BRB No. 08-0716

S.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN PRESIDENT LINES	)	DATE ISSUED: 04/16/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Robert H. Madden, Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Awarding Benefits (2002-LHC-1650) of Administrative Law Judge Jennifer Gee 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 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).

This case is before the Board for the second time. Claimant sustained injuries to his upper left leg, left groin and lower back while working for employer as a refrigerator mechanic on March 30, 1998. Claimant immediately sought medical assistance for his injuries, but resumed his regular work duties the next day. He, however, subsequently obtained additional medical treatment for left hip pain, which required him to be off work

from July 28, 2000, to January 7, 2001,[1] and from September 20, 2001, to February 10, 2002. Claimant's Exhibits (CXs) 8-10, 23. Employer filed Notices of Controversion on September 12, 2001 and February 27, 2002, stating that claimant's left hip condition and hip replacement surgery are unrelated to his March 30, 1998 accident. CXs 11-12. Thereafter, claimant sought temporary total disability benefits for the period from September 20, 2001 to February 10, 2002, during which he was off work for his hip replacement surgery, permanent partial disability benefits from February 11, 2002 and continuing, and medical benefits.

In her Decision and Order Denying Benefits, the administrative law judge ultimately found, based on the record as a whole, that claimant did not establish a causal relationship between his employment with employer and his left hip problems. She thus concluded that claimant is not entitled to any disability or medical benefits relating to his left hip condition. Addressing claimant's appeal, the Board vacated the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, as well as her subsequent finding that a causal relationship was not established based on the record as a whole, and remanded the case for the administrative law judge to address the totality of the evidence on the causation issue. [*S.L.*] *v. American President Lines*, BRB No. 04-0629 (May 4, 2005) (unpub.). Additionally, the Board instructed the administrative law judge that if claimant's September 2000 surgery to excise a bone fragment was performed as treatment for his work injury, employer may be liable for the effects of that surgery, including the acceleration of claimant's arthritic condition. *Id.* Lastly, the Board instructed the administrative law judge to consider, if necessary, the remaining issues with respect to the nature and extent of claimant's disability, medical benefits and employer's request for Section 8(f) relief, 33 U.S.C. §908(f). *Id.*

On remand, the administrative law judge found that claimant's need for hip replacement surgery was caused by his March 30, 1998, fall and that employer is responsible for the medical and compensation benefits associated with the surgery. The administrative law judge thus found claimant entitled to temporary total disability benefits for the periods of work he missed as a result of the surgical procedures performed on his left hip, *i.e.*, June 28, 2000, through January 7, 2001, relating to the removal of the bone chip, and from September 20, 2001, until February 11, 2002, which relates to claimant's left hip replacement surgery. Additionally, the administrative law judge found claimant entitled to an award of permanent partial disability benefits for a loss in overtime wages of $804.90 per week,[2] which he sustained from the date he

[1] Employer voluntarily paid claimant temporary total disability benefits during this period of time.

[2] The administrative law judge found that claimant's actual wages upon his return to work, $1,265.58 per week, are representative of his post-injury wage-earning capacity.

returned to work, *i.e.*, February 11, 2002, until the date upon which claimant most likely read Dr. Norling's deposition that contained his statements that claimant was capable of performing overtime work, *i.e.*, no later than November 30, 2002.

On appeal, claimant challenges the administrative law judge's finding that claimant is not entitled to an award of permanent partial disability benefits after November 30, 2002. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant argues that the administrative law judge erred by limiting the award of permanent partial disability benefits to the period from February 11, 2002, to November 30, 2002, since the record establishes that claimant's permanent impairment continued to adversely affect his ability to perform overtime work and thus, his wage-earning capacity, beyond that period of time. Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). If overtime is part of a worker's pre-injury job, and if the worker sustains a loss of wage-earning capacity due to an injury, that loss of overtime must be considered in a determination of the amount of the loss of wage-earning capacity. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 113 (1989). To prevail on his claim for permanent partial disability benefits based on a loss of overtime wages, a claimant must show: (1) that overtime was available to him after his injury; (2) that his injury prevented him from working overtime; and (3) that he would have worked the overtime if it had been available. *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987). Thus, in such circumstances, the burden is on the claimant to demonstrate entitlement to compensation for lost overtime, by establishing that, absent his injury, he would have worked available overtime. *Brown*, 23 BRBS at 113; *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321, 323 (1982).

We reject claimant's contention that the administrative law judge improperly placed the burden on claimant to establish his entitlement to an award of permanent partial disability based on the loss of overtime hours which he alleges is related to his work injury. *Brown*, 23 BRBS at 113. Claimant bears the burden on this issue. *See id.*; *Sears*, 19 BRBS 235. In this case, the administrative law judge credited Dr. Norling's

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After adjusting those wages for inflation, the administrative law judge arrived at claimant's loss in wage-earning capacity by subtracting the adjusted earnings, $1,045.93, from the parties' stipulated pre-injury average weekly wage, $1,850.83.

opinion, as espoused at his deposition, that claimant has no restrictions regarding the number of hours per day he can work due to his work-related injury and that, as of October 28, 2002, claimant could increase his work hours without damaging his new left hip.[3] EX 27, Dep. at 43-44, 46-47, 64-65, 69. Based on this opinion, which essentially removed claimant's only stated motivation for not working overtime upon his February 11, 2002, return to work,[4] the administrative law judge rationally concluded that any lost overtime from November 30, 2002, is voluntary in nature and therefore, is not due to the work injury. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990)(table).

Moreover, the administrative law judge found that claimant did not provide any creditable evidence that he could not work available overtime due to his injury. *See generally Sears*, 19 BRBS 235. In this regard, the administrative law judge found that claimant's lost overtime chart, which claimant submitted to document the overtime hours he allegedly missed out on due to his work-related inability to perform such work, contained "serious deficiencies." Decision and Order On Remand at 20. This finding is rational and supported by substantial evidence. Claimant acknowledged that his lost

[3] After seeing pictures of a cart similar to the one that claimant worked in and after having learned that it was possible for claimant to do most of his work from a seated position, Dr. Norling opined that he would have eased claimant into overtime work over the course of several months from February 11, 2002, such that by the date of Dr. Norling's deposition, on October 28, 2002, the physician opined that claimant was no longer restricted by his work injury in terms of the number of hours of work he could perform per day. EX 27, Dep. at 46-47. Specifically, Dr. Norling opined that if claimant "truly could sit for most of [his work] he could probably work some overtime." EX 27, Dep. at 64-65. Dr. Norling further articulated that his initial intention was to limit claimant to an eight-hour work day, but that that limitation did not extend to only a five-day work week. EX 27, Dep. at 46. In short, Dr. Norling concluded, during his deposition, that "I think knowing what I know about this job now, [claimant] could at this stage increase [his work hours] without damaging his hip." EX 27, Dep. at 69.

[4] Claimant testified that he decided to not work overtime entirely because of the "no overtime" limitation he believed was imposed by Dr. Norling's February 8, 2002, work release form and that his actual physical restrictions had nothing to do with his decision to not work any overtime. HT at 271-272. Additionally, claimant stated that his decision to forgo all overtime upon his February 11, 2002, return to work was based entirely on Dr. Norling's concern that excessive use of his new left hip joint would cause it to prematurely wear out, EX 25, Dep. at 22, a concern which Dr. Norling no longer had as of the date of the physician's October 28, 2002, deposition.

overtime log represents every single possible opportunity of overtime available at employer's facility over the period in question and does not account for overtime hours for which he was not eligible based on his seniority, or days of overtime for which he was not able to work due to personal reasons, or because he would have exceeded 16 hours of work per day. HT at 281-282; EX 25, Dep. at 26-28. Claimant additionally stated that although "most of [his reefer mechanic work] can be done from the sitting position,"[5] EX 25, Dep. at 40- 41; HT at 284-286, his lost overtime log did not distinguish between overtime opportunities which could be performed from a seated, as opposed to a standing, position. Claimant further testified that he never tried to work any overtime, even after learning of Dr. Norling's changed assessment of claimant's ability to work overtime.[6] HT at 273-274. We therefore affirm the administrative law judge's finding that claimant did not establish that his work injury caused a loss of available overtime as of November 30, 2002, as it is rational, supported by substantial evidence, and in accordance with law. *See Brown*, 23 BRBS at 113; *Sears*, 19 BRBS 235. Accordingly, the administrative law judge's finding that claimant is not entitled to an award of permanent partial disability benefits based on lost overtime after November 30, 2002, is affirmed. *Id.*

We next address claimant's counsel's request for an attorney's fee for work performed before the Board in his prior appeal in this case, BRB No. 04-0629. Counsel seeks a fee of $6,287.05 representing 22.4 hours of work at a rate of $275 per hour, plus $127.05 in costs. Counsel re-filed his attorney's fee petition on July 18, 2008, subsequent to the issuance of the administrative law judge's decision on remand. 20 C.F.R. §802.203(c). As claimant successfully prosecuted his initial appeal by virtue of the administrative law judge's award on remand of temporary total and permanent partial disability benefits, his attorney is entitled to an attorney's fee for work performed before the Board. *See, e.g., Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996); 20 C.F.R. §802.203. The hourly rate of $275 for attorney time requested by counsel is reasonable,

[5] In light of claimant's admission that he could do most of his reefer mechanic work from a seated position, in conjunction with his further statements that he has successfully performed this work from his preferred standing position with minimal squatting and bending since February 11, 2002, we reject his contention that the record establishes that there is no way that claimant could perform a substantial portion of his reefer mechanic work while sitting down.

[6] Claimant acknowledged that he did not attempt to perform any overtime work even though he has successfully performed his reefer mechanic work since February 11, 2002, primarily from a standing position without any physical complaints, time off, requests for accommodations, or assistance, HT at 287, and that he has also been able to minimize his bending and squatting. HT at 293.

20 C.F.R. §802.203(d)(4), and the number of hours requested are reasonably commensurate with necessary work performed in this case. 20 C.F.R. §802.203(e). We therefore grant a fee of $6,287.05, for work performed before the Board in BRB No. 04-0629, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed. Claimant's counsel is awarded a fee in the amount of $6,287.05 for work performed before the Board in BRB No. 04-0629, to be paid directly to claimant's counsel by employer.

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