BRB Nos. 86-2286,
86-2286A and 92-2466

HENRY J. ANDERSON	)	
	)	
Claimant-Respondent Cross-Petitioner Petitioner	)	
	)	
v.	)	
	)	
BRADY-HAMILTON STEVEDORE COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
MANHATTAN RE-INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners Cross-Respondents Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor, and the Approval of Attorney Fee Application of Karen P. Goodwin, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (84-LHC-2932) of Administrative Law Judge Robert J. Brissenden awarding benefits 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). Further, claimant appeals the Approval of Attorney Fee Application (No. 14-70207) of District Director Karen P. Goodwin. We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless the challenging party shows it 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).

Claimant was injured on September 4, 1982 when he slipped and fell on the deck of a wheat ship while untangling a firecord. Claimant landed on his left side, injuring his back. In addition, claimant asserted that the fall resulted in impact to his knee, aggravating a pre-existing degenerative condition such that claimant would later require surgery. He has not returned to work since this accident and sought permanent total disability benefits under the Act.

Claimant had previously injured his back in 1977 while employed by Portland Stevedoring Company. Pursuant to stipulations reached between the parties, claimant was awarded permanent partial disability benefits in a Compensation Order entered on August 15, 1980 by the district director. *See* Emp. Ex. 13. Claimant was awarded $145 per week based on his then average weekly wage of $435.93. Administrative Law Judge Edward C. Burch denied modification of this award on April 27, 1983, but granted Portland Stevedoring relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f). *See* Emp. Ex. 15.

In the present case with regard to the 1982 injury, the administrative law judge found that claimant's knee injury was not work-related and that claimant's back reached maximum medical improvement on February 23, 1986. The administrative law judge also found that claimant is permanently totally disabled. Although in his decision, he stated that claimant is not entitled to a concurrent permanent partial disability award because the 1982 accident aggravated a pre-existing injury, the administrative law judge entered no order regarding the prior award. The administrative law judge found that claimant had an average weekly wage of $674.72 at the time of the 1982 injury and credited employer for holiday pay it paid claimant after the date of injury. He thus awarded permanent total disability benefits based on this average weekly wage. In addition, the administrative law judge found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f). In a Supplemental Decision and Order Awarding Attorney Fees and Costs the administrative law judge awarded claimant's attorney a fee of $6,407.50. In a Compensation Order dated March 6, 1992, the district director awarded claimant's attorney a fee in the amount of $1,357.50 for 10.75 hours of legal service.

On appeal, employer contends that the administrative law judge erred in finding that claimant cannot return to his former work and that the administrative law judge erred in his calculation of claimant's average weekly wage. BRB No. 86-2286. Claimant responds, urging

affirmance of the administrative law judge's finding that claimant cannot return to his former work as it is supported by substantial evidence. Claimant also contends that the administrative law judge properly applied Section 10(a), 33 U.S.C. §910(a), in calculating claimant's average weekly wage.

On cross-appeal, claimant contends that the administrative law judge erred in allowing employer a credit for holiday pay claimant received subsequent to the injury and that the administrative law judge erred in reducing claimant's award for the 1977 injury. Claimant also contends that the administrative law judge erred in awarding interest at six percent instead of the state court interest rate of nine percent. BRB No. 86-2286A. Employer responds, urging affirmance of the administrative law judge's credit for holiday pay claimant received in the year following the injury. Employer also notes that the administrative law judge's decision did not modify the previous award, and that interest was properly assessed by the Office of Workers' Compensation Programs at the interest rate as of the time the award was filed, which was 7.03 percent in this case.

Claimant also appeals the district director's award of an attorney's fee as it is based on rates charged when the case began and there was an unexplained six year delay in entering the award. In addition, claimant contends that the district director erred in disallowing four hours spent preparing the attorney's fee application. BRB No. 92-2466. Employer responds, urging affirmance of the district director's award.

Extent of Disability

On appeal, employer contends that the administrative law judge erred in finding that claimant cannot return to work as a slingman. We disagree. The administrative law judge found that claimant credibly described requirements of the slingman position which were not depicted in the videotape presented by employer and which would be subject to limitation by both Drs. Reynolds and Pasquesi. *See* Decision and Order at 12.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co*, 22 BRBS 332 (1989). In order to determine whether claimant has shown total disability, the administrative law judge must compare his medical restrictions with the specific physical requirements of his usual employment. *See Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In the present case, the administrative law judge found that claimant credibly described the physical requirements of work as a slingman. The administrative law judge also reviewed the medical reports of the physicians that treated claimant's back. He noted that Dr. Cohen concluded that claimant could no longer perform his usual employment as a longshoreman, but with normal healing claimant would be able to work with restrictions against heavy lifting, climbing and twisting. In addition, Dr. Cohen recommended that claimant not be on his feet six to seven hours a day. Dr. Reynolds, claimant's treating physician, recommended that claimant avoid climbing up and down ladders, working on uneven surfaces, lifting items 20 to 25 pounds, reaching overhead, repetitive bending and pulling, and standing six to seven hours on a daily basis. Cl. Ex. 28. Although Dr. Pasquesi opined that claimant would be able to perform the duties of a slingman as depicted in the videotape, he recommended that claimant pursue non-longshore work, that claimant avoid repetitive bending, stooping, twisting, and lifting more than thirty pounds, and that claimant be allowed to sit and stand alternately as he felt necessary. Cl. Ex. 31; Emp. Ex. 19.

Claimant testified that there is no job on the docks that allows a worker to sit or stand when he wants, and that although a slingman can stand or sit alternately during the day, it is not at the worker's choice. H. Tr. at 102-103. In addition, claimant testified that although a slingman works with a partner, they sometimes must lift 100 to 200 pound bars and must be quick to move out of the way of falling or rolling logs. H. Tr. at 95-97. As the administrative law judge considered the restrictions placed on claimant's activities by the physicians of record that addressed claimant's back condition and compared them to the work requirements depicted in the videotape as well as those described in claimant's testimony, we affirm the administrative law judge's finding that the evidence is sufficient to establish a *prima facie* case of total disability. *Manigault*, 22 BRBS at 334. Further, as the administrative law judge found that employer did not establish a specific job on the docks that claimant can perform within his limitations, and no other evidence of suitable alternate employment was presented, we affirm the administrative law judge's finding that claimant is permanently totally disabled.[1] *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

[1] Although Dr. Pasquesi stated that claimant would be physically able to perform the duties of a console operator, it is undisputed that claimant does not have the work experience required to be considered for this position.

Average Weekly Wage

We also reject employer's contention that claimant's wage-earning capacity following the 1977 injury should be used to calculate his average weekly wage at the time of the 1982 injury, rather than his actual wages immediately prior to his second injury. The administrative law judge initially found that:

> Since the accident of September 4, 1982 was not a separate and distinct injury, but rather, aggravated a pre-existing injury, claimant is not entitled to retain his permanent partial award concurrently.

Decision and Order at 12. The administrative law judge, noting that the relevant average weekly wage is claimant's average weekly wage at the time of the 1982 injury, found that claimant earned $30,335.20 during the 52 week period preceding his 1982 injury plus $4,750.20 vacation pay for a total of $35,085.40, which he then divided by 52 for an average weekly wage of $674.72.

In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980), the United States Court of Appeals for the District of Columbia Circuit approved a scheme allowing a claimant to receive concurrent permanent partial and permanent total disability awards under Section 8(c)(21), 33 U.S.C. §908(c)(21), and Section 8(a), 33 U.S.C. §908(a), where claimant sustained two injuries. Contrary to employer's contention, the court in *Hastings* noted that compensation is computed based on the average weekly wage of the injured employee at the time of the injury. *See* 33 U.S.C. §910. Although the court does hold that "the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury," it uses the employee's earning capacity as reflected in his actual wages from the interim period.

Subsequent to *Hastings*, the Board held that where claimant's average weekly wage is ascertainable by the use of claimant's actual wages at the time of the second injury, the administrative law judge need not rely on the wage-earning capacity of the claimant which remains after the first injury to compute claimant's loss after the second injury. *See Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). Further, the Board has held that where an employee sustains an injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his earnings at the time of the aggravation. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Therefore, we affirm the administrative law judge's use of claimant's actual average weekly wage prior to the second injury in calculating benefits for his permanent total disability.

In determining claimant's average weekly wage, the administrative law judge cited Section 10(a), although he did not make a finding as to whether claimant was a five-day-a-week or six-day-a-week employee.[2] *See* 33 U.S.C. §910(a). Therefore, as the administrative law judge did not make a finding regarding whether claimant was a five-day or six-day worker, and did not determine claimant's average daily wage, he could not have properly applied Section 10(a).[3] *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990). Whenever Sections 10(a) or 10(b) cannot reasonably and fairly be applied, claimant's average weekly wage is to be determined pursuant to Section 10(c). Under Section 10(c), the administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work and then dividing this figure by 52. *See* 33 U.S.C. §910(c), (d); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990). The administrative law judge has broad discretion in determining claimant's annual earning capacity under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). The administrative law judge in the present case considered claimant's actual wages for the fifty-two weeks preceding the second work-related injury, increased by compensation paid for vacation time received in lieu of time off, and divided this figure by 52 to determine claimant's average weekly wage. We affirm this finding as it is rational and supported by substantial evidence. *Lobus,* 24 BRBS at 140.

Concurrent Awards

As we affirm the administrative law judge's reliance on claimant's average weekly wage prior to the second injury in determining permanent total disability benefits, we will next address employer's contention that an adjustment must be made to claimant's earnings prior to the second injury so as to account for his reduced wage-earning capacity following the first injury.

Although the court in *Hastings* approved a scheme allowing a claimant to receive concurrent permanent partial and total disability awards, it recognized that where claimant's earnings increase after the injury for which he is awarded permanent partial disability benefits, claimant would be allowed to "double-dip" of a sort if he were awarded permanent total disability benefits for a second

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[2] Section 10(a) provides:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

[3] Likewise, Section 10(b) would not have been applicable as the administrative law judge did not make a finding regarding whether claimant was employed for substantially the whole year prior to the second injury and wages of comparable employees are not in evidence. 33 U.S.C. §910(b).

injury based upon his higher subsequent wages. His aggregate disability payments for his partial and total disability would be based upon a greater earning capacity than he had at the time of his first injury. 628 F.2d at 96, n.30, 14 BRBS at 354, n. 30. In such a case, the court stated that the initial award would result in overpayments; therefore, the court recommended that the first award for permanent partial disability be reduced prospectively to reflect a permanent loss of wage-earning capacity following the second injury consistent with his wage-earning capacity prior to the second injury.

The Board has held that concurrent permanent partial and total disability awards are not permitted in cases in which the claimant is shown to have an increase in wage-earning capacity following the first injury. *See Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Kooley v. Marine Industry Northwest*, 22 BRBS 142 (1989). However, in applying the *Hastings* rule, the Board has declined to hold that a claimant's increased wages at the time of the second injury require a finding that claimant's loss of wage-earning capacity decreased from the time of the initial injury to the time of the subsequent injury. *See Morgan*, 14 BRBS at 791; *see also Wilson v. Matson Terminals Inc.*, 21 BRBS 105 (1988). In addition, contrary to the administrative law judge's statement in this case, a concurrent award of permanent total disability benefits may be based on an aggravation of the same condition on which the permanent partial disability benefits were based. *See Morgan*, 14 BRBS at 786.

Although the administrative law judge in the present case did not address whether claimant's ability to earn higher wages had changed during the period between the two injuries, the record reflects that claimant's higher wages at the time of the second injury are the result of an increase in wage rates under the union contract. *See Morgan,* 14 BRBS at 791. The evidence indicates that in the year prior to the 1977 back injury, claimant worked approximately 2,179 hours and in the year preceding the 1982 back injury he worked approximately 1,686 hours.[4] *See* Emp. Ex. 4. Claimant continued to work off the "old man's board" throughout the period between the injuries. H. Tr. at 73; *see Wilson,* 21 BRBS at 107. Moreover, employer does not dispute that claimant's rise in wages before the second injury was due to a rise in bargained for contract wages and not because claimant had an increase in earning capacity.

[4] Claimant was released for "light duty" effective December 6, 1977. Claimant worked 468.5 hours in 1978, 1,147 hours in 1979, and 1,626 hours in 1980.

As it is undisputed that claimant's increase in wages prior to the second injury is a result of a general increase in wage rates, not an increase in claimant's earning capacity, we hold that no adjustments are necessary in this case. The award entered by the administrative law judge here accurately reflects claimant's earning capacity prior to the 1982 back injury.[5]

Credit for Holiday Pay

On cross-appeal claimant contends that the administrative law judge erred in allowing employer a credit for the holiday pay which claimant received subsequent to his injury of September 4, 1982. The administrative law judge noted that since holiday pay was included in the 52 week period preceding the injury upon which average weekly wage was calculated, a credit will prevent double recovery on days that claimant also receives disability compensation. Decision and Order at 13.

As claimant incurred no wage loss on the days he received holiday pay, employer is not required to pay him compensation under the Act for these days, and, thus, employer is entitled to a credit for the temporary total disability benefits paid, but not for the holiday pay. *See Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). We, therefore, reverse the administrative law judge's determination that employer is entitled to a credit for the holiday pay, but hold that employer is entitled to a credit for its disability payments for the days employer paid claimant holiday pay under the union contract, and modify the administrative law judge's Decision to reflect employer's entitlement to a credit based on claimant's benefit rate for these days. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991).

[5]As we hold that claimant is entitled to concurrent permanent partial and total disability awards, we need not address claimant's contentions on cross-appeal regarding whether the administrative law judge had the authority to effectively modify the previous award of permanent partial disability benefits made by a different administrative law judge and involving a different employer by terminating claimant's permanent partial award. *See* Decision and Order at 12. Moreover, we note that claimant sought enforcement of the permanent partial disability award against the Special Fund in district court, contending that the second administrative law judge had no authority to rule on the propriety of the permanent partial disability award. The district judge agreed, and enforced the award against the Fund in an opinion dated September 23, 1987. The judge noted that the first award was final, as no party appealed Administrative Law Judge Burch's denial of modification, that, in essence, the second administrative law judge had no jurisdiction over the first award, and that the administrative law judge in the present case did not actually order the first award to end.

Interest

Claimant also contends on cross-appeal that the administrative law judge erred in setting interest at six percent per annum on all benefits due prior to October 1, 1982, alleging that nine percent is the applicable interest rate for pre-October 1, 1982 benefits.

The interest rate on awards under the Act is to be calculated at the same rate employed by the United States District Courts under 28 U.S.C. §1961. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on reconsideration*, 17 BRBS 20 (1985). Prior to 1982, Section 1961 provided that the applicable interest rate was that applied in state courts. Section 1961 was amended in 1982 to provide for a uniform interest rate based on the 52-week United States Treasury Bill yield immediately prior to the date of judgment. 28 U.S.C. §1961. The Board adopted the treasury bill rate in order to fully compensate claimants for the loss of the use of their benefits and to ensure uniformity with federal proceedings. *Grant*, 16 BRBS at 271. The treasury bill rate of the amended statute applies to Decisions and Orders filed after October 1, 1982, the effective date of the amendments, even if a portion of the period of liability is prior to that date. *See Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985); *Grant*, 17 BRBS at 23. Thus, we reject claimant's contention that the applicable interest rate on this award filed on July 30, 1986 is the state court interest rate, or nine percent. Further, as the claims examiner who implemented the award assessed the interest rate at 7.03 percent, and not six percent as the administrative law judge ordered, we hold that the administrative law judge's order for interest to be calculated at six percent is harmless error.

Attorney's Fee

We also reject claimant's contention that the district director erred in awarding an attorney's fee based on hourly rates charged eight to nine years ago when the case began. The district director awarded an attorney's fee of $1,357.50 for 10.75 hours of legal services, which broke down to 8 hours charged at the rate of $125, .5 hours at $40 per hour, and 2.25 hours at the rate of $150. The district director disallowed 4 hours spent preparing the attorney's fee application.

Augmentation of the hourly rate to reflect delay in payment is not necessary because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel.[6] *See Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Generally, the hourly rate requested should be based on the rate in effect at the time the services were rendered. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987). *Cf. Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991)(Board affirms a discretionary determination of the administrative law judge that unusually protracted litigation warranted use of rate higher than the historical rate).

In the present case, the district director awarded a fee for services provided from 1982 to

[6]Although the instant case involves a delay in an award rather than a delay in payment, the award was based on a fee application filed in 1986 at the rate the attorney charged then for services provided.

1984 at the rate of $125 and for services in 1986, 1990, and 1992 at the rate of $150, and found the historical rates to be reasonable. *Hobbs*, 18 BRBS at 67. We affirm the district director's use of the historical hourly rate as claimant has not shown it to be arbitrary, capricious, or an abuse of discretion. *See generally Muscella*, 12 BRBS at 274.

Lastly, we also reject claimant's contention that the district director erred in disallowing four hours spent preparing the fee application. An attorney is entitled to a fee for all work performed that he could reasonably regard as necessary to establish entitlement. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); 20 C.F.R. §702.132. Time spent on preparing the attorney's fee application is not compensable. *See Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989). Therefore, we affirm the district director's disallowance of four hours spent on preparing the attorney's fee application.

Accordingly, the Decision and Order of the administrative law judge awarding permanent total disability benefits based on claimant's average weekly wage prior to the second injury is affirmed. We hold that an adjustment to claimant's earnings prior to the second injury based on claimant's wage-earning capacity after the first injury is not necessary. In addition, the administrative law judge's determination that employer is entitled to a credit for holiday pay received after the injury is reversed, and the decision is modified to reflect employer's entitlement to a credit for disability payments paid on the days employer paid claimant holiday pay. Lastly, the Approval of Attorney Fee Application of the district director is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge