BRB No. 96-0692

GENE GRUMBOIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits, Order Granting in Part and Denying in Part Employer's Motion for Reconsideration, and Supplemental Decision and Order Granting Attorney Fee of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

David Hytowitz (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (Decision and Order), Order Granting in Part and Denying in Part Employer's Motion for Reconsideration (Order), and Supplemental Decision and Order Granting Attorney Fee (Supplemental Decision and Order)(94-LHC-2799) of Administrative Law Judge Thomas M. Burke 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. *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 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).

On February 1, 1989, claimant, a worker in a longshore gang, injured his left shoulder when he was struck by a cargo hook. Employer voluntarily paid benefits for various periods starting on June 1, 1989. In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits for periods when claimant experienced "flare-ups" from his left shoulder injury from February 25 to March 11, 1991, May 8 to May 22, 1991, and December 15 to December 26, 1993. The administrative law judge also awarded permanent partial disability benefits from December 6, 1990, and continuing, excluding periods when claimant was receiving temporary total disability benefits, after the parties had stipulated to December 6, 1990, as the date that claimant reached maximum medical improvement. The administrative law judge awarded these benefits based on an average weekly wage of $1,186.78, computed under Section 10(a) of the Act, 33 U.S.C. §910(a), and he found that claimant suffered a loss in wage-earning capacity of 50 percent, which he converted to the amount of $593.39. The administrative law judge further awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest. The administrative law judge denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), after excluding from the record Employer's Exhibit 62, Employer's Amended Application for Section 8(f) Relief.

Upon employer's Motion for Reconsideration, the administrative law judge reaffirmed his finding that claimant's average weekly wage is $1,186.78, and his award of permanent partial disability benefits to claimant, excluding periods when he awarded claimant temporary total disability benefits due to "flare-ups." Employer's request for relief pursuant to Section 8(f) was again denied.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $25,491.21, representing 75.575 hours of legal services at $200 per hour, 17.75 hours at $175 per hour, 28.75 hours at $135 per hour, and expenses in the amount of $2,888.71. Employer filed objections to the fee petition to which claimant's counsel replied and requested an additional $500 to reply to employer's objections. In a Supplemental Decision and Order, the administrative law judge considered employer's objections and awarded claimant's counsel the entire fee and expenses requested plus the additional $500 requested by claimant's counsel.

On appeal, employer challenges the administrative law judge's calculation of claimant's average weekly wage, and his awards of temporary total disability benefits during periods where claimant would experience "flare-ups" and permanent partial disability benefits compensating claimant for a 50 percent loss in wage-earning capacity. Employer also challenges the administrative law judge's exclusion of Employer's Exhibit 62 and his denial of relief under Section

8(f). In its supplemental appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds in support of the administrative law judge's award of benefits as well as his award of an attorney's fee.

We first address employer's challenges to the administrative law judge's award of disability benefits. Employer initially contends that the administrative law judge erred in determining claimant's average weekly wage. Employer argues that the administrative law judge should have averaged claimant's wages during the five years prior to claimant's injury, or alternatively, that claimant is bound to the average weekly wage of $444.31 he agreed to in a 1987 settlement of an unrelated work injury.

In determining claimant's average weekly wage, the administrative law judge stated he applied Section 10(a) as claimant worked substantially the whole of the year preceding the injury.[1] The administrative law judge computed claimant's average weekly wage as $1,186.78 using claimant's actual wages for the 52 weeks preceding the date he first was disabled due to the February 1, 1989, injury. Decision and Order at 6-7. On reconsideration, the administrative law judge reaffirmed this finding, rejecting employer's proposal to average claimant's hours for the five-year period prior to the work-related injury because claimant worked more hours in 1988 than he had previously. The administrative law judge reasoned that claimant suffered back injuries in 1981 and 1983 which caused him to miss work during the 1983 to 1987 period, and his wages were deflated for this reason. Order at 2.

Contrary to employer's contentions, the administrative law judge need not have averaged the wages claimant earned in the five years prior to the injury, as claimant's earnings increased in the year prior to his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Lozupone v. Stephano Lozupone and Sons*, 14 BRBS 462 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1981). Moreover, the administrative law judge was not required to find an average weekly wage of $444.31 because claimant agreed to that wage in a 1987 settlement. The 1987 settlement is for unrelated work injuries and the 1987 settlement did not state that an average weekly wage of $444.31 would be used in all future compensation cases. *See Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989); Cl. Ex. 26. As employer challenges the administrative law judge's method of determining claimant's average weekly wage but not his computation of the average weekly wage under Section 10(a), we affirm the administrative law judge's finding that claimant's average weekly wage is $1,186.78 as it is reasonable and supported by

[1]Section 10(a) looks to the actual wages of the injured worker, employed for substantially the whole year prior to the injury, as the monetary base for determination of the amount of compensation, and is premised on the injured employee's having worked the entire year prior to the injury. *Duncanson-Harrelson Co. v. Director OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded*, 462 U.S. 1101, *on remand*, 713 F.2d 462 (1983). It appears that the administrative law judge did not apply the formula specified in Section 10(a) to compute claimant's average weekly wage, but merely divided claimant's actual earnings in the year preceding his disability by 52. *See* 33 U.S.C. §910(c), (d)(1).

substantial evidence.

Employer next challenges the administrative law judge's award of temporary total disability benefits for periods when claimant would miss work due to "flare-ups" of his work-related left shoulder injury. Employer's challenge lacks merit. Although a temporary total disability award will subsume a permanent partial disability award for the same injury, an underlying permanent disability does not disappear during periods of "flare-ups." Therefore, if claimant has reached a state of permanent disability, a subsequent "flare-up" will not alter this finding. *See Leech v. Service Engineering Co.*, 15 BRBS 18 (1982); *see also Sizemore v. Seal & Co.*, 23 BRBS 101 (1989).

In this case, the administrative law judge awarded temporary total disability benefits after the stipulated date of maximum medical improvement as the uncontradicted statements of Drs. Richards and DiPaola required claimant to be off work due to "flare-ups" of his left shoulder injury after December 6, 1990. *See* Cl. Exs. 48, 51, 66, 71; Emp. Ex. 89. As the administrative law judge's award of permanent partial disability benefits abated during claimant's periods of temporary total disability, the administrative law judge's award of temporary total disability benefits does not permit claimant a double recovery. *See* Decision and Order at 15; Order at 2-3. We, therefore, affirm the administrative law judge's award of temporary total disability benefits during periods when claimant experienced "flare-ups" as it is supported by substantial evidence. *Leech*, 15 BRBS at 18.

Employer also contends that the administrative law judge erred by awarding claimant permanent partial disability benefits for a loss in wage-earning capacity of 50 percent.[2] In determining whether claimant has suffered a loss in wage-earning capacity, the administrative law judge must initially determine whether claimant's actual post-injury wages fairly and reasonably represent his wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If they do not, the administrative law judge must then determine what dollar amount does. In making both determinations, relevant considerations include claimant's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. A loss in wage-earning capacity may be found even if claimant's post-injury earnings exceed his pre-injury wages, so long as it is determined that he suffered a loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

Contrary to employer's contentions, the administrative law judge acted within his discretion in determining that claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity as he credited the testimony of claimant and his co-workers that claimant works only with assistance and must report to work seven days per week instead of five to maintain the same number of hours as before his injury. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14

[2]Employer's request that the Board remand this case to the administrative law judge for consideration of evidence that claimant now has a higher post-injury wage-earning capacity is denied. If employer wishes consideration of new evidence, it may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922. *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Devillier*, 10 BRBS at 649; Decision and Order at 7-10; Tr. at 119, 185, 193. Furthermore, the administrative law judge properly rejected employer's argument that claimant has not suffered a loss in wage-earning capacity since claimant's hours are not down due to the work-related 1989 injury. The administrative law judge accurately noted that claimant suffered several injuries prior to the 1989 injury which required claimant to take time off from work, thus deflating the number of work hours. Order at 3. Moreover, the administrative law judge's determination is supported by his crediting of claimant's testimony as well as the testimony of Mr. Ross, the vocational consultant, that claimant cannot perform 50 percent of the work that is available to him. Decision and Order at 10-12. Although employer questions the credibility of Mr. Ross' testimony, the administrative law judge rationally relied on it after considering employer's objections to this testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); Order at 3-4; Cl. Ex. 36; Emp. Ex. 39; Tr. at 265, 287, 298. The fact that claimant stipulated to a residual earning capacity of $444.31 in a 1987 settlement is irrelevant as the 1987 settlement is a compromise of the 1981 injury, and the 1989 injury is not an aggravation of the prior 1981 injury. *See generally I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1988). As the administrative law judge acted within his discretion in crediting the testimony of claimant, his co-workers, and Mr. Ross, we affirm the administrative law judge's finding that claimant suffered a loss in wage-earning capacity of 50 percent as supported by substantial evidence. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Employer next contends that the administrative law judge erred in denying it relief under Section 8(f). Section 8(f) shifts liability to pay compensation for permanent total or partial disability from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if employer establishes the following three prerequisites: 1) that the employee had an existing permanent partial disability prior to the employment injury; 2) that the disability was manifest to employer prior to the employment injury; and 3) that the current disability is not due solely to the most recent injury. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993). In order to establish the contribution element for purposes of Section 8(f) relief where the employee is permanently partially disabled, employer must show by medical evidence or otherwise that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury did not cause claimant's permanent partial disability. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, U.S. , 115 S.Ct. 1278, 29 BRBS 87 (CRT)(1995); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). The administrative law judge denied employer's request for relief pursuant to Section 8(f) as employer did not establish the contribution element. Decision and Order at 13-15; Order at 4-5.

Upon consideration of employer's challenge to the administrative law judge's denial of relief pursuant to Section 8(f), we hold that it fails to allege any error on the part of the administrative law judge and in essence is a recitation of the discredited "common sense" approach to the contribution element discussed in *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34

(CRT)(5th Cir. 1990).[3] Employer cites no evidence as to how claimant's previous injury materially and substantially contributes to claimant's permanent partial disability. Although claimant agreed, as part of a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), for a prior injury that he had a 35 percent loss in wage-earning capacity as a result of that injury, this agreement does not establish in and of itself that claimant's current 50 percent loss in wage-earning capacity is not due solely to the shoulder injury. *Quan*, 30 BRBS at 124. Employer does not explain why it is entitled to relief pursuant to Section 8(f) and thus does not adequately raise any issues for the Board to address. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986); 20 C.F.R. §802.211; Emp. Br. at 24-26. Consequently, we affirm the administrative law judge's denial of relief pursuant to Section 8(f).

Employer further contends that the administrative law judge erred in excluding Employer's Exhibit 62, Employer's Amended Application for Section 8(f) Relief. The administrative law judge's exclusion of evidence is reversible only if it is arbitrary, capricious, or an abuse of discretion. *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); 20 C.F.R. §702.338. In his Decision and Order and Order on reconsideration, the administrative law judge noted that Employer's Exhibit 62 was excluded from the record. Decision and Order at 13 n. 14; Order at 4. The administrative law judge excluded Employer's Exhibit 62 upon an objection at the hearing by claimant's counsel, Mr. Hytowitz, to a 1987 settlement document contained in the exhibit in pages 90D-90H as it differed in language on one page from the same settlement document found at Claimant's Exhibit 26. Tr. at 24-28. Although it appears that the objection to Employer's Exhibit 62 was only to one page of the settlement document, the administrative law judge excluded the entire exhibit, and employer did not object to its exclusion while the case was before the administrative law judge. Any error in the administrative law judge's exclusion of the entire exhibit is harmless as employer does not assert that any document contained in Employer's Exhibit 62 is sufficient to establish the contribution element for relief pursuant to Section 8(f).

We next address employer's challenge to the administrative law judge's award of an attorney's fee. Employer initially requests that the Board stay the award of the attorney's fee pending appeal. Employer's request is denied. A stay of the attorney's fee award pending appeal is unnecessary in light of employer's timely appeals as an attorney's fee award is not a compensation order and does not become effective until all appeals are exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Jenkins v. Federal Marine Terminals*, 14 BRBS 380 (1981); *see also Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

We also reject employer's challenge to the administrative law judge's award of the requested hourly rates of $200 and $135, for Mr. Hytowitz and an associate, respectively, and to specific entries on June 8, 1994, and May 12, 1995, over employer's objections, as employer has failed to establish that the administrative law judge abused his discretion. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

[3]This approach presumes that when a claimant has a history of prior injuries, the current disability is not due solely to the employment injury.

We further affirm the administrative law judge's rejection of employer's objections to "block billing" on certain dates as the administrative law judge acted within his discretion in overruling employer's objections because employer did not define "block billing." Lastly, the administrative law judge acted within his discretion in allowing the costs of three lay witnesses and the fee of one expert witness as he found that the witnesses presented necessary evidence in favor of claimant's case and the fees are not unreasonable. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983); 33 U.S.C. §928(d); 20 C.F.R. §702.135; Supplemental Decision and Order at 2. Consequently, we affirm the administrative law judge's award of an attorney's fee.

Accordingly, the administrative law judge's Decision and Order and Order Granting in Part and Denying in Part Employer's Motion for Reconsideration awarding benefits are affirmed. The administrative law judge's Supplemental Decision and Order Granting Attorney Fee is also affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge