

BRB Nos. 95-728
and 95-728A

ALFRED JAMES)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
CERES GULF, INCORPORATED)	DATE ISSUED: _____
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
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.

William S. Vincent, Jr., and William J. Delsa, New Orleans, Louisiana, for claimant.

Kathleen K. Charvet and Susan S. Harper (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for employer/carrier.

Michael S. Hertzog (J. Davitt McAteer, Acting Solicitor of Labor, Carol De Deo, Associate Solicitor; Janet R. Dunlop, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (87-LHC-1492) 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 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

This case is on appeal to the Board for the second time. Claimant injured his back while working for employer as a grain stevedore on July 9, 1986. In the first decision and order, Administrative Law Judge Parlen L. McKenna awarded claimant temporary total disability benefits from July 9, 1986 to January 1, 1987. Claimant filed a motion for reconsideration. In the Decision and Order on Motion for Reconsideration, the administrative law judge awarded temporary total disability benefits from July 9, 1986 and continuing based on a doctor's opinion he had previously rejected. Employer appealed to the Board, contending that the decision on reconsideration was invalid because the administrative law judge was no longer with the Department of Labor at the time he issued his decision, and, in the alternative, that the administrative law judge erred in summarily accepting the doctor's opinion and in determining suitable alternate employment was not available. In *James v. Ceres Gulf, Inc.*, BRB No. 88-3331 (July 30, 1993)(unpublished), the Board rejected employer's first contention, and remanded the case for the administrative law judge to provide adequate explanations for his findings on maximum medical improvement and the availability of suitable alternate employment.

In the decision on remand, Administrative Law Judge C. Richard Avery found that since the issuance of Judge McKenna's last decision, claimant underwent neck surgery, and it was necessary to reopen the record to admit new evidence on claimant's disability status. The administrative law judge found that the parties stipulated, *inter alia*, that claimant reached maximum medical improvement on May 8, 1990. The sole remaining issue for adjudication was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. The administrative law judge awarded claimant temporary total disability benefits from July 9, 1986 to May 8, 1990, and permanent total disability benefits from May 8, 1990 and continuing. The administrative law judge found employer was entitled to Section 8(f) relief. Further, the administrative law judge stated that claimant's average weekly wage on the date of injury should be adjusted as of October 1, 1991 to reflect prior cost-of-living adjustments pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). 33 U.S.C. §910(f); Decision and Order at 13.

On November 16, 1994, claimant filed two attorney's fee petitions, one covering the period

from May 15, 1987 through October 3, 1988 when Judge McKenna presided over the case, and the other covering the period from August 9, 1993 through November 9, 1994 when Judge Avery presided over the case. The first fee petition was for \$7,718.75, representing 61.75 hours at an hourly rate of \$125, plus \$3,986.56 in costs. The second fee petition was for \$16,537.50, representing 110.25 hours at an hourly rate of \$150, plus \$857.56 in costs. Employer did not submit any objections to the fee petitions. The administrative law judge considered that employer submitted no objections, found both fee petitions reasonable, and granted claimant the requested fees totalling \$24,256.25, plus \$4,844.12 in costs.

On appeal, the Director contends that the administrative law judge erred in awarding Section 10(f) adjustments occurring prior to the date of permanency pursuant to *Holliday*, 654 F.2d at 415, 13 BRBS at 741, as that case was overruled by the Fifth Circuit in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990) (*en banc*). The Director contends that claimant's entitlement to Section 10(f) adjustments commences on October 1, 1990 in this case.¹ BRB No. 95-728. Claimant and employer have responded to this appeal by agreeing that claimant is entitled to Section 10(f) adjustments only as of October 1, 1990. In its appeal, employer challenges the administrative law judge's award of an attorney's fee. BRB No. 95-728A. Claimant responds, urging affirmance of the fee award.

Initially, we hold that the administrative law judge erred in applying the holding of *Holliday* to this case. In *Holliday*, the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to an increase in payments reflecting cost-of-living adjustments that accrued during prior periods of temporary disability. Subsequently, the Fifth Circuit overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) adjustments during previous periods of temporary total disability. *Phillips*, 895 F.2d at 1033, 23 BRBS at 36 (CRT). *Accord Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990); *contra Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989); *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986). As this case arises within the jurisdiction of the Fifth Circuit, claimant's entitlement to Section 10(f) adjustments commences on October 1, 1990, which is the first October 1 after claimant became entitled to permanent total disability benefits. 33 U.S.C. §910(f). The administrative law judge's decision and order is accordingly modified.

In its appeal, employer contends the administrative law judge erroneously held it liable for claimant's attorney's fee because claimant did not successfully prosecute his claim in that the only issue at the hearing was employer's entitlement to Section 8(f) relief. Additionally, employer contends that the attorney's fee petitions were not sufficiently specific, that time spent on certain entries was excessive, that claimant was erroneously reimbursed for entries dated July 10 and July

¹In response to a Show Cause Order issued by the Board on July 7, 1995, the Director submitted a "Motion for Summary Reversal in Lieu of Brief." We accept this response to the Show Cause Order, and we will consider the contentions as her brief in support of her appeal.

11, 1994 which included review of employer's Section 8(f) applications, and that the administrative law judge erroneously determined that employer is responsible for the fees of two attorneys at the formal hearing.² Claimant responds that employer failed to object to the fee petitions before the administrative law judge and cannot raise objections for the first time on appeal. Employer replies, contending that regardless of whether it submitted objections below, claimant cannot receive an award of an attorney's fee where, as here, claimant has not successfully prosecuted his claim. In response, claimant contends that his attorney's services were necessary because it was only one week before the formal hearing that the parties agreed that only Section 8(f) would be litigated, and that if Section 8(f) relief were denied, the other issues would be litigated. Claimant also states that employer ceased paying compensation at the end of July 1993.

Under Section 28(b), 33 U.S.C. §928(b), when employer pays or tenders compensation without an award, employer remains liable for an attorney's fee if the employee successfully obtains greater compensation than that originally paid or tendered by employer. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1987). In order to preserve an issue for appeal, employer must first raise objections to the fee request before the administrative law judge. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42, 43 (1995); *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 in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). As employer did not object to the fee requests before the administrative law judge, we decline to address employer's contentions on appeal. *Id.* We note, however, that employer ceased compensation payments on July 30, 1993, Cl. Ex. 1 at 4, and that, despite their stipulations, the parties agreed that the issues of the nature and extent of claimant's disability would require further litigation if employer's claim for Section 8(f) relief were denied. *See* Cl. Ex. 9 at 1; Tr. at 17, 24-25. The case before the administrative law judge therefore was not necessarily limited to the issue of Section 8(f), and claimant's counsel was successful in obtaining benefits greater than that previously paid by employer. *See Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995); 33 U.S.C. §928(b). We therefore affirm the Supplemental Decision and Order Awarding Attorney Fees.³

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is modified with regard to claimant's entitlement to Section 10(f) adjustments, and is otherwise affirmed. The Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

²Employer apparently refers to the fact that at the July 18, 1994 hearing attorneys William S. Vincent and William Delsa were present on claimant's behalf. In the fee petition, however, only Mr. Vincent's name is mentioned.

³Claimant's motion for sanctions against employer is denied.

ROY P. SMITH
Administrative

Appeals

Judge

REGINA C. McGRANERY
Administrative

Appeals

Judge