BRB No. 97-0225

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| FRANK KINLAW | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| STEVENS SHIPPING AND TERMINAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| | ) | |
| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), Charleston, South Carolina, for claimant.

Bert G. Utsey, III (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees[1] (94-LHC-2427) of Administrative Law Judge Vivian Schreter-Murray 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 supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman and 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,

[1]By Order dated December 12, 1996, employer's appeal of the administrative law judge's Decision and Order and Decision and Order on Reconsideration, BRB No. 97-0225, was consolidated for purposes of decision with its appeal of her award of attorney fees. BRB No. 97-0225S.

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).

Claimant, a footman, suffered an aggravating back injury on August 1, 1993, during the course of his employment, which resulted in surgery and a recommendation for a second surgical intervention which claimant declined. Claimant retired on a disability pension in May 1994, following surgery for an unrelated condition and is presently working part-time with a wage-earning capacity of between five and six dollars per hour.

In her Decision and Order, the administrative law judge found that claimant was unable to return to his pre-injury employment duties with employer and awarded, *inter alia*, claimant compensation for a permanent partial disability commencing March 14, 1994, with adjustments pursuant to Section 10(f), 33 U.S.C. §910(f). On reconsideration, the administrative law judge vacated her award of Section 10(f) adjustments but reaffirmed her conclusions regarding claimant's inability to return to his usual employment duties with employer.

Thereafter, claimant's attorney submitted a fee petition to the administrative law judge, requesting a fee of $14,306, representing 57.68 hours of services at an hourly rate of $300 for claimant's lead attorney, and $125 per hour for claimant's associate attorney, as well as costs of $1,514.43. Employer filed objections to the fee petition. In her Supplementary Decision and Order Awarding Attorney Fees, the administrative law judge considered employer's specific objections, reduced both the hourly rates and the number of hours requested by counsel, and awarded counsel a sum of $11,689.43 in fees and costs.

Employer now appeals, arguing that the administrative law judge erred in concluding that claimant could not return to his pre-injury employment duties with employer. Additionally, employer challenges the fee awarded to claimant's counsel. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's determination that claimant is incapable of performing his pre-injury employment duties with employer. Specifically, employer avers that any disability sustained by claimant terminated as of Dr. Forrest's March 10, 1994, report which released claimant to return to work as a footman. *See* EX 7. 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). 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, the administrative law judge compared Dr. Forrest's opinion regarding claimant's physical restrictions with the requirements of claimant's usual work when considering claimant's ability to resume his usual employment duties with employer. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). In releasing claimant to

return to work, Dr. Forrest prohibited claimant from more than occasional bending, lifting over 20 pounds, and required that claimant be allowed to sit or stand as needed. *See* EX 7. The administrative law judge found that claimant's work duties as a footman required the processing of 35 containers per hour, *i.e.*, one container every 102 seconds, during which time claimant would be active. *See* Decision and Order at 6. Pursuant to this finding, the administrative law judge specifically rejected employer's contention that there is enough time between containers for claimant to sufficiently rest. Moreover, the administrative law judge rejected employer's position that there is a relief man available, a break room in which claimant could rest, and an hour lunch break in the middle of the work day, concluding that the relief man would have to provide relief for the entire crew and not just claimant, that there was no place to sit in the vicinity of claimant's job, and that claimant's safety duties would preclude his sitting and standing as needed. *See id.* at 6-7. Accordingly, after additionally finding that there was nothing in the record to support a conclusion that Dr. Forrest knew the specific detailed physical requirements of claimant's job, and that claimant would be allowed to sit and/or stand based on the needs of the job and not his own, the administrative law judge concluded that claimant's usual employment duties as a footman are not within the medical restrictions set by Dr. Forrest. *See id.*

It is well established that all adjudicative and factfinding functions reside in the administrative law judge. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The administrative law judge's findings based upon the testimony of Dr. Forrest and claimant, that claimant's return to his pre-injury job was precluded by his physical restrictions is rational and supported by substantial evidence. We therefore affirm the administrative law judge's determination that claimant is incapable of resuming his pre-injury work with employer, and his consequent award of disability compensation to claimant.

Lastly, employer challenges the hourly rates awarded to claimant's counsel by the the administrative law judge. In its fee petition, claimant's counsel requested a uniform hourly rate of $300 for all services provided to claimant by lead counsel, and $125 per hour for services provided by associate counsel. In addressing employer's objection to this requested hourly rate, the administrative law judge considered the location where the instant case arose, the qualifications and experience of counsel, the complexity of the issues, the time expended on the prosecution of the claim, and the degree of success obtained by claimant. Based on these factors, the administrative law judge reduced the hourly rate requested by counsel and awarded a fee based upon a rate of $275 per hour for claimant's lead attorney's trial time, $250 per hour for non-trial time performed by claimant's lead attorney, and $90 per hour for services rendered by claimant's associate counsel. Thus, inasmuch as the administrative law judge considered employer's specific objection when addressing counsel's fee petition and employer has not established an abuse of discretion, we reject employer's contention that the hourly rates awarded to claimant's counsel must be reduced.

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Reconsideration, and Supplementary Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge