BRB Nos. 91-1999
and 92-1535

JOSEPH R. CHASSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARITIME CONTRACTORS, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Attorney Fee Petition of Alexander Karst, Administrative Law Judge, United States Department of Labor.

James R. Walsh, Lynnwood, Washington, for claimant.

Russell A. Metz (Metz & Frol), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Attorney Fee Petition (89-LHC-3031) of Administrative Law Judge Alexander Karst 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).

Employer hired claimant as a ship repair mechanic in late July 1988. On August 10, 1988, claimant fell approximately six to eight feet when a ladder toppled from under him. Claimant landed

on his hands and knees on pieces of angle iron. Claimant did not experience pain until the next day, and he filed an injury report with employer at that time. Emp. Ex. 12.3; Tr. at 34-40. Claimant took two weeks off work, but was unable to continue after his return. Tr. at 41. Employer voluntarily paid claimant temporary total disability benefits from August 15 through September 4, 1988, and from November 17, 1988, through April 26, 1989, when it controverted the claim for continuing benefits. Emp. Ex. 1.3.

At the formal hearing, claimant and employer disputed claimant's average weekly wage and the nature and extent of his disability. The administrative law judge noted that claimant and employer agreed to the use of Section 10(c), 33 U.S.C. §910(c), for determining claimant's average weekly wage, but he rejected both parties' calculations. Instead, he concluded that $400 fairly and reasonably represents claimant's average weekly wage as of the date of his injury. Decision and Order at 4. Further, after reviewing the medical records, the administrative law judge credited the findings of the multi-specialty panels which examined claimant. Based on their reports, he determined that claimant sustained a cervical and lumbar strain as a result of his work accident and that the strain resolved as of March 10, 1989. *Id.* at 7-8. Consequently, he awarded claimant temporary total disability benefits from August 10, 1988, through March 10, 1989, based on an average weekly wage of $400, and interest. He also awarded employer a credit for all compensation previously paid. *Id.* at 8. Thereafter, claimant's counsel submitted a petition for an attorney's fee for work performed before the administrative law judge. The administrative law judge issued an order denying the fee because he determined that claimant did not successfully prosecute the claim. Order at 1.

Claimant appeals the administrative law judge's decision on the merits, contending he erred in calculating average weekly wage, in denying permanent partial and additional temporary total disability benefits after March 10, 1989, and in ignoring the claim for medical benefits. BRB No. 91-1999. Claimant also contends the administrative law judge erred in denying an attorney's fee. BRB No. 92-1535.[1] Employer responds, urging affirmance of the decisions.

Initially, claimant contends the administrative law judge erred in determining that $400 reasonably represents his average weekly wage as of the date of the injury. Claimant argues that a more appropriate figure can be attained by averaging his annual income from 1985 through 1987, the three years preceding the accident. This calculation results in an average weekly wage of $621.65.[2] *See* Decision and Order at 2. Further, claimant argues that employer agreed to this calculation and that it was erroneous for the administrative law judge to disregard such agreement. Claimant's arguments are meritless.

Section 10(c) of the Act affords an administrative law judge considerable latitude in

[1]In an Order dated July 2, 1992, the Board granted claimant's motion to consolidate these appeals.

[2]$47,936.69 + $37,079.72 + $11,961.53 = $96,977.94; $96,977.94 divided by 3 = $32,325.98; $32,325.98 divided by 52 = $621.65. *See* Cl. Ex. 11.

calculating a claimant's average weekly wage. 33 U.S.C. §910(c); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). The purpose of that section is to arrive at a figure which reasonably represents a claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991). Contrary to claimant's assertion that the parties agreed on a formula for average weekly wage, employer argued that claimant's average weekly wage is properly calculated from his earnings during the one-year period immediately preceding his 1988 work injury, resulting in an average weekly wage of $294.[3] Decision and Order at 2; Tr. at 15. The administrative law judge rejected both parties' calculations. He concluded it would be inappropriate to use claimant's computation because claimant "voluntarily removed himself from his previous occupation of tugboat or maritime engineer[,]" and, consequently, he was no longer earning the high wages he once earned. Decision and Order at 4. The administrative law judge also rejected employer's argument that he should use claimant's earnings in the year preceding his injury because claimant either did not work or worked only part-time during significant portions of that year. *Id.* Instead, he determined that claimant's rate of $10 per hour, earned at the time of injury, multiplied by 40 hours per week, represents the "best yardstick" of claimant's earning capacity. *Id.*

The Board has approved an administrative law judge's decision to multiply a claimant's wage rate by a time variable, provided the time variable is one which reasonably represents an amount of work available to the claimant. *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1981); *Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980). As the administrative law judge has broad discretion in determining average weekly wage under Section 10(c), we affirm his decision to use claimant's hourly rate at the time of injury to calculate an average weekly wage of $400. *See id.*; *see also* 33 U.S.C. §910(c), (d)(1); *Gatlin*, 936 F.2d at 823, 25 BRBS at 29 (CRT).

Next, claimant contends the administrative law judge erred in denying additional disability benefits. Specifically, claimant seeks temporary total disability benefits from the date employer ceased voluntary payments, April 26, 1989, through July 14, 1989, when claimant found work, permanent partial disability benefits of $210.10 per week from July 14, 1989, through July 19, 1990, when claimant was laid off, and temporary total disability benefits thereafter. Employer argues that claimant has been paid in full for his disability and that substantial evidence supports the administrative law judge's finding that claimant's disability resolved as of March 10, 1989.

It is well-established that a claimant bears the burden of proving the nature and extent of his work-related disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In this case, claimant testified to continuing pain, and he submitted medical reports as evidence of his continuing cervical and lumbar disability. Cl. Exs. 2, 5, 10, 12. To the contrary, employer submitted the reports of two multi-specialty panels which evaluated claimant on March 10, 1989, and April 25, 1990. Both panels agreed that claimant has pre-existing degenerative disc disease and

[3]Employer originally computed and paid claimant's benefits based on an average weekly wage of $621.65, *see* Cl. Ex. 11; Emp. Ex. 1.3; however, at the hearing, employer informed claimant and the administrative law judge of its change in position. Tr. at 15.

that he sustained cervical and lumbar strain as a result of the work injury, which, as of the dates of the evaluations, had resolved. Emp. Exs. 3, 5, 16-17. The panels determined that claimant would not benefit from additional treatment, except home traction and exercise for his pre-existing degenerative disease. *Id.*; *see also* Emp. Exs. 16 at 15, 17 at 17-18. Further, the first panel concluded that claimant can return to his usual work. Emp. Exs. 3.4, 16 at 17; *see also* Cl. Ex. 2.

The administrative law judge credited the opinions of the panel doctors and found that claimant strained his cervical and lumbar spine but has since recovered. Decision and Order at 7-8. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), it is within his discretion to credit the opinions of the multi-specialty panels over those espoused by claimant's doctors. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the record contains substantial evidence to support the administrative law judge's findings that claimant's temporary total disability resolved by March 10, 1989, we affirm the conclusion that claimant is not entitled to additional disability benefits. *See Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 127 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

Moreover, we reject claimant's argument that he is entitled to additional medical benefits.[4] The treatment in question post-dates March 10, 1989, the date on which the administrative law judge determined claimant's work-related disability resolved. *See* Decision and Order at 8; Cl. Exs. 5, 10. Because we hold that the administrative law judge's finding that claimant's work-related condition resolved as of March 10, 1989, is rational, the medical treatment for which claimant seeks benefits is not necessary for his work-related condition. Therefore, employer is not liable for additional medical benefits. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

[4]At the hearing, claimant sought reimbursement for the treatment rendered by Drs. Bell and Braun, and he sought employer's authorization to undergo the MRI recommended by Dr. Bell. Claimant stipulated that employer paid all other medical expenses. Tr. at 12.

Finally, claimant contends the administrative law judge erred in denying his counsel a fee. Under Section 28(b), claimant's counsel is entitled to a fee payable by employer when employer voluntarily pays or tenders benefits, a controversy arises over additional compensation due, and, thereafter, claimant succeeds in obtaining greater compensation than that paid or tendered by employer. 33 U.S.C. §928(b); *see Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (Decision after Remand). In this case, employer voluntarily paid $10,776.13 in temporary total disability benefits,[5] and the administrative law judge awarded claimant $8,000.10 in temporary total disability benefits.[6] As claimant failed to obtain additional benefits beyond those voluntarily paid by employer, employer is not liable for an attorney's fee under the Act. 33 U.S.C. §928(b); *Scott v. C & C Lumber Co., Inc.*, 9 BRBS 815 (1978).

Accordingly, the administrative law judge's Decision and Order and Order Denying Attorney Fee Petition are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]$621.65 average weekly wage multiplied by 2/3 = $414.43 compensation rate; $414.43 x 26 weeks = $10,776.13. *See* Emp. Ex. 1.3.

[6]$400 average weekly wage multiplied by 2/3 = $266.67 compensation rate; $266.67 x 30 weeks = $8,000.10. *See* Decision and Order at 8.