BRB Nos. 89-1343
and 89-1343A

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| THOMAS W. BROWN | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NEWPORT NEWS SHIPBUILDING | ) | |
| AND DRY DOCK COMPANY | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | |
| Cross-Respondent | ) | DATE ISSUED: |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' | ) | |
| COMPENSATION PROGRAMS, | ) | |
| UNITED STATES DEPARTMENT | ) | |
| OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order and Supplemental Decision and Order - Granting Attorney Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Lee E. Wilder and John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Forest A. Nester and James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

John Jeffrey Ross (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals the Decision and Order, and claimant appeals the Supplemental Decision and Order - Granting Attorney Fees (88-LHC-1411) 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 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).

While working for employer as a first class welding specialist, claimant injured his back on May 21, 1986. Claimant missed work intermittently for 18 weeks through October 1987, and employer paid claimant temporary total disability benefits for the weeks he missed work. Claimant returned to work subject to permanent restrictions including no climbing more than 10 feet, no crawling through tunnels, no lifting over 25 pounds and no repeated lifting. Claimant continued working as a first class welding specialist at the same rate of pay as before his injury, but worked in the submarine shop whereas prior to his injury he worked on board ships. After his injury, claimant primarily welded at a table but he also welded T-frames away from the table, and he could sit or stand as necessary. Claimant's supervisor, Frank Carroll, testified that he told claimant to notify him if the work exceeded his restrictions, that claimant informed him twice of problems, and he accordingly changed claimant's task. Mr. Carroll testified that claimant's work was necessary for employer. Claimant worked little overtime prior to his injury, and there was no overtime in the submarine shop in 1987 and 1988 under Mr. Carroll's supervision.

The administrative law judge found that claimant's post-injury work for employer was regular and continuous, that it was not due to the beneficence of a sympathetic employer, that claimant's work was necessary at the shipyard, that his work was not sheltered employment, and that claimant lost no overtime due to his back injury. The administrative law judge found, however, that the evidence of medical disability indicated a significant possibility that claimant will suffer an economic harm as a result of his injury sometime in the future. The administrative law judge found that the three doctors of record opined that claimant suffered from degenerative disc disease, Dr. Lenthall described the nature of the disease as progressive, and Dr. Tattersall opined that claimant would eventually "come to surgery" and the prognosis of patients with claimant's condition who undergo surgery is not good. Emp. Ex. 11. Further, the administrative law judge found that Dr. Velo did not rule out surgery and described claimant's condition after conservative treatment as stationary.

The administrative law judge also found that claimant had a ninth grade education, had work experience only as a welder, and that the shipyard laid off 1200 employees in 1986 and there was no guarantee that claimant's position was secure. The administrative law judge therefore awarded claimant a 1 percent *de minimis* award in the amount of $2.97 a week which the administrative law judge obtained by multiplying claimant's average weekly wage of $445.70 by .01, to obtain $4.46, which he then multiplied by .667. 33 U.S.C. §908(c)(21). The administrative law judge denied employer relief pursuant to Section 8(f), 33 U.S.C. §908(f), finding that Section 8(f) is inapplicable to a *de minimis* award.

On May 3, 1989, claimant's counsel filed an attorney's fee petition in the amount of $5,038.75, representing 46.5 hours of services at an hourly rate of $125 to $145 for attorneys and of $45 for paralegals.[1] Claimant's counsel stated that, if acceptable to employer, he would accept an attorney's fee of $4,171.25. Employer filed objections contending, *inter alia*, that the fee requested is excessive given that claimant was awarded $2.97 a week.

In the Supplemental Decision and Order - Granting Attorney Fees, the administrative law judge found that the fee requested by claimant was excessive in view of the results obtained, and he reduced the number of hours by half. The administrative law judge also reduced the hourly rate for work performed by the attorney to $125. The administrative law judge disallowed 1.5 hours of 2.5 hours claimant's counsel requested for traveling from Norfolk to Hampton for the hearing on September 20, 1988 on the ground the trip was local and therefore should be included in overhead. Further, the administrative law judge disallowed 1.5 hours for services rendered after claimant received the decision on April 6, 1989. The administrative law judge therefore awarded an attorney's fee in the amount of $2,300 for 20 hours of services.

On appeal, employer contends that the administrative law judge erroneously awarded a *de minimis* award as the Act does not authorize *de minimis* awards and the United States Court of Appeals for the Fourth Circuit in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.9, 18 BRBS 12, 32 n.9 (CRT) (4th Cir. 1985), used language which provides an insubstantial basis for issuing a *de minimis* award. Employer contends that even if *de minimis* awards are authorized by the Act, the evidence is insufficient in this case to support a *de minimis* award. BRB No. 89-1343. Claimant and the Director respond, urging affirmance. Claimant appeals the Supplemental Decision and Order, contending that the administrative law judge erred in reducing the amount of the requested attorney's fee. BRB No. 89-1343A. Employer responds, urging affirmance.

The United States Court of Appeals for the Fourth Circuit, the circuit in whose jurisdiction this case arises, noted in a case involving modification that a *de minimis* award "may be appropriate" where there is sufficient evidence to establish that there is a likelihood of future economic harm due to the work injury, the extent of which is not presently ascertainable. *Fleetwood v. Newport News*

[1]Claimant's counsel charged $125 an hour prior to January 1, 1989 and $145 an hour after that date.

*Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.9, 18 BRBS 12, 32 n.9 (CRT)(4th Cir. 1985); *see also Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). The United States Courts of Appeals for the Second, Fifth and District of Circuits have authorized *de minimis* awards where claimant establishes a present medical disability and a significant possibility of a future loss of wage-earning capacity. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyards Corp.*, 640 F.2d 760, 13 BRBS 237 (5th Cir. 1981). The purpose of a *de minimis* award is to preserve the claimant's right to seek compensation in the future through modification proceedings for a greater loss in wage-earning capacity should his condition deteriorate. *See Hole*, 640 F.2d at 772, 13 BRBS at 239; 33 U.S.C. §922. The *Fleetwood* court referenced the *Hole* case in its decision, and we reject employer's contention that *Fleetwood* does not provide a basis for *de minimis* awards in appropriate cases. *Fleetwood*, 776 F.2d at 1234 n.9, 18 BRBS at 32 n.9 (CRT); *see also Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 137 (1987).

Employer contends that the medical evidence is insufficient to establish a significant possibility of future economic harm because whether claimant will actually need surgery and whether it would impair his ability to work is speculative. Further, employer notes that Dr. Velo, a neurosurgeon, stated that claimant's condition is stationary and he did not indicate surgery was necessary or likely, and that Dr. Tattersall who stated claimant will need surgery is not a specialist. Employer contends it is also speculative whether claimant's job is not secure because claimant had 23 years of experience with employer and Mr. Carroll testified that there had been no layoffs in his division in the past two years.

After considering employer's contentions, we affirm the administrative law judge's *de minimis* award as it is based on substantial evidence and in accordance with law. Although the administrative law judge found that claimant's post-injury work was regular and continuous and his employment is not sheltered, the medical evidence supports the administrative law judge's finding that claimant has a present medical impairment which will likely deteriorate. Dr. Tattersall diagnosed a herniated disc, a diagnosis with which Dr. Lenthall concurred. Dr. Tattersall opined that claimant's condition will deteriorate resulting in surgery, and that claimant's prognosis following recovery from the surgery is not good. As the administrative law judge noted, all the doctors of record diagnosed degenerative disc disease and Dr. Lenthall described claimant's condition as progressive. As noted by the administrative law judge, although Dr. Velo described claimant's condition as stationary, he did not rule out surgery. It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses, including doctors, to weigh the medical evidence, and to draw his own inferences and conclusions from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In this case, the administrative law judge's credibility determinations are rational and are within his authority as fact-finder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Furthermore, the administrative law judge rationally concluded that there is a significant

possibility of future economic harm. Claimant is under permanent work restrictions, has limited education and work experience, and the administrative law judge acted within his discretion in determining that these factors in conjunction with employer's layoff of 1200 people in 1986 suggest that claimant's job is not secure. *See generally 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). The administrative law judge's award, therefore, is affirmed.[2]

In his appeal of the award of an attorney's fee, claimant contends that the administrative law judge erred in reducing the number of hours he requested by half on the ground that they were disproportionate to the award obtained. Claimant contends the standard should be whether the work was reasonable and necessary at the time the services were performed. Claimant also contends that the administrative law judge erred in deducting 1.5 hours from the 2.5 hours requested for travel time to the hearing, as the round trip from Norfolk to Hampton totals 42 miles and includes a three mile tunnel under the Chesapeake Bay, and therefore is not a local trip. Claimant notes that in *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981), the Board held that counsel was entitled to a fee for 1.5 hours for travel time from counsel's office in Norfolk to the hearing in Newport News as it was reasonable and necessary, and it was too lengthy a trip to be considered an incidental overhead expense.

We affirm the attorney's fee award. The United States Supreme Court has held that, in awarding an attorney's fee, it is appropriate to consider whether the degree of claimant's success corresponds to the hours expended. *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983); *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992); *Stowars v. Bethlehem Steel Corp.*, 19 BRBS 134 (1986). The administrative law judge rationally determined that the number of hours for which claimant's counsel sought recompense was excessive in view of the *de minimis* award obtained, and his reduction of the number of hours by half is reasonable.

With regard to the travel time, the administrative law judge correctly noted that the standard is whether the travel time is reasonable, necessary and in excess of that normally considered overhead. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 647 (1982). It is within the administrative law judge's discretion to determine whether travel time is reasonable, and here, the administrative law judge did not abuse his discretion in determining that 2.5 hours of travel time is excessive and should be reduced by 1.5 hours. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Lopes v. New Bedford Stevedoring Co.*, 12 BRBS 170 (1980).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order - Granting Attorney Fees are affirmed.

SO ORDERED.

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[2]We decline to address the Director's substantive contentions regarding the applicability of Section 8(f) in this case, as the administrative law judge correctly determined that Section 8(f) does not apply to *de minimis* awards. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1988).

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge