U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 17-0184
and 17-0270

KENNETH EVANS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 18, 2018
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits, the Order Denying Request for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw, LLP), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits, the Order Denying Request for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (2015-LHC-01131) of Administrative Law Judge Paul C. Johnson, 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 rational, supported by substantial evidence, and 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. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

On September 22, 2014, while working for employer as a lasher,[1] claimant suffered a work accident,[2] which he alleged resulted in injuries to his back, neck, left elbow and left shoulder. EXs 8, 9. On September 24, 2014, claimant began treating with Dr. Wardell. On October 2, 2014, claimant was evaluated by employer's expert, Dr. Fox, who opined that claimant could perform light-duty work as of that date.[3] EX 14 at 2. Dr. Wardell released claimant to light-duty work on December 1, 2014, and claimant performed light-duty work for employer from December 3–19, 2014.[4] Due to claimant's complaints of pain and restricted back and shoulder movement, Dr. Wardell removed claimant from work on December 22, 2014, and did not again release him to light-duty work until March 25, 2015. CXs 12 at 31-32; 13. Claimant returned to work on this date and continued to work as a supervisor until undergoing left shoulder and elbow surgery on January 5, 2016. The surgeries revealed a labral tear and bursitis in claimant's left shoulder, and a torn extensor tendon in his left elbow. EX 33. At the time of the May 2016 hearing, claimant had not been released to work; however, claimant had worked several days in January 2016 following his surgeries before stopping due to pain.[5] CX 24; EXs 39 at 3; 40 at 4; Tr. at 30-32.

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[1] Claimant is employed as a lasher supervisor; however, prior to his injury, he worked as a lasher on days he could not obtain a supervisor job. Claimant testified that a lasher supervisor boards the ships but does not touch the gear, whereas a lasher discharges containers and disengages locks that hold containers together. Tr. at 18-20.

[2] Claimant testified that the gangway slipped out from under him while he was boarding the ship; he grabbed onto a pole to avoid falling in the water; the pole threw him against the ship; and he was left hanging for five minutes until coworkers were able to assist him. Tr. at 20-21.

[3] Dr. Wardell diagnosed claimant with a left trapezius strain, left elbow contusion, left lateral epicondylitis, and left shoulder sprain. EX 16 at 1. Dr. Fox diagnosed claimant with only contusions to the left shoulder and elbow. EX 14 at 2.

[4] Claimant worked as a supervisor during the time he was restricted to light-duty work. EXs 12, 25, 40. Employer concedes that the lashing supervisor position is the lightest-duty position of claimant's usual employment. CX 22 at 29.

[5] Specifically, claimant worked 49 hours over six days in the two-week period immediately following surgery. EX 40 at 4. Claimant testified that he returned to work

While the case was pending before the administrative law judge, the parties stipulated that claimant sustained injuries to his back and neck in the September 2014 work accident and that claimant's average weekly wage at the time of injury was $2,690.18.[6] The parties disputed whether claimant's left elbow and left shoulder injuries are work-related, the extent of claimant's disability during various periods, and claimant's post-injury wage-earning capacity during other periods.

The administrative law judge found that claimant established a prima facie case relating his left elbow and left shoulder injuries to the September 2014 work accident and that employer rebutted the presumption with respect to only the shoulder injury.[7] On the record as a whole, the administrative law judge found that claimant's left shoulder injury is work-related. With respect to the periods claimant performed light-duty work, the administrative law judge rejected employer's assertion that claimant's wage-earning capacity should include payments he received for container royalties and vacation and holiday pay.[8] Decision and Order at 28, 30. The administrative law judge calculated claimant's post-injury wage-earning capacity as $1,640.41 per week for December 3 – 21, 2014, and $2,055.63 per week for March 26, 2015 – January 4, 2016. *Id*. at 29-30. As these sums are less than the stipulated average weekly wage, the administrative law

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because he had to pay child support. Tr. at 30. He further testified that the "guys covered for him" during this period as he was unable to perform his job duties. *Id*. at 30-32.

[6] This sum includes container royalty, vacation, and holiday payments. Tr. at 14; EX 12 at 10.

[7] Therefore, the elbow injury is work-related as a matter of law. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Department of Labor [Peterson]*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

[8] Specifically, the administrative law judge stated:

> Container royalty payments and holiday and vacation payments do not represent post-injury wage earning capacity under Section 8(h). *Seaco v. Richardson*, 136 F.3d 1290 (11th Cir. 1998). . . . Further, even if container royalties and vacation and holiday pay could be included in a calculation of post-injury wage earning capacity, there is no evidence in the record, beyond Employer's own assertions, as to when Claimant actually earned any of these container royalty payments or vacation and holiday pay.

Decision and Order at 28; *see also id*. at 30.

judge found claimant had a loss in wage-earning capacity and is entitled to temporary partial disability benefits during these periods. The administrative law judge awarded claimant temporary total disability benefits for September 23 – December 2, 2014, December 22, 2014 – March 24, 2015, individual days not worked between January 5 – 19, 2016, and from January 20, 2016 and continuing, and all reasonable and necessary medical treatment including the January 2016 surgeries.

Employer filed a motion for reconsideration. The administrative law judge denied employer's motion, rejecting its submission of new evidence and its assertion that claimant's wage-earning capacity should include container royalty, vacation and holiday pay he earned post-injury through work.

The administrative law judge subsequently issued a supplemental decision awarding claimant's counsel an attorney's fee of $12,875.22, payable by employer. The fee award was for 34.17 hours of attorney services at an hourly rate of $359 and 6.27 hours of legal assistant services at an hourly rate of $97. By order dated February 10, 2017, the administrative law judge denied claimant's request for additional attorney fees for time spent responding to employer's objections.

Employer appeals the administrative law judge's award of benefits and his order denying reconsideration. Claimant responds, urging affirmance. Employer filed a reply brief. BRB No. 17-0184. Employer also appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. Claimant did not file a response brief. BRB No. 17-0270.

Compensability of Left Shoulder Injury

Employer contends the administrative law judge erred in finding on the record as a whole that claimant's left shoulder injury is related to the September 2014 work accident. Once, as here, claimant establishes his prima facie case, and employer rebuts the Section 20(a) presumption, the presumption falls from the case, and the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole, with the claimant bearing the burden of persuasion. 33 U.S.C. §920(a); *see Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Employer asserts the administrative law judge erred in crediting claimant's testimony and Dr. Wardell's opinion over that of Dr. Fox.

Contrary to employer's assertions, the administrative law judge addressed all relevant evidence on this matter and his findings are rational. In weighing the evidence as a whole, the administrative law judge rejected employer's assertion that claimant revised his description of the work accident to be consistent with the January 2016

surgical findings.[9] In so doing, the administrative law judge acknowledged, "[e]mployer is correct that there is no record that [c]laimant told the emergency room doctor or Dr. Wardell that he had been dangling from a pole when the gangway slipped. Indeed, Dr. Wardell testified [c]laimant did not tell him about this until after the surgery." Decision and Order at 22. However, the administrative law judge found claimant's description of the work accident to be credible because he repeatedly and consistently provided the same description of events prior to the shoulder surgery.[10] *Id.*; *see Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds],* 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

The administrative law judge also found Dr. Wardell's opinion, that the labral tear in claimant's left shoulder is related to the work accident and is not due solely to degeneration, to be well reasoned, because: Dr. Wardell explained that the tear in claimant's cartilage is consistent with the shoulder's being yanked on, claimant would have had shoulder complaints prior to the accident if his injury were due solely to degeneration, and the evidence of degeneration seen on surgery was related to the 15-month delay between the date of injury and the surgery. Decision and Order at 23; CX 22 at 12-13; CX 24. Further, the administrative law judge found Dr. Wardell's opinion to be persuasive as it was supported by the absence of any shoulder pain prior to the accident, claimant's September 2014 shoulder x-ray showing no degenerative changes, and claimant's consistent complaints of shoulder pain as of the date of the accident. Decision and Order at 23. By contrast, the administrative law judge found Dr. Fox's opinion to be unpersuasive as it was premised on degenerative changes being the most common cause of labral pathology and failed to address claimant's lack of symptoms prior to the accident and the absence of degenerative changes seen on the September 24, 2014 x-ray.[11] Decision and Order at 23; EX 39. The administrative law judge rationally credited Dr. Wardell's opinion over that of Dr. Fox. *Simonds,* 35 F.2d 122, 28 BRBS

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[9] Employer argued before the administrative law judge that claimant first reported the work accident left him "dangling from a pole" after Dr. Wardell informed him, post-surgery, that the tear to his shoulder cartilage is consistent with the shoulder being yanked on. Emp. Post Hr. Br. at 16.

[10] In his initial claim for compensation, dated November 25, 2014, claimant stated that he grabbed onto a pole that was part of the gangway in order to stay out of the water. EX 8 at 2. Similarly, in his December 2014 revised claim, claimant stated that he grabbed onto a pole. EX 9 at 2. During his August 2015 deposition, claimant also testified that he was left dangling from the pole. EX 28 at 7.

[11] Dr. Fox reviewed this x-ray.

89(CRT); CX 24; EX 39. We, therefore, affirm the administrative law judge's findings that claimant's shoulder injury is due to the September 2014 accident and that employer is liable for all reasonable and necessary medical treatment for this injury, including the January 2016 shoulder surgery, as those findings are supported by substantial evidence.[12] *Moore,* 126 F.3d 256, 31 BRBS 119(CRT); *see also* 33 U.S.C. §907; *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968).

Temporary Total Disability Benefits

Employer next contends the administrative law judge erred in finding claimant temporarily totally disabled in each of the following periods: October 3 – December 1, 2014; December 22, 2014 – March 24, 2015; and January 5, 2016 and continuing. A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity. In order to establish a prima facie case of total disability, a claimant must establish that he cannot return to his usual work due to his work injury. If he meets his burden of persuasion, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). We reject employer's assertions of error with respect to each period below.

October 3 – December 1, 2014

Employer alleges the administrative law judge erred in crediting Dr. Wardell's opinion that claimant could not return to light-duty work until December 1, 2014, over Dr. Fox's opinion that claimant could return to light-duty work as of October 3, 2014. CX 22; EX 14. We disagree. It is well established that the administrative law judge is entitled to weigh evidence and draw inferences; his findings may not be disturbed if they are rational and supported by substantial evidence of record. *Simonds,* 35 F.2d 122, 28

[12] With respect to the compensability of claimant's shoulder injury, employer argued before the administrative law judge only that the accident did not occur as alleged such that claimant was left hanging from a pole and that Dr. Fox's opinion should be credited over that of Dr. Wardell. Employer did not allege that there was no evidence of a shoulder injury immediately following the accident. To the extent employer now raises this argument, we decline to address it in the first instance. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

BRBS 89(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

In addressing the probative value of the physicians' opinions on this issue, the administrative law judge acknowledged that, at the time of his January 2016 deposition, Dr. Wardell was unsure as to why he did not release claimant to light-duty work prior to December 1, 2014. Decision and Order at 25-26; CX 22 at 26-28. However, as Dr. Wardell was claimant's treating doctor, and he evaluated claimant's ability to return to work every one-to-four weeks after the accident until releasing him to light-duty work,[13] the administrative law judge rationally found Dr. Wardell's deposition testimony, which was taken over a year later, did not undermine his real-time opinion as to the extent of claimant's disability. Decision and Order at 26; *see Simonds,* 35 F.2d 122, 28 BRBS 89(CRT). Further, as Dr. Wardell's treatment records indicated that claimant reported increased shoulder pain on October 9, 2014, shortly after his October 2 evaluation by Dr. Fox, and as Dr. Fox evaluated claimant only once during this period, the administrative law judge found Dr. Wardell's real-time opinion as expressed in his out-of-work slips to be more persuasive than Dr. Fox's opinion. This conclusion is rational. *Simonds,* 35 F.2d 122, 28 BRBS 89(CRT); *Hess*, 681 F.2d 938, 14 BRBS 1004. Consequently, we affirm the administrative law judge's temporary total disability award for this period as it is supported by substantial evidence. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

December 22, 2014 – March 24, 2015

For this period, employer asserts that the administrative law judge erred in failing to credit its February 2015 labor market survey as establishing the availability of suitable alternate employment between December 22, 2014 and March 24, 2015. Contrary to employer's assertion, the administrative law judge did not reject its February 2015 labor market survey because it was done retroactively. Rather, the administrative law judge found employer's labor market survey was not probative of the extent of claimant's disability during this period because Dr. Wardell believed claimant's disability was temporary and had not released him to work. Decision and Order at 29; CXs 13, 19. Although Dr. Fox opined that claimant could return to work as early as October 2, 2014, the administrative law judge rationally found his opinion to be of limited value for the same reasons it was limited with respect to the period of October 3 through December 1, 2014. Decision and Order at 29; *see Simonds,* 35 F.2d 122, 28 BRBS 89(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

[13] On September 24, October 9, and October 23, 2014, Dr. Wardell kept claimant out of work. On November 24, 2014, Dr. Wardell stated claimant could return to light-duty work beginning December 1, 2014. CX 13 at 1-3.

Further, as Dr. Wardell again removed claimant from light-duty work on December 22, 2014,[14] regularly reviewed claimant's disability status thereafter until releasing him to light-duty work on March 25, 2015,[15] and did not opine that the jobs in employer's labor market survey were suitable for claimant prior to March 25, 2015,[16] the administrative law judge rationally found claimant temporarily totally disabled between December 22, 2014 and March 24, 2015. *See Martinez v. St. John Stevedoring Co.*, 15 BRBS 436 (1983) (temporary total disability award proper where physician opines employee will be able to return to his usual employment full-time in the near future, but not immediately); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979) (temporary total disability award appropriate where the claimant is capable of undergoing rehabilitation but cannot yet work and has not yet reached maximum medical improvement). We, therefore, affirm the award of temporary total disability benefits for this period. *Macklin*, 46 BRBS 31.

January 5, 2016 and Continuing

Employer contends the administrative law judge erred in awarding continuing temporary total disability benefits as of January 5, 2016, the date of claimant's left elbow and shoulder surgeries. Employer asserts that claimant was able to work as a lasher supervisor immediately following surgery, and the record contains no evidence that claimant could not continue to perform this work. We disagree.

The administrative law judge recognized that claimant attempted to work as a lasher supervisor immediately following his January 2016 surgeries. The administrative law judge found that employer's job description specifies that a lashing supervisor is required to board ships via a gangway about six times per shift, supervise a gang of six lashers, and be able to assist that gang and occasionally operate a forklift. Decision and Order at 31; EX 15 at 1. The administrative law judge found claimant credibly testified he was unable to properly supervise his crew during this time because he could not

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[14] Claimant performed light-duty work for employer during the first three weeks of December 2014. EX 40.

[15] On December 22, 2014, Dr. Wardell removed claimant from work for four weeks and reevaluated his work status every one-to-two weeks thereafter until releasing him to light-duty work on March 25, 2015. CX 13.

[16] On April 2, 2015, Dr. Wardell approved the jobs in employer's labor market survey; however, the administrative law judge accurately observed that this postdates Dr. Wardell's work release, as well as claimant's return to work for employer. Decision and Order at 29; EX 21.

ascend the gangway onto the ship.[17] Decision and Order at 32; *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) (questions of witness credibility are for the administrative law judge as the trier-of-fact). Therefore, although claimant worked several days post-surgery, the administrative law judge rationally rejected employer's assertion that claimant was able to perform his job duties. *Simonds,* 35 F.2d 122, 28 BRBS 89(CRT); *see* EX 15 at 1; Tr. at 30-31. As claimant had not been released to work immediately after his surgery or as of the May 2016 hearing, and the parties stipulated claimant's condition had not yet reached permanency, the administrative law judge properly awarded continuing temporary total disability benefits.[18] *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *see also Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978) (that a claimant works after his injury does not preclude a finding of total disability); *Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd mem.*, 624 F.2d 192 (9th Cir. 1980) (table) (where a claimant works post-injury but is unable to continue due to pain, he is totally disabled). We affirm this award as it is supported by substantial evidence.

Temporary Partial Disability Benefits and Reconsideration

Employer contends the administrative law judge erred in failing to find that the container royalty, vacation, and holiday payments claimant received post-injury are wages earned through work and should be included in claimant's wage-earning capacity. Thus, employer asserts the administrative law judge erred in calculating the amount of temporary partial disability benefits due claimant during the periods he performed light-duty work, December 3 – 21, 2014, and March 26, 2015 – January 4, 2016. With regard to this issue, we note that based on the record before him at the time of his initial Decision and Order, the administrative law judge properly excluded the container royalty, vacation, and holiday payments from his wage-earning capacity calculation as nothing in the record established whether these payments were earned through work or disability credit. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT)

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[17] The administrative law judge credited claimant's testimony that he was supposed to be on the ship supervising the crew but that he was unable to ascend the gangway, and he sat in his car while those he supervised completed the work. Decision and Order at 31; Tr. at 30-31. He also credited claimant's statement that if something goes wrong during a shift, the job can become more physical. Decision and Order at 32; Tr. at 49.

[18] Both physicians believed claimant's condition had not yet reached permanency, and both opined that claimant will return to full-duty work at a future date. CX 22 at 30; CX 24; EX 39 at 3-4.

(4th Cir. 1998) (holiday, vacation, and container royalty payments satisfy the Act's definition of "wages," 33 U.S.C. §902(13), if they are earned through work but not if they are earned with disability credit).

However, employer moved for reconsideration on this issue, asserting that claimant earned the payments through work after his injury and submitted new evidence to support its contention.[19] The administrative law judge denied reconsideration, stating that employer's new evidence could not be considered as none of the grounds for granting reconsideration under Federal Rules of Civil Procedure (FRCP) 59(e) were applicable.[20] Order Denying Request for Reconsideration at 2. Specifically, the administrative law judge observed that employer offered Ms. Ford's affidavit after the record had closed and did not establish that the evidence was unavailable at the time of the hearing. *Id.* Further, the administrative law judge stated that, even if he considered Ms. Ford's affidavit, it would not establish that the payments should be included in calculating claimant's wage-earning capacity because claimant did not have opportunity to respond to the evidence, and the record does not establish that the payments represent compensation for services pursuant to the terms of an employment contract. *Id.*

We agree with employer that the administrative law judge erroneously denied reconsideration pursuant to FRCP 59(e). Section 23(a) of the Act, 33 U.S.C. §923(a), and the regulation at 20 C.F.R. §702.339, provide that the administrative law judge is not bound by formal or technical rules of procedure except those provided in the Act. *See also* 33 U.S.C. §919(d). Thus, the administrative law judge has the discretion to grant reconsideration of an issue decided in the original decision even if none of the conditions of FRCP 59(e) is met. Although the administrative law judge has great discretion

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[19] Employer offered the affidavit of Kirby Ford, Vice President for Claims, to support its motion. Ms. Ford explained that the container royalty, holiday, and vacation, payments on December 1, 2014, and February 3 and March 5, 2015, which totaled $27,382.85, were for hours worked in the contract year before claimant's injury (October 1, 2013 through September 30, 2014), and that the payments on December 1, 2015, and February 12 and March 4, 2016, totaling for $28,723.32, were based on claimant's having worked over 1,000 hours between October 1, 2014 and September 30, 2015, and not based on credit hours for disability. Emp. Mot. For Recon., Ford affidavit at 1-2.

[20] Pursuant to case law interpreting Federal Rule of Civil Procedure 59(e), reconsideration of an order should be granted only upon one or more of the following grounds: 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or 3) to correct a clear error of law or prevent manifest injustice. *E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110 (4th Cir. 1997).

concerning the admission of evidence, *see, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2003), he is also charged with admitting all relevant and material evidence and making "such investigation or inquiry or conduct[ing] such hearing in such a manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a); 20 C.F.R. §702.338. Moreover, it is judicially efficient to attempt to resolve issues via a motion for reconsideration. Consequently, the administrative law judge erred in determining he could not consider employer's evidence.

In addition, nothing in the Act or the regulations prevents the administrative law judge from admitting evidence into the record pursuant to a motion for reconsideration. While Section 702.338 of the Act's regulations, 20 C.F.R. §702.338, explicitly allows the administrative law judge to reopen the record for the admission of additional evidence at any time prior to the issuance of a compensation order, the regulation does not preclude the administrative law judge from admitting additional evidence submitted via a timely motion for reconsideration, as the proceedings before him have not become final. Moreover, employer's evidence is admissible under Section 22 of the Act, 33 U.S.C. §922, which allows an administrative law judge to modify a decision at any time prior to one year after the rejection of a claim.[21] 33 U.S.C. §922; *see also* 20 C.F.R. §702.373; *Jensen v. Weeks Marine, Inc.,* 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003) (motion for modification cannot be denied solely on the basis that the evidence could have been presented at an earlier stage in the proceedings). Further, as a request for modification need not be formal in nature, employer's request for reconsideration and submission of evidence sufficiently raises modification. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974) (request for modification need not be formal in nature); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004) (submission of new evidence while the case was before the administrative law judge on remand from the Board is sufficient to raise modification); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986) (interpreting employer's submission of new evidence with motion for reconsideration as motion for modification).

Based on the foregoing, and as employer's new evidence is relevant to the calculation of claimant's wage-earning capacity, a disputed issue in this case, the administrative law judge erred in relying on the FRCP to deny employer's motion and

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[21] Pursuant to Section 22, the administrative law judge can correct any mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1972); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

exclude its evidence.[22] *See* 33 U.S.C. §923(a); 20 C.F.R. §702.339. Consequently, we vacate the administrative law judge's order on reconsideration and his wage-earning capacity and attendant temporary partial disability award calculations. We remand the case for him to admit employer's new evidence and to provide claimant an opportunity to respond. The administrative law judge must then consider the merits of granting employer's request with respect to calculating claimant's wage-earning capacity during the periods he performed light-duty work, December 3 – 21, 2014, and March 26, 2015 – January 4, 2016.[23]

Attorney Fees

Employer also appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. The only contention, however, is that, if the Board vacates or reverses the administrative law judge's decision on the merits, then the Board should also vacate or reverse the attorney's fee award. We decline to vacate or reverse the administrative law judge's award of an attorney's fee. Claimant was successful in pursuing additional benefits before the administrative law judge, and his counsel is entitled to an employer-paid fee in this case.[24] 33 U.S.C. §928. Although a fee award is not enforceable until all appeals have been exhausted, the administrative law judge did not err in awarding a fee prior to the conclusion of the litigation. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon.*

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[22] The regulation at 29 C.F.R. §18.10(a), applicable to proceedings before the Office of Administrative Law Judges, states, in pertinent part, that, "The Federal Rules of Civil Procedure (FCRP) apply in any situation not provided for or controlled by these rules, or by a governing statute, regulation, or executive order."

[23] To the extent the administrative law judge already considered employer's evidence on reconsideration, we note that he did not adequately explain his rejection of Ms. Ford's affidavit by stating "there is no evidence in the record to establish that the contract required [c]laimant to work 1,000 hours during the applicable period in order to earn these payments." Order on Reconsideration at 2. The significance of this finding is unclear given that Ms. Ford's affidavit specifies claimant earned the payments through hours worked, and not disability credit hours, in the relevant contract years. Emp. Mot. For Recon., Ford affidavit; *see Wright*, 155 F.3d at 319, 33 BRBS at 20(CRT).

[24] Even if the administrative law judge finds on remand that claimant did not have a loss of wage-earning capacity during his periods of light-duty work, claimant was successful in establishing the compensability of the shoulder injury, employer's liability for the shoulder surgery, and entitlement to temporary total disability benefits beyond that which employer paid (September 23 – December 9, 2014).

en banc, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). However, if, on remand, the administrative law judge modifies the award of benefits to claimant, he must reconsider the amount of the fee awarded in light of the degree of success achieved in this case. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). As employer does not otherwise challenge the administrative law judge's fee award, we affirm it in all other respects. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the administrative law judge's Order Denying Request for Reconsideration and the award of temporary partial disability benefits are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order – Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' opinion that the administrative law judge erred in declining to admit into evidence Ms. Ford's affidavit on reconsideration after the record had closed. It is well established that the administrative law judge has great discretion concerning the admission of evidence. *See Milam v. Mason Technologies,* 34 BRBS 168 (2000) (McGranery, J., dissenting on other ground). Decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary or capricious, or constitute an abuse of discretion. *See e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Moreover, a party seeking to have evidence admitted must have exercised diligence in developing its claim prior to the hearing. *See Smith v. Ingalls*

Shipbuilding Div., Litton Systems, Inc., 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Claimant's post-injury wage-earning capacity was an issue in dispute prior to the hearing. Specifically, employer asserted that container royalty, vacation and holiday pay should be included in claimant's post-injury wage-earning capacity calculation. *See* Decision and Order at 19-20, 28. Thus, employer had the opportunity to develop and submit evidence addressing this issue prior to the close of the record. Under these circumstances, I cannot say that the administrative law judge erred in declining to admit, after the record closed, additional evidence regarding this issue. *Smith*, 22 BRBS at 50.

In addition, I disagree with my colleagues that the administrative law judge erred in relying on case law interpreting Federal Rule of Civil Procedure 59(e) to determine employer's entitlement to reconsideration. Neither the Longshore Act, its regulations, nor the general rules governing procedure before administrative law judges provide specific guidance for admitting evidence on reconsideration after the record has closed. *Cf.* 20 C.F.R. §702.228 (permitting the administrative law judge to reopen the record prior to the filing of a compensation order). Under such circumstances, the OALJ Rules provide that, "The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." 29 C.F.R. §18.10(a). Thus, the administrative law judge reasonably looked to Rule 59(e) and case precedent interpreting this Rule for guidance on when and whether the record should be reopened for the admission of new evidence on reconsideration. *See generally McCracken v. Spearin, Preston & Burrows, Inc.,* 36 BRBS 136 (2002) (holding administrative law judge should have looked to Rule 55(c) with respect to setting aside a default judgment). Decisions under Rule 59(e) also are reviewed under an abuse of discretion standard. *E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F. 3d 110 (4th Cir. 1997); *Boryan v. U.S.*, 884 F.2d 767 (4th Cir. 1989).

The bases for reconsideration under FRCP 59(e) include one or more of the following: 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or 3) to correct a clear error of law or prevent manifest injustice. *Hutchinson v. Staton*, 994 F. 2d 1076 (4th Cir. 1993). Here, the administrative law judge reasonably found that employer did not establish that the information in Ms. Ford's affidavit concerning claimant's post-injury earnings was previously unavailable. *Boryan*, 884 F. 2d at 772. Furthermore, employer did not establish that the administrative law judge's initial decision was clearly legally erroneous under applicable law. *Hutchinson*, 994 F. 2d at 1081-1082 (disagreement with how the district court applied the law is not a basis for a Rule 59(e) motion). Thus, I would affirm the rejection of the evidence employer submitted on reconsideration as employer has not

established that the administrative law judge's application of FRCP 59(e) is legally erroneous or that he abused his discretion in rejecting its evidence thereunder.[25]

In all other respects, I concur with my colleagues' decision.

RYAN GILLIGAN
Administrative Appeals Judge

[25] That perhaps the administrative law judge's decision in this respect was not expedient in view of the expansive nature of Section 22 of the Act does not detract from the discretion afforded him in addressing evidence newly submitted with a motion for reconsideration.