

BRB Nos. 99-1040  
and 00-0608

RANDY J. BELANGER )  
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 Claimant-Respondent )  
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 v. )  
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 MARINETTE MARINE ) DATE ISSUED:  
 CORPORATION )  
 )  
 and )  
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 CRUM & FORSTER INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeals of the Decision and Order and Supplemental Order Awarding Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, and Compensation Order Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Larry J. Peterson (Larry J. Peterson & Associates), St. Paul, Minnesota, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Order Awarding Attorney's Fee (98-LHC-2309) of Administrative Law Judge Jeffrey Tureck and the Compensation Order Award of Attorney's Fees (Case No. 10-37040) of District Director Thomas C. Hunter 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, an electrician, alleged that he injured his right shoulder at work on January 20, 1998. Employer voluntarily paid claimant temporary total disability benefits from January 21, 1998, to March 22, 1998, and April 2, 1998, to June 16, 1998. Claimant subsequently filed claims for additional injuries to his right shoulder on July 28, 1998, and August 26, 1998. Claimant sought temporary total disability benefits from August 26, 1998, and continuing, until he undergoes surgery. The administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking his shoulder injury to his employment, which employer did not rebut. Therefore, the administrative law judge found that on January 20, 1998, claimant suffered from a work-related aggravation of a pre-existing condition, which contributed to his need for surgery. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from August 27, 1998, until he undergoes surgery and rehabilitation, and also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

Claimant was represented by Messrs. Courtney and Lenz before the administrative law judge. The law office of Mr. Courtney, claimant's initial counsel,<sup>1</sup> subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$365, representing .25 hours of attorney services at \$185 per hour, 1.25 hours of paralegal services at \$75 per hour, and 3.75 hours of legal assistant services at \$60 per hour. Mr. Lenz, claimant's second attorney, submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$15,200, representing 95 hours at \$160 per hour and \$1,275.45 in expenses. In his Supplemental Order Awarding Attorney's Fee, the administrative law judge awarded Mr. Courtney the requested fee of \$365. The administrative law judge awarded Mr. Lenz \$14,320, representing 89.5 hours at \$160 per hour and \$1,275.45 in expenses, disallowing 5.5 hours spent by Mr. Lenz drafting an unsuccessful motion for summary judgment.

The law office of Mr. Courtney also filed a fee petition with the district director,

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<sup>1</sup>Mr. Courtney, claimant's initial counsel, died in an airplane crash in the summer of 1998 on his way to the scheduled hearing in this case. Supplemental Order at 1.

requesting an attorney's fee of \$588.75, representing .5 hours of attorney services at \$185 per hour, 5.75 hours of paralegal services at \$75 per hour, and .25 hours of legal assistant services at \$60 per hour, including \$50 in expenses. In his Compensation Order Award of Attorney's Fees, the district director awarded the sum of \$571.25, reducing the hourly rate requested to \$150, upon employer's sole objection to the fee petition.

On appeal, employer challenges the administrative law judge's awards of benefits and the attorney's fee. BRB No. 99-1040. Employer also challenges the district director's award of an attorney's fee. BRB No. 00-0608.<sup>2</sup> Claimant responds in support of the decisions of the administrative law judge, but has not responded to employer's appeal of the district director's fee award.

Employer initially argues that the administrative law judge erred in finding Dr. Tonino's opinion insufficient to establish rebuttal of the Section 20(a) presumption. Upon invocation of the Section 20(a) presumption, which employer concedes in the instant case, the burden shifts to employer to produce substantial evidence that a causal relationship does not exist between claimant's injury and his employment. *See American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *see also Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

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<sup>2</sup>The Board consolidated employer's appeals of the administrative law judge's decisions, BRB No. 99-1040, and the district director's fee award, BRB No. 00-0608, in an Order dated March 29, 2000.

The administrative law judge found that Dr. Tonino's opinion that claimant's January 20, 1998, right shoulder injury was a temporary aggravation lasting not more than three to four weeks and that it did not cause claimant's subsequent need for surgery is not substantial evidence in support of rebuttal since it is conclusory and based on incorrect factual assumptions. Decision and Order at 10-11. The administrative law judge found Dr. Tonino's opinion conclusory because he did not explain why the January 1998 accident was not a significant factor in causing claimant's symptoms. Moreover, the administrative law judge found that Dr. Tonino's acknowledgment that it was not possible to determine when the changes on claimant's April 1998 magnetic resonance imaging showing right shoulder impingement occurred reduced the probative value of the physician's opinion. Lastly, the administrative law judge found that Dr. Tonino's opinion was based on incorrect facts as set forth by employer's counsel in a long hypothetical question posed to Dr. Tonino. First, the administrative law judge pointed out, Dr. Tonino was asked to assume that claimant's shoulder problems began in 1980 due to a motorcycle accident when, in fact, the motorcycle accident occurred in 1985.<sup>3</sup> C&F Ex. 2 at 16. Dr. Tonino also assumed that claimant injured his shoulder both in 1991 and 1993, whereas, the administrative law judge noted claimant had only one injury in 1993.<sup>4</sup> Decision and Order at 10 n. 7; C&F Ex. at 16-17; Cl. Ex. 3 at 19-24. The administrative law judge also noted that Dr. Tonino was asked to assume that claimant suffered shoulder symptoms in November 1996 while he worked for employer whereas claimant's shoulder was asymptomatic from 1994 until the autumn of 1997. C&F Ex. 2 at 18; Cl. Ex. 1 (Carlson). The administrative law judge also found that Dr. Tonino's opinion was based on an assumption that on January 20, 1998, claimant experienced sharp pain in his right shoulder similar to what he had described on previous occasions, when in fact claimant testified that the pain he experienced on that date was the worst he ever had. C&F Ex. 2 at 20; Cl. Ex. 3 at 70.

The Board has held that an administrative law judge may find a physician's opinion insufficient to rebut the Section 20(a) presumption if the opinion is not well-reasoned or lacks the proper factual foundation. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Inasmuch as the administrative law judge rationally found that Dr. Tonino's opinion was conclusory, unconvincing, and based on erroneous facts, we affirm his finding that Dr. Tonino's opinion

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<sup>3</sup>While it is reported that claimant had a motorcycle accident in 1985 in 1993 medical records, claimant could not remember injuring his shoulder in the motorcycle accident. Cl. Ex. 3 at 20.

<sup>4</sup>This erroneous fact arose from claimant's "confusing" deposition testimony, as characterized by the administrative law judge, wherein claimant stated that his first injury was in 1991, but then realized that he meant to say 1993 and not 1991. Decision and Order at 10 n. 7; Cl. Ex. 3 at 19-24.

is insufficient to satisfy employer's burden of producing substantial evidence that claimant's shoulder injury and resultant surgery are not work-related. *See American Grain Trimmers*, 181 F.3d at 810, 33 BRBS at 71 (CRT). Consequently, we affirm the award of disability and medical benefits.

Employer also challenges the fee awards of both the administrative law judge and the district director. Turning first to employer's appeal of the administrative law judge's fee awards to the law office of Mr. Courtney and to Mr. Lenz, we affirm the hourly rates of \$185 and \$160, respectively, as employer has shown no abuse of discretion by the administrative law judge in awarding these rates. *See O'Kelley v. Dep't of the Army/NAF*, BRBS , BRB No. 99-0810 (May 2, 2000). We reject employer's contention that Mr. Lenz was required to bill at a lower hourly rate for administrative work or travel time. *See Jaqua v. Pro-Football, Inc.*, 12 BRBS 572 (1980); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). Moreover, we reject employer's contention that the administrative law judge was required to reduce Mr. Lenz's fee because he billed in quarter-hour minimum increments. Employer has shown no abuse of discretion in this regard, *see Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986), and there is no binding circuit precedent mandating that the administrative law judge reduce the fee on this basis. *See, e.g., Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999). With regard to employer's challenge to Mr. Lenz's billing for local and long distance travel time and expenses, we affirm the administrative law judge's award of these items as employer has shown no abuse of discretion.<sup>5</sup> *See generally Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995). Consequently, we affirm the administrative law judge's awards of attorney's fees to both the law office of Mr. Courtney and to Mr. Lenz.

Finally, we turn to employer's challenge to the district director's fee award. Employer challenges the one-quarter hour minimum billing increments used by the law office of Mr. Courtney, citing *Conoco, supra*. As employer did not raise this objection before the district director, it cannot be raised for the first time before the Board on appeal.<sup>6</sup> *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Thus, employer's challenge to the district director's fee award is without merit, and the district director's fee award is affirmed.

Accordingly, the administrative law judge's Decision and Order and Supplemental Order Awarding Attorney's Fee are affirmed. The district director's Compensation Order

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<sup>5</sup>Contrary to employer's contention, Mr. Lenz's fee petition indicates he prorated the travel time on January 26 and 28, 1999, as well as the travel expenses from January 26-28, 1999, for the three cases he was working on at the same time.

<sup>6</sup>Before the district director, employer's sole objection was to the hourly rate of \$185, which the district director accordingly reduced to \$150.

Award of Attorney's Fees also is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge