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| BILLY BILBRO |) | |
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| Claimant-Respondent |) | |
| |) | |
| v. |) | |
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| UNIVERSAL MARITIME SERVICE |) | DATE ISSUED: <u>Dec. 12, 2003</u> |
| CORPORATION |) | |
| |) | |
| and |) | |
| |) | |
| SIGNAL MUTUAL INDEMNITY |) | |
| ASSOCIATION, LIMITED |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | DECISION and ORDER |

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

Quentin D. Price and John D. McElroy (Barton, Price & McElroy), Orange, Texas, for claimant.

Steven L. Roberts and Rick L. Rambo (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Order Awarding Attorney Fees (2002-LHC-00915) 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 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). The amount of an attorney’s fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer as a gearman beginning in 1983. On June 19, 1997, employer ceased stevedoring operations at the Barbours Cut facility. Claimant testified that he worked intermittently for employer after June 19, 1997, performing clean up work until July 7, 1997, when he injured his back during the course of his employment for employer. Claimant initially reported the injury to Jerry Kelly, a co-worker, and George Helm, his supervisor. Subsequently, claimant filed a claim for compensation due to his back condition when he stopped working on August 20, 1997. An MRI conducted on September 16, 1997, showed a large disc herniation at L4-5. Claimant underwent back surgery on October 20, 1997, and he required a second back surgery on August 16, 1999. Claimant has received treatment for pain management since February 14, 2000. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from August 20, 1997, to September 16, 2001. Claimant sought compensation under the Act for temporary total disability from August 20, 1997, to September 15, 2000, permanent total disability, 33 U.S.C. §908(a), from September 16, 2000, to July 1, 2002, and continuing permanent partial disability from July 2, 2002, 33 U.S.C. §908(c)(21), based on a loss of wage-earning capacity.

In his decision, the administrative law judge found that claimant established a *prima facie* case entitling him to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back condition to his employment. The administrative law judge credited the testimony of claimant and Mr. Helms, and employer’s weekly payroll records demonstrating payment to claimant after June 19, 1997, to find that claimant sustained a back injury during the course of his employment for employer on July 7, 1997, and he rejected employer’s assertions to the contrary. The administrative law judge found that claimant’s back condition reached maximum medical improvement on February 14, 2000. The administrative law judge determined that claimant is unable to return to his usual employment as a gearman due to his back condition, nor is he able to perform longshore work as a dock driver or pin knocker. The administrative law judge found that employer established suitable alternate employment as of July 2, 2002, as a central station monitor, a position claimant agreed is suitable. Finally, the administrative law judge found that employer is responsible for claimant’s pain management treatment, that employer is not liable for a penalty under Section 14(e), 33 U.S.C. §914(e), and that employer is not entitled to Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability under the Act. The administrative law judge awarded claimant compensation for temporary total disability from August 20, 1997, to February 14, 2000, for permanent total disability from February 15, 2000, to July 2, 2002, and for ongoing

permanent partial disability from July 2, 2002. Employer appeals the award, contending that the administrative law judge erred by finding that claimant sustained a work-related injury and that claimant is not capable of employment as a dock driver. Claimant responds, urging affirmance.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of \$92,281.07, representing 111.4 hours of attorney time by Ed W. Barton at an hourly rate of \$250, 110.25 hours of attorney time by John D. McElroy and 113.50 hours of attorney time by Quentin D. Price at an hourly rate of \$225, and expenses of \$14,087.32. In his supplemental decision, the administrative law judge addressed employer's objections, reduced the hourly rate for Mr. Barton to \$225 and the number of his compensable hours to 106.025, and he reduced the hourly rate for Mr. McElroy and Mr. Price to \$200, and the number of compensable hours to 110.125 and 112, respectively. Claimant's counsel was awarded an attorney's fee totaling \$68,280.63, plus the requested expenses of \$14,087.32, for a total award of \$82,367.95. Employer appeals the administrative law judge's fee award, and his rejection of its specific objections. Claimant responds, urging affirmance.

Employer first challenges the administrative law judge's finding that claimant sustained a work-related injury. Specifically, employer argues that the administrative law judge erred by finding that employer failed to rebut the Section 20(a) presumption, and by not addressing, on the record as a whole, the issue of whether an accident occurred as alleged by claimant.¹

In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed that could have caused or aggravated the harm. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31

¹ Employer also argues that the administrative law judge erred by applying the principle that all doubtful issues of fact must be resolved in claimant's favor, inasmuch as this principle was specifically invalidated by the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Contrary to employer's contention, the administrative law judge did not apply the "true doubt rule" to the facts of this case. The administrative law judge merely stated this principle among the boilerplate in his decision before he addressed the relevant facts in dispute. Decision and Order at 19. Moreover, the administrative law judge's next sentence properly states that claimant bears the ultimate burden of persuasion by a preponderance of the evidence, citing *Greenwich Collieries*. Accordingly, any error is harmless in the administrative law judge's inclusion of the superceded "true doubt rule" in his decision.

BRBS 119(CRT) (4th Cir. 1997). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his back injury is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury was not caused by his employment. *See Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1999). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Moore*, 126 F.2d 256, 31 BRBS 119(CRT). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.*; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We reject employer's contention of error. Assuming, *arguendo*, that the administrative law judge erred in stating that the Section 20(a) presumption was not rebutted, the administrative law judge nonetheless fully weighed the evidence as a whole on the only contested issue concerning causation, namely the occurrence of a work accident as alleged by claimant.² Substantial evidence supports the administrative law judge's finding that the accident occurred as alleged. The administrative law judge listed employer's twelve specific assertions, which it asserted established that claimant fabricated the occurrence of a back injury on July 7, 1997, during the course of his employment for employer. Decision and Order at 19-20. The administrative law judge then noted claimant's seven contentions in response to employer's argument. *Id.* at 20. The administrative law judge stated that "after reviewing the entire record and observing claimant's demeanor on the stand," and having "taken into consideration Employer's assertions," he credited the testimony of claimant and George Helm, as supported by the

² As part of its argument that an injury did not occur, employer cites Dr. Pennington's opinion that claimant could not have sustained the severe disc herniation in a work accident on July 7, 1997, as alleged, and continue to work thereafter. He stated, based on reasonable degree of medical probability, that claimant's L4-5 herniation is not related to an incident at work on July 7, 1997. EX 34 at 52-53, 92-96. Employer's sole contention regarding causation both before the administrative law judge and on appeal is that the alleged work accident did not occur. As the only issue employer raises concerns the administrative law judge's weighing of the evidence regarding the occurrence of the alleged accident, it is the only issue before us. Thus, while Dr. Pennington's opinion would be sufficient to rebut Section 20(a) with regard to the causal connection between the alleged accident and claimant's condition, *see Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), as employer raises no error regarding weighing the medical evidence on causation, we will not address this issue.

weekly payroll records, and found that claimant worked for employer after it ceased operations at Barbours Cut on June 19, 1997, and that claimant injured his back on July 7, 1997, while rolling up heavy wire cable. *Id.*; see Tr. at 80-91, 189, 324-339, 345-372; CX 29. The administrative law judge credited claimant's testimony as to the occurrence of the work injury based on claimant's long work history, which includes declining in the past to file for compensation or medical benefits for work-related injuries, claimant's reputation for honesty, and his demeanor at the hearing. *Id.* at 20; see Tr. at 338-339, 343-344. The administrative law judge also credited the testimony of Jerry Kelly that claimant reported a back injury to him on the day of the injury. Tr. at 418-425.

The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Employer has not raised any reversible error in the administrative law judge's weighing of the evidence as a whole. Because the testimony of claimant, Mr. Helm, and Mr. Kelly, and employer's weekly payroll records constitute substantial evidence in support of the conclusion that claimant sustained a back injury at work injury on July 7, 1997, and as the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, *see generally 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 (2^d Cir. 1961), we affirm the administrative law judge's finding.³

Employer next challenges the administrative law judge's determination that claimant is incapable of performing suitable alternate employment as a dock driver. Specifically, employer contends the administrative law judge erred by discrediting evidence that this position is within claimant's work restrictions. Where, as here, it is uncontested that claimant is unable to return to his usual employment, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and

³ As the administrative law judge fully weighed the relevant evidence, his concluding statement, Decision and Order at 21, that as he credited claimant's assertions regarding the accident, employer had failed to rebut Section 20(a), is in error. Employer's burden under Section 20(a) is one of production, a burden employer met when it submitted evidence in support of its position. However, the administrative law judge's error is harmless, since once Section 20(a) is rebutted, the administrative law judge must then weigh all of the evidence, and he did so here.

physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden under the standard set forth in *Turner*. See generally *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

In his decision, the administrative law judge discussed employer's surveillance videotape showing claimant engaged in various physical activities and claimant's testimony acknowledging occasional driving, loading and unloading of livestock and equipment from a pick-up trucks, and lifting and pushing. Decision and Order at 22-23. The administrative law judge further noted claimant's testimony that his back pain nonetheless requires him to rest three to four hours a day five to seven days per week. Tr. at 117, 144. The administrative law judge found claimant's testimony credible and that none of the videotape evidence shows claimant working at a fast pace, which is required of dock work. With the exception of claimant's lifting a heavy tire, the administrative law judge found that none of claimant's videotaped activities appear to exceed claimant's work restrictions as established by his treating physician, Dr. Grabois. See CXS 8 at 16-24; 9; EXS 36-43; Tr. at 467. Moreover, the administrative law judge specifically found that claimant could not work as a dock driver. *Id.* at 23. The administrative law judge discussed the testimony of Dr. Grabois, who limited claimant to four hours per day of work as a dock driver, which could eventually become eight hours per day. CX 8 at 18-19, 23-24, 59-60. The administrative law judge credited the testimony of Tommy Isbell and Randy Stiefel that, while some dock driver shifts may last only four hours, shifts also can last twelve hours, and employees may not leave early unless they secure a replacement. Tr. at 458-461, 516. The administrative law judge further credited the testimony of claimant and Mr. Isbell that dock drivers experience considerable bending, twisting, stooping, and vibrations, which claimant is unable to endure due to his back condition. Tr. at 131-134, 309-310, 461-466. The administrative law judge found their testimony more credible than the contrary testimony of Ms. Favaloro, a vocational consultant, and Dr. Pennington, who examined claimant at employer's request, because they have actually worked as dock drivers and, as such, are more knowledgeable about the physical requirement of the job.

In adjudicating a claim, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. See *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In the instant case, employer has not demonstrated error in the administrative law judge's rejection of the videotape evidence. Moreover, the administrative law judge's decision

to credit the testimony of claimant, Mr. Isbell, and Mr. Stiefel that claimant is unable to work as a dock driver is rational and supported by substantial evidence. We therefore affirm the administrative law judge's determination that employer did not establish that a dock driver position is suitable alternate employment. *See DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Lastly, employer challenges the fee awarded to claimant's counsel. Employer contends that the awarded hourly rates of \$225 to Mr. Barton, and of \$200 to Mr. McElroy and Mr. Price are excessive. We reject employer's contention. 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 Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also 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 rates of \$250 for Mr. Barton, and of \$225 for Mr. McElroy and Mr. Price were excessive. However, he found Mr. Barton entitled to a fee based on an hourly rate of \$225, and Mr. McElroy and Mr. Price entitled to a fee based on an hourly rate of \$200, pursuant to the factors enumerated in Section 702.132. As employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on his determination as to the proper hourly rate for each of claimant's attorneys, we affirm the administrative law judge's finding.⁴ *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251, 253 (1998)(decision on recon. *en banc*).

We also reject employer's contention that time requested for "file review" is not sufficiently specific nor separated from the other activities listed for which the total amount of time expended to complete the combined activities is listed as a single bulk entry. In his supplemental order, the administrative law judge listed each bulk entry containing time expended for file review. The administrative law judge found that any

⁴ Employer submitted no evidence in support of its assertion that \$200 per hour is Mr. Barton's current hourly rate, and it argued that Mr. McElroy and Mr. Price submitted no evidence they have been awarded a fee in cases arising under the Act based on an hourly rate of \$200. Contrary to employer's assertions, in their fee petition, Mr. Barton stated that local family law and criminal defense lawyers bill at an hourly rate of \$200, and this hourly rate does not account for the contingency nature of longshore cases and delay in payment until completion of the case. Moreover, appended to their fee petition was a 1999 Board Order in which Mr. Barton and Mr. McElroy were awarded a fee based on an hourly rate of \$200.

time requested for file review is reasonably related to the substantive activity listed in the bulk entry, and that time expended thereon is reasonable and necessary for performing the substantive activity listed. Supplemental Order Awarding Attorney Fees at 11-13. The administrative law judge also found no useful purpose in requiring counsel to state the time required for each component of a single task. *Id.* at 14. As the administrative law judge adequately addressed employer's challenge to time requested for file review, we decline to disturb his determination that the time requested is compensable. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Finally, employer challenges the award of a fee for 9.25 hours expended after the administrative law judge issued his decision, including 3.5 hours to prepare the fee petition. Employer, however, may be held liable for reasonable wind-up services after the administrative law judge has issued his decision, and, in this case, employer has not shown that the administrative law judge abused his discretion in this regard. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). In addition, we reject employer's contention that the administrative law judge erred in awarding counsel a fee for 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*, 530 U.S. 1213 (2000). We, therefore, affirm the administrative law judge's attorney fee award.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge