RUSSELL J. DAVIS	)	BRB No. 97-310
Claimant-Respondent	)	
v.	)	
NORTHWEST MARINE, INCORPORATED	)	
and	)	
LEGION INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
RUSSELL J. DAVIS	)	BRB No. 97-442
Claimant-Petitioner	)	
v.	)	
NORTHWEST MARINE, INCORPORATED	)	DATE ISSUED:______________
and	)	
LEGION INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Thomas Schneider, Administrative Law Judge, and the Compensation Order of Karen P. Staat, District Director, United States Department of Labor.

Jeffery S. Mutnick and Robert K. Udziela (Pozzi, Wilson, Atchison, LLP), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (94-LHC-3338) of Administrative Law Judge Thomas Schneider, and claimant appeals the Compensation Order (OWCP No. 14-106743) of District Director Karen P. Staat, 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant was a sheet metal worker for a roofing company, and in 1976, he fell off a roof, fracturing both elbows, his left heel, his nose and his skull.[1] He underwent therapy and against his doctor's wishes, he began sheet metal work at the shipyard. Cl. Dep. at 5-6; Tr. at 63. On February 15, 1991, claimant injured his left arm when he was carrying ducting through a doorway and it got caught, twisting his arm. Cl. Dep. at 12-13. Claimant continued to work until he underwent a hernia operation. He first saw Dr. Post for his left arm injury on March 5, 1991, and following recovery from the hernia operation, claimant returned to work in April 1991 and continued until August 1991 in a light duty capacity as a "guidance foreman" (instead of "working foreman"). The course of conservative treatment for claimant's arm was not successful, so Dr. Post referred claimant to Drs. Nye and Gill who performed surgery in March 1992. The surgery was ultimately unsuccessful. Thereafter, claimant worked as a consultant for employer for periods in 1992. He underwent rehabilitation and began work as a dispatcher for a towing company in January

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[1]Claimant sustained a displaced comminuted fracture of the radial head in his left elbow. He underwent surgery to insert a prosthesis. Later, when the prosthesis loosened, he underwent surgery to have it removed. Emp. Ex. 6; SAIF Ex.A 11. In 1980, Oregon awarded claimant state workers' compensation benefits for a 30 percent loss of use of his left arm, a 20 percent loss of use of his right arm, and a 15 percent loss of use of his left foot. Emp. Ex. 3; SAIF Ex.A 44.

1995. Cl. Dep. at 36, 38, 41-42; Tr. at 64-66. Claimant filed a claim for permanent partial disability benefits pursuant to the schedule for his arm injury as well as permanent partial disability benefits for a loss in wage-earning capacity due to the resultant neck and shoulder conditions.

The administrative law judge found that modified use of claimant's left arm caused his shoulder pain and that such pain results from the 1991 injury. Decision and Order at 6. Consequently, he awarded claimant temporary total disability benefits pursuant to Section 8(b) from February 15, 1991, through May 19, 1993, permanent partial disability benefits pursuant to Section 8(c)(1) for a 35 percent impairment to the left arm, and permanent partial disability benefits pursuant to Section 8(c)(21) for a loss of wage-earning capacity due to an injury to the left shoulder, commencing at the termination of the scheduled benefits. Decision and Order at 7-8. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied employer's motion for reconsideration, and he awarded claimant's counsel an attorney's fee in the amount of $14,041.55. Subsequently, the district director awarded claimant's counsel a fee of $2,083.13, of which $804.38 is payable by employer. Employer appeals the administrative law judge's award of benefits, and claimant responds, urging affirmance. BRB No. 97-310. Claimant appeals the district director's fee award, and employer responds, moving to strike attachments to claimant's brief and urging affirmance of the fee award. BRB No. 97-442.

Disability

Employer contends claimant failed to establish entitlement to disability benefits for a shoulder condition resulting from the 1991 work-related arm injury. Specifically, employer argues that claimant failed to notify it of the shoulder injury prior to the formal hearing with the administrative law judge. Additionally, employer asserts that claimant failed to establish a shoulder injury that was the natural result of the work-related arm injury, that the administrative law judge erred in awarding benefits for a 35 percent impairment to claimant's arm, and that even if there is a work-related shoulder injury, claimant failed to prove the shoulder injury prevented him from returning to his usual work. Claimant responds, arguing that employer was aware of his shoulder condition well before the hearing, that he is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking his shoulder condition to his employment and that substantial evidence supports the administrative law judge's award of benefits.

Initially, the administrative law judge found that employer was not prejudiced by claimant's failure to mention the shoulder condition on his LS-18 form, Pre-Hearing Statement, because employer became aware of the injury in April 1995 and the hearing occurred in October 1995. Tr. at 79. The evidence of record supports the administrative law judge's determination. Although claimant did not separately mention his shoulder injury on the LS-18 or in his other pre-hearing statements, an April 1995 letter written by Dr. Post indicated claimant had left shoulder girdle problems. Cl. Ex. 3. Moreover, employer specifically argued against the existence of a shoulder injury in its pre-hearing statements dated in April and September 1995. For these reasons, we affirm the administrative law

judge's finding that employer had sufficient notice of the claim for benefits for a shoulder injury. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988) (separate notice under Section 12 not required for a second condition which arises from the same work accident).

Next, the administrative law judge found that claimant's left shoulder condition was caused by the modified use of his left arm after the left arm injury. Decision and Order at 6. Employer contends this finding is incorrect. In determining whether a condition is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). To establish a *prima facie* case, a claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at the employer's facility which could have caused that harm or pain. Initially, we reject employer's argument that claimant failed to state a *prima facie* case by proving harm to his shoulder. The administrative law judge credited claimant's testimony regarding shoulder pain and the opinion of Dr. Post, which supports claimant's testimony. Claimant thus established a *prima facie* case. Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). An employer can also rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, not related to his work, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Although the administrative law judge did not analyze the evidence in terms of the Section 20(a) presumption, his failure to do so constitutes harmless error, as the administrative law judge's ultimate conclusion that claimant's shoulder condition is the natural and unavoidable result of his 1991 work-related arm injury is supported by substantial evidence in the record. *See Kubin*, 29 BRBS at 117; *Bass*, 28 BRBS at 15. To support its arguments, employer cites claimant's lack of shoulder complaints prior to the hearing and the failure of medical reports to address these complaints. Further, it cites non-work incidents which it contends caused claimant's alleged shoulder problem.

Initially, we reject employer's contention that the lack of evidence of shoulder complaints or objective findings is sufficient to rebut the Section 20(a) presumption. The administrative law judge credited claimant's testimony regarding shoulder pain and employer does not cite any evidence which affirmatively establishes that he does not have a shoulder condition arising from the work injury. Contrary to employer's assertion, injuries

which arise following a work injury and are related to the work injury, even though they are not immediately apparent, are compensable. *See, e.g., Bass*, 28 BRBS at 17-18. Further, the doctors' reports on which employer relies to establish the lack of a shoulder problem are insufficient to rebut the Section 20(a) presumption. Dr. Gill, who reported that claimant had "normal shoulder function," expressed this opinion in December 1991 -- three months prior to claimant's tendon-transfer surgery. Emp. Ex. 6; *see also* SAIF Ex.A 143 at 225 (post-surgery physical therapy notes indicating shoulder problems). Similarly, Dr. Tesar did not discuss a particular shoulder injury. Instead, he only noted that there was no tenderness in claimant's shoulders at the time of the examination, Emp. Ex. 4, and in his deposition, he stated that claimant did not complain of neck or back pain and should not have developed neck or back pain as result of an elbow injury. Emp. Ex. 7 at 6, 12. Neither of these reports states that claimant's shoulder condition is not related to the work injury; therefore, as a matter of law, they cannot serve to rebut the Section 20(a) presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Additionally, employer argues there were two non-work incidents which may have caused claimant's current left shoulder condition: a "turned neck" at a softball game and recurring epicondylitis in his right elbow. Although the administrative law judge did not directly address these incidents as possible subsequent injuries rebutting the presumed causal nexus, employer submitted no medical evidence attributing claimant's shoulder problems to a cause other than the work injury. Moreover, the administrative law judge discussed Dr. Post's concerns about claimant's left arm condition as a sequelae of the recurring right arm condition and his postulation that claimant's overuse (due to the right elbow condition) and modified use (due to the left elbow condition) of the left arm resulted in stress and secondary symptoms in the shoulder girdle area. Decision and Order at 4-6; SAIF Ex.A 15 at 43-44; SAIF Ex.A 170 at 292; Tr. at 69-72, 95-96, 113, 129. While no doctor definitively stated that the 1991 left elbow injury and subsequent treatment did not cause claimant's left shoulder problems, Dr. Post related claimant's shoulder problems to the work injury. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). Relying on Dr. Post's testimony and claimant's description of how he modified the use of his left arm while climbing vertical ladders,[2] the administrative law judge determined that claimant's left shoulder girdle condition is the natural or unavoidable

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[2]Claimant testified that when he returned to work in April 1991, he was still required to climb vertical ladders. To do so, he would wrap his left arm around the ladder to steady himself until he could pull himself up with his arm. When this became too difficult, claimant decreased the number of ladders he climbed, until he eventually stopped work due to the pain. Cl. Dep. at 14-16, 21. The administrative law judge credited this testimony.

result of his 1991 work injury. Because this conclusion is supported by substantial evidence of record, we affirm it. *See Kubin*, 29 BRBS at 119; *Bass*, 28 BRBS at 15.

Employer next contends that claimant's shoulder injury does not prevent him from returning to his usual work. Specifically, employer argues that the evidence establishes that claimant's arm injury, and not his shoulder injury, is the reason for his inability to return to sheet metal work. Dr. Post refused to opine on whether claimant's shoulder girdle condition prevented him from performing sheet metal work and, instead, deferred to claimant's opinion on the matter.[3] Tr. at 102. Dr. Tesar gave no opinion concerning a shoulder injury or its effect on claimant's ability to perform his usual work. Claimant, however, testified that shoulder pain is the condition which rendered him unable to return to his usual work, and the administrative law judge credited this testimony. Cl. Dep. at 22, Decision and Order at 5-6. A claimant's credible testimony is sufficient to meet his burden of demonstrating an inability to return to his usual work. *Anderson v. Todd Shipyards Corp.*,22 BRBS 20 (1989); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). As the administrative law judge credited claimant's uncontroverted testimony in this regard, we affirm the finding that claimant's shoulder pain prevents him from returning to his usual work. Because claimant also testified to employment with a towing company paying less than his average weekly wage, we affirm the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(21) for a loss in wage-earning capacity.

Finally, employer contends the administrative law judge erred in awarding benefits for a 35 percent impairment to the arm. Only two doctors rated claimant's disability. Dr. Post believed claimant has approximately 40 percent impairment to his left upper extremity. Tr. at 85. Dr. Tesar stated that claimant has a 25 percent impairment to his left arm, but that this disability is the same as it was following claimant's 1976 injury; therefore, there is no additional impairment for which employer could be liable. Emp. Exs. 4, 7 at 9, 13-14. The administrative law judge credited Dr. Post's opinion but found that claimant has a 35 percent impairment to his left arm, as he found Dr. Post's impairment rating to be an approximation. The administrative law judge credited Dr. Post's rating over that of Dr. Tesar, as is within his discretion, *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); however, he is not bound by the opinion of any one examiner and may draw reasonable inferences from the medical opinions. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm his award of benefits for a 35 percent impairment to the arm.

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[3]Dr. Post stated only that there was no reason to restrict claimant's activities based on his cervical complaints, thus indicating there is no neck disability. Tr. at 125-126. The administrative law judge did not award benefits for an impairment to claimant's neck.

Attorney's Fee

Subsequent to the issuance of the administrative law judge's decision, claimant filed an application for an attorney's fee for work performed before the district director between June 25, 1993, and May 31, 1994, in the amount of $2,840.63, representing 12.625 hours at a rate of $225 per hour. Employer filed its objections, and the district director awarded counsel a fee in the amount of $2,083.13, which reflects a reduction of the hourly rate to $165 but no reduction in the number of hours requested. Further, the district director determined that a controversy arose between the parties on February 14, 1994; therefore, claimant is responsible for the fee accrued prior to that date ($1,278.75), and employer is responsible for the fee thereafter ($804.38). Claimant contends the district director erred in determining when a controversy began and in reducing the hourly rate. Employer responds, moving to strike documents claimant attached to the appeal and urging affirmance of the fee award.

Initially, claimant contends the district director erred in holding employer liable for a fee after February 14, 1994, instead of after January 31, 1994.[4] Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). The employer, however, is only liable for the attorney's fee which accrues after the date of controversy, and the termination of voluntary payments constitutes a controversy for purposes of Section 28(b). 33 U.S.C. §928(b); *Ping v. Brady-Hamilton Stevedore Co.*, 21 BRBS 223 (1988); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986). In this case, employer voluntarily paid benefits through January 31, 1994. Instead of issuing the next bimonthly payment on February 14, 1994, *see* 33 U.S.C. §914(b), employer filed a notice of controversion, contesting claimant's entitlement to additional benefits. Emp. Ex. 1. Therefore, the date of controversy is February 14, 1994, as the district director found. *See Ping*, 21 BRBS at 225.

Claimant also contends the district director erred in reducing the hourly rate from the requested $225 to $165, as such reduction was an abuse of discretion. Claimant attached documents to his appeal which he alleges support his assertion that the approved $165 hourly rate was below the prevailing hourly rate as well as counsel's historic rate of $200. Further, counsel notes that none of these rates takes the delay in fee payment into account; therefore, he argues he is entitled to $225 per hour. Neither the documents nor the delay argument was presented to the district director for consideration. The Board

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[4]Claimant contends employer should be held liable for the additional .25 hour of services performed on February 2, 1994. *See* Fee Application.

may not consider evidence or arguments which have not previously been considered in the proceedings below. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Hansley v. Bethlehem Steel Corp.*, 9 BRBS 498.2 (1978). Consequently, we grant employer's motion to strike. 20 C.F.R. §802.219. As the district director acted within her discretion in awarding a fee based on an hourly rate of $165, we reject claimant's arguments and affirm the approved hourly rate.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the district director's Compensation Order Awarding an Attorney's Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge