BRB No. 92-1877

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| CESAR VALLEJO | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED | ) | DATE ISSUED: _____ |
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| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Cornelius V. Gallagher (Linden, Gallagher & Field), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-00676) of Administrative Law Judge Frank D. Marden 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 findings of fact and conclusions of law of the administrative law judge if they 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained an injury to his right hand, wrist and ring finger on December 21, 1986. Employer paid claimant temporary total disability benefits from December 23, 1986 to March 1,

1987, when claimant returned to work. Thereafter, claimant filed a claim for benefits under the Act.

In his Decision and Order, the administrative law judge awarded claimant permanent partial disability compensation for a five percent impairment pursuant to Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3), based on Dr. Margolies' medical opinion. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $4,500, plus $859.75 in expenses.

On appeal, employer contends that the administrative law judge erred in determining the extent of claimant's disability. Employer additionally challenges the administrative law judge's failure to apply the credit doctrine with respect to claimant's alleged prior hand injuries, and his award of an attorney's fee to claimant's counsel. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's decision to award claimant compensation for a five percent impairment to his right hand based upon the testimony of Dr. Margolies. In the instant case, the administrative law judge credited and relied upon the opinion of Dr. Margolies, which he found to be supported by the objective clinical evidence of record as well as corroborated by the opinion of Dr. Patel, rather than the opinions of Drs. Bennett and Larkins. In rendering this credibility determination, the administrative law judge specifically determined that no credibility determination could be made from the medical opinions of record regarding the effect of claimant's prior injuries upon his current condition. We hold that the administrative law judge committed no error in relying upon the opinion of Dr. Margolies in concluding that claimant sustained a five percent permanent partial disability. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant suffers from a five percent permanent partial disability. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987).

Employer next contends that the administrative law judge erred in failing to award it a credit for payments of compensation made to claimant under the Act for prior injuries to his right hand. It is well-established that the credit doctrine applies where a claimant receives multiple schedule awards for successive injuries to the same part of the body; although the employer at the time of the second injury is liable for the combined effects of both injuries under the aggravation rule, the credit doctrine allows employer to credit the prior compensation *actually received* by the claimant for his first injury against its subsequent liability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986) (*en banc*). In determining the credit to be allowed against the total award of compensation, the amount of the credit is the actual *dollar amount* of the compensation previously paid to the claimant, and not an amount based on the percentage of injury for which the

claimant was previously compensated. *See Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989). In the instant case, employer has failed to set forth evidence sufficient to carry its burden of proof. Specifically, Employer's Exhibit 6, the sole document relied upon by employer, does not specify the exact amount of compensation previously paid to claimant. For example, a 1977 entry for an injury to claimant's *right arm* states that claimant received "12.2 weeks 5% *Rt Hand*;" similarly, a 1984 entry for an injury to *both knees* reads "[]% left leg []Rt leg 10/0 [sic] Rt Hand." *See* EX 6. As these entries are insufficient to establish amounts paid for the same injury, we hold that the administrative law judge committed no error in failing to award employer a credit for any compensation paid for prior alleged injuries to claimant's right hand.

Lastly, employer challenges the fee awarded by the administrative law judge, contending that counsel's fee petition fails to conform to the requirements of 20 C.F.R. §702.132, that the hourly rate awarded is excessive, and that certain charges are clerical in nature. Claimant's counsel sought an attorney's fee of $4,500, representing 15 hours at $300 per hour, as well as expenses in the amount of $859.75. The administrative law judge, after taking into consideration the complexity of the legal issues involved, the quality of the representation, and the results obtained, awarded the fee and expenses sought by counsel.

After considering employer's objections to the number of hours and hourly rate awarded, we reject employer's contentions as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Regarding the hourly rate sought by counsel and approved by the administrative law judge, we note that employer's mere assertion that the awarded hourly rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden to prove that the rate is excessive. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Maddon*, 23 BRBS at 55. Lastly, employer's contentions which were not raised below will not be addressed for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We thus affirm the administrative law judge's award of an attorney's fee and expenses to counsel in the amount of $5,359.75.

Accordingly, 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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge