BRB Nos. 89-3868,
89-3868A and 92-1195

STEVEN HESKIN)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
DULUTH, MISSABE & IRON RANGE) DATE ISSUED:
RAILWAY COMPANY)
)
Self-Insured)
Employer-Petitioner)
Cross-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Remanding for §8(f) Determination, the Supplemental Decisions and Orders - Granting Attorney's Fees, and the Decision and Order - Awarding Benefits and Denying §8(f) Relief of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

D. Edward Fitzgerald (Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A.), Duluth, Minnesota, for self-insured employer.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Remanding for §8(f) Determination, the October 20, 1989 Supplemental Decision and Order - Granting Attorney's Fees, the Decision and Order - Awarding Benefits and Denying §8(f) Relief, and the March 17, 1992 Supplemental Decision and Order - Granting Attorney's Fees (88-LHC-1432) of Administrative Law Judge Charles W. Campbell 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). Claimant cross-appeals the October 20, 1989 Supplemental Decision and Order - Granting Attorney's Fees. [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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

On December 6, 1984, claimant experienced pain in his lower back while placing a channel on a saw while working for employer as a welder. Claimant stated that he recovered from this incident after a few days, and that he did not recall any other remarkable instances of back pain until 1986. Claimant was laid off from work on July 31, 1986, and initially sought treatment for his back in early 1987. On June 11, 1987, claimant was rejected for regular employment based on a pre-employment physical performed by Dr. Hansen. On July 2, 1987, claimant underwent a lumbar laminectomy. On December 17, 1987, claimant filed a claim for benefits under the Act.

In his initial Decision and Order issued on May 18, 1989, the administrative law judge awarded claimant temporary total disability compensation from June 14, 1987 until December 29, 1987, and temporary partial disability benefits thereafter. Although employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief was listed as an unresolved issue to be addressed, the administrative law judge determined that as claimant was only seeking temporary disability compensation in connection with his injury, he had no authority to consider this issue. Accordingly, the administrative law judge remanded the claim for Section 8(f) relief to the district director with instructions that the award of temporary partial disability could be modified to an award of permanent partial disability if the district director deemed it appropriate. Subsequently, on October 20, 1989, the administrative law judge issued a Supplemental Decision and Order - Granting

[1] On June 18, 1980, the Board consolidated employer's appeal of the administrative law judge's Decision and Order - Awarding Benefits and Remanding for §8(f) Determination and appeal of the October 20, 1989 Supplemental Decision and Order - Granting Attorney's Fees (BRB No. 89-3868) with claimant's appeal of the October 20, 1989 Supplemental Decision and Order - Granting Attorney's Fees (BRB No. 89-3868A). We hereby consolidate these appeals with employer's appeal of the Decision and Order - Awarding Benefits and Denying §8(f) Relief and the March 17, 1992 Supplemental Decision and Order - Granting Attorney's Fees (BRB No. 92-1195) for the purposes of decision. 20 C.F.R. §802.104(a).

Attorney's Fees wherein he awarded claimant's counsel $9,284.81 in fees and costs. On September 15, 1989, the district director issued a finding that employer was not entitled to Section 8(f) relief and that claimant was permanently partially disabled commencing December 30, 1987. Thereafter, employer requested a hearing regarding that determination. A second hearing was held before the administrative law judge on April 24, 1990.

In a Decision and Order dated December 21, 1991, the administrative law judge awarded claimant permanent partial disability compensation commencing December 30, 1987, and denied employer's request for Section 8(f) relief. In a Supplemental Decision and Order - Granting Attorney's Fees dated March 17, 1992, the administrative law judge awarded claimant's attorney a fee of $1,937.50 for work done before him subsequent to the initial decision.

Employer appeals the administrative law judge's initial Decision and Order, contending that the administrative law judge erred in finding that the claim was timely. Employer also appeals the October 20, 1989, Supplemental Decision and Order Granting Attorney's Fees, contending that claimant's counsel's fee petition was not timely and that the hourly rate awarded by the administrative law judge is excessive. BRB No. 89-3868. Claimant responds, urging affirmance of the administrative law judge's finding that the claim was timely filed. Claimant, in addition, cross-appeals the October 20, 1989 Supplemental Decision and Order, asserting that the fee awarded is $2,100 too low because of a mathematical error made by the administrative law judge. BRB No. 89-3868A.

Employer also appeals the December 21, 1991, Decision and Order, arguing that the administrative law judge erred in awarding claimant permanent partial disability compensation, and in denying its claim for Section 8(f) relief. In addition, employer appeals the administrative law judge's March 17, 1992, Supplemental Decision and Order Granting Attorney's Fees, contending that claimant is not entitled to an attorney's fee. BRB No. 92-1195. The Director, Office of Workers' Compensation Programs (the Director), responds that as the administrative law judge properly determined that claimant's May 1984 injury did not constitute a pre-existing permanent partial disability, the denial of Section 8(f) relief should be affirmed. Claimant also responds, urging affirmance of the administrative law judge's March 17, 1992 fee award.

Timeliness Of The Claim

Section 13(a), 33 U.S.C. §913(a), applies in traumatic injury cases and provides that the right to compensation for disability shall be barred unless the claim is filed within one year from the time claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a); *Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting on other grounds). Section 13(b)(2) requires that a claim for compensation, in a case involving an occupational disease, be filed within two years after claimant is or should have been aware of the relationship between his disease, disability and employment. 33 U.S.C. §913(b); *Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993). Furthermore, Section 20(b) provides a presumption that a claim has been timely filed.

Fortier v. General Dynamics Corp., 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983).

In his Decision and Order - Awarding Benefits and Remanding for §8(f) Determination, the administrative law judge found that as claimant's back impairment was caused or aggravated by the heavy nature of his work over a period of time rather than by a single traumatic accidental injury occurring at a specific time, his injury was more similar to an occupational disease than a traumatic injury. The administrative law judge further noted that although it was possible that claimant may have made a connection between his back pain and his employment as early as 1986, claimant did not have reason to believe that his condition would reduce his wage-earning capacity on a permanent basis until he was turned down for regular work based on the results of a pre-employment physical performed on June 11, 1987. Accordingly, the administrative law judge determined that inasmuch as the claim was filed on December 17, 1987, within two years of claimant's June 11, 1987 date of awareness, the claim was timely filed.

On appeal, employer argues that in determining that the claim was timely filed, the administrative law judge erred in finding that claimant's back condition was an occupational disease entitling him to two years in which to file the claim, rather than a traumatic injury for which a claim must be filed within one year. Employer accordingly asserts that as claimant was clearly aware of the relationship between his back condition and his employment more than one year prior to the filing of the claim, the claim is barred under Section 13(a). We need not resolve this question, however, as regardless of whether claimant's condition is properly characterized as a traumatic injury or an occupational disease, the December 17, 1987 claim is timely on the facts presented in this case.

In both an occupational disease and traumatic injury case, the relevant time period does not commence until claimant is aware of an impairment in his earning capacity. Section 13(b) explicitly provides that the time limit for occupational diseases does not commence until claimant is aware of the relationship between his disease, disability and employment. *See* 20 C.F.R. §§702.212(b), 702.222(c). Interpreting Section 13(a), the Board and the United States Courts of Appeals have consistently held that the statutory limitations period for traumatic injuries does not commence until the employee knows or should have known that his injury is likely to impair his earning capacity. *Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970); *Love*, 27 BRBS at 150; *Nelson*, 25 BRBS at 280. Moreover, a "claimant is not injured for purposes of the Section 13(a) statute of limitations until he [becomes] aware of the *full character, extent, and impact of the harm done to him.*" *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991), *quoting Todd Shipyards v. Allan*, 666 F.2d 399 (9th Cir. 1982), *aff'g* 12 BRBS 589 (1980), *cert. denied*, 459 U.S. 1034 (1982)(quoting *Stancil*, 436 F.2d at 279)(emphasis in original).

The evidence of record supports the administrative law judge's determination that claimant was not aware that his back condition was likely to result in a permanent impairment of his wage-earning capacity until he was precluded from returning to his regular work based on the results of the

pre-employment physical performed on June 11, 1987. Claimant testified that prior to 1984 he had never had any back trouble. Claimant stated that in 1986 he started experiencing recurring back pain which usually would subside within a day or two and that he continued to perform his usual work until July 1986, when he was laid off. After he was laid off, claimant sought medical treatment for his back pain in March 1987 from Dr. Boyce, a general practitioner, who prescribed physical therapy. Following several visits where claimant was treated for his pain, on May 21, 1987, Dr. Boyce interpreted a May 18, 1987, CT scan as showing a central L-4 protrusion and recommended physical therapy with traction and extension exercises.

Dr. Donley first examined claimant on June 4, 1987, and agreed with Dr. Boyce's assessment of the May 18, 1987, CT scan. Dr. Donley diagnosed a central disc protrusion at L-4 without evidence for a neurologic deficient and a relatively normal lumbar spine examination; he advised claimant to return to work on a light duty basis. After undergoing a pre-employment physical performed by Dr. Hansen on June 11, 1987, claimant was apparently informed that in light of Dr. Donley's limitation to light duty work, there was no work available which claimant could perform. Claimant specifically testified that he first recognized that his back injury was likely to affect his ability to perform his usual work after he was rejected for re-entry based on the results of this pre-employment physical. Tr. at 36-37. Based on this evidence, the administrative law judge rationally determined that claimant was not aware of the effects of his injury on his wage-earning capacity until June 11, 1987. As the December 17, 1987 claim was filed within one year of this date, it is timely under Section 13 regardless of whether claimant's injury was a traumatic injury or an occupational disease. Accordingly, we reject employer's arguments and affirm the administrative law judge's finding that the claim was timely filed. *See Love*, 27 BRBS at 152-153.

The October 30, 1989 Award of Attorney's Fees

We also reject employer's and claimant's arguments relating to the fee award made in the Supplemental Decision and Order dated October 20, 1989. Subsequent to the administrative law judge's initial Decision and Order, claimant's counsel submitted an attorney's fee petition for work performed before the administrative law judge, requesting $9,284.81, which claimant's counsel stated represented 62.6 hours of work at $150 per hour plus $1,459.81 in expenses. Thereafter, employer filed objections. In making the fee award, the administrative law judge noted that although claimant's attorney stated that he was seeking an hourly rate of $150, in actuality the fee requested was computed based on an hourly rate of $125,[2] an amount which he found to be reasonable. The administrative law judge further noted that although claimant's counsel computed the fee based on 62.6 hours of work, the actual number of hours itemized in the fee petition amounted to 82.4 hours. After disallowing three hours claimed for work performed before the district director, the administrative law judge determined that the remaining 79.4 hours claimed were compensable. The administrative law judge then concluded that as claimant's counsel only requested $7,825.00 ($9,284.81 - $1,459.81 for expenses = $7,825.00) for the services claimed, the actual hourly rate requested was less than the $100 per hour which employer deemed to be

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[2]$125 x 62.6 hours = $7,825.00. $7,825.00 plus the advanced costs of $1,459.81 = $9,284.81.

appropriate; he therefore awarded claimant's counsel the total fee requested.

The fee award contained in the October 20, 1989 Supplemental Decision and Order is affirmed. Employer contends that the administrative law judge abused his discretion in entertaining the fee petition, as it was filed six weeks beyond the time set by the administrative law judge in his Decision and Order - Awarding Benefits. Employer notes that 20 C.F.R. §702.132 states that the fee petition must be filed within the time limit specified by the administrative law judge and asserts the administrative law judge had no basis for modifying the regulation. We reject this argument. In his Decision and Order, the administrative law judge ordered claimant's attorney to file a fee petition within 30 days of receipt of the decision. Although claimant's attorney's fee petition was not filed until August 15, 1989, beyond the time limit specified, the administrative law judge acted within his discretion in granting claimant's motion to extend the time limits and excusing claimant's counsel's untimely filing based on a finding of "excusable neglect" pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, FED. R. CIV. P. 6(b). *See generally Muscella,* 12 BRBS at 274. It is within the administrative law judge's discretion to extend the time limits he has set and excuse the failure to comply with the initial order.

Employer also contends that the $125 hourly rate approved by the administrative law judge is too high. As previously discussed, however, the actual fee awarded was based on an hourly rate less than the $100 hourly rate which employer states would be appropriate. Moreover, we reject employer's contention that the fee should be lowered because it amounts to more than one-third of the benefits awarded. As a result of the administrative law judge's initial Decision and Order, claimant was awarded substantial temporary total disability and temporary partial disability compensation, as well as medical benefits and interest in what amounted to a highly contested case. Claimant ultimately received a continuing award of permanent partial disability benefits. Employer, therefore, has not met its burden of showing that the fee awarded by the administrative law judge was unreasonable in light of the benefits obtained. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Rogers v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 89-3716 (August 19, 1993)(Brown, J., dissenting).[3]

We also reject claimant's contention on cross-appeal that the fee awarded was $2,100[4] too low because of the mathematical error made by the administrative law judge in failing to calculate the award based on the actual 79.4 hours of attorney time spent while the case was before the

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[3]Employer also contends that claimant's counsel's fee petition does not comply with the regulation, 20 C.F.R. §702.132(a), in that it lists $150 per hour as claimant's average earnings in contingent fee cases rather than his normal Longshore Act billing rate. We need not address this argument which is being raised for the first time on appeal. *Clophus v. Amoco Production Co.*, 21 BRBS 261, 265-266 (1988). The administrative law judge, moreover, did not abuse his discretion in reviewing the petition based on logical inferences regarding the claimed rate.

[4]This figure represents the 16.8 hour difference between the 62.6 hours claimed and the 79.4 hours of approved itemized hours times an hourly rate of $125.

administrative law judge. The mathematical error alleged, however, was not made by the administrative law judge, but rather, by claimant's own attorney. In entering the fee award, the administrative law judge specifically noted the discrepancy between the 62.6 hours which claimant's counsel claimed were compensable in the fee petition and the 82.4 hours actually itemized. Acting within his discretion, he, nonetheless, found that the fee requested was reasonable. As we find no merit to the parties' contentions on appeal, the fee award made in the October 1989 Supplemental Decision and Order - Granting Attorney's Fees is affirmed.

The Award of Permanent Partial Disability Compensation

Initially, we reject employer's assertion that the administrative law judge erred in concluding that the permanency of claimant's condition was at issue merely because employer filed an application for Section 8(f) relief. Prior to the hearing, the parties entered into the following stipulation: "This hearing stipulation to have no effect on the prior finding of employee earning capacity, however, it is understood that the court will determine whether employee's disability is permanent versus temporary." ALJ-4. Although employer now contends that it had no objection to a finding of permanent partial disability beginning on December 30, 1987 only if Section 8(f) relief was awarded, the permanency of claimant's disability was clearly at issue by virtue of the parties' stipulation. The administrative law judge reasonably found that claimant became permanently partially disabled as of December 30, 1987, based on the opinion of claimant's treating physician, Dr. Donley, who indicated that claimant reached maximum medical improvement six months after his June 30, 1987 laminectomy. CX-9 at 15. Because the administrative law judge's finding that permanency was reached as of December 30, 1987 is rational and supported by substantial evidence, the award of permanent partial disability compensation is affirmed. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

The Denial of Section 8(f) Relief

We also reject employer's argument that the administrative law judge erred in denying employer Section 8(f) relief based on his prior December 6, 1984 work injury.[5] In denying employer Section 8(f) relief, the administrative law judge determined that the work-related back injury which claimant sustained on December 6, 1984, was insufficient to establish a pre-existing permanent partial disability within the meaning of Section 8(f). Employer argues on appeal that the administrative law judge's finding in this regard cannot stand because it is inconsistent with his

[5]Section 8(f) of the Act shifts liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. In order to be entitled to Section 8(f) relief where claimant is permanently partially disabled, employer must establish that claimant had a manifest pre-existing permanent partial disability, which combined with claimant's subsequent work injury to produce a materially and substantially greater degree of disability than that which would have resulted from the subsequent work injury alone. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Readel v. Foss Launch & Tug*, 20 BRBS 229 (1988); 33 U.S.C. §908(f)(1).

determination in his initial Decision that the filing of claimant's report of injury regarding this injury was sufficient to charge employer with actual knowledge of a compensable injury for purposes of Section 12(d)(1) of the Act, 33 U.S.C. §912(d)(1)(1988). We disagree. Initially, we note that the administrative law judge did not find that claimant's filing of an injury report with regard to the December 6, 1984 injury was sufficient to establish employer's actual knowledge of a compensable injury; he merely determined that this report in conjunction with the results of the pre-employment physical was sufficient to charge employer with actual knowledge that claimant's injury was work-related.

Even if the administrative law judge did, as employer claims, determine that claimant's filing of an injury report was sufficient to establish employer's actual knowledge of a compensable injury, the Director correctly asserts that this conclusion does not equate to a finding that claimant's December 6, 1984 injury constituted a pre-existing permanent partial disability under Section 8(f). Contrary to employer's contentions, the administrative law judge reasonably determined that the December 6, 1984 injury did not constitute a pre-existing permanent partial disability within the meaning of Section 8(f) because it did not result in any serious lasting physical problem. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992), *quoting C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Claimant testified that although he did complete an accident report for employer in conjunction with the December 6, 1984 incident, he completed work that day, he did not seek medical attention as a result of the incident, and his back symptoms subsided in about two days. Because the administrative law judge's finding that claimant's pre-existing December 6, 1984 back injury did not constitute a pre-existing permanent partial disability within the meaning of Section 8(f) is rational and supported by substantial evidence,[6] the denial of Section 8(f) relief is affirmed.[7]

The March 17, 1992 Award of Attorney's Fees

Finally, employer challenges the award of an attorney's fee contained in the March 17, 1992

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[6]Employer also maintains that the fact that the doctors of record were unanimous in testifying that the 1984 injury contributed to the chronic process which ultimately resulted in claimant's surgery indicates that claimant never recovered from this injury and that accordingly it constituted a pre-existing permanent partial disability under Section 8(f). The fact, however, that the medical evidence was in general agreement that claimant's back condition was caused by a chronic process related to his employment activities, including the December 1984 work incident, does not mandate a finding that this injury resulted in a serious lasting physical condition sufficient to constitute a pre-existing permanent partial disability under Section 8(f).

[7]Employer contends that the affidavit of employer's timekeeper, Mr. Anderson, proves that claimant was using vacation time for sick days as a result of his back pain. The administrative law judge, however, acted within his discretion when he determined that there could be many reasons for claimant's taking vacation days and that employer had failed to prove that claimant used vacation days due to back pain.

Supplemental Decision and Order. Claimant's counsel submitted a fee petition for work done before the administrative law judge subsequent to the administrative law judge's initial Decision and Order in which he requested a total fee of $1,250, representing 10 hours of legal services at an hourly rate of $125. Employer filed no objections, and the administrative law judge awarded the full fee requested. Although employer now contends that claimant's counsel is not entitled to a fee because he did nothing beyond what was done at the initial hearing to establish the presence of permanent partial disability, we decline to address this argument which is being raised for the first time on appeal. *Clophus v. Amoco Production Co.,* 21 BRBS 261, 265-266 (1988). Accordingly, the fee award contained in the March 17, 1992 Supplemental Decision and Order is affirmed.

Accordingly, the Decision and Order - Awarding Benefits and Remanding for §8(f) Determination and the October 29, 1989 Supplemental Decision and Order - Granting Attorney's Fees are affirmed. BRB Nos. 89-3868 and 89-3868A. The Decision and Order - Awarding Benefits and Denying §8(f) Relief and the March 17, 1992 Supplemental Decision and Order - Granting Attorney's Fees are also affirmed. BRB No. 92-1195.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge