BRB No. 03-0696

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| LORA LEE SCHARES | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| AGRIFOS FERTILIZER, L.P. | ) | |
| | ) | |
| and | ) | |
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| ZURICH AMERICAN INSURANCE COMPANY | ) | DATE ISSUED: July 15, 2004 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

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

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Lance S. Ostendorf and David P. Buehler (Ostendorf, Tate, Barnett & Wells, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (2002-LHC-1880) 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 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).

Claimant, a mill operator, was injured on March 23, 1993, while working for Mobil Mining Company (Mobil Mining), when she was pulled by a conveyor belt under a metal hood. Claimant sustained multiple rib fractures, abrasions of both thighs, and she developed pain in the right mid-back and left shoulder. Claimant began treatment for back pain on April 15, 1993, and was released to work on June 21, 1993. Dr. Daley opined that claimant reached maximum medical improvement on November 6, 1995 with an eight percent whole body impairment. She continued to be treated by Dr. Daley throughout 1996 and 1997, and was transferred to Dr. Alvarez for pain management in February 1998. Dr. Alvarez administered epidural injections for claimant's non-operable back pain; the final injection was administered on December 4, 1998.

On December 15, 1998, while employed by Agrifos Fertilizer, L.P. (Agrifos or employer), claimant was attempting to replace a loosened lid from an air slide. As she swung her sledgehammer and reached, she testified that her wrists went limp and she dropped the hammer. She also stated that that she felt her back "grab," and she had sharp pains that radiated up and under her shoulder blades. Claimant informed the shift operator about what had taken place and filled out an incident report. However, she finished her shift and refused immediate medical attention, explaining that she would be seeing her back specialist in a few days. Claimant continued to work as an operator and to take prescription pain medications as needed. In July 1999, claimant bid for and obtained a job at employer's acid plant, which was considered to be slightly less strenuous than her previous job. She continued to work until November 23, 1999. On November 24, 1999, claimant underwent a right carpal tunnel and ulnar nerve release.[1] She did not return to her former work after this surgery. Dr. Daley performed an open decompression of the left shoulder on July 6, 2000. Claimant eventually regained left shoulder movement, but continued to complain of back pain. She continued treatment for her back pain with Dr. Daley, who opined that she should not return to the strenuous mill operator work she had been performing.

[1] Claimant also underwent a left carpal tunnel release on March 31, 2000.

Claimant began vocational rehabilitation with the United States Department of Labor in August 2000. She enrolled in the x-ray technology program at San Jacinto Junior College, training for a light-duty position as an x-ray technician. She maintained a 3.45 grade point average and anticipated graduating in August 2003. The Department of Labor vocational specialist, Ms. Skinner, stated that the average annual salary in 1998 for an x-ray technician was $32,880. On September 27, 2002, claimant obtained a part-time job at Methodist Hospital while she finished her program. Claimant sought permanent partial disability benefits under the Act.

In his Decision and Order, the administrative law judge found that the evidence establishes that claimant suffered a discrete aggravation or injury to her back on December 15, 1998, which was not simply the natural progression of her prior condition. The administrative law judge thus invoked the Section 20(a) presumption that claimant's condition is work-related. 33 U.S.C. §920(a). The administrative law judge also found that this presumption was not rebutted, and that Dr. Andrew's opinion is outweighed by the opinion of Dr. Daley. Thus, he concluded that claimant's current back condition is related to the work incident on December 15, 1998. Consequently, the administrative law judge found that, as claimant suffered a new injury on December 15, 1998, the employer and carrier on the risk at that time, Agrifos and Zurich America, are responsible for claimant's compensation and medical benefits.

The administrative law judge also found that claimant is unable to return to her former duties as a mill operator. In considering whether employer established the availability of suitable alternate employment, the administrative law judge found that claimant was not prohibited from working while she attended college, and that she eventually secured employment with Methodist Hospital. However, he found that claimant was not able to work before she began working at the hospital because she was enrolled full-time and had a "serious academic commitment." Thus, he found that claimant was permanently totally disabled from January 30, 2002, until October 29, 2002, when she began part-time employment at $10 per hour for 16 hours per week, and permanently partially disabled thereafter. Finally, the administrative law judge found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), beginning 104 weeks from the date claimant's disability became partial on October 29, 2002. The administrative law judge subsequently awarded claimant's counsel an attorney's fee of $19,145, plus expenses of $4,105.17.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to rebut the Section 20(a) presumption and in finding that Agrifos rather than Mobil Mining is the responsible employer. Employer contends that there was not a distinct aggravation of claimant's pre-existing lumbar injury on

December 15, 1998.[2] In addition, employer contends that the administrative law judge erred in finding that suitable alternate employment was not established while claimant was in the rehabilitation program. Employer contends that claimant did not suffer a loss in wage-earning capacity as she returned to work following the accident and voluntarily withdrew from the work force to pursue vocational rehabilitation. Employer also contends that the Special Fund's liability, pursuant to Section 8(f), should commence 104 weeks after the stipulated date of maximum medical improvement, February 1, 2001. Finally, employer appeals the administrative law judge's fee award. Claimant responds, urging affirmance of the administrative law judge's decisions. The Director, Office of Workers' Compensation Programs (the Director), limits his response to the Section 8(f) issue, and agrees with employer that administrative law judge relied on the wrong date to calculate the commencement of the Special Fund's liability.

Employer first contends that the administrative law judge erred in finding that the evidence is insufficient to establish rebuttal of the Section 20(a) presumption that claimant's current back condition is related to the work incident on December 15, 1998. Section 20(a), 33 U.S.C. '920(a), provides claimant with a presumption that her disabling condition is causally related to her employment if claimant establishes a *prima facie* case by proving that she suffered a harm and that working conditions existed which could have caused the harm. Once the presumption is invoked, as in this case, the burden shifts to employer to rebut it with substantial evidence that claimant=s disabling condition is not related to her employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003). Where aggravation of a pre-existing condition is at issue, as in this case, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The administrative law judge rationally rejected employer's contention that claimant's continued ability to work at the plant following the incident on December 15, 1998, and the fact that she did not seek immediate medical attention, establish rebuttal of the Section 20(a) presumption. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5th Cir. 2000); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Moreover, although the administrative law judge also found Dr. Andrew's opinion that claimant did not suffer from a work-related injury in either 1993 or 1998 insufficient to rebut the Section 20(a) presumption, he went on to weigh the conflicting medical evidence of record to determine whether claimant=s suffered a work-related back injury on December

[2] Mobil Mining was not a party to this case before the administrative law judge.

15, 1998. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Specifically, the administrative law judge found that the opinion of claimant's treating physician, Dr. Daley, outweighed the contrary opinion of the reviewing physician, Dr. Andrew. The administrative law judge credited Dr. Daley's testimony describing how claimant's description of the pain she suffered following the December 1998 incident indicated a new injury. Dr. Daley was not persuaded to change his opinion even considering that claimant had continued to work following the December 1998 incident. He opined that that the symptoms described by claimant supported a diagnosis of a further ligamentous sprain, which aggravated her degenerative back condition.

The weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, after consideration of all of the relevant evidence of record, the administrative law judge credited the opinion of claimant's treating physician, Dr. Daley, that claimant sustained an injury to her back as a result of the December 15, 1998, accident, over the contrary opinion of Dr. Andrew. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Cicizzon*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). Given the administrative law judge's broad discretion in resolving conflicts in the evidence, we affirm his determination that claimant sustained a back injury as a result of the December 15, 1998, accident as it is rational and supported by substantial evidence.[3]

An aggravation of a prior injury constitutes a new injury and liability must be assumed by the employer for whom claimant was working when "reinjured." If there has been a second injury which aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all compensation and medical expenses related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham*

[3] As we affirm the administrative law judge=s finding that the evidence is sufficient to establish that claimant=s back condition is related to the work incident on December 15, 1998, any error by the administrative law judge in finding that the evidence is insufficient to establish rebuttal of the Section 20(a) presumption is harmless. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

*Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem.*, No. 81-7801 (9th Cir. 1982). Therefore, as we affirm the administrative law judge's finding that a new injury occurred on December 15, 1998, we affirm the administrative law judge's finding that claimant's employer at that time, Agrifos, is the responsible employer. *See Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

Employer next contends that the administrative law judge erred in awarding claimant disability benefits because she was able to return to her regular duties following her injury. A claimant establishes her *prima facie* case of total disability if she is unable to perform her usual employment duties due to her work-related injury. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In the instant case, the administrative law judge credited Dr. Daley, who opined that, based on the totality of claimant's condition, including her back injury, she should not return to her former heavy-duty position. In her former position, claimant transferred rock from the silos or the barge and routed the rock on the conveyor belts. This description was corroborated by the testimony of a co-worker, Mr. Fuller. H. Tr. at 118. The administrative law judge found that claimant's former duties required her to lift more than 20 pounds occasionally and included twisting, bending, and overhead work, which are contrary to her restrictions. *See* Cl. Ex. 37 at 27-28. The administrative law judge found that Dr. Daley's restrictions are supported by the objective findings of compression fractures and claimant's credible complaints of chronic pain. Dr. Daley reported in October 1999 that it was advisable that claimant change the type of work she was doing and seek a lighter, more sedentary job. In addition, in a report dated January 7, 1999, Dr. Alvarez, claimant's pain management specialist, noted that claimant seemed to have exacerbated the pain in her back by engaging in twisting motions at work and he recommended that claimant consider another type of work. Cl. Ex. 14.

Contrary to employer's contention, substantial evidence supports the administrative law judge's conclusion that claimant cannot perform her former job. The administrative law judge thoroughly reviewed the evidence of record, and employer has raised no reversible error on appeal. Thus, as the job description provided by claimant, the restrictions imposed by Dr. Daley, and claimant's testimony of chronic pain support the administrative law judge's finding that claimant's work injury prevents her from returning to her usual employment, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. *See Padilla*, 34 BRBS at 52; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Once a claimant has shown her inability to return to her usual work, the burden shifts to employer to establish the availability of suitable alternate employment. The employer must show the realistic availability of jobs that the claimant can perform in order to meet its burden. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). A claimant may establish that identified suitable alternate employment is not reasonably available due to her participation in a DOL-approved vocational rehabilitation program. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998). In the instant case, the administrative law judge rationally found that claimant was unable to perform the identified suitable alternate employment due to the requirements of her college course work. The administrative law judge found that claimant's rehabilitation plan has the goal of retraining claimant for a more skilled career, which benefits both claimant and employer. *See Brown v. National Steel & Shipbuilding Co.,* 34 BRBS 195 (2001). The administrative law judge also found that while the rehabilitation program did not specifically prohibit claimant from seeking part-time employment, the plan required a full course load and a serious academic commitment. He found that it would have been unreasonable to expect claimant to perform the jobs identified by employer's vocational counselor while claimant attempted to successfully complete her rehabilitation goals. *See Brickhouse*, 315 F.3d at 294, 36 BRBS at 91-92(CRT) The administrative law judge concluded that as claimant will earn higher wages upon completion of the program than she would have earned at the jobs identified in the labor market survey, employer did not establish the availability of suitable alternate employment during the period of claimant's vocational rehabilitation program, prior to her obtaining part-time employment at Methodist Hospital. Therefore, as it is rational, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits from January 30, 2002, the date employer discontinued benefits, through October 29, 2002, the date claimant began part-time employment, and permanent partial disability benefits from that date continuing. *Id.; Bush*, 32 BRBS 213.

Employer next contends that the administrative law judge erred in calculating the date from which the 104-week period of employer's liability will run pursuant to Section 8(f), 33 U.S.C. §908(f). The Director responds, agreeing that the 104 week period of employer's liability should have been calculated from the date of permanency on February 1, 2001, rather than the date claimant's disability became partial on October 29, 2002. Pursuant to Section 8(f), employer is liable for 104 weeks of permanent disability benefits in this case which involves an unscheduled injury. Employer's period of liability, pursuant to Section 8(f), thus commences on the date claimant's condition becomes permanent. *See* 33 U.S.C. §908(f)(1), (2); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

In the present case, the parties do not contest the administrative law judge's finding that the elements necessary for Section 8(f) relief have been established. *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner],* 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997). Employer and the Director correctly argue that the administrative law judge erred in finding that employer is liable for claimant's permanent disability benefits for a 104-week period beginning on October 29, 2002, the date claimant began working part-time at Methodist Hospital and her disability became partial. The administrative law judge accepted the parties' stipulations that claimant reached maximum medical improvement as of February 1, 2001. As employer's liability is for 104 weeks of permanent disability benefits, we vacate the administrative law judge's finding that the 104-week period began to run on the date the extent of claimant's disability changed, and hold that the proper date is the date claimant's disability became permanent, February 1, 2001. *Hansen*, 31 BRBS 155. The administrative law judge's decision is accordingly modified.

Finally, employer contests the administrative law judge's attorney's fee award. Employer contends it is not liable for an attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the present case, employer voluntarily paid claimant temporary total disability benefits from November 24, 1999 to January 30, 2002, when employer terminated its payments. However, claimant continued to seek benefits under the Act, and the administrative law judge awarded claimant permanent total disability benefits from January 30, 2002 to October 29, 2002, and continuing permanent partial disability benefits from October 29, 2002. Therefore, inasmuch as a controversy remained after employer voluntarily paid some benefits and claimant was successful in obtaining additional compensation over that employer initially paid, we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee award to be assessed against employer pursuant to Section 28(b) of the Act. *See generally Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

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). Employer contends the fee petition and accompanying affidavit do not sufficiently identify the attorney who performed the work and his normal billing rate. Employer also contends that claimant's counsel impermissibly billed in minimum increments. The administrative law judge found that although counsel's fee application

is not as thorough as others he has seen, it was nonetheless sufficient under the regulation, 20 C.F.R. §702.132(a), for him to determine who performed the work.[4] *See Forlong v. American Security & Trust Co.*, 21 BRBS 15 (1988). Indeed, the fee petition states that the hours requested were for work performed by claimant's attorney, Dennis L. Brown, and he requested an hourly rate of $200, which the administrative law judge reduced to $175. Moreover, the administrative law judge considered and rationally rejected employer's contention that the minimum billing increments inflated the time expended on routine matters. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).
Employer has not established that the administrative law judge abused his discretion in this regard. Consequently, we affirm the administrative law judge's award of an attorney's fee in the amount of $19,145, representing 109.4 hours of legal service at the hourly rate of $175, plus expenses in the amount of $4,105.17, as it is reasonable and within the discretion of the administrative law judge. *See generally Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

[4] Section 702.132(a) states, in pertinent part:

> The application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work.

Accordingly, the administrative law judge's finding regarding the date employer's liability for 104 weeks of permanent disability under Section 8(f) began to run is modified to reflect the date of February 1, 2001. The administrative law judge's Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees are affirmed in all other respects.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge