BRB Nos. 04-0658
and 04-0658A

RAYMOND GERTE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: May 16, 2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits and Order Denying Motions for Reconsideration and Erratum of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand Awarding Benefits and Order Denying Motions for Reconsideration and Erratum (2000-

LHC-00209 and 2003-LHC-00161) of Administrative Law Judge Daniel F. Sutton 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 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 longshoreman, injured his head and face at work on October 22, 1998. Employer voluntarily paid claimant temporary total disability benefits from October 23, 1998 to May 27, 1999, July 8 to November 24, 1999, and May 24 to May 29, 2000, as well as medical benefits. Cl. Ex. 2. Claimant returned to work post-injury in his usual job but underwent three corrective surgeries by Dr. Lowlicht in 1998 and 1999. A dispute arose over the payment of medical bills which resulted in the case's referral to the Office of Administrative Law Judges (OALJ) and then remand to the office of the district director, where the parties reached an agreement.

On January 24, 2001, claimant's counsel submitted a fee application for work performed before Administrative Law Judge Di Nardi between September 21, 1999, and May 12, 2000. Employer objected to the fee petition asserting that claimant's counsel was not entitled to a fee because claimant did not obtain additional benefits before Judge Di Nardi. Judge Di Nardi denied counsel's fee request, his request for a hearing on his entitlement to an attorney's fee, and claimant's motion for reconsideration of the denial of a fee.

Upon claimant's appeal, the Board vacated Judge Di Nardi's denial of an attorney's fee and remanded the case for resolution of the issue of whether claimant obtained benefits that employer initially refused to pay or benefits greater than those voluntarily paid or tendered by employer. *Gerte v. Logistec of Connecticut*, BRB No. 01-0612 (April 22, 2002)(unpub.). The Board held that Judge Di Nardi erred in summarily stating that claimant did not obtain greater benefits without the benefit of an evidentiary record and remanded the case for necessary findings of fact regarding employer's liability for the requested attorney's fee. The Board stated that Judge Di Nardi need not conduct an oral hearing, if the parties waived their rights to such hearing, but that all relevant documentary evidence should be admitted into the record, and that his findings concerning employer's fee liability should be based on that evidence.

On remand, the case was reassigned to Administrative Law Judge Sutton (the administrative law judge) due to Judge Di Nardi's retirement. The administrative law judge awarded claimant's counsel an attorney's fee of $614.75, based upon his finding that claimant received benefits over those voluntarily paid by employer, as his attorney obtained the prompt authorization and payment for the third surgery by Dr. Lowlicht. The administrative law judge also addressed claimant's claim for additional disability and

medical benefits. The administrative law judge found that claimant's past benefits should be paid at an average weekly wage of $1,021.50, applying Section 10(a) of the Act, 33 U.S.C. §910(a), rather than $974.37. The administrative law judge, however, denied claimant ongoing permanent partial disability benefits. The administrative law judge further found that additional treatment by Drs. Katz, Richard, and Kudej is not reasonable and necessary and that employer never refused authorization for psychological treatment with Dr. Gang. The administrative law judge denied the motions for reconsideration filed by claimant and employer.

Claimant appeals the administrative law judge's fee award, the denial of medical benefits for further treatment with Drs. Richard and Kudej, the denial of a gym membership recommended by Dr. Katz, and the denial of ongoing permanent partial disability benefits. Claimant also contests the administrative law judge's finding that employer never refused claimant's request for authorization to treat with Dr. Gang. Employer challenges the administrative law judge's fee award and his increase in claimant's average weekly wage. Employer filed a response brief to which claimant objected and employer replied, and employer subsequently filed a supplemental brief.[1]

We first address employer's contention that the administrative law judge erred in calculating claimant's average weekly wage pursuant to Section 10(a). Employer asserts that the administrative law judge's finding that claimant worked five days per week was based on claimant's "guess" that he worked that number of days per week and is thus not supported by substantial evidence. Tr. at 258. Employer asserts that the administrative law judge should have applied Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate 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), to calculate his annual earning capacity. 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 can be applied only where the record supports a conclusion that claimant worked five or six days per week. Section 10(a) provides a specific formula for calculating annual earnings. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT)(1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991). Section 10(c) applies when neither Section 10(a) nor Section 10(b) can be fairly or reasonably applied.[2] *Id.*

We affirm the administrative law judge's average weekly wage calculation of

[1] We accept employer's supplemental brief as part of the record. 20 C.F.R. §802.215.

[2] Pursuant to Section 10(b), a claimant's average weekly wage can be calculated based on the wages of a similarly situated co-worker. No party contends this subsection is applicable in this case.

$1,021.50 using Section 10(a). The administrative law judge addressed employer's concern regarding claimant's "guess" and reasonably held that the payroll records and claimant's testimony provide a reliable estimate that claimant worked five days per week. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *aff'g*, 4 BRBS 284 (1976), *cert. denied*, 440 U.S. 911 (1979) Decision and Order on Remand Awarding Benefits at 10-11; Order Denying Motions for Reconsideration and Erratum at 2-3; Emp. Ex. 33; Cl. Ex. 17; Tr. at 251-252. Moreover, employer's concession that claimant worked an average of 4.77 days per week supports the administrative law judge's finding that claimant is a five-day worker. Emp. Br. at 12. Having reasonably found that claimant is a five-day worker, the administrative law judge rationally applied Section 10(a) because claimant worked substantially the whole of the year immediately preceding his injury (248 days), there was competent, uncontradicted evidence establishing claimant's average daily wage, and no showing was made that Section 10(a) could not be fairly and reasonably applied.[3] *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT)(5th Cir. 2004); *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT)(9th Cir. 2004), *cert. denied*, 125 S. Ct. 1724 (2005); Order Denying Motions for Reconsideration and Erratum at 2-3. The administrative law judge's average weekly wage finding is therefore affirmed.

We next address claimant's contention that the administrative law judge erred in denying the claim for ongoing permanent partial disability benefits by requiring claimant to establish the actual number of days he missed work due to his work injury. An award for permanent partial disability benefits is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). A finding that claimant can perform his usual work full-time, without restrictions, can support a conclusion that he has no loss in wage-earning capacity and thus is not entitled to partial disability benefits. *See, e.g., Ward v. Cascade General, Inc.*, 31 BRBS 5 (1995).

We affirm the administrative law judge's denial of ongoing permanent partial disability benefits. While the administrative law judge stated claimant did not demonstrate the actual number of days he missed worked due to his injury, the administrative law judge also found that claimant's overall testimony regarding the effect of his injury on his ability to work was vague. *See generally Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79(CRT)(8th Cir. 1988); Decision and Order on Remand Awarding Benefits at 11; Order Denying Motions for Reconsideration and Erratum at 4; Emp. Exs. 33, 34; Cl. Ex. 17; Tr. at 277. Claimant conceded on cross-examination that there is no way of knowing whether his

[3] Moreover, the administrative law judge properly applied the specific computation required by Section 10(a). 33 U.S.C. §910(a), (d); Decision and Order on Remand Awarding Benefits at 11.

decrease in earnings resulted from absences due to the work injury or to other factors.[4] *See* Tr. at 277; *see* Emp. Exs. 33, 34; Cl. Ex. 17. As claimant bears the burden of establishing he has a loss in wage-earning capacity due to the injury, the administrative law judge acted within his discretion in finding too vague claimant's evidence that his injury caused a loss of wage-earning capacity. *See generally Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

Claimant next challenges the administrative law judge's findings concerning his entitlement to medical benefits. Under Section 7(d) of the Act, 33 U.S.C. §907(d), claimant is entitled to recover medical benefits if he requests employer's authorization for treatment, employer refuses the request, and the treatment thereafter procured on claimant's own initiative is reasonable and necessary. *See Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 33 U.S.C. §907(d).

The administrative law judge rationally found that claimant did not establish the necessity of the gym membership recommended in 1999 and 2000 by Dr. Katz, claimant's treating orthopedic surgeon, because Dr. Katz stated in 2003 that employer had adequately responded to his gym membership request by authorizing supervised physical therapy in 1999. Decision and Order On Remand Awarding Benefits at 5-6; Cl. Exs. 19 at 1-4; 28 at 1; Emp. Ex. 25. Moreover, the administrative law judge rationally held that acupuncture and nerve block treatment recommended by Dr. Richard in 2000 and 2001, to treat temperomandibular jaw syndrome was not needed based on the opinions of Drs. Katz and Sella to that effect. *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); Decision and Order on Remand Awarding Benefits at 6-8; Cl. Ex. 31; Emp. Exs. 19, 49. Contrary to claimant's contention, the administrative law judge was not required to defer to the opinion of Dr. Richard as claimant's treating physician, without considering the weight to be accorded the contrary medical opinions of record. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997); *see also Amos v. Director, OWCP*, 153 F.3d 1051, *as amended by*, 164 F.3d 480, 32 BRBS 144(CRT)(9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

Additionally, the administrative law judge rationally found that chiropractic care or physical therapy provided by Dr. Kudej, licensed in both specialties, was not compensable since claimant does not have subluxation of the spine and since Dr. Katz stated that

[4] Claimant's 52 week pre-injury earnings of $50,667.23 represent approximately 1,975 hours. Emp. Ex. 33; Cl. Ex. 17. Post-injury, claimant earned $50,520.05 representing approximately 1,905 hours in 2000; $42,713.39 representing approximately 1,668.5 hours in 2001; and $37,496.45 representing approximately 1,449 hours in 2002. Emp. Ex. 34.

additional physical therapy after 2001 was not needed. *See Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998); Decision and Order on Remand Awarding Benefits at 8-9; Emp. Exs. 25 at 1; 26 at 1; 48 at 1. The administrative law judge rationally found that employer did not refuse to authorize claimant to treat with Dr. Gang, as the parties stipulated to the authorization at the hearing and since Dr. Gang acknowledged in 2003 that the insurance company's response has been good.[5] Decision and Order on Remand Awarding Benefits at 9; Cl. Ex. 27; Emp. Ex. 22; Tr. at 238. Consequently, we affirm the administrative law judge's findings regarding medical treatment by Drs. Gang, Katz, Kudej, and Richard.

Lastly, we address the challenges of both claimant and employer to the administrative law judge's fee award. The amount of an attorney's fee award is discretionary, and will not be set aside unless shown by the challenging party 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). On remand, the administrative law judge awarded claimant's counsel an attorney's fee of $614.75, for the services expended in obtaining the prompt authorization and payment of Dr. Lowlicht's third surgery.

We affirm the administrative law judge's finding that claimant obtained greater benefits than those employer voluntarily paid or tendered in the form of the prompt authorization and payment for Dr. Lowlicht's third surgery, and thus affirm the administrative law judge's award of a fee for services related to that task. *See generally Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT)(9th Cir. 1993); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997); Decision and Order on Remand Awarding Benefits at 3-5, 12-13; Emp. Exs. 13 at 2-5; 46 at 1-2, 7-8; Cl. Ex. 16 at 14, 18. Contrary to claimant's arguments, the administrative law judge reasonably limited the fee to those services performed from the date of the case's referral on October 4, 1999, to the date Dr. Lowlicht was paid on December 2, 1999, as Dr. Lowlicht's bill was the primary reason for the referral. Emp. Ex. 11 at 4. Employer's assertion that it did not delay the authorization and payment of Dr. Lowlicht's third surgery, alleging it was authorized on November 9, 1999, after claimant requested authorization on October 21, 1999, does not take into account that referral to the Office of Administrative Law Judge was required in order to obtain that authorization in view of employer's dilatory response to claimant's first two operations.[6]

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[5] Claimant's reliance on Dr. Gang's October 17, 2003, letter to support the argument that the administrative law judge erred in finding that Dr. Gang's treatment has always been authorized is not contained in the record, and thus the Board cannot consider it. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); Cl. Br. at 17-18; Emp. Resp. Br. at 57 n. 6.

[6] Claimant testified that Dr. Lowlicht would not perform the third surgery until he was paid, due to employer's response to the prior operations. Tr. at 123. Dr. Lowlicht first

We also affirm the administrative law judge's award of $195 per hour for attorney services as employer has not shown it to be unreasonable and since claimant's counsel may charge a higher hourly rate to his longshore claimants than to his defense clients due to his risk of loss. *See City of Burlington v. Dague,* 505 U.S. 557 (1992) (risk of loss appropriately accounted for in lodestar figure, but is not subject to additional enhancement); *Muscella,* 12 BRBS 272; Decision and Order on Remand Awarding Benefits at 13; Emp. Ex. 39 at 7-8. As neither party has established that the fee award is unreasonable or contrary to law, the fee award is affirmed.

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performed surgery on October 22, 1998, and was not paid until February 26, 1999; his second surgery was performed on February 11, 1999, and he was not paid until September 23, 1999. Emp. Ex. 13 at 2, 3.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Motions for Reconsideration and Erratum are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge