BRB No. 00-0928B

JERRY KATE BAZOR (Widow of BEN BAZOR) Claimant-Respondent v. BOOMTOWN BELLE CASINO and LOUISIANA WORKERS' COMPENSATION CORPORATION Employer/Carrier-Petitioners and GREAT-WEST LIFE AND ANNUITY INSURANCE COMPANY Intervenor	)	DATE ISSUED: July 11, 2001 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Seelig, Cossé, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

David K. Johnson (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Elizabeth S. Wheeler (King, Leblanc & Bland, L.L.P.), New Orleans, Louisiana, for intervenor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decisions and Orders Awarding Attorney Fees (99-LHC-1198) of Administrative Law Judge Clement J. Kennington 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 which 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).

Decedent was a facilities manager for the Boomtown Belle Casino boat. At the time decedent was employed, the vessel was under construction at the Avondale Shipyard. It was overdue for completion, and decedent divided his time between employer's facility preparing the dock and loading areas, and the shipyard, where decedent oversaw the cleaning of the vessel and installation of wiring for the gambling machines, computers and security system. On July 13, 1994, decedent collapsed and fell to the ground unconscious, in the tent area near the dock. He was taken by ambulance to the hospital where he was treated and diagnosed with an aneursymal subarachnoid hemorrhage secondary to a MCA aneurysm (a stroke). On the same date, decedent underwent a right frontal temporal craniectomy, clipping of the middle cerebral bifurcation aneurys, evacuation of intracerebral hemorrhage, and anterior temporal lobectomy. Decedent never regained consciousness and continued to receive care in hospitals, at home with 24 hour nursing care, and in a nursing home until his death on October 2, 1997. Decedent's medical bills were paid by a health insurance policy he obtained upon being hired, underwritten by Great-West Life & Annuity Insurance Company (the intervenor). Claimant, decedent's widow, sought decedent's permanent total disability benefits under the Act for the period from July 13, 1994 to October 1, 1997, 33 U.S.C. §908(a), and death benefits pursuant to Section 9, 33 U.S.C. §909, thereafter.

In his Decision and Order, the administrative law judge found that decedent spent a substantial portion of his time outfitting and cleaning the casino vessel. In addition, he found that decedent was responsible for maintenance and repair of the tent and dock area and in fact had supervised the reconstruction of the vessel ramp. Therefore, he found that decedent met the status requirement of the Act, and was not excluded from coverage under the Act by virtue of Section 2(3)(B), 33 U.S.C. §902(3)(B). The administrative law judge also found that the tent and dock area where decedent had his stroke was within 100 feet of the Harvey Canal, a navigable waterway, and constituted the only area from which passengers could embark or disembark the casino vessel. Therefore, he concluded that the Act's situs requirement was met. 33 U.S.C. §903(a).

In considering whether decedent's injury and death were work-related, the administrative law judge found that the evidence is sufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that the stroke was causally related to the long hours and stress of decedent's employment responsibilities. Thus, as he found that there is

no credible evidence to rebut these facts, the administrative law judge concluded that decedent's work had a direct link to, and was at least an aggravating factor in, the stroke. Consequently, the administrative law judge awarded claimant permanent total disability benefits and death benefits. The administrative law judge also considered the intervenor's claim for reimbursement of the medical bills paid during decedent's period of disability ($606,306.64). He noted that employer had knowledge of the medical treatment decedent needed and informed claimant to seek coverage from the intervenor. Thus, the administrative law judge found that the intervenor has a right of reimbursement from employer for treatment which it provided, but does not have a lien on claimant's compensation.

In an Order on Reconsideration, the administrative law judge found that the intervenor is entitled to an attorney's fee and interest payable by employer. Subsequently, claimant's attorney filed for an attorney's fee requesting a fee from both employer and the intervenor. The administrative law judge discussed employer's objections to the petition filed by claimant's counsel, but found that the charges contained in the fee application were for necessary services which are reasonable in amount and thus awarded claimant's counsel a fee of $27,096.07, representing $24,492.50 in attorney's fees and expenses in the amount of $2,603.48, payable by employer. In a Supplemental Decision and Order Denying Attorney Fees, the administrative law judge found that there is no authority to allow claimant to recover an attorney's fee from the intervenor and thus denied further fees. Counsel for the intervenor also filed a fee petition for work performed before the administrative law judge. The administrative law judge noted that employer did not file objections to this petition. Therefore, as he found the services rendered to be reasonable and necessary, the administrative law judge awarded intervenor's counsel a fee in the amount of $24,492.50 for legal services and $2,603.48 for expenses, to be paid by employer.

On appeal, employer contends that the administrative law judge erred in finding coverage under the Act.[1] Employer maintains that decedent's employment is excluded from coverage as he was an employee of a casino, a recreational operation, *see* 33 U.S.C. §902(3)(B), and that the tent where the stroke occurred is not a covered situs. In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption. Employer also avers that it should not be responsible for medical benefits because it did not receive ongoing medical reports from the intervenor and claimant did not request a change in physicians. Lastly, employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to the

[1]The appeals of claimant, BRB No. 00-0928, and the intervenor, BRB No. 00-0928A, were dismissed by Board Order dated August 17, 2000.

intervenor's counsel. Claimant responds, urging affirmance of the administrative law judge's decisions. The intervenor also responds, urging affirmance of the administrative law judge's award of an attorney's fee to be paid by employer.

Status

Initially, employer contends that the administrative law judge erred in finding that decedent was not excluded from coverage as an employee of a recreational operation. Section 2(3) states in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-
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> * * *
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> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
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> * * *
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3); *see also* 20 C.F.R. §701.301(a)(12)(iii)(B). The United States Court of Appeals for the Fifth Circuit has considered a case under Section 2(3)(B), *Green v. Vermilion Corp.*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1251 (1999). In *Green*, claimant was employed at a duck camp located on marsh land near a private canal off a bayou. During the three-month duck season, the claimant worked as both a cook and watchman. During the rest of the year, he was a watchman and general maintenance worker. He lived at the camp Monday through Friday, and his mode of transportation to and from the camp was by boat. He occasionally assisted in mooring and unloading supply boats that docked at the camp. Claimant was injured on the deck of a vessel while assisting in its mooring. The district court granted employer's motion for summary judgment on the Longshore Act claim on the ground that the claimant was excluded under the Section 2(3)(B) "club/camp" exception and claimant appealed to the Fifth Circuit. The Fifth Circuit held that as the claimant was employed exclusively and solely to render services to promote and maintain a duck camp, he was excluded from coverage. *Green*, 144 F.3d at 335, 32 BRBS at 182 (CRT).

In *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999), the Board considered a case in which the claimant was employed as a harbor master for a company

which owned several river cruising passenger vessels, barges, tugboats, water taxis, and docks. At the time of the injury, the claimant was the harbor master for the *Mike Fink*, a 160-foot paddle-wheel, permanently moored vessel used a restaurant. The claimant's duties consisted of maintaining the exterior of the property owned by Mike Fink, Incorporated: the parking lot, the vessel, and the dock. Initially, the Board held that all employees of a restaurant are not excluded from coverage regardless of the duties they perform, but rather the nature of the duties to which claimant is or may be assigned remains relevant under Section 2(3)(B). *See Huff*, 33 BRBS at 184, *citing Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Specifically, the Board held that "the focus is properly on claimant's overall job duties and whether they further the operation of a restaurant within the plain meaning of that term, or whether they are duties that further maritime commerce and expose the claimant to maritime hazards." *Huff*, 33 BRBS at 185. The Board noted claimant's duties of repairing and enlarging the dock, and the fact that he was responsible for the safety of the dock and the pleasure crafts moored there. Thus, the Board held that as claimant's duties furthered maritime commerce on the Ohio River, and were not solely and exclusively in furtherance of a restaurant within the plain meaning of that term, the claimant was not excluded from coverage under the Act. *Id.*

Employer initially contends that the nature of the employer's business determines whether decedent is excluded from coverage under Section 2(3)(B). This contention, however, has been rejected by the Board, *see Huff*, 33 BRBS at 184, and is borne out by the legislative history of the 1984 Amendments as discussed in *Huff, id.,* citing 1984 U.S.C.C.A.N. at 2737. Moreover, in *Green*, the Fifth Circuit cited this legislative history, stating:

> businesses falling under this paragraph (B) may have employees that should remain covered under the Act 'because of the nature of the work which they do, or the nature of the hazards to which they are exposed.' By the same token, we believe the opposite is true--clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities.

Green, 144 F.3d at 334, 32 BRBS at 182 (CRT)(citation omitted). Thus, in *Green,* the court also held that it is the nature of claimant's duties, and whether they involve maritime activities and hazards, which is dispositive. Similarly, the Board held in *Shano v. Rene Cross Construction*, 32 BRBS 221 (1998), a case involving the marina exclusion at Section 2(3)(C), that the inquiry centers on the claimant's assignable duties at the time of the injury, not the corporate purpose or structure of the employer. *Id.* at 223. Thus, we reject employer's contention that decedent is excluded from the Act's coverage merely because he was employed by a casino.

Employer also contends that all of decedent's duties were related to the gambling enterprise, and thus that he is excluded from coverage on this basis. The administrative law judge rejected this contention and found that "[decedent's] work was essentially linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery with subsequent maintenance and repair following delivery and hence had a substantial connection to maritime commerce." Decision and Order at 15. The record indicates that decedent was hired to be the facilities manager before the launch of the Boomtown Belle as a casino. The project was experiencing delays at the Avondale Shipyard, and decedent was under pressure by his employers to see the boat expeditiously completed. Thus, decedent frequently supervised work at the shipyard, bringing his own employees to work on the vessel under construction. The crew was responsible for installing wiring for slot machines, as well as installing a battery back-up should power be lost to the boat. Cl. Ex. 16 at 14. In addition, decedent supervised the engineer responsible for the vessel's air conditioning system and for running the data lines from the slot machines to the vessel's computers. Decedent also oversaw vessel plumbing, electrical, refrigeration and lighting activities, Cl. Ex. 20 at 59, and was involved with cleaning the vessel at the Avondale yard. Mr. Banks, decedent's co-worker and successor, testified they were responsible for all vessel maintenance excepted steering, navigation and power train components. Cl. Ex. 20 at 59. The administrative law judge also found that decedent was responsible for maintenance and repair of the tent and dock area, and had supervised the reconstruction of the vessel ramp at the dock. *See* Cl. Ex. 20 at 58-59.

In order to determine whether decedent is excluded from coverage by Section 2(3)(B) of the Act, the focus is properly on decedent's overall job duties and whether they furthered the operation of a "recreational operation" within the plain meaning of that term, or whether they are duties that further maritime commerce and exposed decedent to maritime hazards. *Huff*, 33 BRBS at 185. In the present case, decedent's duties were performed prior to the completion of the vessel, and thus are properly characterized as "shipbuilding" activities. Decedent was involved solely in the vessel construction phase, and there is no exclusion for employees involved in the construction of a recreational vessel unless it is under 18 tons net.[2] *See* 33 U.S.C. §902(3)(H). Mr. Creighton, one of decedent's co-workers, testified that he worked with decedent in removing trash from the vessel while it was under construction and cleaning the vessel prior to delivery, which are duties covered under the Act. *See Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 153 (2000); *see also Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT) (1989); Tr. at 136. As discussed, decedent oversaw many aspects of the vessel's construction as it neared completion at the Avondale yard. We reject, in addition, employer's contention that

[2]Employer does not contend that the *Boomtown Belle* did not meet this size restriction.

decedent's duties wiring the vessel for slot machines, data processing and security systems preclude decedent's coverage under the Act. Electrical wiring is part of the vessel's construction, *see generally Barton v. Litton Systems, Inc., Ingalls Shipbuilding, Inc.,* 6 BRBS 92 (1977), and there are no restrictions against coverage for a shipbuilder based on the area of the vessel in which he is working or its intended purpose. Finally, decedent also was responsible for maintaining the dock and loading area for the passengers, duties which expose a claimant to traditional maritime hazards.

To briefly summarize, decedent's duties in the present case were performed prior to the vessel's being completed and placed into operation as a casino. At the time of decedent's injury and at all times prior, the vessel was under construction. Decedent was thus not involved in a recreational operation, but a shipbuilding operation at all times when he worked on the vessel. *See generally Mackey v. Bay City Marine, Inc.,* 23 BRBS 332 (1990). The fact that he also worked on land in maintaining employer's other facilities is not controlling, as he spent "at least some of his time" in maritime employment. *See Caputo,* 432 U.S. 249, 6 BRBS 150*; see also McGoey v. Chiquita Brand Int'l*, 30 BRBS 237 (1997). The fact employer is a casino operation also is not controlling, as it is the nature of the employee's work which controls and *Green* and *Huff* recognize that employers in the categories of exclusion under Section 2(3)(B) would have some covered workers. Therefore, we affirm the administrative law judge's finding that decedent was a covered employee as it is supported by substantial evidence and in accordance with law.

<u>Situs</u>

Employer also contends that the administrative law judge erred in finding that decedent was injured on a covered situs. Section 3(a) provides that

> compensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). Coverage under Section 3(a) is determined by the nature of the place of work at the time of injury. *See Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994). In the present case, decedent suffered a stroke while in the tent located between the parking lot and the dock, which would be used to house the passengers prior to their embarking the vessel. It is not disputed that this dock was on the navigable waters of the Harvey Canal and that the tent joined the dock. *See* Cl. Ex. 20 at 49. The administrative law judge found the situs requirement met as the area was used for loading and unloading

passengers. Employer's contention on appeal is that the area was not used for maritime commerce because the "loading" of passengers on a gambling vessel is not maritime commerce.

We need not determine whether the "loading" of passengers onto a vessel constitutes "loading" within the meaning of Section 3(a). The conclusion that the situs element is met is affirmed, based on the cumulative nature of decedent's injury. The administrative law judge found that decedent's stroke was due, in part, to the stresses he suffered while working at the Avondale shipyard and the dock facility. A shipyard is a covered situs, *see generally Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *aff'g* 21 BRBS 83 (1988), *cert. denied*, 493 U.S. 1070 (1990); *Martin v. Kaiser Co. Inc.,* 24 BRBS 112 (1990), as is a dock. *See* 33 U.S.C. §903(a); *Eckhoff,* 28 BRBS 51. As decedent was subjected to work stresses in area that are indisputably maritime sites, we affirm the administrative law judge's conclusion that the situs element of Section 3(a) is satisfied.

Causation

Employer next contends that the administrative law judge erred in finding that the evidence is sufficient to establish invocation of the Section 20(a) presumption that decedent's injury and death were work-related and that employer failed to rebut the presumption. Section 20(a) provides a presumption that decedent's injury was causally related to his employment, if claimant establishes that decedent had a physical harm, and that an accident occurred or working conditions existed that could have caused the harm. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that decedent's disabling condition and death were not caused or aggravated by his employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In the instant case, the record contains the opinion of Dr. Scrignar, a forensic psychiatrist, who testified in a deposition that stress causes elevated heart rates, blood pressure, headaches and weight loss and forms the genesis of a cerebral vascular accident. Dr. Scrignar opined that decedent was subjected to excessive responsibilities at work without the necessary help which combined with a natural conscientiousness which eventually led to or contributed to his stroke. The evidence also includes the opinion of Dr. Tong, a neurologist, who reviewed decedent's medical records. Dr. Tong opined that decedent suffered a subarachnoid hemorrhage or rupture of two brain aneurysms which eventually led to his death and that working conditions as verified by family and co-workers produced considerable stress contributing to the hemorrhage. Cl. Ex. 22 at 11-13. The administrative law judge found that decedent had work-induced stress associated with unreasonable

expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from Avondale superintendent, Octave Rainey. We affirm the administrative law judge's finding that the evidence is sufficient to invoke the Section 20(a) presumption as his finding that decedent's stressful working conditions contributed to the stroke is supported by substantial evidence.[3] *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54 (2d Cir. 2001).

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[3]Employer argues that claimant failed to prove working conditions were extraordinarily stressful. However, the Fifth Circuit established long ago that work events need not be unusually strenuous to establish a compensable injury, stating,

> There is no standard or normal man who alone is entitled to workmen's compensation . . . If the workmen overstrains his powers, slight though they be, or if something goes wrong within the human frame, such as the straining of a muscle or the rupture of a blood vessel, an accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external. This was held in an English case, where on post mortem it was found that the employee had a very large aneurism of the aorta which might have burst while the man was asleep but which in fact ruptured while, with slight effort, he was tightening a nut with a spanner wrench.

Southern Stevedoring Co. v. Henderson, 175 F.2d 863, 866 (5th Cir. 1949)(citations omitted).

In considering whether the employer presented substantial evidence that decedent's disabling condition and death were not work-related, the administrative law judge rejected the testimony of employer's witnesses, Mr. Creighton, employer's current facilities manager, and Mr. Gaspard, employer's current maintenance manager, who denied decedent's being under considerable pressure as he found that they were not credible given the testimony of the other employees, including employer's director of purchasing, and decedent's family. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, and may draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963);*Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). As employer identifies no error in this finding on appeal, we affirm the administrative law judge's finding that decedent's work was a "direct link and was at least an aggravating factor in the stroke he suffered" as it is rational and supported by substantial evidence. Decision and Order at 17.

Section 7

Employer also contends on appeal that the administrative law judge erred in finding it responsible for the reimbursement of decedent's medical bills to decedent's health insurer. Section 7(d) of the Act sets the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. In order to be entitled to medical expenses, claimant must first request employer's authorization pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d). *See Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997). Under Section 7(d)(1), an employee is entitled to recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

Initially, we note that in the present case, employer did not raise before the administrative law judge the issue of whether claimant sought authorization for a change in physician. *See* H.Tr. at 9; Emp's Post Trial Memorandum. Moreover, employer was aware of decedent's stroke and instructed claimant to seek medical coverage from another provider. *See* 33 U.S.C. §907(d)(1). The case cited by employer on appeal, *Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989), is inapposite as, in that case, the United States Court of Appeals for the District of Columbia Circuit rejected the notion of implied consent where employer was aware of the medical treatment the

claimant received. However, in this case, the administrative law judge found that employer "declined to cover the medical expenses, but rather, informed Claimant to seek coverage from Intervenor." Decision and Order at 19. As employer does not raise any error in this finding, we affirm the administrative law judge's finding that it refused to authorize treatment, and thus that employer is liable for decedent's medical treatment.

In addition, contrary to employer's contention, there is no provision under the Act requiring that a private health insurer provide ongoing medical reports to the employer. The administrative law judge found that employer had knowledge of decedent's injury, and could have investigated the reasonableness of the services provided and charges therefor. As the administrative law judge rationally found that employer refused to authorize decedent's treatment and made no inquiry into the care provided, we affirm the administrative law judge's finding that the intervenor has a right of reimbursement for the medical care and expenses which it provided decedent due to decedent's work-related injury, as it is supported by substantial evidence.

<u>Section 28</u>

Employer contends that the administrative law judge's attorney's fee award to claimant's counsel should be substantially reduced, and that the administrative law judge erred in awarding a fee to intervenor's counsel. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel filed a fee petition requesting a fee in the amount of $26,320, representing 131 hours of legal services at the hourly rate of $200, and expenses in the amount of $9,929.45. Employer filed objections to claimant's counsel's fee petition. In addition, intervenor's counsel filed a fee petition in the amount of $24,492.50 for legal services, and expenses in the amount of $2,603.48. Employer did not file objections to this fee petition.

The administrative law judge has broad discretion in his award of an attorney's fee and the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary and capricious, or an abuse of discretion. *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). It is the administrative law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done. In awarding a fee, he must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §702.132; *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

In the present case, the administrative law judge thoroughly reviewed employer's objections to claimant's counsel's fee petition and, after reducing one item by one hour and disallowing 1.85 hours, concluded that the hours requested were reasonable. Initially, we

reject employer's contention that the administrative law judge erred in awarding claimant's counsel an hourly rate of $200, as the administrative law judge specifically considered the applicable rate in the geographic locality involved, the experience of the attorney, and the complexity of the case. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting). Employer also contends that a number of entries are excessive and should be reduced, and that the time spent driving a witness is clerical work for which counsel cannot receive a fee. The administrative law judge considered employer's contentions and found that the arguments were without merit. As employer has not raised any error with these findings, we affirm the administrative law judge's finding that these services were reasonable and necessary. In addition, we reject employer's contention that the administrative law judge erred in awarding counsel time spent preparing the fee petition, as it is well-settled that this time is compensable. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). We also reject employer's contention that the post-hearing meeting with claimant on January 26, 2000, should be disallowed as there was no "additional work, which need to be performed at that time to establish entitlement to compensation." Br. at 4. The administrative law judge rationally allowed this time as "wind-up" services. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999). Employer also contends that the administrative law judge erred in awarding claimant's counsel 1.75 hours over a number of days to review intervenor's pre-hearing statement and correspond with intervenor's counsel. As this time spent pertained to the award of medical benefits which indirectly involved claimant, we affirm the administrative law judge's finding that this time was necessary and reasonable. Thus, as the administrative law judge specifically considered employer's objections, and employer has raised no reversible error on appeal, we affirm the administrative law judge's award of an attorney's fee to claimant's counsel.

Employer also contends that the amounts awarded as expenses for Drs. Tong and Scrignar should be reduced. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that the costs, fees, and mileage for necessary witnesses can also be assessed against employer when an attorney's fee is awarded against employer, but only if they are reasonable and necessary. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge considered employer's contention and found that the amounts requested for Drs. Tong ($6,600) and Scrignar's ($1825) expenses were supported under the facts of this case. In addition, the administrative law judge rejected employer's contention that a number of the expenses should be disallowed as they were not used at the hearing. The test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover,

contrary to employer's contention the expenses requested pursuant to Section 28(d) do not have to be documented, but must be adequately explained. As the administrative law judge found that the costs were adequately itemized, and employer does not raise any error with this finding, we affirm the award. *See Forlong,* 21 BRBS 155.

With regard to the appeal of the intervenor's attorney's fee award, employer initially contends that the administrative law judge erred in awarding a fee for work performed prior to the date the intervenor appeared before the administrative law judge. As employer did not raise objections to intervenor's counsel's fee petition before the administrative law judge, we decline to address them now. *See Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.2d 66 (5th Cir. 1995).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and the Supplemental Decisions and Orders Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge