BRB No. 07-0629

W.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOLLINGER SHIPYARDS, INCORPORATED	)	DATE ISSUED: 02/29/2008
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Gino J. Rendeiro (Weeks, Kavanagh, & Rendeiro), New Orleans, Louisiana, for claimant.

Kevin A. Marks and Randy J. Hoth (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee (2005-LHC-2148) of Administrative Law Judge Lee J. Romero, 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 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).

Claimant worked for employer as a sandblaster beginning in January 2005. Claimant alleges that, on March 3, 2005, at approximately 11:45 p.m., when he was exiting a compartment of a barge, the barge rocked from the wake of some boats, and he fell and injured his back. He testified that a co-worker saw this fall. Claimant stated he returned to work for one more week in a light-duty capacity but could not continue. Tr. at 26-31. He was initially diagnosed with lumbosacral strain and degenerative disc disease, but following an MRI, doctors discovered a herniated disc. Cl. Exs. 35, 38-39. Claimant filed a claim for benefits, and employer controverted the claim. Cl. Exs. 2-3.

The administrative law judge found that this case is "riddled with inconsistencies." Decision and Order at 30. In evaluating claimant's credibility, the administrative law judge determined that claimant's inconsistent testimony is due to his confusion and not to any intent to deceive. The administrative law judge found that claimant was consistent in his description of his accident to his supervisors and his doctors, but concluded that his recollection of the details was unreliable. *Id.* at 30-32. Despite the discrepancies concerning the time and place of the accident, the administrative law judge found that both claimant and his co-worker Hawkins uniformly described claimant's fall at work and that the medical evidence supported the conclusion that claimant sustained a back injury from a fall at work which aggravated an existing condition. *Id.* at 33-34. Therefore, he found that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. Regarding rebuttal, the administrative law judge determined that employer's circumstantial evidence was unpersuasive and that there is no medical evidence disputing a causal nexus between claimant's injury and his employment. Nonetheless, assuming, *arguendo*, that employer rebutted the presumption, the administrative law judge found that the evidence as a whole supports claimant's claim. *Id.* at 35-37. Accordingly, he found that claimant's injury is work-related. In addition, the administrative law judge found that claimant's condition has not reached maximum medical improvement and that claimant has not been released to return to work. After rejecting both employer's and claimant's calculations of average weekly wage, the administrative law judge found that claimant is entitled to temporary total disability benefits based on an average weekly wage of $321.75, as well as medical benefits, a Section 14(e), 33 U.S.C. §914(e), assessment, and interest. Decision and Order at 46-50. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $41,970.23, representing 201.5 hours at an hourly rate of $175, plus $6,707.73 in expenses. Employer appeals the administrative law judge's award of benefits and the fee award, and claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in finding that claimant's injury is work-related. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, there is no dispute that claimant sustained a "harm," as he was diagnosed with a herniated disc and an aggravation of his pre-existing degenerative disc disease. Employer contends the administrative law judge erred in finding that claimant established the "accident" element of the *prima facie* case. The administrative law judge fully evaluated claimant's testimony and found it generally lacked credibility. However, he specifically found that claimant was consistent in describing his accident. Decision and Order at 31. Mr. Hawkins, claimant's only eyewitness, also consistently described claimant's fall. In addition, the administrative law judge relied on medical evidence supporting the allegation that claimant injured his back while working on a barge for employer. *Id.* at 33-34. The credited evidence is sufficient to establish that a fall at work occurred that could have caused claimant's injury, and the administrative law judge did not err in relying on it. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As substantial evidence supports the administrative law judge's conclusion that claimant established both elements of his *prima facie* case, the administrative law judge's invocation of the Section 20(a) presumption is affirmed. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *see generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

Employer next contends the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption. Employer asserts that the time cards for March 3, 2005, establish that claimant was not at work at the time he alleges his accident occurred and that claimant was unable to refute this evidence; therefore, employer concludes that the administrative law judge erred in finding that an accident occurred at work. Contrary to employer's assertion, the administrative law judge rationally explained why he found employer's evidence unpersuasive. Specifically, the administrative law judge noted that, although claimant had no evidence to dispute the time cards for that date,[1] the time cards established other dates when claimant worked with Mr. Hawkins when his accident could have occurred.[2] Decision and Order at 35 n.18. Additionally, the administrative law judge found that there are no medical opinions of record stating that claimant's back injury is not related to a fall at work. Nevertheless, assuming *arguendo* that employer rebutted the Section 20(a) presumption, the administrative law judge weighed the evidence as a whole. In doing so, he found employer's "sole reliance upon circumstantial evidence" unpersuasive due to inconsistencies in the evidence. The administrative law judge found that a consensus of the evidence establishes that claimant fell at work despite any discrepancies regarding the date of the fall.[3] Decision and Order at 36. The administrative law judge rationally credited the consistent testimony concerning the occurrence of a fall, including Mr. Stann's testimony that claimant reported a fall to him, as well as the medical reports, which also consistently reported claimant's description of the accident. The administrative law judge's credibility determinations must be accepted by the Board, as they are not inherently incredible or patently unreasonable. *Cordero*, 580 F.2d 1331, 8 BRBS 744; Decision and Order at 36-37; *see generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's injury is work-related.

Next, employer contends that the administrative law judge erred in awarding benefits because claimant has no loss of wage-earning capacity. Specifically, contrary to the administrative law judge's finding, employer argues that claimant's pre-injury wages

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[1]Claimant testified only that the time cards are "messed up" all the time and are maintained solely by the supervisors. Decision and Order at 7; Tr. at 68-69.

[2]The administrative law judge had previously found that claimant's unreliability was due to confusion and not to his intent to deceive. Decision and Order at 32.

[3]For example, the administrative law judge stated that employer did not explain the disappearance of a note written by the supervisor to whom claimant first reported his injury and that employer's testimonial evidence also was confusing and equivocal.

were $224.67 per week and that higher-paying suitable alternate employment is available to claimant.[4] The administrative law judge calculated claimant's average weekly wage by using only the wages claimant earned the two months during which he was employed by employer as a sandblaster and excluding prior, lesser, wages. Consequently, he found that claimant's average weekly wage is $321.75. Decision and Order at 47. The goal of Section 10(c), 33 U.S.C. §910(c), is to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. Under Section 10(c), the administrative law judge has broad discretion and may take into account a claimant's new, higher, wages. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). Accordingly, the administrative law judge's decision to calculate claimant's average weekly wage using only the wages from employer, which are those most contemporaneous with claimant's injury, is supported by substantial evidence and in accordance with law.[5]

Moreover, substantial evidence supports the administrative law judge's findings that claimant's condition has not reached maximum medical improvement and that he has not been released to return to any work.[6] Cl. Exs. 41-43. Consequently, the administrative law judge did not err in declining to address the suitability of any alternate employment identified by employer. The administrative law judge therefore properly found that claimant is entitled to temporary total disability benefits.[7] *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

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[4]Employer relies on claimant's Social Security earnings records to show that prior to his injury, claimant earned, at most, $11,683 per year, which results in $224.67 per week. Emp. Ex. 7. Employer relies on its vocational expert's reports to establish that suitable alternate employment paying up to $326.40 per week is available to claimant. Emp. Ex. 18.

[5]We decline to address claimant's challenge to the administrative law judge's average weekly wage finding as it was not raised in a cross-appeal. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); 20 C.F.R. §§802.205(b), 802.213(b).

[6]Drs. Nelson, Vogel and Steck placed claimant on non-work status indefinitely and/or advised that he undergo diagnostic testing and an additional epidural injection series prior to determining his ability to return to any work. Decision and Order at 22-26, 40; Cl. Exs. 35, 41-43.

[7]As claimant is currently unable to work, *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C.J., concurring in pertinent part and dissenting on other grounds), *motion for recon. denied*, 17 BRBS 160 (1985) (Ramsey, C.J., concurring and dissenting), is distinguishable from the instant case and employer's

Lastly, employer challenges the attorney's fee awarded to claimant's counsel by the administrative law judge. 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). In this regard, an attorney's fee must be awarded in accordance with the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In this case, claimant's counsel filed a petition for an attorney's fee in the amount of $43,195.23, representing 208.5 hours at an hourly rate of $175, plus $6,707.73 in expenses. Employer objected to the request, challenging as improper counsel's use of minimum-increment billing and excessive time to prepare for a mediation conference and to prepare the post-hearing brief. The administrative law judge reduced the request by a total of seven hours for the improper use of minimum-increment billing. He rejected employer's remaining objections and awarded counsel a fee of $41,970.23, representing 201.5 hours at an hourly rate of $175, plus $6,707.73 in expenses.

Employer argues that the fee award should be reversed in its entirety or reduced. As we have affirmed claimant's award of benefits, claimant's counsel is entitled to an attorney's fee in this disputed case. 33 U.S.C. §928(a). With regard to the amount of the fee, employer reasserts its objections that counsel's request for a fee for time preparing for a mediation conference and the post-hearing brief is excessive, and it asks the Board to reduce the approved fee award by 23 hours. Other than stating that it would be "reasonable," employer gives no rationale and cites no case law in support of its suggestion. As the administrative law judge found, employer's argument is "mere disagreement" with the request. We conclude that the administrative law judge's fee award must be upheld, as employer has failed to show the award to be unreasonable or an abuse of the administrative law judge's discretion. Therefore, we affirm the administrative law judge's fee award. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

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reliance thereon is misplaced. In *Villasenor*, the claimant had been released to return to sedentary work by two physicians; however, he refused to cooperate with employer's vocational expert. The Board vacated the award of benefits and remanded the case for the administrative law judge to consider whether the claimant made a diligent effort to return to gainful employment.

Accordingly, the administrative law judge's Decision and Order awarding benefits and Supplemental Decision and Order Awarding Attorney's Fee are affirmed.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8]Claimant's counsel has requested a fee for work performed before the Board. At such time as counsel files a petition for an attorney's fee in accordance with 20 C.F.R. §802.203, the Board will consider the request.