BRB No. 05-0480

NELS JENSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINETTE MARINE CORPORATION	)	DATE ISSUED: 02/03/2006
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees and Expenses of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Michael B. Kulkoski, Green Bay, Wisconsin, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart and Storm, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees and Expenses (2004-LHC-1383) of Administrative Law Judge Stephen L. Purcell 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 law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant began working for employer in 1977 and, as of the date of the injury at issue, he was working as a welder leadman. During the course of his employment, he developed problems with his right shoulder. An MRI revealed degenerative problems and a muscle tear. Claimant underwent surgery and returned to work, using his left arm more in order to protect his right shoulder. Claimant testified that, on September 25, 2002, although there was no traumatic injury, he began feeling pain in his left shoulder after climbing, fitting steel plates, swinging a sledge hammer and adjusting a ladder. Tr. at 16-18; Decision and Order at 2-3. The next day, claimant saw Dr. Leow, the orthopedic specialist who had performed surgery on claimant's right shoulder. Dr. Leow ordered an MRI which revealed a small full thickness tear with tendonopathy in claimant's left shoulder, and he recommended surgery. Cl. Ex. 2. Because employer declined authorization for the surgery, claimant continued conservative treatment and continued to work, ignoring the restrictions set by his doctor. Tr. at 22-23; Decision and Order at 4. As of July 2003, Dr. Leow continued to recommend surgery. Claimant filed a claim for disability and medical benefits for the left shoulder injury.

The administrative law judge found that claimant is a credible witness and that he established a *prima facie* case of an injury to his left shoulder as a result of his work activities and the "ladder incident" on September 25, 2002, invoking the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge found that employer rebutted the presumption based on the opinion of Dr. Kihm, an independent medical examiner who performed an examination of claimant at the request of the Department of Labor and who stated that claimant's injury resulted in a temporary aggravation that had resolved and that the current condition was due solely to claimant's pre-existing degenerative shoulder condition. Decision and Order at 13-14; Emp. Ex. 14. On the record as whole, the administrative law judge gave greater weight to Drs. Leow and Himmel, claimant's treating orthopedic surgeon and general practitioner respectively, and found that claimant established a work-related injury. Decision and Order at 15-17; Cl. Ex. 2; Emp. Exs. 2, 4. The administrative law judge awarded medical benefits and held employer liable for the surgery and other expenses related to the left shoulder injury. Because the administrative law judge found that claimant had no loss of wage-earning capacity, the administrative law judge awarded claimant a *de minimis* award of $10. Decision and Order at 18-20. Employer appeals the award, arguing that the administrative law judge erred in finding that claimant sustained a work-related injury.

Employer argues that the administrative law judge erred in using the "treating physician" rule to give greater weight to the opinions of Drs. Himmel and Leow than to

that of Dr. Kihm. We reject employer's contention. The administrative law judge did not mechanically defer to claimant's treating physicians. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003). Rather, he examined the logic of the doctors' conclusions, and he explained that Drs. Himmel and Leow administered a number of objective tests and relied on the results of those tests and on physical examinations of claimant to support their opinions. The administrative law judge found that their treatment of claimant was consistent with the test results and was reasonable. The administrative law judge rejected Dr. Kihm's opinion because he found it contradictory and "not well-reasoned." Decision and Order at 17.

Dr. Leow stated that, following the injury on September 25, 2002, an MRI revealed a small full thickness rotator cuff tear in claimant's left shoulder and that this was a new problem for claimant. Cl. Ex. 2. Dr. Himmel attributed the torn rotator cuff in claimant's left shoulder to a work incident, as claimant's work involved repetitive motions. Emp. Ex. 2. Dr. Kihm diagnosed rotator cuff impingement syndrome with probable incomplete tearing and initially thought "that [claimant] did have a material aggravation of his symptoms from this ladder-lifting incident." He also stated that claimant's underlying degenerative shoulder problem was aggravated by the ladder incident, and he stated that claimant should have surgery if more conservative treatment, such as an epidural injection, did not resolve the problem. Emp. Ex. 13. Dr. Kihm later sent what the administrative law judge called an unexplained "clarification letter." Therein, Dr. Kihm stated that any aggravation caused by the "ladder incident" was temporary and had resolved, and that claimant's condition is the result of the natural progression of his pre-existing degenerative shoulder condition. Emp. Ex. 14.

It is well established that an administrative law judge is entitled to evaluate and weigh the evidence of record and that the Board may not reweigh the evidence but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Based on the contradictory nature of Dr. Kihm's two letters, it was rational for the administrative law judge to give Dr. Kihm's opinion less weight than the opinions of Drs. Himmel and Leow. Moreover, the opinions of Drs. Himmel and Leow constitute substantial evidence supporting the administrative law judge's conclusion that claimant sustained a work-related left shoulder injury. *See generally Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Therefore, we

affirm the administrative law judge's finding that claimant is entitled to medical benefits related to this injury.

Subsequent to the award of benefits, claimant's counsel filed a petition for an attorney's fee in the amount of $6,210, representing 27.6 hours of work at an hourly rate of $225, plus $150.37 in expenses. Employer filed objections which, with the exception of finding a task clerical and reducing the fee requested by one-half hour, the administrative law judge rejected. Therefore, he awarded claimant's counsel $6,095.50, representing 27.1 hours of work at an hourly rate of $225, plus $150.37 in expenses. Supp. Decision and Order at 3-4. Employer appeals the fee award, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in awarding a fee based on an hourly rate of $225. Specifically, employer argues that the administrative law judge erred in relying on the "2002 Survey of Law Firm Economics" because it was not submitted into evidence by either party, so there was no foundation for its use. We reject this contention. Employer objected to the requested hourly rate in part based on the place where the services were performed. The administrative law judge did not err in referring to a standard reference to determine the rates in relevant geographic areas and experience. *See generally Story v. Navy Exch. Serv. Center*, 33 BRBS 111 (1999). It was within his discretion to look at the survey for guidance in setting counsel's hourly rate. Accordingly, we reject employer's challenge to the hourly rate awarded. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Next, employer contends the administrative law judge erred in allowing a fee petition with "block billing" entries or in awarding a fee for those entries after having found that those entries did not comply with the regulation at 20 C.F.R. §702.132(a).[1] Claimant responds, arguing that the entries in question consist of groups of related, identified activities. Section 702.132(a) states that the fee petition will be supported by a complete statement of work done including "hours devoted by each such person to each category of work." The administrative law judge found that counsel's failure to specify the amount of time spent on a particular type of work did not comply with the "literal" requirement of the regulation and that the combined entries "make[] it more difficult than it should be to accurately assess the reasonableness of the total amount of time claimed for these entries." Supp. Decision and Order at 4. Nonetheless, he concluded that the

[1]For example, the entry on June 10, 2003, requested one hour for "telephone conference with DOL Claims, Informal Conference, letter to client[,]" and the entry on May 14, 2004, requested one and one-half hours to "Prepare answers to interrogatories, correspondence to client, telephone call to counsel."

"description of work performed for each entry is adequate to allow me to evaluate the reasonableness of the time expended on the collective tasks identified therein," reviewed the charges and found the total time was reasonable for the listed tasks. *Id*. Thus, the administrative law judge declined to strike the petition. *Id.* at 5.

We reject employer's challenge. The administrative law judge fully addressed employer's objection and rationally determined that those five entries were sufficiently specific for him to evaluate the reasonableness of the time expended on the collective tasks. Supp. Decision and Order at 4-5. The administrative law judge's conclusion is rational, and employer has failed to demonstrate reversible error. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000) (work reasonably necessary is compensable); *compare with Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993) ("unit" billing not permitted because it is not related to actual work performed). We also reject employer's remaining objections to specific entries. The administrative law judge addressed all of employer's objections and rejected them, finding that the time requested by counsel was reasonable. As employer has shown no abuse in discretion, we affirm the administrative law judge's fee award. *O'Kelley*, 34 BRBS 39; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order – Award Benefits and his Supplemental Decision and Order Awarding Attorney Fees and Expenses are affirmed.

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