant, who stated that there were eight longshore jobs available within claimant's work restrictions. The

administrative law judge found that the jobs enumerated by Ms. Woodward and approved by claimant's treating physician, Dr. Johnson,[1] are specific to the port of Savannah and that employer failed to introduce any evidence that the physical requirements of these jobs are applicable to claimant's place of employment, Charleston, South Carolina.[2] In rendering these findings, the administrative law judge additionally credited Mr. Riley's testimony, which she found to be unrefuted, that due to a reduction in manpower at the port of Charleston, claimant may be requested at any time to perform more rigorous duties in addition to the duties he is initially assigned by an employer.

In adjudicating a claim, it is well-established that 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 witness; rather, the administrative law judge may draw her own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, we hold that the administrative law judge's decision to credit the testimony of Mr. Riley, that claimant's return to longshore employment at the port of Charleston is precluded by his physical restrictions, is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359. We therefore affirm the administrative law judge's determination that claimant is incapable of resuming his pre-injury work with employer.

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[1]Claimant's initial treating physician, Dr. Johnson, determined that claimant has a seven percent permanent partial back impairment, and he assigned permanent work restrictions of lifting no more than forty pounds and occasional bending, reaching, climbing, squatting, and kneeling. CX 5.

[2]At the hearing, the administrative law judge requested that employer provide post-hearing evidence that the physical requirements of these positions located at the port of Savannah are applicable to similar positions at the port of Charleston. In her Decision and Order, the administrative law judge noted that employer failed to produce this post-hearing evidence. *See* Decision and Order at 7.

Lastly, employer challenges the fee awarded to claimant's counsel. Specifically, employer contends that the awarded hourly rate of $250 is excessive, and that the administrative law judge erred in allowing five hours of travel time for a round trip by claimant's counsel between Savannah, Georgia, and Charleston, South Carolina, for the formal hearing. We reject employer's contentions. Section 732.132 of the regulations, 20 C.F.R. §702.132, provides that the award of an attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues, 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 agreed with employer that the requested hourly rate of $300 was excessive. However, she found claimant's counsel to be entitled to a fee based on an hourly rate of $250 pursuant to the factors enumerated in Section 702.132 and the geographic area where claimant resides. As employer has not satisfied its burden of showing that the administrative law judge abused her discretion in awarding a fee based on an hourly rate of $250, we affirm the administrative law judge's finding. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251, 253 (1998). The administrative law judge also allowed for travel time of five hours round-trip between Savannah and Charleston for claimant's attorney, reasoning that claimant has a right to choose his attorney; the administrative law judge did, however, disallow the travel time requested for a second trip on consecutive days between Savannah and Charleston, as she found these hours unnecessary. As the administrative law judge rationally found that the hours requested are reasonable, we affirm the administrative law judge's allowance of five hours for travel time between Savannah, Georgia, and Charleston, South Carolina. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138, 141 (1986).

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge