BRB Nos. 02-0721
and 02-0721A

MICHAEL M. METHE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
GULF BEST ELECTRIC, INCORPORATED	)	DATE ISSUED: 07/18/2003
	)	
and	)	
	)	
LOUISIANA WORKERS= COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Michael S. Guillory, Metairie, Louisiana, for claimant.

Ted Williams (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order and claimant appeals the Decision and Order and Supplemental Decision and Order Awarding Attorneys Fees (2001-LHC-3179) 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).

Claimant, a journeyman electrician, injured his low back at work on March 10, 2000. Claimant did not return to work. Employer voluntarily paid claimant temporary total disability benefits commencing March 13, 2000, at an average weekly wage of $859.27. The administrative law judge found that claimant reached maximum medical improvement on June 8, 2000, since claimant=s refusal to have back surgery is not unreasonable and is justified. The administrative law judge also found that claimant=s average weekly wage is $848.51 applying Section 10(c) of the Act, 33 U.S.C. '910(c), and excluding the $3.47 per hour contribution made by employer to claimant=s retirement, annuity, and health insurance plans. Thus, the administrative law judge awarded claimant temporary total disability benefits from March 10 through June 8, 2000, at an average weekly wage of $848.51, permanent total disability benefits commencing June 8, 2000, medical benefits, and past due mileage for claimant=s aqua therapy. The administrative law judge denied claimant reimbursement under Section 7(d) of the Act, 33 U.S.C. '907(d), for fees he paid in advance for his aqua therapy. The administrative law judge also found that employer is not liable for an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. '914(e). The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. '908(f). The administrative law judge stated at the hearing that he did not have jurisdiction to consider claimant=s Section 31(c), 33 U.S.C. '931(c), claim, and thus did not address the issue in his decision. On claimant=s motion for reconsideration, the administrative law judge modified claimant=s average weekly wage to $859.27 based on a determination that claimant=s annual earnings in the year prior to injury were $44,681.81 and not $44,122.26.

Claimant=s counsel subsequently filed a petition for an attorney=s fee for work performed before the administrative law judge, requesting a fee of $36,800, representing 184 hours of work at an hourly rate of $200, plus $2,586.02 in costs. Employer filed numerous objections. The administrative law judge awarded claimant=s counsel a fee of $10,325, representing 59 hours of work at an hourly rate of $175, plus $871 in expenses.

In its appeal, employer challenges the administrative law judge=s findings regarding maximum medical improvement and Section 8(f). Claimant responds in support of these finding, and appeals the administrative law judge=s findings regarding average weekly wage, and Sections 7(d)(1), 14(e), and 31(c). Employer responds in support of these findings. Claimant also appeals the administrative law judge=s fee award to which employer responds

in support.

Average Weekly Wage

We first address claimant=s appeal of the administrative law judge=s Decision and Order. Claimant first argues that the administrative law judge erred in excluding from his average weekly wage the $3.47 per hour employer paid to claimant=s benefits plans.

[1] Section 2(13) defines wages as:

> [T]he money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. ' 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee=s or dependent=s benefit, or any other employee=s dependent entitlement.

33 U.S.C. ' 902(13)(1994).

We affirm the administrative law judge=s conclusion that Section 2(13) precludes employer=s contributions to claimant=s health insurance and retirement plans from inclusion in average weekly wage. The United States Supreme Court held under the 1972 version of Section 2(13) that Awages@ do not include fringe benefits, such as employer contributions to union, retirement, pension, health and welfare, or other benefit plans. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155(CRT)(1983). The 1984 amendment version, quoted above, codified the Court=s holding, and now the plain language of Section 2(13) specifically excludes fringe benefits including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, or other benefit plans.

[1]The $3.47 per hour consists of $1.80 for health insurance, $1.05 to a local retirement and annuity plan, and $.62 to a national retirement plan. Tr. at 80, 83-85, 87-88.

[2] 33 U.S.C. '902(13); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT)(5th Cir. 2000). Thus, as it is in accordance with law, we affirm the administrative law judge=s exclusion of these payments from claimant=s average weekly wage.

Claimant also argues that the administrative law judge erred in applying Section 10(c) instead of Section 10(a) in computing claimant=s average weekly wage. Claimant=s average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. '910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant=s employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, Section 10(b) may be applied based on the wages of comparable employees. Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant=s average weekly wage at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT)(5th Cir. 1991).

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[2]Moreover, the applicable collective bargaining agreements specifically exclude these payments from being Awages.@ Section 5.02 of the Ship Repair Agreement provides that $1.80 per hour worked Awill be paid into a fund by the Employers for use in meeting the cost of the New Orleans Electric Health & Welfare Plan, the amount to be paid not as wages, but as a fringe benefit over and above the wage rates hereinafter provided.@ Emp. Ex. 4 at 15; Cl. Ex. 12 at 14. Section 5.08 of that same agreement provides that the $1.05 per hour worked by each employee Awill be paid by the Employers to the New Orleans Electrical Pension & Retirement Fund, the amount to be paid not as wages but as a fringe benefit over and above the wage rates hereinafter provided.@ Emp. Ex. 4 at 17; Cl. Ex. 12 at 16. Under the collective bargaining agreement with members of the National Electric Benefit Fund, the term wages excludes contributions made by the employer to Aa separate entity or fund which provides retirement benefits or medical benefits; . . . .@ Emp. Ex. 4 at 50; Cl. Ex. 12 at 71.

We agree with claimant that the administrative law judge erred by calculating his average weekly wage pursuant to Section 10(c) rather than Section 10(a).[3] The administrative law judge applied Section 10(c) because he found that although the record contained evidence allowing him to make a Section 10(a) computation, such computation would not reasonably and fairly represent claimant=s average annual earnings because it would exceed claimant=s actual earnings by $4,000. Section 10(a) applies where claimant works substantially the whole of the year prior to the injury and the record contains sufficient information so that the administrative law judge can calculate claimant=s average daily wage. In this case, claimant worked 47.4 weeks which is Asubstantially the whole of the year.@ *See Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev=d and remanded on other* grounds, 640 F.2d 769, 12 BRBS 237 (5th Cir. 1981) (42 weeks constitutes Asubstantially the whole of the year@). Moreover, claimant was a five-day per week worker and employer conceded that claimant worked 237 days in the year preceding his injury. Decision and Order at 4 n.8. This amounts to 91 percent of the workdays available to claimant (237) 260).

In *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT)(9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit held that, as a matter of law, Section 10(a) must be applied when a claimant works at least 75 percent of the available workdays, and an average daily wage is calculable from the record evidence. The court addressed the concern that such a rule may result in an average weekly wage greater than the claimant=s actual earnings. The court stated that any resulting Aover-compensation@ due to the use of claimant=s theoretical earnings does not, standing alone, mandate the conclusion that Section 10(a) is inapplicable, as such over-compensation Ais built into the system institutionally.@ *Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151(CRT); *see also Castro v. General Constr. Co.*, 37 BRBS 65 (2003). In *Matulic*, the claimant worked 82 percent of the available workdays and because the nature of his employment was stable and continuous, the court held that Section 10(a) applies as a matter of law. *Matulic*, 154 F.3d at 1058, 32 BRBS at 152(CRT); *see also Castro*, 37 BRBS 65 (applying *Matulic* where claimant worked 77.4 percent of available workdays); *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *appeal pending*, No. 02-71207 (9th Cir.) (75.7 percent).

The Fifth Circuit, within whose jurisdiction the instant case arises, has not adopted a bright-line test for the applicability of Section 10(a), *see generally Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), *aff=g* 33 BRBS 88 (1999), but its decisions support the conclusion that Section 10(a) must be applied to the facts herein. As discussed above, claimant worked substantially the whole of the year prior to his injury, and his employment is not Ainherently discontinuous or intermittent,@ which would provide a

[3]Under Section 10(a), the total income claimant earned in the 52 weeks preceding the work injury ($44,681.81), is divided by the actual number of days claimant worked (237), then multiplied by 260 for a five day worker as here, and then divided by 52, which totals $942.65. 33 U.S.C. '910(a), (d). The administrative law judge calculated claimant=s average weekly wage under Section 10(c) by dividing claimant=s actual earnings of $44,681.81 by 52 to arrive at $859.27.

basis for finding Section 10(a) inapplicable.

[4] *Gatlin*, 936 F.2d at 822, 25 BRBS at 28(CRT); *see also Hall v. Consolidated Employment Systems, Inc*., 139 F.3d 1025, 32 BRBS 91(CRT)(5th Cir. 1998).

In *SGS Control Services v. Director, OWCP,* 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996), the Fifth Circuit affirmed the administrative law judge=s application of Section 10(a) in computing claimant=s average weekly wage. The court rejected employer=s argument that Section 10(c) should apply instead because Section 10(a) could not fairly and reasonably be applied where claimant=s field of employment suffered a downward trend after his work injury. The court specifically stated, ASubsections (a) and (b) are the basic formulae for determining average annual income; *only if* either provision >can not reasonably and fairly be applied= may the ALJ turn to the method set forth in subsection (c).@ *Id.*, 86 F.3d at 441, 30 BRBS at 59(CRT)(emphasis added). The court further held that Section 10(a) could fairly and reasonably be applied in determining claimant=s average weekly wage because, as here, claimant=s work was not discontinuous or intermittent and no harsh results would follow from determining his average weekly wage based on his earnings during the year prior to injury pursuant to Section 10(a). *Id.*

In *Wooley*, 204 F.3d 616, 34 BRBS 12(CRT), the Fifth Circuit affirmed the administrative law judge=s conclusion that claimant=s four actual vacation days should be treated as days worked in the computation of claimant=s average weekly wage under Section 10(a), but that vacation pay received in lieu of days off should not be turned into Adays.@ The court stated the black letter law that, AWhen a claimant worked substantially the whole of the year immediately preceding his injury, . . . , '910(a) of the LHWCA controls the method of calculating his average weekly wage.@ *Wooley*, 204 F.3d at 617, 34 BRBS at 13(CRT). Moreover, the court stated, AThe calculation mandated by '910(a) >aims at a theoretical approximation of what a claimant could ideally have been expected to earn= in the year prior to his injury.@ *Wooley*, 204 F.3d at 618, 34 BRBS at 13(CRT).

Based on this case law, we hold that the administrative law judge erred in calculating claimant=s average weekly wage under Section 10(c) rather then Section 10(a). Claimant worked substantially the whole of the year and his employment was not inherently intermittent or discontinuous. *See SGS Control Services*, 86 F.3d at 441, 30 BRBS at 59(CRT). The only potentially Aharsh result@ identified by employer is the over-compensation that results from the theoretical approximation of the wages claimant would have earned had he worked every day. As this Aover-compensation@ is built into the statutory framework of Section 10(a), *see Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151(CRT), the $4,000 difference between claimant=s theoretical and actual wages cannot provide a basis for the non-use of Section 10(a) where that Section is otherwise applicable. *See generally Wooley*, 204 F.3d 616, 34 BRBS 12(CRT); *SGS Control Services*, 86 F.3d 438, 30 BRBS 57(CRT). Therefore, we hold that claimant=s average weekly wage must be calculated pursuant to Section 10(a), and we modify claimant=s average weekly wage to

[4]Claimant worked for employer for 26 years prior to his injury.

$942.65. *See* n.3, *supra*.

Medical Benefits for Aqua Therapy

Claimant next argues that the administrative law judge erred in denying reimbursement for out-of-pocket expenses in the amount of $143.17 which he paid to an athletic club for aqua therapy prescribed by Dr. Bourgeois. Section 7(d) of the Act, 33 U.S.C. '907(d), requires that claimant seek employer=s prior authorization for medical treatment. *See, e.g., Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff=d sub nom. Galle v. Director, OWCP*, 246 F.2d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 122 S.Ct. 479 (2001). Dr. Bourgeois referred claimant for aqua therapy on September 13, 2001, and this referral was received by employer on September 19, 2001. Cl. Ex. 1 at 5. Dr. Bourgeois=s referral was entered into employer=s medical logs on September 25, 2001, Cl. Ex. 7 at 35, and was approved by letter to the doctor and copied to claimant on October 4, 2001. Cl. Ex. 9 at 30.

The administrative law judge denied claimant reimbursement because claimant paid the fees before he had received employee=s approval. We agree with claimant that this finding is in error. Claimant paid the advance fees of $143.17 on September 25, 2001. Cl. Ex. 9 at 24E. Employer=s approval of claimant=s aqua therapy dates to September 25, based on the content of the October 4, 2001, letter approving the therapy. Cl. Ex. 9 at 30. That claimant paid the fee before he received employer=s letter does not negate employer=s actual approval of all the medical services in question. We therefore hold that employer is liable for claimant=s out-of-pocket expenses in the amount of $143.17 for his aqua therapy, and we modify the administrative law judge=s decision accordingly.

Section 31(c)

Claimant further argues that the administrative law judge erred in failing to hear testimony and admit evidence on claimant=s Section 31(c) claim, and in not ordering the district director to refer the claim to the appropriate parties.

[5] Section 31(c) provides:

> A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 909 of this title if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. '931(c); see also Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 21 BRBS 1(CRT)(5th Cir. 1988). Section 31(a)(1) of the Act imposes the same punishment to a

[5]Claimant alleges under Section 31(c) that the carrier made willful and false representations about job availability to reduce the benefits it paid claimant.

claimant or his representative who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under the Act. 33 U.S.C. '931(a)(1). Section 31(a)(2) of the Act provides that, AThe United States attorney for the district in which the injury is alleged to have occurred shall make every reasonable effort to promptly investigate each complaint made under this subsection.@ 33 U.S.C. '931(a)(2). Chapter 3-700, Section 5.a.(2) of the Division of Longshore and Harbor Workers= Compensation Procedure Manual (DLHWC Procedure Manual) specifically provides:

> Instances of alleged fraud or abuse in LHWCA claims may also come to light in the course of formal hearings before an Administrative Law Judge, who *may*, in the Decision and Order, refer the matter to the OWCP for appropriate action on the information. Such referrals should be carefully considered by the district director . . . and should be investigated if warranted by the facts.

DLHWC Procedure Manual, Chapter 3-700, '5.a.(2)(emphasis added). Thus, the administrative law judge has the discretion, but is not required, to refer claimant=s Section 31(c) claim to the OWCP.

In the instant case, the administrative law judge stated at the hearing that he lacked jurisdiction to decide claimant=s Section 31(c) claim, and did not intend to address it in his decision. Tr. at 16-22, 26-27, 34-35. As the investigatory functions regarding any alleged fraud lies with the district director in the first instance, we reject claimant=s contention that the administrative law judge erred in not admitting evidence and hearing testimony on this issue. Claimant may initiate any complaint with the district director.[6] *See* DLHWC Procedure Manual, Chapter 3-700, ''1., 5.c., f.

Section 14(e) Assessment

Claimant contends that the administrative law judge erred in denying a Section 14(e) assessment. Once a dispute exists between the parties as to the amount of compensation due, employer has 28 days to pay the amount demanded or 14 days to file a notice of controversion in order to avoid incurring a 10 percent assessment on the amount due under Section 14(e) of the Act, 33 U.S.C. '914(e). *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff=d on recon.*, 25 BRBS 88 (1991).

[6]After the claim is investigated by the district director, a recommendation will be made either to refer the claim to the United States Attorney for prosecution or to close the file if no basis exists for prosecution. *See* DLHWC Procedure Manual, Chapter 3-700, '5.f.; *see also* 33 U.S.C. '931(a)(2).

We affirm the administrative law judge=s denial of a Section 14(e) assessment. All of employer=s payments were timely made, and since the administrative law judge properly found that employer filed a timely notice of controversion, employer is not liable for a Section 14(e) assessment on its underpayment of benefits resulting from the increase in claimant=s average weekly wage.[7] *See Browder*, 24 BRBS 216; Cl. Exs. 8 at 3, 9 at 62-65. In addition, claimant is not entitled to a Section 14(e) assessment based on employer=s non-payment of the aqua therapy charges because these charges are not subject to the assessment as they are medical expenses, and not Acompensation@ for purposes of Section 14(e). *See Scott v. Tug Mate, Inc*., 22 BRBS 164 (1989); 33 U.S.C. ' 902(12).

Maximum Medical Improvement

We next address employer=s challenge to the administrative law judge=s Decision and Order. Employer argues that claimant is only temporarily disabled and has not reached maximum medical improvement because his refusal to have back surgery is unreasonable and unjustified. Employer also challenges the administrative law judge=s finding that claimant=s condition reached maximum medical improvement on June 8, 2000. A disability is considered permanent as of the date claimant=s condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc*., 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

We affirm the administrative law judge=s findings regarding maximum medical improvement as they are rational and supported by substantial evidence. See Louisiana Ins. Guar. Ass=n v. Abbott, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); McCaskie v. Aalborg Ciserv Norfolk, Inc., 34 BRBS 9 (2000); see also Carlisle v. Bunge Corp., 33 BRBS 133 (1999), aff=d, 227 F.3d 934, 34 BRBS 79(CRT)(7th Cir. 2000); Diosdado, 31 BRBS 70. The administrative law judge rationally found that claimant=s refusal to have surgery is not unjustified and is reasonable based on the opinions of Drs. Bourgeois and Faust, and claimant=s testimony. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200 (1986). Dr. Bourgeois most recently opined that there is a Agood chance@ that claimant would experience some functional improvement with surgery but that there Ais no guarantee, even with surgery, that his functional level would improve.@ Cl. Ex. 1. Dr. Faust stated that surgery was justifiable but would not benefit claimant. Cl. Ex. 4 at 6; Emp. Ex. 8 at 3. Claimant testified that he is afraid of complications and has talked with others who did

[7]A dispute concerning claimant=s average weekly wage arose on June 20, 2000, when claimant filed his claim asserting his average weekly wage was $971.20. Cl. Ex. 8 at 7. Employer had been paying benefits based on an average weekly wage of $859.27. There is no proof that employer was aware of the controversy over claimant=s average weekly wage until July 19, 2000, when the Office of Workers= Compensation Programs sent employer a copy of claimant=s claim. Cl. Ex. 8 at 5-6. Employer timely filed its notice of controversion, within 14 days of the date it received notice of claimant=s claim, on July 26, 2000. Cl. Ex. 8 at 3.

not find the surgery a success. Tr. at 98-99. Thus, substantial evidence supports the administrative law judge=s finding that surgery is not anticipated and that claimant=s condition is no longer temporary. McCaskie, 34 BRBS 9. The administrative law judge=s finding that claimant reached maximum medical improvement on June 8, 2000, based on Dr. Bourgeois=s February 26, 2002, to that effect, Cl. Ex. 1, and Dr. Faust=s statement that claimant reached maximum medical improvement by the time of the physician=s independent medical evaluation of claimant on March 14, 2001, Cl. Ex. 4 at 7; Emp. Ex. 8 at 4, is affirmed as it is supported by substantial evidence.

Section 8(f)

Employer also argues that the administrative law judge erred in finding that it did not establish the contribution element necessary for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. ''908, 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. '908(f)(1); *Two AR@ Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT)(5th Cir. 1990). In order to establish the contribution element, employer must show, by medical or other evidence, that claimant=s subsequent injury alone would not have caused claimant=s permanent total disability. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT)(2d Cir. 1992). In denying employer Section 8(f) relief, the administrative law judge assumed that claimant had a pre-existing permanent partial disability to his back which was manifest to employer. However, the administrative law judge found that employer did not establish the contribution element because there is no evidence that claimant=s 2000 work injury was more disabling because of his pre-existing condition.

We affirm the administrative law judge=s finding that employer did not establish the contribution element as it is supported by substantial evidence. *See Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT)(5th Cir. 1997); *Two AR@ Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT); *see also Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); Decision and Order at 9-10; Cl. Ex. 1 at 2; Emp. Ex. 6 at 44-45. Dr. Bourgeois=s opinions are insufficient to establish the contribution element because he states that claimant=s back problems are due to his 2000 work injury.

[8] Although Dr. Bourgeois stated that the 2000 work injury aggravated the pre-existing asymptomatic back problems, his opinion does not state that claimant=s subsequent work injury alone would not have caused his permanent total disability, or analyze the effect of claimant=s injuries on his ability to work. The contribution element is not established where the work injury alone is totally disabling and a pre-existing condition combines with the work injury to make claimant=s physical condition even worse or more painful. *Allred*, 118 F.3d 387, 31 BRBS 91(CRT).

Administrative Law Judge=s Fee Award

Lastly, we address claimant=s appeal of the administrative law judge=s fee award. The administrative law judge awarded claimant=s counsel a total fee of $10,325, representing 59 hours of work at an hourly rate of $175, plus $871 in expenses. 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 first argues that the administrative law judge erred in reducing the requested hourly rate from $200 to $175. In the instant case, the administrative law judge agreed with employer that $200 per hour is excessive and found $175 per hour is reasonable. As claimant has not established that the administrative law judge abused his discretion or acted unreasonably in reducing the requested hourly rate from $200, we affirm the administrative law judge=s award of an hourly rate of $175. *See generally Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); Supplemental Decision and Order at 2-3.

Claimant next argues that the administrative law judge erred in disallowing all services performed between November 13, 2000, and May 22, 2001, during the time the case was before the district director prior to referral to the Office of Administrative Law Judges on May 23, 2001. The administrative law judge properly disallowed all requested time and costs of $8.79 for work performed before the district director, and we affirm this disallowance *See Stratton v. Weedon Eng=g Co.*, 35 BRBS 1 (2001)(en banc); Supplemental Decision and Order at 2. In addition, we disallow an additional .25 hours for work performed prior to referral, as claimant correctly asserts the administrative law judge miscalculated the number of hours of services performed before the district director.

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[8]Dr. Bourgeois stated in his February 26, 2002, written report that, AI believe that all of his current problems stem from an on-the-job injury, which has been well documented, that occurred on or about March 10, 2000, whereby he sustained significant and irreversible aggravation of a previously asymptomatic lumbar spondylolisthesis.@ Cl. Ex. 1 at 2. Also, Dr. Bourgeois testified by deposition that claimant=s current permanent total disability is related to the March 10, 2000, work injury and that his asymptomatic pre-existing back condition was Agreatly aggravated by and made symptomatic by the injury in question.@ Emp. Ex. 6 at 44-45.

Claimant also argues that the administrative law judge erred in disallowing 93 hours for time spent on certain average weekly wage issues because of claimant=s failure to prevail at the hearing level on these issues. In the instant case, the administrative law judge agreed with employer that all time spent on the average weekly wage issue should be disallowed as claimant did not obtain a higher average weekly wage. *See* Supplemental Decision and Order at 3-4. In light of our modification of the administrative law judge=s determination of claimant=s average weekly wage, we must vacate the administrative law judge=s reductions on this issue and remand the case to the administrative law judge for reconsideration of his reductions in light of claimant=s partial success on appeal.[9] *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Claimant additionally argues that the administrative law judge erred in disallowing 7.625 hours of time related to vocational rehabilitation and expenses of $1,060 because employer stipulated that claimant was totally disabled. The administrative law judge agreed with employer=s objection and disallowed the time and expenses at issue as unnecessary since the parties stipulated that claimant was totally disabled. See Supplemental Decision and Order at 4. We vacate the administrative law judge=s findings related to this issue and modify the administrative law judge=s award to hold employer liable for the fee and expenses related to claimant=s vocational rehabilitation as claimant=s attorney, at the time the work was performed, could have reasonably regarded the work as necessary to protect claimant=s interests.

[9]Claimant has prevailed on his argument that Section 10(a) is applicable but did not prevail in his assertion that $3.47 more per hour should be included in his average weekly wage.

[10] *See O=Kelley v. Dep=t of the Army/NAF*, 34 BRBS 39 (2000).

Claimant further argues that the administrative law judge erred in disallowing two hours in connection with the aqua therapy dispute because claimant=s claim in that regard was disallowed. Based on our holding that employer is liable for claimant=s out-of-pocket expenses relating to his aqua therapy, we vacate the administrative law judge=s disallowance of this time and hold that employer is liable for a fee for these two hours. *See* Supplemental Decision and Order at 4.

Claimant next argues that the administrative law judge erred in disallowing 2.625 hours because the entries were billed in minimum increments of one-quarter hour. The administrative law judge reviewed claimant=s counsel=s fee application and properly disallowed certain hours as improperly billed in minimum increments of one-quarter hour in this Fifth Circuit case. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpub.); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. Jan. 12, 1995)(table); *Doucet v. Avondale Indus., Inc*., 34 BRBS 62 (2000); Supplemental Decision and Order at 3.

Claimant also argues that the administrative law judge erred in disallowing 1.25 hours spent in preparing the attorney=s fee petition. The United States Court of Appeals for the Ninth Circuit held in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT)(9th Cir. 1996), that time spent preparing a fee petition is compensable. In light of this holding and subsequent Board cases following this holding in the Fifth Circuit, we vacate the administrative law judge=s disallowance of claimant=s counsel=s time spent in preparing the fee petition and modify the administrative law judge=s fee award to include this charge. *See Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev=d on other grounds*, 313 F.3d 300, 36 BRBS 79(CRT)(5th Cir. 2002); *Hill v. Avondale Indus., Inc*., 32 BRBS 186 (1998), *aff=d sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT)(5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); Supplemental Decision and Order at 3-4.

Claimant additionally argues that the administrative law judge erred in disallowing all costs for postage, courier fees, telephone charges, fax and photocopy fees as office overhead and a cost of doing business. The administrative law judge acted within his discretion in disallowing all of these costs. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989)(Order); Supplemental Decision and Order at 4.

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[10]Claimant was notified in January 2002 that employer had hired a vocational specialist who was going to meet with claimant=s treating physician on February 15, 2002, to review certain jobs that claimant might be able to perform if it met with his doctor=s approval. Cl. Ex. 6. In response, claimant retained his own vocational specialist. Cl. Ex. 13; Tr. at 131-148. Claimant did not know that employer would stipulate to total disability until February 28, 2002, just one week prior to the March 8, 2002, hearing in this case. Jt. Ex. 1.

Claimant further argues that the administrative law judge erred in disallowing certain costs associated with the taking of claimant=s deposition and the deposition and supplemental report of his treating physician, Dr. Bourgeois, as well as the costs associated with the witness fees and mileage expenses of Mr. Duvieilh, Ms. Allen, and Ms. Riecke. Under Section 28(d) of the Act, 33 U.S.C. ' 928(d), the cost of an expert witness=s testimony or report offered in support of claimant=s claim may be awarded where claimant prevails, and the administrative law judge finds the cost to be necessary and reasonable. *See Zeigler Coal Co.*, 326 F.3d 894; *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190 (1984); *Branham v. Eastern Associated Coal Corp*., 19 BLR 1-1 (1994); 33 U.S.C. ' 928(d); 20 C.F.R. ' 702.135. The general rule is that a party is not entitled to witness fees and per diem expenses related to taking his own testimony. *Price v. Brady-Hamilton Stevedore Co*., 31 BRBS 91 (1996). A witness who appears by deposition or in court is limited to an attendance fee of $40 per day for each day=s attendance absent contractual or explicit statutory authority to the contrary. *Id.*

It is not apparent what costs the administrative law judge awarded and what costs he did not award. *See* Supplemental Decision and Order at 4, 5. Thus, the case is remanded to the administrative law judge for an explanation and itemization of the award of costs. If the administrative law judge finds the costs associated with Dr. Bourgeois=s deposition and supplemental report necessary and reasonable, he should award these costs. *Zeigler Coal Co*., 326 F.3d 894. Moreover, while the administrative law judge may not award the costs associated with the taking of claimant=s own deposition, he should award witness fees to the other witnesses in this case.

Claimant lastly argues that the administrative law judge should award $519.99 in costs associated with a copy of the hearing transcript. Claimant did not include this cost in his fee petition before the administrative law judge. The Board has held that the cost of a hearing transcript is a reasonable and necessary expense as a matter of law. *See Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982); *see also Ezell v. Direct Labor, Inc*., 33 BRBS 19 (1999). However, the Board cannot award this cost as it was for work performed before the administrative law judge. Claimant=s counsel may file a supplemental fee petition with the administrative law judge requesting this additional cost.

Accordingly, the administrative law judge=s Decision and Order is modified to reflect that claimant=s average weekly wage is $942.65 and that employer is liable to claimant for out-of-pocket expenses in the amount of $143.17 for his aqua therapy. Claimant may file his Section 31(c) allegations with the district director. In all other respects, the administrative law judge=s Decision and Order is affirmed. The administrative law judge=s Supplemental Decision and Order Awarding Attorneys Fees is modified so that employer is liable to claimant for an additional fee for 7.625 hours and expenses in the amount of $1,060 for vocational rehabilitation services, 2 hours for time spent on the aqua therapy dispute, and 1.25 hours spent by claimant=s counsel preparing the fee petition. The Supplemental Decision and Order is also modified to reflect that employer is not liable for an additional .25 hour for time spent prior to the referral of this case to the administrative law judge. The Supplemental Decision and Order is vacated with respect to the administrative law judge=s

disallowance of 93 hours on the average weekly wage issue, and the case is remanded to the administrative law judge to reconsider his reductions on this issue in light of claimant=s partial success on appeal. The Supplemental Decision and Order also is vacated with respect to the administrative law judge=s disallowance of time and costs associated with medical and lay witnesses,

and the case is remanded to the administrative law judge to reconsider these costs. In all other respects, the administrative law judge=s Supplemental Decision and Order Awarding Attorneys Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority=s decision. I write separately, however, because I disagree with employer=s suggestion that application of Section 10(a) in the instant case unjustly enriches claimant. Employer argues that application of Section 10(a) would result in unjust enrichment to claimant because an average weekly wage determination under Section 10(a), $942.65, exceeds claimant=s actual weekly earnings of $859.27. Employer appears to overlook, however, that the average weekly wage determination is not equivalent to the compensation award; it is merely the base on which the award is calculated. In the instant case, the award based upon the average weekly wage calculated pursuant to Section 10(a) would be $628.44. 33 U.S.C. '908(a). That sum is clearly substantially less than claimant=s average weekly earnings; as compensation for a workplace injury causing total disability, it does not constitute unjust enrichment to claimant. Moreover, in mandating that the formula provided in Section 10(a) apply to disabled workers who have worked Aduring substantially the whole of the year immediately preceding [the] injury . . . ,@ it cannot be said that Congress acted unfairly, any more than it could be said that Congress acted unfairly in mandating that a total disability compensation award equal only two-thirds of the calculated average weekly wage. The law is clear that claimant=s average weekly wage should be calculated pursuant to the formula set forth in Section 10(a). Accordingly, I reject employer=s contention that application of Section 10(a) in the instant case is in any way unfair to employer.

REGINA C. McGRANERY
Administrative Appeals Judge