BRB No. 95-1339

LARRY W. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

D. A. Bass-Frazier (Huey and Leon), Mobile, Alabama, for claimant.

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer

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

PER CURIAM:

Employer appeals the Decision and Order, the Order Denying Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (92-LHC-2803) of Administrative Law Judge Quentin P. McColgin awarding benefits and an attorney's fee 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).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not

[1]The Board considers the one-year review period provided by Public Laws 104-134 and 104-208 to begin on June 21, 1996, the date employer's supplemental appeal was filed. *See Barker v. Bath Iron Works Corp.,* 30 BRBS 198 (1996)(order).

in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 4, 1991, claimant, a pipefitter, was attempting to loosen a bolt with a wrench when the tool failed and he injured his right knee. He testified that he immediately felt pain in his right leg, and that this pain extended from his hip to his ankle. Er. Ex. 9 at 20-22 (Claimant's Deposition). Because of pain to his leg, claimant was unable to return to work the next day. Claimant continued to suffer pain and a "popping" of his right knee. He underwent arthroscopic surgery three times, and also received an epidural block which alleviated some of the symptoms. Claimant was unable to return to his former employment as a pipefitter, and has since worked as a security guard for $4.75 per hour. Employer voluntarily paid temporary total disability, temporary partial disability and permanent partial disability benefits for various periods. The administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Employer's motion for reconsideration was denied. The administrative law judge also awarded claimant an attorney's fee in a Supplemental Order. Employer appeals all three orders.

The administrative law judge found that claimant suffered an 18 percent impairment to his right knee. He also found, based on claimant's complaints of pain and Dr. Fondren's opinion, that claimant suffered an injury to his lumbar nerve. Recognizing that the record did not demonstrate an anatomical pathology in the back, the administrative law judge nonetheless credited the opinion of Dr. Fondren that claimant's initial knee injury altered claimant's gait resulting in an inflammation of a nerve root in claimant's back which in turn affected his knee. Decision and Order at 9.

In awarding permanent partial disability benefits under Section 8(c)(21), the administrative law judge relied on the Board's decisions in *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), and *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1989), to find that claimant's overall impairment, and resultant loss in wage-earning capacity, were due not exclusively to claimant's knee injury but also to a "nerve problem emanating from claimant's back." Decision and Order at 9. After reviewing the medical evidence, especially Dr. Fondren's opinion that claimant's knee impairment was the result of three factors -- back pain, arthritic changes and articular cartilage in the lateral compartment of the knee, *see* Cl. Ex. 2 at 12-14 -- the administrative law judge found that "an unquantified portion of the quantified impairment rating to claimant's scheduled member is attributable to the nerve problem." Decision and Order at 10. Citing *Grimes v. Exxon Co.*, 14 BRBS 573 (1981), the administrative law judge concluded that the resulting disability must be determined under Section 8(c)(21) because he could not factor out that portion of the disability attributable to claimant's knee injury. Decision and Order at 9-11; *compare Frye*, 21 BRBS at 198; *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 234 (1985). Therefore, because he found it undisputed that claimant could not return to his former employment, and in view of the parties' stipulation as to claimant's reduced post-injury wage-earning capacity of $180 per week, the administrative law judge ordered compensation pursuant to Section 8(c)(21) only. Decision and Order at 10-11.

In its appeal, employer challenges the administrative law judge's finding that claimant is entitled to permanent partial disability benefits under Section 8(c)(21), and asserts that claimant's recovery is limited to an award under the schedule for an injury to his knee.[2] Employer also takes

[2]Employer additionally contends that, assuming that the administrative law judge was correct in

issue with the administrative law judge's method for determining average weekly wage, claiming that the administrative law judge should have applied Section 10(c), 33 U.S.C. §910(c), instead of Section 10(b), 33 U.S.C. §910(b). In a supplemental appeal, which has been consolidated with the appeal on the merits, employer challenges the award of an attorney's fee on the grounds that this award is premature because of its appeal on the merits.

Employer first contends that the administrative law judge erred in finding that claimant suffered a back injury, and that he compounded this error by finding that claimant's back condition developed as a natural consequence his knee injury. Employer asserts that the record does not support the finding that claimant suffered a back injury, there being "no objective medical evidence ... to substantiate an injury to claimant's back." Er. Brief at 10. Employer emphasizes that claimant originally alleged that he suffered only a cartilage tear to his right knee and points out that he was treated for two years after the accident solely for a knee injury and had testified that he was unaware of any type of back injury or condition. *See* Er. Ex. 10. Employer suggests that claimant's new theory of recovery is prompted more by speculation from Dr. Fondren and claimant's counsel. Employer also asserts that the administrative law judge misapplied the Board's decisions in *Bass* and *Frye* to find that claimant's back condition was a consequence of claimant's knee injury. Employer concludes that, absent substantial evidence in the record to support the administrative law judge's finding of a back injury or its role in the development of claimant's leg pain, the Section 20(a), 33 U.S.C. §920(a), presumption does not apply.

The administrative law judge's finding that claimant suffered an injury to his back as a consequence of the knee injury is supported by substantial evidence. Dr. Fondren testified that the probable cause of the nerve irritation is an alteration in claimant's gait, which led to an inflammation of the nerve root in claimant's back. Cl. Ex. 1 (Deposition) at 15-17. He reported that claimant suffered from an 18 percent lower extremity impairment, which translated to a four percent whole man impairment. *Id*. at 19-21. In Dr. Fondren's opinion, the point of origin of the back and nerve problem would be the leg injury. *Id*. at 24. In a letter dated February 11, 1991, Dr. Fondren reported that claimant's altered gait resulted in a "sciatica-type problem which has been relieved with his epidural block." Cl. Ex. 3.

The administrative law judge cited Dr. Fondren's conclusion as evidence to find that the lumbar nerve problem resulted from the alterations of claimant's gait following the knee injury and is sufficient to invoke the Section 20(a) presumption. To the administrative law judge, Dr. Fondren's inference, that claimant suffered a lumbar nerve injury based on the success of the epidural blocks at relieving his pain, was also reasonable. This finding is within the administrative law judge's discretion as the trier-of-fact, a finding that the Board may not disturb as it is rational and supported

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finding that the back condition was derived from claimant's knee injury, the record nonetheless does not establish any loss in wage-earning capacity. Because employer stipulated to a post-injury wage-earning capacity that is less than claimant's average weekly wage, it must be assumed that employer's argument goes to the lack of evidence that claimant suffers from any measurable impairment due to the consequential back pain.

by substantial evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 1563, 29 BRBS 28, 39 (CRT)(D.C.Cir. 1994). Having applied Section 20(a), the administrative law judge also rationally determined that employer's evidence did not sever the presumed connection between the lumbar nerve condition and claimant's employment and, absent an intervening cause, any resultant consequential disability is work-related. Decision and Order at 7; *see Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104, 107 (1989); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 96 (1988).

The administrative law judge's award pursuant to only Section 8(c)(21), however, cannot be affirmed. In *Bass*, 28 BRBS at 11, and *Frye*, 21 BRBS at 194, the Board held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury in addition to an award under the schedule for the initial injury. Because the scheduled injury would be compensated separately, any loss in post-injury wage-earning capacity that is found due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Frye*, 21 BRBS at 198.

As pointed out above, the administrative law judge concluded that he was unable to factor out the scheduled injury from the Section 8(c)(21) award. Decision and Order at 9. He then stated that "an unquantified portion of the quantified impairment" is due to the lumbar nerve problem. Decision and Order at 10. It is apparent that the administrative law judge concluded that since claimant suffered in some part from an unscheduled injury to his back, and the scheduled component of his economic disability was not measurable, by default the entire loss in post-injury wage-earning capacity should be reflected in an award pursuant to Section 8(c)(21). In fact, however, on the present record the scheduled part is the only quantified portion of his disability, *viz*. an 18 percent leg impairment which translates into a four percent whole man disability. Because the unscheduled aspect of the overall disability was considered "unquantified," the resulting award based solely on Section 8(c)(21) is thus irrational and unsupported by substantial evidence. As a result, we vacate the Section 8(c)(21) award and remand the case to the administrative law judge for him to make more detailed findings as to the composition of claimant's disability consistent with *Bass* and *Frye*. *See generally Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). There is evidence, for example, that the knee injury alone could account for the loss in claimant's post-injury wage-earning capacity.[3] A Section 8(c)(21) award in this case must be based on economic loss, *i.e.*, loss in wage-earning capacity, resulting from claimant's back problems, while his knee impairment is compensated under the schedule.

Employer next contests the administrative law judge's determination of claimant's average

[3]Dr. Fondren stated that claimant's back impairment did not increase claimant's anatomical rating or work restrictions. Deposition at 6, 10. If this opinion is accepted, the administrative law judge could rationally limit claimant's compensation to a recovery under the schedule for his left leg, because it may be found that the leg impairment alone precludes claimant from performing his usual work resulting in a loss in his wage-earning capacity.

weekly wage. The administrative law judge, applying Section 10(b), computed claimant's average weekly wage on the basis of the wages of claimant and three "same class" employees, all of whom received a pay increase on February 1, 1991, just over two weeks prior to claimant's first day on the job and two months before his injury. The administrative law judge, without demonstrating his calculations, found that the average daily wage for the three "same class" pipefitters for the previous year was $89.55. He then multiplied this figure by 260 and divided the result by 52 to arrive at an average weekly wage of $447.76. Decision and Order at 10. Employer contends that this figure exaggerates claimant's earnings, and that the administrative law judge should have computed an average weekly wage of $356.59 pursuant to Section 10(c).

The average weekly wage of the injured employee at the time of the injury forms the basis upon which a claimant's compensation is computed. 33 U.S.C. §910. "The determination of the average weekly wage is governed by [S]ection 10 of the Act, which provides three alternative methods for calculating the average annual [wage], 33 U.S.C. §910(a)-(c), the amount of which is divided by 52 weeks to arrive at the average weekly wage, 33 U.S.C. §910(d)(1)." *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821, 25 BRBS 26, 27-28 (CRT)(5th Cir. 1991); *see Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 51 (1996). Section 10(b) provides for the calculation of average weekly wage where the injured employee's pre-injury employment is permanent and continuous but the employee has not been employed for substantially the whole of the year within the meaning of Section 10(a). For this provision to obtain, there must be evidence of the wages of similarly situated employees who have worked substantially the whole of the year prior to the injury.[4] *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321-323, 18 BRBS 100, 102-103 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 344 (1988).

Employer assails an award based on an hourly rate that was not in effect for the entire 52 weeks preceding the injury and on the assumption that claimant worked consistently as a full-time employee. Employer points out that claimant, who started with employer on February 18, 1991, did not work a full 40-hour week for three of the weeks of his employment prior to the date of his injury on April 4, 1991. Employer further avers that the administrative law judge erred in using a pay increase to $11.18 per hour that took effect on February 1, 1991, just before claimant began his

[4]Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding injury and provides a specific formula for calculating annual earnings. The arithmetic employed for Sections 10(a) and 10(b) is identical: the administrative law judge should divide the actual earnings of the appropriate employee for the 52-week period prior to the injury by the actual number of days worked during the reference period, multiply this actual daily rate by 260 (for a 5-day employee), then divide the product by 52. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978); *see also Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 n. 3 (1986) (multiplier is 300 for a six-day worker). Section 10(c) dictates a general method for determining annual earnings where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991).

employment and shortly prior to the date of claimant's accident, to compute claimant's average weekly wage. This pay raise, employer contends, does not accurately reflect the pre-injury annual wage for the "same-class" employees who were similarly situated to claimant because most of their annual earnings for the preceding year were at a lower rate. According to employer, the actual average annual earnings of the similarly-situated employees, when divided by 52 weeks, results in an average weekly wage of $356.59. Er. Br. at 17; *see* Er. Ex. 5.

Employer's arguments are without merit. Initially, we reject the assertion that the administrative law judge should have applied Section 10(c). The criteria for the application of that provision do not apply. Section 10(c) should apply when an employee's work is "inherently discontinuous or intermittent"[5] and when "otherwise harsh [unreasonable or unfair] results" would follow were an employee's, or a "same class" employee's, wages calculated merely with respect to the previous year's earnings. *See Gatlin*, 936 F.2d at 822, 25 BRBS at 27-28 (CRT); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979). Such is not the case here. The method of calculation urged by employer, that of using actual earnings of the similarly situated employees for the relevant pre-injury period divided by an entire work year, was rejected in a case involving Section 10(a) by the Board in *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978). Because the administrative law judge's decision to apply Section 10(b) accords with applicable law, and his method of computing claimant's average weekly wage thereunder is likewise correct and supported by substantial evidence, we affirm the administrative law judge's findings with respect to claimant's average weekly wage.

Employer also appeals the Supplemental Decision and Order awarding attorney's fees on the grounds that the fee award would be premature "in the event that the Decision and Order awarding benefits is ... vacated." In response, claimant notes merely that the administrative law judge was within his authority to render a determination as to legal fees, and agrees that the fee award becomes enforceable only when the award becomes final.

We reject employer's contention that the issuance of the fee award is premature, as an administrative law judge may award a fee during the pendency of an appeal. The award, however, is not enforceable until the compensation order becomes final. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). Employer does not challenge the amount of the fee awarded by the administrative law judge, and it is therefore affirmed on the present record; the administrative law judge nevertheless may reconsider the amount of the fee on remand in view of his determination regarding claimant's entitlement to disability benefits.

Claimant's counsel requests an attorney's fee for work before the Board. Employer objects to counsel's request for a fee, citing in this instance the fact that claimant has yet to successfully prosecute this claim. Employer also contests as excessive the hourly rate of $150 claimed by counsel, citing the "nature of the issues involved and counsel['s] ... limited involvement in this case," and disagrees with the request for expenses.

[5]Claimant testified that he was employed in a full-time position and that he passed his probationary period. H.T. at 23-25.

Employer's objections are without merit. Upon consideration of the fee petition, and in view of claimant's success on the issues of causation and average weekly wage, we conclude that the hourly rate of $150 is not excessive, and that the 13.25 hours claimed for work on appeal are reasonable and commensurate with the services provided. We therefore grant the fee request in full and award claimant's counsel $2,078.70 in attorney's fees, plus $91.20 in expenses. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 129 (1989); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration awarding claimant benefits under Section 8(c)(21) are vacated, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion. The decisions are otherwise affirmed. The Supplemental Decision and Order awarding an attorney's fees is affirmed. Claimant's counsel is awarded an attorney's fee of $2,078.70 plus expenses of $91.20, to be paid directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge