BRB Nos. 96-0653
and 96-0653A

MILTON DOMINIQUE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CHAPPARAL STEVEDORING COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
NORTH RIVER INSURANCE COMPANY and THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of George P. Morin and the Supplemental Decision and Order - Granting Attorney Fees of Thomas M. Burke, Administrative Law Judges, United States Department of Labor.

Dennis L. Brown, Houston, Texas, for claimant.

James W. Karel and Tina Snelling (Hirsch, Sheiness & Garcia), Houston, Texas, for employer/carriers.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits of Administrative Law Judge George P. Morin and employer appeals the Supplemental Decision and Order - Granting Attorney Fees of Administrative Law Judge Thomas M. Burke (95-LHC-935) 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 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). The amount of an attorney's fee 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a crush injury to his right foot on March 4, 1985. Claimant was released for work on March 4, 1986, but did not return to work until August 15, 1986 because he felt physically unable to perform his job. HT at 125, 130. On September 17, 1987, Dr. Christensen rated claimant's disability at twenty percent. Dr. Bishop subsequently rendered ratings of twenty-three, twenty-six, and fifty-three percent. Employer voluntarily paid compensation for various periods of time from March 5, 1985 to September 24, 1993. CX 9a.

In his Decision and Order, Judge Morin awarded claimant permanent partial disability benefits under Section 8(c), 33 U.S.C. §908(c), for a twenty percent disability to claimant's right foot. He also found that claimant's condition reached maximum medical improvement on September 17, 1987, and denied temporary total disability compensation for the period of March 4, 1986 to August 7, 1986. Judge Burke, who was assigned the case due to Judge Morin's retirement, denied claimant's Motion for Reconsideration.

Claimant's counsel subsequently filed a petition requesting an attorney's fee for 77.25 hours of services at $175 per hour, 3.75 hours of paralegal services at $70 per hour, plus $2,928.76 in expenses. Employer filed objections to this fee request. In a Supplemental Decision and Order, Judge Burke awarded counsel the entire fee sought, $16,728.76.

In his appeal of Judge Morin's Decision and Order, BRB No. 96-0653, claimant challenges Judge Morin's reliance on Dr. Christensen's opinion, as supported by the opinions of Drs. Seger and Baxter, in determining the extent of his disability and the date his condition reached maximum medical improvement. Claimant also argues that he is entitled to temporary total disability compensation for the period from March 4, 1986 to August 7, 1986. Employer responds, urging affirmance of Judge Morin's decision. In its appeal of Judge Burke's fee award, BRB No. 96-0653A, employer contends that the fee must be reduced because claimant was not fully successful. Claimant has not filed a brief in response to employer's appeal.

Claimant, in his appeal, initially contends that the administrative law judge erred in awarding him compensation for a twenty percent permanent partial disability to his foot based upon the testimony of Dr. Christensen. In awarding claimant compensation, the administrative law judge credited the testimony of Dr. Christensen, who opined that claimant suffered a twenty percent permanent partial disability to his right foot, rather than the opinion of Dr. Bishop. In rendering this credibility determination, the administrative law judge specifically noted that Dr. Christensen utilized the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and maintained his opinion through seven years of treatment,[1] while Dr. Bishop's rating was questionable because (1) Dr. Bishop admitted that he reevaluated claimant's impairment

[1]We note that the Act does not require impairment ratings based on medical opinions using the criteria of the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. 33 U.S.C. §§908(c)(13), 902(10).

upon claimant's request; and (2) he increased the rating to reflect heel fat pad atrophy - a condition which no other physician of record, including Dr. Christensen, noted. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's credibility determinations are rational and within his authority as factfinder; accordingly, as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant suffers from a twenty percent permanent partial disability. *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); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987).

Claimant next contends that the administrative law judge erred in finding he reached maximum medical improvement on the date he was rated by Dr. Christensen since he subsequently underwent surgery for his work-related condition. 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 & Construction Co.*, 17 BRBS 56 (1985). The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). If anticipated surgery is not expected to improve claimant's condition, the condition may be permanent. *See White v. Exxon Co.*, 9 BRBS 138 (1978)(Smith, J., dissenting), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

In the instant case, the administrative law judge found that the medical consensus is that claimant reached maximum medical improvement no later than September 17, 1987. Specifically, the administrative law judge noted that the opinion of Dr. Christensen, who rated claimant on that date, was supported by the opinion of Dr. Seger, who found that claimant reached maximum medical improvement on January 1, 1987, and Dr. Baxter who, on April 15, 1986, recommended no further treatment for claimant. Our review of the record reveals that at the time of Dr. Christensen's rating on September 17, 1987, no surgery was anticipated and, moreover, claimant's condition did not improve and actually worsened after his subsequent surgery. *Compare* EX 1 at 60 and EX 2 at 62; *see Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *rev'd on other grounds sub nom.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*). Accordingly, as the administrative law judge's finding that claimant reached maximum medical improvement on September 17, 1987, is supported by substantial evidence, the administrative law judge's finding on this issue is affirmed. *See generally Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Lastly, claimant asserts that the administrative law judge erred in failing to find that he was temporarily totally disabled from March 4, 1986, when Dr. Seger released him for work, until

August 7, 1986, when he returned to work.[2] We disagree. In this case, Judge Morin relied on Dr. Seger's opinion that claimant could return to work on March 4, 1986, *see* EX 1 at 23, and Dr. Baxter's April 15, 1986 work release, *see* EX 2 at 33, to find that claimant was able to work during this period. Judge Morin's credibility determination is rational and within his purview as factfinder, and the credited opinions constitute substantial evidence supporting his finding that claimant was not temporarily totally disabled during the period of March 4, 1986 to August 7, 1986. *See 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); *Perini Corp. v. Heyde*, 306 F.Supp 1321 (D.R.I. 1969). We therefore affirm Judge Morin's determination that claimant was capable of resuming his usual employment duties with employer during this period.

In its appeal of the fee award, BRB No. 96-0653A, employer argues, citing *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992), that since claimant was only partially successful before Judge Morin, Judge Burke's decision to award claimant the entire requested fee cannot be upheld; in support of its contention, employer notes that claimant prevailed on only one of five issues on which he sought relief before the administrative law judge. Employer also asserts that there is no evidence that the fees and expenses incurred by counsel were reasonable or necessary.

We agree with employer that the fee awarded by Judge Burke cannot be affirmed; specifically, in light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), we hold that Judge Burke's fee award must be vacated and the case remanded for further consideration on this issue. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Construction Co.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

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[2]Claimant's contention that all doubts must be resolved in his favor lacks merit. The United States Supreme Court has held that the true doubt rule does not apply to cases under the Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C §556(d), which requires that the party seeking the award bear the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the present case, employer properly raised the issue of the amount of benefits before the administrative law judge, arguing that the fee was, *inter alia*, "unreasonable, excessive, and wholly inappropriate when evaluated against the results obtained." *See* Employer's Counsel's letter dated December 22, 1995. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)*(en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

In this case, Judge Burke did not address employer's specific contentions in awarding the fee; we therefore conclude that the administrative law judge erred in failing to consider the *Hensley* test when awarding counsel his requested fee. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Thus, we vacate the fee award and remand the case for consideration of the fee petition pursuant to *Hensley*.

Accordingly, the Decision and Order - Awarding Benefits of Administrative Law Judge Morin is affirmed. The Supplemental Decision and Order - Granting Attorney Fees of Administrative Law Judge Burke is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge