BRB No. 93-2514

JIMMY B. WALKER	)	
	)	
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 Supplemental Decision and Order Awarding Attorney Fees and Costs of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees and Costs of Administrative Law Judge Paul A. Mapes 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 facts and conclusions of law 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, a longshoreman, was injured on February 1, 1992, during the course of his

employment when he hit his right shoulder on a ship's railing, fell and struck both knees and his right hand on the deck. Claimant was released to return to his usual job without restriction by three physicians in March 1992. Subsequently, claimant was tentatively diagnosed as suffering from a mild impingement syndrome. Claimant returned to his usual work in March 1993, but suffered an unrelated work injury three days later.

In his decision, the administrative law judge calculated claimant's average weekly wage, which he determined was $816.54, based on the wages claimant earned in the 52 weeks preceding his February 1992 injury without including the vacation pay which claimant received in the year following his injury. He further found that claimant suffered no work-related impairment subsequent to March 19, 1992, and therefore, that neither additional compensation nor medical benefits are due claimant past that date. The administrative law judge also determined that claimant is responsible for employer's costs in defending this claim under Section 26 of the Act, 33 U.S.C. §926. Finally, the administrative law judge found that employer was entitled to a credit for one day's holiday pay which claimant had received post-injury. Accordingly, the administrative law judge awarded claimant $234.10, plus interest, in additional compensation.

In his Supplemental Decision and Order, the administrative law judge awarded employer $7,614.54, in itemized costs. He also awarded claimant's attorney a fee of $412.50 plus $3.50 in costs, representing 2.5 hours of attorney services at $150 per hour and .75 hours at $50 per hour for the services of a legal assistant.

Claimant appeals, contending that the administrative law judge erred in denying him compensation and medical benefits after March 19, 1992; in failing to include his vacation pay in calculating his average weekly wage for compensation purposes; in awarding employer a credit for the holiday pay claimant received; and in holding claimant liable for employer's costs. Additionally, claimant argues that, if successful on appeal, the case should be remanded for an award of additional attorney fees. Employer responds, urging affirmance of both of the administrative law judge's decisions.

Claimant initially contends that the administrative law judge erred in denying his claim for compensation and medical benefits subsequent to March 19, 1992. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in concluding that claimant did not sustain a compensable impairment subsequent to March 19, 1992, credited and relied upon the opinion of Dr. Duff that claimant had no work-related impairment that precluded his return to his usual employment. CX 8. This opinion is supported by those of Dr. Buehler, and Dr. North, who both found claimant able to return to his regular job. CX 9. The administrative law judge gave these opinions greater weight than that of Dr. Irvine, that claimant suffered a mild impingement syndrome based upon an essentially normal MRI and his complaints of pain. CX 20. In rendering this credibility determination, the administrative law judge noted that there was no objective evidence supporting claimant's contentions, that all the

doctors of record stated that any diagnosis of an impingement syndrome was based primarily on claimant's symptomology, and that claimant was an unreliable witness based on his inaccuracies both in his deposition and hearing testimony and the videotape which revealed claimant had a full range of motion and activity. Moreover, Dr. Irvine opined that if the symptoms which claimant related were inaccurate, then his diagnosis was not correct. EX 29 at 414.

We hold that the administrative law judge committed no error in relying upon the opinion of Dr. Duff, as supported by the opinions of Drs. Buehler and North, rather than that of Dr. Irvine, in concluding that claimant sustained no continuing impairment subsequent to March 1992. 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 sustained no impairment subsequent to March 1992.[1] *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). Therefore, the administrative law judge's denial of compensation subsequent to March 19, 1992, is affirmed. As we affirm the administrative law judge's finding that claimant's physical condition had resolved in March 1992, we hold that the administrative law judge committed no reversible error in failing to award claimant medical expenses incurred subsequent to that date. *See Wheeler*, 21 BRBS at 33.

Claimant next argues that the administrative law judge erred in failing to include the vacation pay which he received in the year following his injury in his calculation of claimant's average weekly wage for compensation purposes. We disagree. Vacation pay received in the year prior to the injury, rather than the vacation pay received after the injury should be included in the administrative law judge's calculation of claimant's average weekly wage, on the theory that it had been "earned" in the year prior to the injury. *See Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(Brown and Dolder, JJ., dissenting in part), *aff'g in pert. part and modifying in part on recon. en banc*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds). Thus, the administrative law judge's decision to omit claimant's post-injury vacation pay from his average weekly wage calculation is affirmed.

Claimant additionally contends that the administrative law judge erred in finding employer entitled to a credit for the one day of holiday pay which claimant received post-injury. We agree. Claimant testified, and employer does not dispute, that he could have both worked that day, but for his injury, and also received holiday pay. Tr. I. at 42-44. In cases where a union contract provides for payment of holiday pay in lieu of compensation, an employer is entitled to a credit for its

[1]We note that the administrative law judge acted within his discretion in declining to credit claimant's subjective complaints of pain. *See Donovan*, 300 F.2d at 741.

payment. *See Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990). However, if, as in the instant case, there is no provision in the union contract that holiday pay be paid in lieu of compensation and had claimant not been injured he could have worked and received this pay, then employer is not entitled to a credit. *See Sproull*, 28 BRBS at 271. Accordingly, as it is uncontroverted that claimant could have both worked and received holiday pay, we reverse the administrative law judge's award to employer of a credit for the holiday pay received.

Claimant next contends that the administrative law judge erred in assessing employer's costs against him pursuant to Section 26 of the Act. We agree. In the instant case, the administrative law judge held claimant liable for $7,614.54, in employer's itemized costs. Subsequent to the issuance of the administrative law judge's decision, the United States Courts of Appeals for the Fifth and Ninth Circuits have addressed the question of the compensability of costs under Section 26, and concluded that neither the district director, the administrative law judge, nor the Board has authority to award costs under Section 26; rather, costs under Section 26 can only be assessed upon review by the court of appeals or upon enforcement of an order by the district court. *See Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g on other grounds* 24 BRBS 84 (1990); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993). For the reasons stated in *Rihner* and *Brickner*, we reverse the administrative law judge's determination that claimant is liable for employer's costs under Section 26. *See also Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994). Accordingly, the administrative law judge's award of costs is reversed.

Lastly, claimant argues that if he is successful on any issues on appeal, the issue of his fee should be remanded in order for him to submit a supplemental fee petition to the administrative law judge seeking fees for the work done on those issues. Subsequent to the issuance of the administrative law judge's decision in this case, the administrative law judge permitted claimant's attorney to seek a fee for services relating to the sole successful issue at that time, recoupment of an underpayment of benefits. In his supplemental decision, the administrative law judge awarded claimant's attorney a fee for this work of $412.50, representing 2.5 hours of attorney services at $150 per hour and .75 hours of legal assistant services at $50 per hour, plus $3.50 in costs. Initially, we note that the administrative law judge's award of a fee only for services rendered in pursuit of the issues on which claimant prevailed was proper. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). On appeal, claimant has succeeded on two additional issues, resulting in reversal of a credit for one day's benefits and reversal of an assessment of costs against him. Claimant may seek a fee

for work before the administrative law judge limited to these issues, and the case is remanded for him to do so.

Accordingly, the administrative law judge's calculation of claimant's average weekly wage and his denial of an award for compensation and medical benefits subsequent to March 1992 are affirmed. The administrative law judge's award to employer of a credit for holiday pay received by claimant's post-injury is reversed. Additionally, the administrative law judge's finding that claimant is liable for employer's costs under Section 26 is reversed. The case is remanded for the administrative law judge to consider a fee for work related to these issues. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney Fees and Costs are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge