BRB Nos. 90-1116
and 90-1116A

CLARENCE ELLSWORTH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION AND ORDER

Appeals of the Decision and Order Denying Compensation; Awarding Medical Benefits of Steven A. Halpern, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle (Stafne & Doyle), Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*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).

Employer appeals and claimant cross-appeals the Decision and Order Denying Compensation; Awarding Medical Benefits (89-LHC-2513) of Administrative Law Judge Steven E. Halpern 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 7, 1985, claimant sustained injuries when he was hit in the head by a metal object, which had fallen about 25 feet. Claimant had numerous symptoms as a result of this work-related accident, including cognitive problems, headaches, light headedness, memory loss, and pain in his left arm and shoulder. After undergoing extensive medical treatment, claimant returned to work for employer. The parties stipulated that claimant reached maximum medical improvement on June 29, 1987. Employer voluntarily paid claimant compensation through July 10, 1987. Claimant sought permanent partial disability compensation thereafter and medical benefits for past and continuing chiropractic care.

The administrative law judge denied the claim for permanent partial disability compensation, finding that claimant failed to establish a loss in his wage-earning capacity. *See* 33 U.S.C. §908(h). The administrative law judge further noted that although he favored *de minimis* awards under appropriate circumstances, a *de minimis* award was not warranted in this case because claimant failed to establish a reasonable likelihood of future economic harm. The administrative law judge, however, did award claimant medical benefits for past and continuing chiropractic treatment.

On appeal, employer contends that the administrative law judge erred in awarding medical benefits for claimant's chiropractic care. BRB No. 90-1116. Claimant responds urging that the award of medical expenses be affirmed. Claimant cross-appeals the denial of disability compensation, arguing that he sustained a continuing loss in his wage-earning capacity or that, at the very least, he is entitled to a *de minimis* award. BRB No. 90-1116A. Employer responds urging that the administrative law judge's denial of disability benefits be affirmed.

Initially, we reject employer's assertion that the administrative law judge erred in awarding claimant medical benefits for the chiropractic treatment provided by Dr. Hankins. Employer contends that inasmuch as claimant chose Dr. Hopfner, his family doctor, as his initial free choice of physician, claimant is only entitled to medical care for treatment provided by Dr. Hopfner or a referred specialist. Employer maintains that inasmuch as it is undisputed that claimant was not referred to Dr. Hankins by Dr. Hopfner, the administrative law judge erred in awarding claimant reimbursement for Dr. Hankins' treatment. Moreover, employer avers that there is no evidence which indicates that further chiropractic care is either reasonable or necessary.[1]

[1]Although employer also contends that it is not liable for this medical care because claimant aggravated his condition when he fell from a ladder during subsequent covered employment with Jones Washington Stevedoring Company, we need not address this argument as it is raised for the

Section 7(d) of the Act, 33 U.S.C. §907(d)(1988), generally requires that claimant receive authorization from employer prior to seeking medical help in order for employer to be liable for claimant's medical expenses. Once employer refuses to provide treatment or to satisfy claimant's request for treatment, however, claimant is released from the obligation of continuing to seek employer's approval. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 95 (1991); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Claimant then need only establish that the treatment he subsequently procured on his own initiative was necessary for the injury in order to be entitled to such treatment at employer's expense. *See Roger's Terminal and Shipping Corp v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989).

In the case at hand, Dr. Hankins' chiropractic treatments were paid for by American General, claimant's private insurance carrier, until the later part of 1988, when this carrier refused further payment. At that time, claimant requested payment of these expenses from employer. In response to claimant's request, employer apparently did pay for services rendered by Dr. Hankins on October 6, 1988. *See* CX. 30, p. 259. By letter dated January 11, 1989, however, employer, informed claimant's attorney that in light of claimant's unwillingness or inability to attend a medical examination which it had scheduled with the Central Seattle Panel of Consultants scheduled for January 5, 1989, it would not pay for any further chiropractic treatment after that date.[2] CX. 27, p. 167. Inasmuch as employer refused claimant's request for authorization for this treatment, claimant is entitled to payment of these expenses so long as the treatment he procured from Dr. Hankins was necessary. As employer does not challenge the administrative law judge's determination that the chiropractic care already provided by Dr. Hankins was necessary, contending only that future chiropractic treatment is unwarranted, the administrative law judge's award of medical expenses for the treatment Dr. Hankins previously provided is affirmed.

With regard to future chiropractic care, employer asserts that such treatment is neither reasonable nor necessary because no medical doctor, including claimant's attending physician, has recommended such treatment, and numerous physicians have recommended that chiropractic manipulation cease. Employer further avers that claimant has already exceeded the normal chiropractic regimen without apparent benefit, and has in fact discontinued such treatment without ill effect. Finally, employer asserts that unlimited chiropractic care is unwarranted because claimant could obtain the same benefit through a self-directed exercise program.

There is medical evidence in the record to support employer's position, *i.e.*, the medical reports of Drs. Aigner, Birkland and Silverman. The administrative law judge, however, reasonably determined based upon the February 9, 1989 opinion of the Central Seattle medical panel, who

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first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261, 265-266 (1988).

[2]Employer, however, did inexplicably pay a bill for services rendered by Dr. Hankins on May 19, 1989. CX. 30, p. 260.

conducted the most recent examination of claimant at employer's request, that further chiropractic treatment was warranted. The Central Seattle panel opined that although claimant could maintain his current level of symptomatology with appropriate exercises on a self-directed program, "continuation of chiropractic treatment is likely to be supportive and palliative." Ex. 24, p.246. Inasmuch as employer has failed to establish that the administrative law judge's decision to credit this medical evidence was either inherently incredible or patently unreasonable, the administrative law judge's award of continuing chiropractic medical benefits is affirmed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

On cross-appeal, claimant contends that the administrative law judge erred in denying him disability compensation. Claimant avers that his increased post-injury earnings do not represent his post-injury wage-earning capacity but merely reflect his attempt to recoup income which he previously lost while he was temporarily totally disabled, and to restore his family to financial health before his condition further deteriorates. Claimant further asserts that he has sustained actual economic loss as a result of the work injury because there are some longshoring jobs which he now avoids and because he no longer works night shifts with the corresponding greater pay differential. Claimant, in addition, avers that he lost a gratuity of $50 per week for preaching on Sundays at The New Hope Fellowship Church, having been forced to terminate his position there as an associate minister because of problems with slurred speech and concentration related to the work injury.

Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall equal his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. Only if such earnings do not represent the claimant's wage-earning capacity should the administrative law judge calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See* 33 U.S.C. § 908(h). The objective of the inquiry concerning the claimant's wage-earning capacity is to determine the post-injury wage that would be paid under normal employment conditions to the claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some of the factors to be considered in determining whether the claimant's post-injury earnings fairly and reasonably represent this post-injury wage-earning capacity include the claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, the claimant's earning power on the open market, and any other reasonable variables that could form a factual basis for this determination. *See Darcell v. FMC Corp., Marine and Rail Equipment Division*, 14 BRBS 294 (1981); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979).

If the claimant's post-injury work is found to be continuous and stable, the claimant's post-injury earnings are more likely to be found to reasonably and fairly represent his wage-earning capacity. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991). Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically

capable of performing it, and whether claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). If claimant's current employment meets the aforementioned standards, claimant is not economically disabled even though he may continue to suffer some physical impairment as a result of his injury. *See Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 275-276 (1990). Higher post-injury earnings, however, do not preclude an award of compensation where claimant has actually sustained a loss in his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

We reject claimant's assertion that the administrative law judge erred in finding that his higher post-injury wages reasonably and fairly represent his post-injury wage-earning capacity.[3] The administrative law judge rationally determined based on wage and earning records submitted by employer that although claimant has ongoing symptomatology which makes him somewhat selective in the work he accepts, he has been able to work more hours and to consequently earn substantially more money post-injury. These wage records indicate that in the year preceding the accident, claimant averaged 37.3 hours a week as a longshoreman, but in 1988, he averaged 53.8 hours per week and in 1989, 57.6 hours per week. The wage records also belie claimant's assertion that he limited himself to lighter duty work following his injury; they indicate that claimant has increased his hours in the heavier longshore jobs such as holdman, lasher, boom man, side runner and linesman. The administrative law judge also correctly noted that while claimant was a "B" registered longshoreman at the time of injury, he is now an "A" registered longshoreman, which affords him greater employment opportunities and increases his wage-earning capacity.

Claimant, in essence, concedes that under current economic conditions he has been able to obtain work which he is able to perform, but maintains that he has nonetheless sustained an economic loss because he must now avoid some longshore work which he was previously able to perform and because he no longer accepts night work with the premium pay differential. That claimant may no longer be able to accept all of the work which he could have performed previously does not mandate a finding of disability, where, as here, claimant has successfully obtained and performed alternate employment for more than two and one-half years on a regular and continuous basis, having worked more hours and earned more money without adverse consequences. *See generally Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The administrative law judge acted within his discretion in concluding based on the record before him that there was no convincing evidence that claimant's ability to obtain and perform such work was likely to decrease in the reasonable foreseeable future. As the administrative law judge evaluated the evidence of record pursuant to the factors relevant to Section 8(h) and there is substantial evidence in the record to support his conclusion that claimant's actual earnings represent his wage-earning capacity, we affirm his finding that claimant has sustained no actual loss in his wage-earning capacity. *Burkhardt*, 23 BRBS at 277; *Cf. Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (CRT)(9th Cir. 1982),

[3]Contrary to claimant's assertions on cross-appeal, the Section 20(a), 33 U.S.C. §920(a), presumption does not aid claimant in establishing the nature and extent of disability. *Brown v. Potomac Electric Power Co.*, 15 BRBS 337 (1983); *Holton v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1981).

cert. denied, 459 U.S. 1034 (1982).

Claimant's assertion that the administrative law judge erred in failing to enter a *de minimis* award similarly must fail. In order to justify a *de minimis* award, claimant must establish a present physical disability and the reasonable likelihood of a future loss of wage- earning capacity. *See, e.g., Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.9, 18 BRBS 12, 32 n.9 (CRT)(4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In the present case, the administrative law judge determined that a *de minimis* award is not appropriate because the evidence does not support a finding that claimant is likely to become unable to perform his post-injury longshore work in the reasonably foreseeable future. The administrative law judge termed claimant's chance of becoming worse in the future "sheer speculation." As the administrative law judge's finding that claimant had no reasonable expectation of future loss in wage-earning capacity is rational and consistent with the evidence of record, the administrative law judge's denial of a *de minimis* award in this case is affirmed.

Claimant's counsel has also petitioned for an attorney's fee of $4,008 representing 26.72 hours of services at a hourly rate of $150 for work performed before the Board. Employer did not file objections to the fee petition. Any fee awarded by the Board must be reasonably commensurate with the necessary work done, the quality of the representation, the complexity of the issues involved, and the amount of benefits awarded. 20 C.F.R. §802.203. As claimant was unsuccessful in his appeal of the denial of disability compensation, the time requested for services performed in connection therewith is denied. Accordingly, we disallow the .37 hours requested on March 14, 1990 and March 15, 1990 to prepare the appeal, the 11.75 hours billed on October 7, 1990 through October 9, 1990, for the preparation of claimant's brief on appeal, and the .3 hours billed on November 6, 1990 to review employer's reply brief. The 1.3 hours claimed on November 16, 1990 for review of costs and a letter to Judge Halpern regarding unpaid costs is also disallowed, as this work was performed before the administrative law judge. *See* 20 C.F.R. §802.203(d).

Claimant's counsel, however, is entitled to a fee reasonably commensurate with the necessary work performed in successfully defending employer's appeal of the award of medical benefits. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989); 33 U.S.C. §928; 20 C.F.R. §802.203(b). Accordingly, we award claimant's counsel a fee for the remaining time claimed based on the requested hourly rate of $150. *See Canty*, 26 BRBS at 158. Claimant's counsel is therefore entitled to an attorney's fee of $1,857.00, representing 12.38 hours at $150 per hour, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order Denying Compensation; Awarding Medical Benefits is affirmed. Claimant's counsel is awarded a fee of $1,857.00 for work performed before the Board.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge