BRB Nos. 03-0289
and 03-0437

COSMO COLARUOTOLO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTENNIAL STEVEDORING SERVICES	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	DATE ISSUED: MAR 17, 2004
	)	
Employer/Carrier-Petitioners	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	
	)	
and	)	
	)	
ALMA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Supplemental Order Awarding Attorney's Fees and Costs, and the Order Denying Request to Re-Open the Record of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

David Utley, Carson, California, for claimant.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Centennial Stevedoring Services and Homeport Insurance Company.

Eric A. Dupree (Dupree Law, P.L.C.), San Diego, California, for International Transportation Services and Alma.

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

PER CURIAM:

Centennial Stevedoring Services (Centennial) appeals the Decision and Order Awarding Benefits, the Supplemental Order Awarding Attorney's Fees and Costs, and the Order Denying Request to Re-Open the Record (2002-LHC-0287-0292; 2002-LHC-1393; 2002-LHC-1395) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et. seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 commenced longshore employment during the early 1990's, at which time he was employed as a crane mechanic. In 1992 or 1993, claimant sustained an injury to his back for which he subsequently underwent two surgical procedures. Claimant thereafter returned to generally light-duty longshore employment. On August 14, 1998, claimant felt pain in his neck and lower back when he was jostled while driving a utility vehicle for International Transportation Services (ITS). Although claimant sought treatment with Dr. Rah following this work-incident, he continued his longshore employment. On September 24, 1998, claimant underwent an MRI which revealed a disc herniation at C6-7 and a disc bulge at C5-6. Despite his continued symptoms, claimant continued to work on the waterfront until December 15, 1998; claimant's employer on that date was Harbor Industrial Services (Harbor).

On February 10, 1999, claimant underwent a discectomy and fusion at the C6-7 level of his cervical spine. Claimant began physical therapy following his surgery, but he continued to experience symptoms relating to his cervical spine. In September 1999, claimant returned to work with restrictions which essentially limited his employment to that of a signalman; in performing this job claimant was required to repetitively move his neck and head. Claimant testified that his symptoms became progressively worse following his return to work and that he continued to seek medical care as a result of these symptoms. Dr. Rah concluded that claimant could continue to work on a limited basis and, on December 8, 2000, recommended that claimant undergo a surgical fusion at C5-6. After receiving authorization for this surgical procedure in January 2001, Dr. Rah scheduled claimant's surgery for February 23, 2001. Although claimant testified that it was his intention to work until the day before his scheduled surgery, claimant last worked as a signalman on February 19, 2001; claimant's employer on this date was Centennial.

Following his February 23, 2001, discectomy and fusion, claimant received physical therapy and, although he continued to experience discomfort in his neck, shoulder and back, he was released to return to work on September 7, 2001, by Dr. Rah with restrictions on repetitive head movements, lifting, and overhead work.[1] Claimant returned to work on September 8, 2001, and was thereafter assigned employment as a signalman. Claimant continued to report symptoms of pain in his neck and back to Dr. Rah. Ultimately, on November 20, 2001, Dr. Rah concluded that claimant could not continue to work. On November 19, 2001, claimant's last day of employment, claimant was employed as a signalman by Centennial.

Claimant sought benefits under the Act against ITS, listing a date of injury of August 14, 1998, Harbor, on December 15, 1998, and Centennial on February 19 and November 19, 2001. In July 2002, claimant settled his claims against ITS and Harbor.

In his Decision and Order Awarding Benefits, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that he suffered work-related cumulative trauma injuries to his neck and back while employed by Centennial on February 19, 2001 and November 19, 2001, and that Centennial rebutted the presumption with the opinions of Drs. Miller, Delman, and Rothman. Decision and Order at 14. Upon consideration of the record as a whole, the administrative law judge found that claimant's employment with Centennial on February 19, 2001 and November 19, 2001, either caused, aggravated, accelerated, or otherwise permanently worsened claimant's pre-existing neck and back conditions; accordingly, he found Centennial was the responsible employer for benefits for claimant's work-related injuries on those dates. *Id*. at 14-16. Next, the administrative law judge found that claimant reached maximum medical improvement as of February 23, 2002, and that Centennial established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from February 20, 2001 through September 5, 2001, and November 20, 2001 through February 22, 2002, temporary partial disability benefits from September 6, 2001 through November 19, 2001, and permanent partial disability benefits commencing February 23, 2002. 33 U.S.C. §908(b), (c)(21), (e). Lastly, the administrative law judge ordered Centennial to reimburse ITS $23,520.11 for the temporary total disability compensation that ITS paid to claimant subsequent to February 19, 2001, and $25,381.24 for the medical expenses that ITS had paid on behalf of claimant during that period, and he requested that counsel for claimant and ITS submit their respective fee petitions to him within 20 days of the service of his decision.

Centennial appealed the administrative law judge's Decision and Order Awarding Benefits to the Board. BRB No. 03-0289. Following the filing of claimant's and ITS's

[1] During the period of time between claimant's February 23, 2001, surgery and his return to work, ITS paid claimant $23,520.11 in temporary total disability benefits, and $28,381.24 in medical expenses. *See* 33 U.S.C. §§908(b), 907.

fee petitions with the administrative law judge, Centennial filed a motion to remand the case to the administrative law judge so that the record could be reopened for further investigation. On March 25, 2003, the Board dismissed Centennial's appeal without prejudice and remanded the case to the administrative law judge for consideration of Centennial's argument, which the Board viewed as a petition for modification. Unbeknown to the Board when it issued its March 25, 2003 Order, however, the administrative law judge had previously acted on Centennial's motion; specifically, in an Order Denying Request to Re-Open the Record dated March 12, 2003, the administrative law judge had denied Centennial's request to reopened the record. Additionally, the administrative law judge on March 12, 2003, issued a Supplemental Order Awarding Attorney's Fees and Costs, wherein he addressed Centennial's objections to claimant's counsel's fee request and awarded claimant's counsel a fee of $20,517.25, representing 94.45 hours of services rendered at an hourly rate of $205 and 5.5 hours of services rendered at an hourly rate of $210, and $1,100 in costs. Lastly, also on March 12, 2003, the administrative law judge issued an Order in which he deferred ruling on ITS's request for an attorney's fee and costs payable by Centennial, until appellate review of his initial Decision and Order has been completed.

Centennial appealed the administrative law judge's March 12, 2003, Orders to the Board, BRB No. 03-0437, and requested that its appeal of the administrative law judge's Decision and Order Awarding Benefits be reinstated. In an Order dated April 7, 2003, the Board reinstated employer's initial appeal, BRB No. 03-0289, and consolidated that appeal with BRB No. 03-0437 for purposes of decision.[2]

On appeal, Centennial contends that the administrative law judge erred in determining that claimant sustained an injury during his employment with Centennial on February 19, 2001, and that it is the employer responsible for claimant's benefits under the Act. BRB No. 03-0289. Centennial also challenges the attorney's fee awarded to claimant's counsel by the administrative law judge, and the administrative law judge's refusal to reopen the record on Centennial's motion to do so. BRB No. 03-0437. ITS and claimant have each filed response briefs, urging affirmance of the administrative law judge's decisions.

Centennial initially contends that the administrative law judge erred in determining that claimant sustained either a specific injury or a cumulative trauma injury, within the meaning of Section 2(2) of the Act, 33 U.S.C. §902(2), to his cervical spine on

[2] On May 14, 2003, the Board issued an Order vacating its March 25, 2003, order remanding the case to the administrative law judge since the administrative law judge had, on March 12, 2003, taken the action dictated in its March 25, 2003 Order.

February 19, 2001.[3] In support of its position on this issue, Centennial states that claimant remained symptomatic following his February 10, 1999 surgery, that claimant's symptoms became progressively worse following that surgery, that claimant did not report the occurrence of a specific incident on February 19, 2001, and that the medical evidence of record fails to support the administrative law judge's finding that an injury occurred on that date. Employer's contention is without merit. Claimant must demonstrate that he has sustained a physical harm, and that working conditions existed which could have caused it, in order to establish a *prima facie* case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). In this regard, the Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary to establish a claimant's *prima facie* case. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Moreover, an injury need not be traceable to a definite time, but can occur gradually over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). In the instant case, claimant alleged that his neck condition was aggravated by his work as a signalman, which, he testified, required repeated neck movements. The administrative law judge credited claimant's testimony and the opinions of Drs. Rah, London, Thomas and Chafetz, in determining that claimant sustained a cumulative trauma injury to his neck and back on February 19, 2001 and November 19, 2001.[4] *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); Decision and Order at 14. It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Herein, the administrative law judge acted within his discretion in accepting claimant's testimony, as supported by the aforementioned physicians. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440

[3] In raising this issue, Centennial does not challenge the administrative law judge's finding that claimant sustained a cumulative trauma injury to his neck and back while employed by Centennial on November 19, 2001. *See* Decision and Order at 14; Centennial's br. at 9-15. Thus, the award of benefits for disability following this injury is affirmed.

[4] Claimant testified that, after reviewing his employment records, he recalled that he experienced back, neck and arm pain while working for Centennial on February 19, 2001 and that, although it was his intention to continue working up to the date of his February 23, 2001 surgery, he was unable to do so due to the progression of his symptoms. *See* Tr. at 152-154, 185. Claimant also testified regarding the repetitive neck motions required in his job as a signalman. Drs. Rah, London, Thomas and Chafetz respectively opined that claimant had a disc protrusion at the C6-7 level, and there is ample evidence that claimant's work could have caused the harm alleged. *See, infra.*

U.S. 911 (1979). We therefore affirm the administrative law judge's conclusion that claimant sustained an injury on February 19, 2001.[5]

Centennial's arguments primarily challenge the administrative law judge's determination that, based on this injury, it is the responsible employer for claimant's February 23, 2001, surgery and resulting disability. In support of its position on appeal, Centennial asserts that the record is devoid of evidence documenting an aggravation or worsening of claimant's underlying orthopaedic condition at the C5-6 level of his cervical spine at the time of his February 19, 2001, employment with Centennial. For the reasons that follow, we reject Centennial's allegation of error, and we affirm the administrative law judge's finding on this issue.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 950 F.2d 1308 (9th Cir. 1986); *see also Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx 547 (9th Cir. 2001); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)*; see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff=d mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). Accordingly, in the case at bar, Centennial must prove that claimant's disability is due solely to the natural progression of his initial injury in order to meet its burden of establishing that it is not the responsible employer. *See Buchanan*, 33 BRBS at 36; *see generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT)(9th Cir. 1991).

[5] The administrative law judge thus found that claimant established a *prima facie* case, and applied the Section 20(a) presumption to link claimant's harm to his employment with Centennial. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). As he then found it rebutted, the presumption dropped from the case, and the administrative law judge weighed the evidence in the record as a whole.

Subsequent to the administrative law judge's decision, in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), the Ninth Circuit reiterated its holding in *Foundation Constructors* regarding the standard to be utilized for determining the last employer in cases where the employee's disability is a result of cumulative traumas. In *Metropolitan Stevedore*, the court affirmed a finding that the employer on claimant's last day of work prior to knee surgery was the responsible employer, notwithstanding that claimant's knee replacement was scheduled prior to that employment. The court stated that if "the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability," the employer at the time of that subsequent injury is the liable employer. *Id*., 339 F.3d at 1105, 37 BRBS at 90(CRT)(emphasis in original). The court noted that although the assignment of liability to Metropolitan under the "last employer rule" might seem harsh,[6] there is inherent virtue in that rule since each employer subject to the Act shares the risk that it will bear the burden of compensation at one point or another, even if it was not predominantly responsible for the compensable injury. *Id.*, 339 F.3d at 1107, 37 BRBS at 92(CRT).

The instant case is similar to *Metropolitan Stevedore*. The administrative law judge concluded that a preponderance of the evidence supports the conclusion that the cumulative trauma that claimant experienced while working for Centennial on February 19, 2001, and November 19, 2001, either caused, aggravated, accelerated, or otherwise permanently worsened claimant's pre-existing neck and back impairments. Decision and Order at 14. In support of this conclusion, the administrative law judge found that all of the physicians of record agree that any increase in neck movements by a person who has undergone a cervical fusion increases the risk of damaging adjacent cervical discs, that claimant's employment as a signalman required repeated neck bending,[7] that claimant's testimony that he experienced back pain while leaning backwards is credible, and that the opinions of Drs. Rah, London and Thomas that claimant's repetitive neck movements occasioned by his work as a signalman aggravated, accelerated, or otherwise

[6] Despite claimant's history of knee problems with other employers, which led him to schedule knee replacement surgery in December 1994, the Ninth Circuit affirmed the administrative law judge's finding that the employee's single day of work with Metropolitan Stevedore on April 22, 1995, aggravated his underlying knee condition, thus rendering Metropolitan Stevedore liable for the employee's benefits. The administrative law judge credited evidence that each day claimant worked caused a loss of knee bone and cartilage, and concluded claimant's employment with Metropolitan caused some minor but permanent increase in his disability and need for surgery.

[7] Specifically, the administrative law judge noted claimant's testimony that his duties as a signalman required that he look up to observe the operation of overhead cranes approximately 30 times an hour for as many as eight hours a day.

permanently worsened his cervical spine are supported by convincing evidence.[8] *Id.* at 14-15. The administrative law judge considered the testimony of Drs. Miller and Delman that claimant's work as a signalman did not aggravate, accelerate, or otherwise worsen his cervical spine condition, but found those opinions to be unconvincing. *Id.*

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT)(D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT)(9th Cir. 1988). In this case, the administrative law judge rationally determined that claimant's testimony, as well as the opinions of Drs. Rah, London and Thomas, establishes that claimant's employment with Centennial aggravated, accelerated, or otherwise worsened his pre-existing medical condition. In this regard, claimant testified that upon his return to work in September 1999, his symptoms of pain while working became progressively worse until he was forced to quit working on February 19, 2001. *See* Tr. at 129-130, 184-185. Dr. Rah, who performed claimant's surgeries, opined that the continuation of claimant's work activities following his initial surgery, at least in some part, resulted in the gradual deterioration of claimant's C5-6 disc and the need for claimant's second surgery. *See* Tr. at 307-308; CX 5. Dr. London similarly opined that claimant's work, up to the last day, contributed on some minor basis to the overall condition of claimant's cervical spine which thereafter required a second surgical procedure in February 2001. *See* Tr. at 371-372, 381-382; CX 6. Lastly, Dr. Thomas also opined that claimant's work as a signalman between September 1999 and February 19, 2001, aggravated his pre-existing C5-6 disc protrusion; specifically, Dr. Thomas stated in a report dated June 3, 2002, that "[t]here could not have been a more likely activity to cause the patient an aggravation of his C5-6 disc protrusion, than working as a signalman on the casual duty board." CX 1. Contrary to Centennial's assertion on appeal, the credited testimony of claimant and these physicians provides substantial evidence to support the administrative law judge's determination that claimant's employment as a signalman on February 19, 2001 with Centennial caused some degree of aggravation, acceleration, or worsening of his cervical condition. *See Metropolitan Stevedore*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan*, 33 BRBS 32. Accordingly, as the administrative law judge's conclusion that Centennial is the responsible employer is supported by substantial evidence and is consistent with the applicable law governing the responsible employer determination in cumulative traumatic injury cases, it is affirmed. *Id.; Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita*, 950 F.2d 1308.

[8] Contrary to employer's contention, the administrative law judge did not irrationally rely on a 1999 MRI to find an aggravation in 2001. Rather, the administrative law judge referenced this MRI in comparison to an earlier MRI showing a smaller bulge at C5-6 as one of several pieces of evidence corroborating the assertion that claimant's condition worsened during periods of employment as a signalman.

Centennial next argues that the administrative law judge erred in his Supplemental Order Awarding Attorney's Fees and Costs by not addressing its 14 specific objections to time entries contained in claimant's counsel's initial fee petition.[9] Specifically, Centennial avers that each of the challenged time entries relate to work performed by claimant's counsel in the prosecution of claimant's claim against ITS and Harbor. In his Supplemental Order, the administrative law judge specifically addressed Centennial's objections and found its assertion that the disputed services performed by claimant's counsel were solely devoted to pursuing his claim against Harbor was unconvincing. Rather, the administrative law judge concluded that services such as the taking of medical depositions concerned both claims, and that it would be impossible to allocate those hours exclusively to either claim. Order at 2. He thus awarded the 94.45 hours of services rendered requested by claimant's counsel in his initial fee petition.[10]

After review of the administrative law judge's supplemental decision, we hold that Centennial has not demonstrated that the administrative law judge abused his discretion in determining a reasonable fee. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. Moreover, a fee award should be for an amount that is reasonable in relation to the results obtained. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the instant case, the administrative law judge fully considered Centennial's objections to counsel's fee request as well as claimant's counsel's response. Thus, administrative law judge adequately addressed Centennial's objections, and Centennial's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in determining the amount of claimant's counsel's fee. We therefore decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Accordingly, the

[9] Centennial, on appeal, has withdrawn its objections to the hourly rate sought by claimant's counsel, as well as the $1,100 requested in costs. *See* Centennial's br. at 26.

[10] In responding to Centennial's objections before the administrative law judge, claimant's counsel agreed to waive six specific entries, totaling 4.45 hours, thus reducing to 94.45 the number of hours sought.

administrative law judge's award of a fee to claimant's attorney is affirmed.[11] *See generally Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Maddon*, 23 BRBS 395.

Lastly, Centennial challenges the administrative law judge's denial of its request for modification. Specifically, Centennial contends that a review of the fee petition submitted to the administrative law judge by ITS's counsel indicates that counsel for claimant and ITS may have worked in concert with each other to establish a last responsible employer claim against Centennial; Centennial thus avers that this document raises serious questions regarding the validity of the testimony offered by claimant in support of his claim for benefits against Centennial.

Section 22 of the Act, 33 U.S.C. '922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 359, *reh'g denied*, 391 U.S. 929 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). The Supreme Court's decisions in *O'Keeffe* and *Banks* make clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact may be corrected on modification. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Old Ben Coal Co.*, 292 F.3d at 541, 545, 36 BRBS at 40, 43-44(CRT); *Betty B Coal*, 194 F.3d at 497; *Jessee*, 5 F.3d at

[11] Subsequent to the issuance of the administrative law judge's decision in this case, ITS filed a fee petition seeking reimbursement from Centennial for its counsel's fees and costs related to this claim. In an Order dated March 12, 2003, the administrative law judge deferred consideration of ITS's request until all appellate review of his December 13, 2002, decision has been completed. On appeal, Centennial specifically reserves its right to appeal any future award of attorney's fees and costs rendered by the administrative law judge. Should the administrative law judge issue a final order addressing this contested issue, Centennial may file a notice of appeal at that time. *See* 33 U.S.C. §921; 20 C.F.R. §802.201. We note, however, that the Act does not provide for the award of an attorney's fee to employer's counsel. *See* 33 U.S.C. §§926, 928; *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990).

725. The decision to reopen a case due to a mistake in fact must render justice under the Act. *See O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 364; *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45(CRT). In this regard, in *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), the United States Court of Appeals for the Seventh Circuit reasoned that although Section 22 of the Act articulates a preference for accuracy over finality, an administrative law judge is not required to reopen a case where it is clear from the moving parties' submissions that reopening the record could not alter the substantive award.

Having considered the arguments raised by Centennial on appeal and the applicable legal standards, we conclude that the administrative law judge properly exercised his discretion in denying employer's motion for modification based on a mistake in fact. Citing the Seventh Circuit's decision in *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), the administrative law judge rationally denied Centennial's motion since "it is clear from [Centennial's] submissions that re-opening the record could not alter the substantive award." Order Denying Request to Re-Open the Record at 2. Specifically, the administrative law judge determined that, even if Centennial ultimately established that counsel for claimant and ITS coordinated their respective legal strategies on the instant claim, such a showing would be insufficient to change any of the findings contained in his initial decision; rather, the administrative law judge found such alliances to be neither illegal or unethical but, instead, a normal part of the litigation process. *Id.* at 3. As the administrative law judge fully considered the relevant caselaw addressing this issue, and his determination that Centennial's new evidence does not provide a basis for a mistake in fact in his initial decision is rational, we affirm his decision to deny Centennial's motion for modification pursuant to Section 22 of the Act. *See Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); *see also General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Supplemental Order Awarding Attorney's Fees and Costs, and Order Denying Request to Re-Open the Record are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge