JENNIFER L. GUMM	)	BRB Nos. 93-1167
	)	and 93-1167A
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent Cross-Respondent	)	
	)	
JENNIFER L. GUMM	)	BRB No. 93-1495
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:_____
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Awarding Attorney's Fees of

James J. Butler, Administrative Law Judge, and appeal of the Compensation Order of Karen P. Goodwin, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock (Littler, Mendelson, Fastiff & Tichy), Portland, Oregon, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order, and claimant appeals the Order Awarding Attorney's Fees, (91-LHC-1740) of Administrative Law Judge James J. Butler, and claimant appeals the Compensation Order (OWCP No. 14-92060) of District Director Karen P. Goodwin, 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). 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant works at a facility primarily noted for export of lumber products. On September 23, 1987, she fell onto a bundle of logs, injuring her ankle, wrist, and knee. Cl. Ex. 1; Tr. at 52-53. She developed back problems soon thereafter and eventually was diagnosed as having a herniated disc at L4-5. Cl. Exs. 1, 10-11, 18. Claimant returned to work in October 1987. She stopped working in late March 1988, underwent a lumbar laminectomy on August 16, 1988, and returned to work in January 1989 as a regular day shift "white plug" worker, avoiding work on the log rafts.[1] Emp. Ex. 4; Tr. at 55-57. In the fall of 1989, claimant was able to switch to black plug work. With the exception of time off

[1]A "white plug" worker is one who is available for all types of longshoring work, including heavy work. A "black plug" worker is one who is limited to light duty dock work on flat surfaces. Tr. at 50, 59.

due to an exacerbation of her back condition in December 1990, claimant worked black plug assignments from October 1989 through October 1991 when the union reclassified her as a white plug employee. Emp. Ex. 4; Tr. at 61, 63, 87-88. Claimant re-injured her back on December 4, 1991, and remained off work until May 16, 1992, when she returned to white plug night duty. Emp. Ex. 4; Tr. at 70-72. As of the date of the hearing, claimant continued to work the night shift, earning more by working four hours at night than she did working the eight-hour day shift.

Claimant filed a claim for permanent partial disability benefits for her 1987 injury and for temporary total disability benefits for her 1991 exacerbation. Employer voluntarily paid temporary total disability benefits from September 24 through October 20, 1987, March 31, 1988, through January 25, 1989, December 10, 1990, through January 20, 1991, December 5, 1991, through February 26, 1992, and April 3 through May 15, 1992.[2] Cl. Exs. 2-4; Emp. Ex. 2. The administrative law judge determined that claimant's condition reached maximum medical improvement on July 25, 1991, that she is partially disabled, and that her earnings as a white plug day worker, black plug worker, or white plug night worker do not reasonably represent her post-injury wage-earning capacity. Decision and Order at 9-11. He concluded that the most significant factor in determining claimant's post-injury wage-earning capacity is the loss of hours worked; therefore, he calculated that claimant has a 51 percent loss of wage-earning capacity which amounts to a loss of $373.12 per week. *Id.* at 11. Additionally, the administrative law judge found that employer is entitled to a credit for holiday pay and is liable for medical expenses, interest, and an attorney's fee. *Id.* at 11-12. Claimant and employer moved for reconsideration of the decision, and the administrative law judge summarily denied both motions. Claimant and employer appeal the decisions, and each responds to the other's appeal accordingly. BRB Nos. 93-1167/A. The Director, Office of Workers' Compensation Programs (the Director), also responds to the appeals.

Employer contends that claimant has not suffered a loss of wage-earning capacity. It argues that the administrative law judge erred in relying solely on claimant's loss of hours worked to determine that she sustained a 51 percent loss of wage-earning capacity. Claimant and the Director assert that the findings are supported by substantial evidence.

Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be her actual post-injury

[2]Beginning December 10, 1990, employer paid benefits based on an average weekly wage of $678.87. Cl. Ex. 4; Emp. Ex. 2. This is less than the stipulated average weekly wage of $731.61.

earnings if they fairly and reasonably represent her wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, __ BRBS __, BRB No. 92-2308 (Feb. 15, 1996); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Some factors to consider include the claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, the claimant's earning power on the open market, and any other relevant factors. *Guthrie v. Holmes & Narver, Inc.*, __ BRBS __, BRB No. 93-624 (Feb. 27, 1996); *Cook*, 21 BRBS at 6; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In this case, claimant testified that after her 1987 injury she worked white plug day shift, black plug day shift, and white plug night shift. The parties agree that she is physically unable to return to the white plug day shift. Decision and Order at 9. With regard to the black plug day shift, claimant testified that, although she worked in that capacity for two years, eight hours of standing and bending aggravate her back condition. Tr. at 63, 72. The administrative law judge credited claimant's testimony that she cannot work the black plug day shift and determined that earnings of other black plug workers do not reasonably represent claimant's post-injury earning capacity. Decision and Order at 10. Further, he found that claimant's wages as a white plug night shift worker do not reasonably represent her capacity to earn because, although it is only a four-hour shift, the jobs often exceed claimant's medical restrictions and cause her to work with pain.[3] Decision and Order at 10-11. The administrative law judge acknowledged that claimant earns more money on the night shift than she did in her usual job, but he noted that under *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991), higher wages do not preclude a finding that claimant has suffered a loss of wage-earning capacity. Decision and Order at 10 n.6. He then determined that claimant's hours decreased by 51 percent, and he converted that loss into a loss of $373.12 per week. *Id.* at 11.

Although employer disputes this award, the facts accord exactly with those in *Container Stevedoring*. In *Container Stevedoring*, the United States Court of Appeals for the Ninth Circuit, wherein jurisdiction of the present case resides, affirmed the administrative law judge's reliance on the loss of hours worked, the switch to night shift, and testimony that claimant Gross worked with pain, to support the finding of a loss of wage-earning capacity. *Container Stevedoring*, 935 F.2d at 1549-1550, 24 BRBS at 220-

[3]Doctors advised claimant to avoid climbing or working on uneven surfaces, and they restricted her to dock work. Cl. Exs. 28, 34-35, 47. Although white plug work moves at a slower pace at night, it involves work on ships and climbing. Tr. at 74, 86. Claimant understands that this work violates the doctors' orders, and she stated that she prefers day hours because of her children, but she feels it is better for her back to work the night shift. Tr. at 71, 74, 86.

221 (CRT). In accordance with *Container Stevedoring*, we affirm the administrative law judge's finding that claimant sustained a loss of wage-earning capacity based on her lost work hours, as it is supported by substantial evidence.[4] *Id.*, 935 F.2d at 1551, 24 BRBS at 223 (CRT); *see also Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Gillett v. Brady-Hamilton Stevedore Co.*, 13 BRBS 438 (1981).

In her cross-appeal, claimant contends the administrative law judge erred in failing to discuss her entitlement to temporary total disability benefits for the period between December 5, 1991, and May 16, 1992. She contends she is entitled to additional benefits based on the stipulated average weekly wage for that period because employer paid benefits based on a lower average weekly wage for only a portion of the time. Employer responds, maintaining that claimant is ineligible for temporary total disability benefits after the date of maximum medical improvement because that date signifies the change of condition from a temporary to a permanent status.

[4]We reject employer's argument that the administrative law judge failed to allocate the burden of proof to claimant. The administrative law judge stated that claimant has the burden of showing that she has a loss of wage-earning capacity, and he credited her testimony over the wage evidence presented by employer. Decision and Order at 10-11.

In this case, employer voluntarily paid temporary total disability benefits from December 5, 1991, through February 26, 1992, and again from April 3 through May 15, 1992. Emp. Ex. 2. In his decision, the administrative law judge determined that claimant's condition reached maximum medical improvement on July 25, 1991.[5] Although this date denotes the change in the nature of claimant's condition from temporary to permanent, it does not automatically preclude claimant from receiving temporary disability benefits thereafter. *See Leech v. Service Engineering Co.*, 15 BRBS 18 (1982) (where an employee with a permanent partial disability suffers a temporary exacerbation, his underlying permanent partial disability may be subsumed in his temporary total disability, but it does not disappear). As claimant may be entitled to additional benefits for the period between December 5, 1991, and May 16, 1992, and as the administrative law judge did not address this issue, we remand the case for him to consider it.

Claimant also contends the administrative law judge erred in granting employer a credit for disability payments on the days she also received holiday pay. Employer responds, arguing that it is entitled to the credit pursuant to the Board's decision in *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., concurring and dissenting). The Director responds, agreeing with claimant and arguing that *Sproull* was decided incorrectly. Since the administrative law judge issued his decision, the Board reconsidered its decision in *Sproull* and reversed its initial decision on this issue. Consequently, where there is no evidence of a provision for the payment of holiday pay in lieu of compensation, an employer is not entitled to a credit for disability compensation paid on holidays. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994) (Decision and Order on Recon. *en banc*) (Brown and McGranery, JJ., concurring on other grounds); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). Claimant testified that she qualified for holiday pay by working at least 800 hours under the contract during the previous year. Tr. at 84. There is no evidence that this money was to be paid in lieu of compensation. Therefore, we reverse the administrative law judge's decision on this issue and hold that employer is not entitled to a credit for disbursements of holiday pay. *Branch v. Ceres Corp.*, 29 BRBS 53 (1995); *Sproull*, 28 BRBS at 276.

Claimant's counsel filed petitions for attorney's fees with both the administrative law judge and the district director. Employer filed objections to both fees, challenging only the hourly rate requested and the entries charging for preparation of the fee petitions. The administrative law judge reduced the fee by two hours, stating that fee preparation time is not allowable; however, he added two hours for "defending the fee." He decreased the hourly rate from the requested $165 to $150 and awarded a total fee of $10,907.75, representing 69.75 hours at a rate of $150 per hour, seven hours at a legal assistant rate of $50 per hour, and $95.25 in expenses. The district director reduced the fee by one hour, stating that time preparing the fee application is not compensable, and determined that an hourly rate of $125 is reasonable. Consequently, she awarded a total fee of $3,106.25,

[5]No party challenges this finding.

representing 24.25 hours of services at a rate of $125 per hour, and 1.5 hours at a rate of $50 per hour, plus $107.45 in expenses. Claimant's counsel appeals the administrative law judge's fee order, BRB No. 93-1167A, and the district director's fee order, BRB No. 93-1495. Employer responds to both appeals, urging affirmance.

Claimant's counsel challenges the propriety of the fee reductions by the administrative law judge and the district director. He contends they erred in failing to award the fees based on the current hourly rate of $165 instead of the historical rates of $150 and $125. Employer argues that the approved hourly rates are reasonable.

The Board has determined that compensation for delay of payment is permissible for attorney's fees under the Act. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Specifically, it is permissible for the tribunal awarding the fee to compensate an attorney for delay, if the issue is timely raised, and to approve a fee based on current instead of historical hourly rates, or by using some other appropriate method. *Id.* In this case, however, counsel first raised the issue of delay before the Board. Consequently, the issue was not raised in a timely fashion and is rejected. *Id.* Moreover, as the administrative law judge and the district director acted within their discretion in awarding fees based on hourly rates of $150 and $125, we reject counsel's arguments and affirm the approved hourly rates.

Claimant's counsel also avers that the administrative law judge and the district director erred in disapproving time for preparing the fee petitions. As employer responds, well-established precedent precludes compensation for time spent preparing a fee petition. *Nelson*, 29 BRBS at 95; *Sproull*, 28 BRBS at 277; *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). Therefore, we reject counsel's argument, and we affirm both fee awards.

Accordingly, the administrative law judge's Decision and Order is reversed insofar as it allows employer a credit for the payment of holiday pay. The case is remanded to the administrative law judge for consideration of claimant's claim for temporary total disability benefits.[6] In all other respects, the administrative law judge's Decision and Order is affirmed. The attorney's fees awarded by both the administrative law judge and the district director are affirmed.

SO ORDERED.

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[6]On April 15, 1996, the Board received from claimant a motion to remand this case for modification so that the administrative law judge may consider claimant's entitlement to temporary total disability benefits from March 18 to April 24, 1995. On remand, the administrative law judge should consider claimant's motion for modification.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge