

BRB Nos. 95-2094 and
95-2094A

THOMAS CAMPBELL)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
MASERSK STEVEDORING)	DATE ISSUED:
)	
and)	
)	
SIGNAL MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
Cross-Respondents)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Supplemental Decision and Order Re Attorney's Fees, and Order on Reconsideration of Attorney's Fees of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

David Utley (Devirian, Utley & Detrick), Wilmington, California, for claimant.

James P. Aleccia (Mullen & Filippi), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Supplemental Decision and Order Re Attorney's Fees, and Order on Reconsideration of Attorney's Fees, and claimant cross-appeals the Supplemental Decision and Order Re Attorney's Fees and Order on Reconsideration of Attorney's Fees (95-LHC-143), of Administrative Law Judge Thomas Schneider 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. *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 in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

On May 23, 1994, claimant sustained a work-related injury to his low back, mid-back, and buttocks. Employer voluntarily paid temporary total disability benefits to claimant for the period of May 23, 1994, to September 1, 1994. 33 U.S.C. §908(b). In his Decision and Order, the administrative law judge, relying on the medical opinions of Dr. Hunt, claimant's treating physician, Dr. Capen, a consulting orthopedic surgeon, and Dr. Rafael, a consulting neurologist, as well as claimant's testimony, concluded that claimant was incapable of resuming his usual employment duties with employer as of September 1, 1994. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from May 24, 1994, and continuing.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of \$33,600, representing 192 hours of services rendered at a rate of \$175 per hour, plus \$2,105.22 in expenses. Employer filed objections to the requested fee. In a Supplemental Decision and Order Re Attorney's Fees, the administrative law judge, after consideration of employer's objections, approved the hourly rate sought by claimant's counsel, reduced the requested number of hours by 71.25, and disallowed \$989.48 of the requested costs. Accordingly, claimant's counsel was awarded an attorney's fee of \$21,131.25, and \$1,115.74 in expenses. The administrative law judge denied claimant's subsequent motion for reconsideration.

On appeal, employer challenges the administrative law judge's award of temporary total disability compensation to claimant. In a supplemental appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge. Claimant cross-appeals the administrative law judge's fee award, specifically challenging the administrative law judge's decision to reduce the amount of time requested for client meetings.¹

It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In the instant case, employer challenges the administrative law judge's determination that claimant was incapable of resuming his usual employment duties with employer as of September 1,

¹In an Order dated March 5, 1996, the Board consolidated for purposes of decision employer's appeals of the administrative law judge's Decision and Order Awarding Benefits, Supplemental Decision and Order Re Attorney's Fees, and Order on Reconsideration of Attorney's Fees with claimant's cross-appeal of the administrative law judge's Supplemental Decision and Order Re Attorney's Fees and Order on Reconsideration of Attorney's Fees. *See* 20 C.F.R. §802.104. As these cases were consolidated, the date of the last appeal, February 26, 1996, controls in determining the one-year period of review under Public Law Nos. 104-134 and 104-208.

1994. Specifically, employer avers that the administrative law judge erred in relying upon the medical opinions of Drs. Hunt and Rafael, who opined that claimant remained temporarily totally disabled, over the contrary opinions of Drs. London and Farran.² Contrary to employer's assertions that Dr. Hunt's opinion does not constitute substantial evidence since he failed to both note the findings of his physical examinations and determine the etiology of claimant's numerous medical complaints, the administrative law judge could properly rely upon the opinion of Dr. Hunt, who became claimant's treating physician three days post-injury, as he rendered various working medical reports documenting claimant's ongoing medical problems. *See* Claimant's Exhibits 103-145. Moreover, we reject employer's contention that Dr. Rafael's April 20, 1995 report constitutes an unreasoned medical opinion since it is inconsistent with his earlier March 31, 1995 report and the diagnostic studies administered on March 30, 1995. The inconsistencies contained in Dr. Rafael's two reports were specifically brought to the administrative law judge's attention during the formal hearing, *see* Transcript at 9, 207-208, and the administrative law judge, in his decision, accepted Dr. Rafael's explanation that a mistake in dictation was made during the March 31, 1995 report, which should have reflected that claimant did in fact suffer from radioculopathy with numbness and tingling in both lower extremities at the time of the March 30, 1995 consultation.

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 from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, we affirm the administrative law judge's decision to give determinative weight to the opinions of Drs. Hunt and Rafael, as that determination is neither inherently incredible nor patently unreasonable, and his consequent award of ongoing temporary total disability compensation to claimant. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

In challenging the attorney's fee awarded to claimant's counsel by the administrative law judge, employer contends that the fee awarded is excessive and should be reduced further. Claimant, in his cross-appeal, asserts that the administrative law judge's 40 hour reduction of time spent for client meetings for the period of September 30, 1994 to August 23, 1995 is an abuse of discretion, arbitrary, contrary to law and, at the least, inadequately explained.

We affirm the \$21,131.25 attorney's fee awarded to claimant's counsel by the administrative law judge. In the instant case, employer filed 74 specific objections to counsel's fee request with the administrative law judge. Thereafter, in considering counsel's fee petition, the administrative law judge, for "the reasons stated by Mr. Aleccia" and the judge's "own experience in law practice and as an administrative law judge," accepted 42 of employer's objections and consequently disallowed 71.25 hours sought by counsel, a reduction of approximately 37 percent, and approved the remaining 120.75 itemized hours. We decline to restore, further reduce or disallow the hours addressed by the

²Dr. London opined that claimant suffers from nothing more than a contusion to the thoracolumbar spine and suggests a return to work on September 1, 1994. Employer's Exhibit 12. Dr. Farran evaluated claimant on April 25, 1995, and opined that all neurological testing failed to evidence any neurological deficits attributable to the September 23, 1994 incident. Employer's Exhibit 16.

administrative law judge, as both employer's and claimant's assertions are insufficient to meet their burden of proving that the administrative law judge abused his discretion in this regard. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Lastly, employer contends that the hourly rate requested by claimant's counsel and approved by the administrative law judge is excessive. The administrative law judge approved the hourly rate of \$175 sought by claimant's counsel, finding that the rate requested was commensurate with hourly rate in the area where this claim arose. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the hourly rate awarded by the administrative law judge to counsel. *See Welch v. Penzoil Co.*, 23 BRBS 395 (1990); *Maddon*, 23 BRBS at 55.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Supplemental Decision and Order Re Attorney's Fees, and Order on Reconsideration of Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge