BRB Nos. 93-0772
and 93-0772A

BILLIE WHITE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (91-LHC-1422) of Administrative Law Judge C. Richard Avery 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 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 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, a combination joiner-shipfitter, was injured during the course of his employment

on February 4, 1988, when he hit his left elbow on an I-beam. Following a period of treatment, claimant was released to return to work without restrictions on February 6, 1989, but was unable to work due to pain. Following a work-hardening program, claimant was again released to his usual work without restrictions on February 20, 1989. Claimant thereafter continued working until March 1989, at which time he was laid off due to a reduction in employer's work force. Claimant subsequently sought compensation for his elbow injury and for an alleged reflex sympathetic dystrophy in his left shoulder and neck.

In his Decision and Order, the administrative law judge found claimant entitled to temporary total disability compensation for the period April 15, 1988, until February 20, 1989, permanent partial disability compensation for a 10 percent impairment to his left arm under the schedule at Section 8(c)(1), 33 U.S.C. §908(c)(1), as well as medical benefits arising out of his work injury to his left elbow. Lastly, the administrative law judge found claimant's alleged reflex sympathetic dystrophy and complaints of pain in his left shoulder and neck, if any, to be unrelated to his work injury and, therefore, non-compensable.

Subsequent to the issuance of the administrative law judge's decision, claimant's attorney submitted a fee petition seeking $7,281.25, representing 58.25 hours at $125 per hour plus expenses of $1,119.95. Employer filed objections to this fee request. In his supplemental decision, the administrative law judge awarded claimant a fee, payable by employer, of $6,407.50, representing 58.25 hours at $110 per hour, plus the expenses requested.

On appeal, claimant challenges the administrative law judge's finding that his current conditions are unrelated to his work-injury.[1] Employer responds, urging affirmance of the administrative law judge's Decision and Order. In its cross-appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge. Claimant, in a response brief, contends that the administrative law judge properly awarded a fee payable by employer.

Pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), it is presumed that a claimant's injury arose out of his employment if it is shown that claimant sustained a physical harm and that working conditions existed or a work accident occurred that could have caused the harm. *See Kelaita v. Triple A Machine Shops*, 13 BRBS 326, 328-334 (1981). In the instant case, the administrative law judge properly invoked the presumption, as claimant submitted evidence of pain in his shoulder and neck and a tentative diagnosis of reflex sympathetic dystrophy by Dr. McCloskey, and evidence that an accident occurred which could have caused his symptomatology.

[1]We note employer's objection that claimant's brief constitutes an unreviewable appeal because it fails to list the specific issues to be considered on appeal as required by the Board's implementing regulations. *See* 20 C.F.R. §802.211(a), (b). Where a party is represented by counsel, as in the instant case, the mere assignment of error is insufficient to invoke Board review. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986). In the instant case, counsel has submitted a marginal argument on appeal which we shall address. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990).

See, e.g., Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). If, however, employer presents specific and comprehensive evidence sufficient to sever the connection between the injury and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.) *cert. denied*, 429 U.S. 820 (1976).

In the present case, the administrative law judge determined that the opinions of Drs. Enger and Irvin, both of whom opined that claimant's conditions were unrelated to his work injury or its subsequent treatment, were sufficient to rebut the presumption. *See* Emp. Exs. 20, 21. As these opinions constitute substantial evidence severing the causal connection between claimant's conditions and his employment, we affirm the administrative law judge's finding that the Section 20(a) presumption was rebutted. *See Phillips v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 94, 96 (1988). Next, the administrative law judge credited the opinions of Drs. Enger and Irvin, over the opinion of Dr. McCloskey, noting the superior credentials of Dr. Irvin and the fact that Dr. Enger was claimant's long-term treating physician. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). It is well-established that the administrative law judge is entitled to weigh the medical evidence of record and draw his own inferences from it and that he is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's decision to credit the opinions of Drs. Irvin and Enger over the opinion of Dr. McCloskey and find that claimant's neck and shoulder conditions are not related to his employment with employer is neither inherently incredible or patently unreasonable Accordingly, we affirm the administrative law judge's determination that claimant's neck and shoulder conditions are not work-related.

In its cross-appeal, employer challenges the administrative law judge's decision to hold it liable for claimant's counsel's fee. Specifically, employer asserts that, since it voluntarily paid compensation to claimant which not only fully compensated him for his work-related injury but resulted in an overpayment of $1,086, there has been no successful prosecution of the instant claim and, accordingly, employer should not be held liable for claimant's counsel's fees. We agree.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, after reducing the hourly rate sought by claimant's counsel, determined that employer was liable for counsel's awarded fee of $6,407.50. Specifically, the administrative law judge found that counsel had been successful in obtaining benefits for claimant's elbow injury, and on the issues of average weekly wage and medicals.

Under the Act, an employer can only be held liable for claimant's counsel's fees if Section 28(a) or (b), 33 U.S.C. §928(a), (b), applies. Section 28(a) is not applicable here, as it applies where employer declines to pay any compensation voluntarily and employer here made voluntary payments. Pursuant to Section 28(b), where an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

In the instant case, we conclude that claimant is not entitled to a fee payable by employer on the facts presented in this case. Employer did not contest the work-relatedness, compensation for periods of temporary total disability, or liability for medical benefits related to claimant's injury to his left elbow; rather, employer voluntarily paid claimant benefits exceeding those found due as a result of that work-related condition. Claimant subsequently sought compensation and medical benefits for an alleged work-related condition of his left shoulder and neck; compensation for these conditions, however, was denied by the administrative law judge. Although, as the administrative law judge implies, claimant's compensation for his elbow injury was based upon an average weekly wage of $429.72 instead of $423.35, a difference of $6.37, this nominal increase was fully subsumed by the overpayment of compensation tendered by employer. Accordingly, since claimant's counsel's efforts did not result in claimant's receiving any additional compensation for this claim, employer is not liable for counsel's fee under Section 28(b). *See Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). Accordingly, we reverse the administrative law judge's award of an attorney's fee payable by employer.

Lastly, we remand the case to the administrative law judge to consider whether claimant should be held liable for his counsel's fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977). Pursuant to Section 28(c), the administrative law judge may award a fee payable by claimant. We note that the regulations provide, *inter alia*, that the financial circumstances of claimant shall be taken into account when the fee is assessed against claimant. *See* 20 C.F.R. §702.132(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is reversed and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge