RICHARD STETZER	)	BRB No. 06-0537
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: 01/31/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
RICHARD STETZER	)	BRB Nos. 06-0802 and 06-0802A
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Supplemental Decision and Order Awarding Attorney's Fees, and the Decision and Order Denying Claimant's Motion for Reconsideration of Supplemental Decision

and Order Awarding Attorney's Fees and Denying Respondent's Motion to Dismiss Claimant's Motion for Reconsideration as Untimely of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream and May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Murphy and Beane), New London, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, and employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Decision and Order Denying Claimant's Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees and Denying Respondent's Motion to Dismiss Claimant's Motion for Reconsideration as Untimely (2005-LHC-0024) of Administrative Law Judge Colleen A. Geraghty 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).

On July 8, 2000, claimant slipped in the hold of a ship and injured his back. He was treated and returned to restricted-duty work on May 13, 2001, and he filed a claim for additional benefits. Administrative Law Judge Sutton found that employer owed no additional temporary total disability benefits for the period ending May 13, 2001. For the period between May 31, 2001, and March 28, 2002, Judge Sutton found that claimant is entitled to temporary partial disability benefits in a lump sum amount of $5,834.17. Thereafter, he found claimant entitled to ongoing temporary partial disability benefits based on "two-thirds of the difference between the Claimant's actual earnings and those

received by the comparable employee." Cl. Ex. 6 at 13 (Sutton Decision and Order).[1] Claimant appealed the award, challenging only Judge Sutton's decision to use Section 10(c), 33 U.S.C. §910(c), to calculate claimant's average weekly wage. The Board agreed with claimant and held that average weekly wage should have been calculated using Section 10(a), 33 U.S.C. §910(a), because claimant was a five-day per week worker. Using Judge Sutton's calculation under Section 10(a), the Board modified the award of temporary total disability benefits from July 9, 2000, through May 13, 2001. In all other respects, the decision was affirmed. *Stetzer v. Logistec of Connecticut, Inc.*, BRB No. 03-785 (Aug. 20, 2004) (not publ.).

On September 20, 2004, claimant filed an LS-18 pre-hearing statement with the district director alleging that employer was in default of Judge Sutton's award and seeking a Section 14(f), 33 U.S.C. §914(f), assessment on the unpaid benefits. ALJ Ex. 1. The district director did not issue a default order, but transferred the case to the Office of Administrative Law Judges because there was an issue of fact to be decided,[2] as claimant argued that three large payments made to Mr. Haggerty should have been included in the comparison used to determine claimant's compensation rate.[3] Decision and Order at 2. Administrative Law Judge Geraghty (the administrative law judge) held a hearing on February 14, 2005.[4] She found that claimant failed to establish that the payments to Mr. Haggerty were wages earned for his services to employer, and she excluded those payments from the calculation of claimant's loss of wage-earning capacity. Decision and Order at 7-8. The administrative law judge found that claimant was entitled to $87.13 per week for the period between March 29, 2002, and January 15, 2005, totaling $12,720.98, and that he is entitled to this same weekly rate of compensation from January 16, 2005, through the remainder of the five-year period under

[1]Claimant's co-worker, Daniel Haggerty, was deemed to be the comparable employee.

[2]When an enforcement claim arises under Section 18(a), 33 U.S.C. §918(a), the district director may transfer the case to an administrative law judge if a question of fact must be resolved. *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000); *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988); *see also Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); 20 C.F.R. §§702.315-702.316, 702.372.

[3]Mr. Haggerty received payments of $6,750, $4,500, and $4,500 on September 17, 2003, February 5, 2004, and October 14, 2004, respectively. Cl. Ex. 3; Emp. Exs. 1-2.

[4]The administrative law judge admitted exhibits, and counsel presented arguments, but no testimony was taken.

Section 8(e), 33 U.S.C. §908(e).[5] Decision and Order at 8-9. Because she concluded it was necessary to consult extra-record facts to compute Judge Sutton's award, the administrative law judge found that employer is not liable for a Section 14(f) assessment. Decision and Order at 10-11.

Claimant appeals the administrative law judge's award of benefits, arguing that she erred in denying the Section 14(f) assessment, in excluding the payments to Mr. Haggerty from the wage-earning capacity calculation, and in failing to enforce Judge Sutton's order. BRB No. 06-537. Employer responds, urging affirmance of the findings that the three payments to Mr. Haggerty were properly excluded from claimant's post-injury wage calculation and that Judge Sutton's order was unenforceable as written. Thus, employer asserts that the administrative law judge properly resolved the issues and denied the Section 14(f) assessment.

Claimant first argues that the administrative law judge erred in finding that Judge Sutton's order was not enforceable and, therefore, in denying a Section 14(f) assessment. An administrative law judge's award is not enforceable if it does not adequately state the amount of compensation owed to a claimant. *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992); *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990); *Cohen v. Pragma Corp.*, 445 F.Supp.2d 15 (D.D.C. 2006). Moreover, an order is not final or enforceable until the district director makes the necessary compensation calculations. *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994). In order for the district director to make the necessary calculations, the administrative law judge must specify the amount of compensation due or provide the means to calculate compensation without resorting to extra-record facts. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT). If an order is not enforceable, then no Section 14(f) assessment is warranted. *Keen*, 35 F.3d 226, 28 BRBS 110(CRT); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT).

Judge Sutton's order specifically stated that claimant is entitled to benefits "from March 29, 2002 to the present and continuing for a period not to exceed five years, in an amount equal to two-thirds of the difference between the Claimant's actual earnings and

[5]The administrative law judge found that claimant earned $103,752.49 during the 146-week period in question and that Mr. Haggerty earned $122,836.06. She found that the difference of $19,082.57 represents a wage loss of $130.70 per week for claimant ($19,082.57 ÷ 146 = $130.70) and results in a compensation rate of $87.13 (2/3 x $130.70 = $87.13). Decision and Order at 8.

those received by Daniel Haggerty. . . ." Cl. Ex. 6 at 14.[6] Because Judge Sutton's award did not specify either the earnings to be used to calculate future benefits or the amount of future benefits to which claimant is entitled, it is necessary to rely on extra-record facts, *i.e.*, the earnings statements for both men, to make the calculation. Thus, the administrative law judge properly found that Judge Sutton's order is not enforceable. *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT); *Lazarus*, 958 F.2d 1297, 25 BRBS 145(CRT); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT). Because it is not enforceable, the administrative law judge properly denied claimant's request for a Section 14(f) assessment. *Keen*, 35 F.3d 226, 28 BRBS 110(CRT); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT). Therefore, we reject claimant's arguments, and we affirm the administrative law judge's denial of a Section 14(f) assessment.

Claimant next contends the administrative law judge erred in calculating Mr. Haggerty's wages and, thus, claimant's compensation rate, as that issue had been resolved in Judge Sutton's decision. We disagree. The administrative law judge has the authority to address issues of fact raised in enforcement proceedings, *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000), and as Mr. Haggerty's wages and claimant's benefits could not be computed from Judge's Sutton's decision alone, it was proper for the administrative law judge to address the issue. Moreover, Section 22 of the Act, 33 U.S.C. §922, permits the modification of an award if the party seeking to alter the award establishes either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *see generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The administrative law judge has broad discretion to correct any mistakes of fact and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). In this case, the administrative law judge stated that she was treating claimant's motion as a motion for modification. Decision and Order at 3 n.3.

A claimant bears the burden of showing the nature and extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). In this case, claimant's post-injury wage-earning capacity has been defined in part by the wages of a comparable employee, Mr. Haggerty. "Wages" are defined, *inter alia*, as "the money rate

[6]Employer's attorney acknowledged that both parties should have challenged this language when the case first came before Board. Tr. at 25.

at which the service rendered by an employee is compensated by an employer under the contract of hiring. . . ." 33 U.S.C. §902(13); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

In this case, Mr. Haggerty's earnings statements indicated he received three payments, labeled on the earnings report as "other" payments with no corresponding work hours and totaling $15,750. Cl. Ex. 3; Emp. Exs. 1-2. Claimant did not receive similar payments but argues that he should have and, therefore, they should be included in the computation of his loss of wage-earning capacity. Because claimant's compensation, pursuant to Judge Sutton's order, was set at two-thirds of the difference between claimant's actual earnings and Mr. Haggerty's earnings, inclusion of the three payments in Mr. Haggerty's wages would show a greater disparity between Mr. Haggerty's and claimant's wages, thereby entitling claimant to greater benefits. Employer attempted to explain that the payments were from Coastline Terminal, employer's landlord, for Mr. Haggerty's services as an officer of that company; claimant does not hold a comparable position with the company.[7] Thus, employer explained that, like any second job for which it did not pay wages, it should not have to account for the $15,750 paid to Mr. Haggerty in its calculation of benefits for claimant. Cl. Ex. 8 at 27-28; Tr. at 26. Mr. Atwood, employer's Director of Health and Safety, testified at his deposition that the payments could have been officer compensation, but he did not know for certain because he did not know which company, employer or Coastline, generated the earnings report, and the payment designation as "other" was unclear. Cl. Ex. 8 at 26-27. The administrative law judge found that claimant did not satisfy his burden of proving that the three payments were made by employer to its employee, Mr. Haggerty, as wages for services rendered. Rather, she found that claimant demonstrated only that there was a lack of clarity in the records. Decision and Order at 7-8. Because there was no evidence to substantiate claimant's position, the administrative law judge stated that she could not find that the payments of $15,750 were "wages" to Mr. Haggerty from

[7]There is a complex relationship among companies at employer's facility. New Haven Terminals is a property owner; Coastline Terminals is also a property owner and is a lessee from New Haven; Logistec (employer) is a lessee from Coastline. Coastline is an employee-owned company and is the primary source of ILA labor for Logistec. Cl. Ex. 8 at 7-8. Employer argued that the payments were most likely compensation for Mr. Haggerty's work as an officer of Coastline, Tr. at 26, but it could not verify this until 2.5 months post-hearing. The administrative law judge declined to admit the verification statement into evidence, as employer had no explanation for its failure to obtain the statement earlier. Decision and Order at 3 n.5. As claimant bears the burden of showing that the payments should be included, establishing his wage-earning capacity, it is of no moment that employer failed to definitively explain the payments.

employer, and she excluded that amount from the computation. As claimant has failed to establish any error on the part of the administrative law judge in excluding these three payments, we reject claimant's argument, and we affirm the administrative law judge's determination that the three payments totaling $15,750 to Mr. Haggerty should not be included in the calculation of claimant's benefits. 33 U.S.C. §902(13); *Price*, 36 BRBS 56; *see generally Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). There being no further challenge to the award of benefits at the compensation rate of $87.13 per week, we affirm the administrative law judge's award of benefits.

Subsequent to the administrative law judge's award of benefits, claimant's counsel filed a petition for an attorney's fee totaling $14,794.93, representing $14,334 for legal services rendered plus $460.93 in expenses. Employer objected to the petition, challenging the request as being excessive as well as containing entries for duplicate items, unrelated charges, and unsuccessful issues. While employer agreed that counsel was entitled to a fee for between 15.2 and 27.04 hours of services, if claimant's attorney could justify the hours as being related to issues on which he prevailed, it argued that the request for a fee for 77.7 hours of work was excessive. The administrative law judge disapproved one hour for being unrelated to the case, and she disapproved all work related to the unsuccessful Section 14(f) issue, reducing the fee request by 12.4 hours plus 50 percent of the time requested for preparing the brief.[8] The administrative law judge also found that claimant was unsuccessful on the Haggerty three-payment issue but that it was part of a common core of facts related to increasing claimant's weekly benefits, so that the work may be considered reasonable and necessary. Consequently, she awarded a fee to claimant's counsel in the amount of $10,096.93.[9] Supp. Decision

[8]The administrative law judge found that the time preparing the brief was not divided by issue in the fee petition. Consequently, she used employer's suggestion of calculating the page ratio in the brief on the merits to determine the percentage reduction of the fee for preparing the brief. The administrative law judge found that approximately half of the 13 pages were devoted to the Section 14(f) issue, on which claimant was not successful; therefore, she reduced the fee for preparing the brief by half. She disapproved 14.8 hours for brief preparation, allocating 2.05 hours to Attorney Kelly and 12.75 hours to his associate. Supp. Decision and Order at 5-6.

[9]The $10,096.93 represents: 27.95 hours at a rate of $260 per hour = $7,267; plus 14.35 hours at a rate of $140 per hour = $2,009; plus 7.2 hours at a rate of $50 per hour = $360; plus costs = $460.93. Supp. Decision and Order at 5-6.

and Order at 5-6. Claimant filed a motion for reconsideration, which the administrative law judge denied. Denial M/Recon. at 3-4.[10]

Employer appeals the fee award, arguing that it is excessive and should be reduced further because claimant was not successful on the issues, except to obtain an increase of between $2 and $4 dollars per week in benefits, which is far less an amount than he sought. BRB No. 06-802. Claimant cross-appeals the fee award, arguing that if the page-method reduction is used, then only one page was devoted to the Section 14(f) issue; therefore, the fee should have been reduced by only seven percent. BRB No. 06-802A.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provide that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, 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). If a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988). In this case, the administrative law judge found claimant to have been successful in his pursuit of additional benefits because she found that he established his entitlement to $12,720.98 in temporary partial disability benefits for the period between March 29, 2002, and January 15, 2005, and he obtained additional benefits in excess of the amount employer had been paying per week, as she awarded claimant $87.13 per week, instead of the $83.60 or $85.53 per week which employer had been paying, from January 16, 2005, through the remainder of the five-year period under Section 8(e). Accordingly, she reasoned that counsel is entitled to a fee for work performed in obtaining the additional temporary partial disability benefits. Supp. Decision and Order at 4-5.

We agree with employer that this fee award must be vacated. A review of the record and the administrative law judge's decision reveals that, although claimant

[10]The administrative law judge stated that claimant's argument against the page-method of reduction was waived because it had not been raised in response to employer's objections. Although the administrative law judge erred in stating that the argument was waived as a party may challenge an allegedly erroneous finding in a motion for reconsideration, her error is harmless in this case for the reasons stated *infra*.

obtained an award for an additional $2 to $4 per week in temporary partial disability benefits beyond the amount employer had been paying, he was unsuccessful on all issues he raised. As the administrative law judge found, and we affirmed, Judge Sutton's order is not enforceable and claimant, therefore, is not entitled to a Section 14(f) assessment; thus, it was appropriate for the administrative law judge to deny claimant's counsel a fee for work performed on those issues. *Hensley*, 461 U.S. 424; *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999) (Board has approved across-the-board reductions); *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 S.Ct. 2215 (2000); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Moreover, claimant did not prevail on the issue of his wage-earning capacity in his quest to obtain benefits in the amount of $157 per week by including the three payments to Mr. Haggerty into the calculations, and this, claimant had previously declared, was the entire basis for the dispute before the district director and the administrative law judge. Cl. Post-Hearing Brief at 3 n.2. Rather, claimant obtained a minimal increase in his weekly benefits by virtue of the administrative law judge's calculations alone. Decision and Order at 8; *see generally Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT). Finally, although the administrative law judge stated in her fee award that claimant established entitlement to $12,720.98 for the period between March 29, 2002, and January 15, 2005, based on her calculation of claimant's entitlement to $87.13 per week, Decision and Order at 8, she failed to consider that this amount had been paid in full prior to claimant's initiation of the enforcement proceedings. Decision and Order at 5, 10 n.17; Cl. Ex. 4. Specifically, on June 23, 2004, nearly three months before claimant filed his enforcement claim with the district director, employer paid claimant $14,998.30 for temporary partial disability benefits for the period between March 29, 2002, and June 10, 2004. Cl. Ex. 4. Because employer's June 2004 payment exceeded the amount of benefits to which claimant was entitled through January 15, 2005, and beyond, employer is entitled to credit its overpayment against future payments of benefits to claimant, which the administrative law judge awarded but did not calculate. Thus, claimant gained no additional benefits for the period between March 29, 2002, and January 15, 2005. As the administrative law judge here erred in stating that claimant recovered over $12,000, and as she did not calculate the amount of employer's credit so as to ascertain the actual amount of benefits claimant obtained in these proceedings, we vacate the administrative law judge's fee award, and we remand the case to her for further consideration of the amount of the fee to which claimant's counsel is entitled. *Hensley*, 461 U.S. 424; *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *Ahmed*, 27 BRBS 24.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. However, the administrative law judge's attorney's fee award is vacated, and the case is remanded to her for further consideration consistent with this opinion.

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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REGINA C. McGRANERY
Administrative Appeals Judge