BRB Nos. 01-319
and 01-319A

KENNETH D. WILLSEY, JR.	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
JONES OREGON STEVEDORING COMPANY	)	DATE ISSUED: Dec. 4, 2001
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier- Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, the Order Awarding Attorney's Fees and Costs, and the Order Denying Attorney's Fees and Costs on Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jay W. Beattie and William M. Tomlinson (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for Jones Oregon Stevedoring Company.

John Dudrey (Williams Fredrickson, P.C.), Portland, Oregon, for Stevedoring Services of America and Homeport Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,

Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer Jones Oregon Stevedoring Company cross-appeals, the Decision and Order (99-LHC-2435, 99-LHC-2436) of Administrative Law Judge Edward C. Burch 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). In addition, claimant appeals the Order Awarding Attorney's Fees and Costs and the Order Denying Attorney's Fees and Costs on Reconsideration rendered on the same claim. 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).

Claimant worked as a casual longshoreman for several different companies, including Jones Oregon Stevedoring Co. (Jones) and Stevedoring Services of America (SSA). In addition, claimant was self-employed in an auto detailing business, in which he worked both as a detailer and as a manager of subcontractors whom he planned to hire and supervise. Claimant was injured on June 4, 1997, while employed by Jones, when he fell on a bundle of logs and landed on his outstretched left hand. He sought emergency treatment that evening. The emergency room doctor noticed a navicular bone fracture in claimant's left hand and referred him to Dr. Whitney, a board-certified orthopedic surgeon, for examination. Dr. Whitney concluded that the navicular fracture was old and opined that degenerative arthritis had set in. Claimant continued to be treated by Dr. Whitney, and after conservative treatment failed to relieve the pain, Dr. Whitney suggested two surgical options, either a radial styloidectomy or an arthrodesis, which would fuse the wrist and stabilize the joint. Claimant chose to have the radial styloidectomy, which was performed on September 22, 1997.

Claimant was released for longshore work on January 28, 1998. Claimant testified that he was still suffering from some pain, but he took the longshore work that was offered to him. On July 27, 1998, while employed by SSA, claimant tripped on some loose bark and fell, cushioning his fall with his left hand. Dr. Whitney put claimant's wrist in a cast as a precaution, but found no permanent damage. On September 29, 1998, Dr. Whitney concluded that claimant's condition was medically stationary, rated his left arm impairment at 44 percent, and released him to longshore work. However, as claimant's pain continued, he underwent the arthrodesis on May 13, 1999. The surgery was successful, but a metal plate remaining in claimant's hand to facilitate the fusion has become so irritating that Dr. Whitney has suggested another surgery to remove it. Claimant was released for light duty work on August 18, 1999. Claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant suffered work-related injuries on June 4, 1997, and on July 27, 1998. He found that claimant reached maximum medical improvement with respect to the first accident on September 22, 1997, but

that, as he was not released for work until January 27, 1998, he is entitled to temporary total disability benefits from June 5, 1997 to January 27, 1998, payable by Jones. He also found that claimant is entitled to a period of temporary total disability benefits from the date of the second surgery, May 13, 1999, to the date he became medically stationary on October 12, 1999, as he could not return to longshore work until then. The administrative law judge found claimant experienced no permanent damage from the 1998 accident at SSA; therefore, he found that SSA is responsible only for a period of temporary total disability from the date of the second injury, July 27, 1998, to the date Dr. Whitney opined claimant was medically stationary, September 29, 1998. The administrative law judge found Jones liable for temporary total disability benefits from May 13, 1999 to October 12, 1999, for permanent partial disability benefits for a 44 percent arm impairment, 33 U.S.C. §908(c)(2), and for ongoing medical treatment, including the surgery performed in May 1999.

Next, the administrative law judge reviewed the evidence regarding claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and found that claimant's earnings, $11,525.14, in the year before claimant's accident at Jones best represent his annual earning capacity as a longshoreman. In addition, he found that claimant's average annual income from auto detailing, as represented by his 1997 earnings, was $10,806. Thus, his combined average annual earnings were $22,331.14, which yields an average weekly wage of $429.45. The administrative law judge also found that claimant's average weekly wage prior to the SSA accident in 1998 was $48.99.

Subsequent to the issuance of the award of benefits, claimant's counsel submitted a fee petition requesting $22,300, representing 111.50 hours of legal services at the hourly rate of $200, and $488.75, representing 5.75 hours of legal assistant time at the hourly rate of $85. In addition, counsel sought $1,587.41 for costs and $400 for another four hours of attorney time spent to defend the fee petition. In his Order Awarding Attorney's Fees and Costs, the administrative law judge found that Jones and SSA offered claimant $60,000, as well as costs and a reasonable attorney's fee, to settle the two claims. Claimant refused this offer and received an award totaling $59,981.48 against both employers, or $52,171.10 after credits for benefits already paid. However, the administrative law judge found that as claimant did secure future medical costs, he was at least partially successful. Moreover, he concluded that claimant had partial success on the issue of his average weekly wage. The administrative law judge concluded that claimant's fee request should be reduced by 50 percent, which reflects the employers' voluntary compensation payments, claimant's refusal of the employers' offer, and claimant's partial success. Thus, he awarded claimant's counsel a fee of $11,594.38, and costs of $1,087.41. On Jones's motion for reconsideration, the administrative law judge found that the parties agreed that the employers' tender offer included both past and future medical benefits, as well as compensation benefits. Therefore, the administrative law judge concluded that the amount secured through adjudication was less than the amount tendered, and, thus, that Section 28(b) of the Act, 33 U.S.C. §928(b), precludes any award of attorney's

fees or costs against employer. The administrative law judge accordingly vacated the fee award.

On appeal, claimant contends that the administrative law judge erred in finding that claimant is not entitled to temporary partial disability benefits between the time he returned to work on January 28, 1998, and the date of the second injury on July 27, 1998. In addition, claimant contends that the administrative law judge erred in his calculation of claimant's average weekly wage at the time of the first injury by including the 5.29 weeks claimant did not work because he was in Hawaii attempting to work, and did not determine separate wages for claimant's two positions in his business, those of auto detailer and manager. Claimant also contends that the administrative law judge erred in finding that claimant's business records were unreliable, and thus erroneously relied on claimant's income tax return to calculate his average weekly wage. Employers Jones and SSA respond, urging affirmance of the administrative law judge's decision on these issues.

On cross-appeal, Jones contends that the administrative law judge erred in awarding temporary total benefits for the period when claimant was working in his auto detailing business as a manager. Claimant responds, agreeing that he would at most be entitled to temporary partial disability benefits for all periods prior to the date of maximum medical improvement, except when he was recovering from surgery. Jones also contends that the administrative law judge erred in finding it liable for all benefits due claimant, except for the period of temporary total disability immediately following the July 27, 1998 injury, and for ongoing medical benefits. Jones contends that claimant's symptoms were aggravated by the July 1998 accident and the increased symptoms led to the second surgery in May 1999, rendering SSA liable for all of claimant's benefits after the July 1998 injury, including medical benefits. SSA and claimant respond, urging affirmance of the administrative law judge's decision on this issue.

On appeal of the attorney's fee award, claimant contends that the administrative law judge erred in finding that the tender offer made by the employers precludes an award of an attorney's fee for services performed prior to that date. Claimant also contends that the administrative law judge erred in reducing the original fee award by 50 percent to account for limited success. Lastly, claimant urges the Board to vacate the denial of any fee award, if he is successful on appeal, and remand for reconsideration of the fee in light of an increase in benefits on remand. Jones and SSA respond, agreeing with claimant that the administrative law judge erred in failing to award a fee for services performed prior to June 15, 2000, the date of the tender offer, but urge affirmance of the administrative law judge's Order Awarding Attorney's Fees and Costs in all other respects.

Extent of Disability

Claimant contends that the administrative law judge erred in denying temporary partial disability benefits from January 28, 1998, the date claimant was released to perform longshore work, to September 29, 1998, the date the administrative law judge found claimant reached maximum medical improvement. Jones contends that the administrative law judge erred in awarding claimant temporary total disability benefits for the periods from June 4, 1997 to January 27, 1998, and from May 13, 1999 to October 12, 1999, as claimant was able to work as a manager at his auto detailing business for significant portions of that time. Claimant and Jones agree that claimant was unable to perform any work for one week following the first surgery and two weeks following the second surgery. Claimant agrees he is not entitled to temporary total disability benefits for the entire period awarded by the administrative law judge, as he was able to perform managerial duties for his business, but contends that he is entitled to temporary partial disability benefits due to his inability to engage in longshore work for part of the period in question, and in any auto detailing, due to the work injury.

Total disability is defined as complete incapacity to earn pre-injury wages in the work engaged in the time of injury or in any other employment. *Godfrey v. Henderson,* 222 F.2d 845 (5th Cir. 1955). To establish a *prima facie* case of total disability, the employee must show that he cannot return to his usual employment due to his work-related injury. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). In the present case, claimant testified that after his injury his duties at his auto detailing business have been limited to managing the business and supervising the workers. H. Tr. at 127. Further, he testified that the only periods he could not do these managerial duties included one week following his first surgery, and two weeks following the second surgery. *Id.* The administrative law judge recognized that claimant retained some ability to work as he found that claimant "managed his auto detailing business shortly after his [June 4, 1997] injury," Decision and Order at 10, and managed his auto detailing business between the date of the second injury and the date of maximum medical improvement for that injury. Decision and Order at 14.

It is evident, and not disputed by any party, that claimant retained some wage-earning capacity following the two work-related injuries as he was able to engage in managerial duties at his business. Therefore, we vacate the administrative law judge's finding that claimant is entitled to temporary total disability benefits for the periods from June 4, 1997 to January 27, 1998, and July 28, 1998 and September 29, 1998, except for the periods of time it is undisputed claimant could not perform any work following his two surgeries. In addition, the administrative law judge found that claimant was unable to perform anything other than managerial tasks for his auto detailing business after his release to return to longshore work in January 1998. Decision and Order at 4. Therefore, as claimant was unable to return to at least a portion of his former duties, *i.e.*, longshoring and auto detailing, we hold that the administrative law judge erred in failing to consider whether claimant is entitled to temporary partial disability benefits.

An award of benefits for temporary partial disability under Section 8(e), 33 U.S.C. §908(e), is based on a claimant's reduced earning capacity, similar to an award under Section 8(c)(21), 33 U.S.C. §908(c)(21). *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). A claimant with a scheduled injury which has not yet reached maximum medical improvement can receive temporary partial disability benefits if he is still receiving treatment. *Cox v. Newport News Shipbuilding & Dry Dock Co.* 9 BRBS 791 (1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979). In the present case, claimant's inability to return to detailing cars since his injury on June 4, 1997, and his release to perform his usual duties as a longshoreman on January 28, 1998, both affect claimant's residual wage-earning capacity after the first injury. As the administrative law judge did not make a determination of claimant's post-injury wage-earning capacity for the relevant periods, we remand the case to the administrative law judge to make findings regarding claimant's entitlement to temporary partial disability benefits following the first injury.

In addition, if the administrative law judge finds on remand that claimant has suffered a loss in wage-earning capacity, and thus is entitled to temporary partial disability benefits, claimant may be entitled to concurrent awards of temporary partial disability benefits following the second injury, as he sustained a work-related aggravating injury to his wrist while he was receiving ongoing temporary partial disability benefits for an earlier injury. Where an employee sustains a second injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his residual earnings at the time of aggravation. His average weekly wage should be based on the earning capacity remaining after the disability due to the first injury he sustained while working for the first employer. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Claimant has not been able to return to auto detailing since the time of the first injury. His entitlement to benefits for this loss of wage-earning capacity does not cease upon the occurrence of the second injury and claimant's award following the second injury thus is not limited to his loss of $48.99 per week from his longshore work. Thus, claimant may be entitled to concurrent awards: a continuing temporary partial disability award based on the loss in earning capacity caused by the first injury payable by Jones and a temporary partial disability award based on an average weekly wage reflective of claimant's already reduced earning capacity prior to the second injury payable by the employer responsible for benefits for the second injury, *see infra*, until the date of maximum medical improvement. *Id.* The only limiting factor is that the concurrent awards may not exceed the 66 2/3 percent of average weekly wage maximum of Section 8(a), 33 U.S.C. §908(a). *See Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Average Weekly Wage

Claimant also contends that the administrative law judge erred in his determination of claimant's average weekly wage at the time of the first injury. Initially, claimant contends that the administrative law judge erroneously included 5.29 weeks during which claimant was seeking work in Hawaii. The administrative law judge found that the year before claimant's accident at Jones best represents his annual earning capacity as a longshoreman, as he had control of his alcoholism by then.[1] The administrative law judge also found that the weeks claimant was in Hawaii should not be excluded from the average weekly wage calculation as claimant voluntarily removed himself from the labor market.

In *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987), the Board reviewed a case in which claimant worked without pay as a trainee-cook at a lodge. The Board affirmed the administrative law judge's finding that no allowance should be made for the longshoring work claimant could have performed but refused to do because he had chosen instead to perform this "volunteer" work as a trainee-cook. The Board held that the claimant was entitled to be compensated only for the post-injury loss in wages which he would have earned but for the work-related injury. Therefore, since the claimant voluntarily undertook the 30 hours per week job without compensation long before he sustained the work-related injury, the Board held that the administrative law judge's determination that this expenditure of time was irrelevant to the average weekly wage determination was rational and supported by the record. Similarly, in the present case, the administrative law judge found that claimant voluntarily sought employment in Hawaii, and thus was not available for his usual longshore work during that time period. Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that these weeks should be included in the determination of claimant's annual earnings at the time of injury, and thus affirm the administrative law judge's finding that claimant had an average annual earnings from longshore work prior to the June 4, 1997 injury of $11,525.14, which, when divided by 52 yields an average weekly wage of $221.64. *See generally Fox v. West State, Inc.,* 31 BRBS 118 (1997).

With regard to claimant's average weekly wage from his auto detailing business, claimant contends that the administrative law judge erred in using claimant's taxable income as reported on tax forms submitted to the IRS to calculate his annual earnings rather than the

[1]Claimant's substance abuse had resulted in absenteeism and long periods without work prior to 1996. *See* H. Tr. at 108.

supplemental business records prepared by claimant and his accountant in preparation for the hearing. The administrative law judge found that "the discrepancies between the tax forms and the business records are substantial, and the explanations of Claimant and his tax preparer are unconvincing." Decision and Order at 13. The administrative law judge noted that there are no hand-written records or receipts to substantiate the revised business records. Thus, the administrative law judge concluded that only the tax forms, which indicate that claimant had $10,806 in earnings for the year 1997, would be used to calculate claimant's average weekly wage from the auto detailing business.

Questions of witness credibility are for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of all testimony. *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). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the present case, there is extensive testimony by claimant and his accountant regarding the construction of claimant's business records. Claimant's accountant testified that he based his calculations on figures provided by claimant. The administrative law judge found it significant that the differences in the income reported on the tax return and the income in the business records were not documented. As the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c), *see Wayland v. Moore Dry Dock,* 25 BRBS 53 (1991); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979), and the administrative law judge fully reviewed the evidence presented, we hold that the administrative law judge's credibility findings regarding the testimony are not "inherently incredible or patently unreasonable," and thus affirm the finding that claimant's average annual earnings in 1997 are best represented by the tax form filed in that year.[2] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987).

Claimant also contends that the administrative law judge erred in failing to determine separate average weekly wages for claimant's position as an auto detailer and as the manager of his auto detailing business. Claimant notes that he worked exclusively as an auto detailer prior his injury on June 4, 1997, except for the three days immediately preceding the injury,

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[2]However, as claimant did not start his business until January 17, 1997, we agree with claimant that his average annual earnings should be divided by 49.71 weeks, rather than by 52, to determine his average weekly wage, *see Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.2d 122, 28 BRBS 89 (CRT)(4th Cir. 1994), and thus instruct the administrative law judge to correct this on remand.

and exclusively as a manager from June 4, 1997 through December 1997, except for one week following his September 1997 surgery. However, he testified that his intention from the inception of the business was to hire and train subcontractors to perform the auto detailing, in addition to the detailing he would continue to perform. H. Tr. at 124. Claimant does not dispute that the wages he earned prior to the 1997 injury do not represent wages earned for both positions with the company, but rather urges the Board to add the average weekly wage prior to June 1997 to his average weekly wage following June 1997, in accounting for the amount of total disability benefits to which he is entitled following the surgery. We reject this suggestion, as it is speculative that claimant would have earned as much in either position if he was performing them both at the same time.

The objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's wage-earning capacity at the time of the injury. A definition of "earning capacity" for purposes of this subsection is the "ability, willingness, and opportunity to work," or the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410; *see also Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). Although this was a minimal part of claimant's actual wages at the time of injury, as the business had expanded to include sub-contractors only three days prior to the longshore injury, claimant is entitled to be compensated for any lost managerial wages during his recovery from surgery. Thus, we vacate the administrative law judge's finding that including claimant's wages as a manager in his average weekly wage determination would effectively award claimant a double recovery. On remand, the administrative law judge should determine the managerial earnings claimant would have earned, but for his injury, and account for them during claimant's periods of total disability.

Responsible Employer

On cross-appeal, Jones contends that the administrative law judge erred in finding it is the responsible employer for any benefits after July 27, 1998, as claimant suffered a second distinct trauma while employed with SSA. In cases involving multiple traumatic injuries, the determination of responsible employer turns on whether claimant's condition is the result of the natural progression or aggravation of a prior injury. The Ninth Circuit has held that the multiple traumatic injury rule applies such that if the disability resulted from the natural progression of the prior injury, and would have occurred notwithstanding the subsequent injury, then the responsible employer is the one at the time of the initial injury. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), citing *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). However, if the second injury aggravated, accelerated or combined with the earlier injury, resulting in claimant's disability, the employer for whom claimant worked at the time

of the second injury is the responsible employer, even though the claimant did not incur the greater part of his injury with that particular employer. *Id.*; *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon.*, 32 BRBS 251 (1998); *Buchanan v. International Transportation Services*, 31 BRBS 81 (1997).

In the present case, the administrative law judge found that claimant's pre-existing navicular fracture and arthritis were asymptomatic prior to the accident with Jones on June 4, 1997. The administrative law judge also found that claimant strained his wrist as a result of the accident during his employment with SSA on July 28, 1998, but that this strain healed such that the wrist returned to the condition it was in before that injury. Moreover, the administrative law judge found that claimant's wrist could have benefitted from the fusion surgery immediately following the 1997 accident. Therefore, the administrative law judge concluded that SSA is responsible for only a short period of temporary disability for the wrist strain occurring in 1998, and Jones is liable for the second surgery, the disability resulting therefrom, and claimant's permanent partial disability.

There are three physicians of record that discuss the mechanism of claimant's current disability. Dr. Whitney, claimant's treating physician, opined that claimant's wrist problems after September 29, 1998, were not related to the injury that occurred on July 27, 1998, and that while claimant suffered a temporary worsening of his wrist condition due to the July 1998 fall, he did not have any permanent disability over that which was due to the June 1997 injury. SSA Ex. 30, 31. Dr. Whitney noted that the first injury acted as an accelerant to claimant's condition because the radial styloid was still present, but that the mechanism of the second strain was different because the radial styloid had been surgically removed. He also noted that following the second injury, claimant's range of motion returned to what it was before that injury. Dr. Whitney also testified that all of the activities claimant performed between the two surgeries, including the five days of longshore work, contributed to his symptomology, SSA Ex. 52 at 30, and that the 1998 fall hastened the need for surgery, *id.* at 48, although the limited number of longshore hours claimant worked was probably not significant, *id.* at 53

Dr. Vessely testified that the first surgery was hastened by the June 1997 injury, but that the second surgery was already necessary by the time of the second injury. SSA Ex. 43 at 19. He opined that claimant's work activities and/or injuries to his wrist did not contribute in any way to the arthritic condition for which the 1999 surgery was performed. SSA Ex. 53 at 25. Although he opined that increased symptoms do not necessarily equate to an aggravation because there is no structural change, he agreed that the July 1998 injury contributed in some way to the decreased range of motion and the decreased strength. SSA Ex. 53 at 50. Dr. Nye opined in March 1999 that claimant was only medically stationary at that time if he was satisfied with his condition and could tolerate the discomfort. He

predicted that claimant would "undoubtedly need a total wrist fusion as previously advised." SSA Ex. 32

The second surgery (the wrist fusion) was predicted at the time of the first surgery, but claimant and Dr. Whitney were trying to postpone it as long as possible, depending on claimant's comfort level. At the time Dr. Whitney recommended the radial styloidectomy, he noted that it was a temporary solution and that claimant would end up with a wrist fusion. SSA Ex. 14. The administrative law judge found it significant that the second surgery was on the horizon after the first injury. The relevant inquiry in determining the responsible employer in a multiple traumatic injury case looks to which injury resulted in claimant's disability. Although the wrist fusion was recommended at the time of the first injury, claimant choose to postpone that procedure until he had no alternative. While the physicians relied on by the administrative law judge opine that the 1998 injury did not affect the mechanics of claimant's condition, they do state that claimant's continued work and the second injury may have increased his symptomology. Thus, as the second surgery was performed to alleviate the discomfort, or increased symptoms of pain, these opinions may suffice to establish that claimant's injury at SSA accelerated or hastened the need for the second operation. Thus, we vacate the administrative law judge's finding that Jones is liable for claimant's second operation and resultant disability, and instruct the administrative law judge to reconsider this issue on remand. *See Foundation Constructors, Inc.,* 950 F.2d at 623, 25 BRBS at 75(CRT); *Buchanan*, 31 BRBS at 84-85.

Attorney's Fee

Subsequent to the issuance of the award of benefits, claimant's counsel submitted a fee petition requesting $22,300, representing 111.50 hours of legal services at the hourly rate of $200, and $488.75, representing 5.75 hours of legal assistant time at the hourly rate of $85. In addition, counsel sought $1,587.41 for costs and $400 for another four hours of attorney time spent to defend the fee petition. 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).

In his Order Awarding Attorney's Fees and Costs, the administrative law judge found that Jones and SSA offered claimant $60,000, as well as costs and a reasonable attorney's fee, to settle the two claims. Claimant refused this offer and received an award totaling $59,981.48 against both employers, or $52,171.10 after credits for benefits already paid. However, the administrative law judge found that as claimant did secure future medical benefits, he was at least partially successful. Moreover, he concluded that claimant had partial success on the issue of his average weekly wage. The administrative law judge concluded that claimant's fee request should be reduced by 50 percent, which reflects the

employers' voluntary compensation payments, claimant's refusal to settle, and his partial success. On reconsideration, the administrative law judge found that the parties agreed that the employers' tender offer included both past and future medical benefits, as well as compensation. Therefore, the administrative law judge found that as the amount secured through adjudication was less than the amount tendered, Section 28(b) precludes any award of attorney's fees or costs against employer, and consequently he vacated the fee award.

Initially, we agree with claimant's contention that as the case is being remanded for reconsideration of the extent of claimant's disability, the order denying an attorney's fee should be vacated. On remand, the administrative law judge may award an attorney's commensurate with claimant's success on remand. In addition, claimant contends that the administrative law judge erred in finding that a valid tender offer precludes the award of any attorney's fees for services provided up to that date. Jones and SSA agree that claimant's counsel is entitled to a fee for work performed before the tender offer on June 15, 2000. This concession is consistent with law. *See Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1981); *Brown v. Rothschild-Washington Stevedore Co*., 8 BRBS 539 (1978). Therefore, we vacate the administrative law judge's finding that claimant is not entitled to any attorney's fees, and the case is remanded for further consideration.[3]

Claimant also contends that the administrative law judge erred, in his original fee order, in reducing the fee requested by 50 percent based on his finding that claimant was 50

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[3]However, we reject claimant's contention that he should be entitled to a fee for services performed after the tender offer as employer "vigorously" defended the case at the hearing. In order to encourage settlements, the Board held in *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986), that if an employer tenders compensation, and claimant's counsel does not secure additional compensation through resort to the adjudicative process, employer is not responsible for claimant's attorney's fees pursuant to Section 28(b). *Armor*, 19 BRBS at 122. It is not disputed that claimant did not accept the employers' tender offer and nothing in the case law limits the "zeal" employer uses in defending the case.

percent successful before the administrative law judge, as it does not accurately reflect the amount of time spent by the attorney on the successful issues. This contention currently is moot, as all fees were denied on reconsideration. However, we will address the method the administrative law judge used to reduce the fee award to account for partial success, because employers concede some fee liability for the pre-tender period. The administrative law judge considered the amount of time counsel spent preparing the case and found that a substantial portion of it pertained to claimant's average weekly wage. The administrative law judge found that the average weekly wage established was substantially less than that proposed by claimant's counsel, but greater than that proposed by employer. In addition, he noted that claimant refused to settle and that the employers had voluntarily paid some compensation. The administrative law judge rationally found the issues interrelated, *see Hensley v. Eckerhart,* 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992), and therefore reduced the fee relative to claimant's overall success. As this method comports with law, *see id.,* and as the administrative law judge gave adequate reasoning for reducing the fee request by 50 percent, we reject claimant's contention of error. *See generally Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(Board affirmed administrative law judge's fee award, as counsel prevailed on the issues of causation and medical benefits, and the administrative law judge's 50 percent reduction was reasonable in relation to the results obtained).

Claimant also contends that the administrative law judge should have allowed the costs associated with the testimony of claimant's accountant, Mr. Danville, even if the administrative law judge did not agree with him, as his testimony was reasonable and necessary. The Act and regulations provide that employer may be liable for costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. 33 U.S.C. §928(d); 20 C.F.R. §702.135. In the instant case, Mr. Danville prepared claimant's income tax returns, but testified that these failed to reflect claimant's earnings and advanced new earnings figures that were substantially higher than those reported on the earlier forms. The administrative law judge found that Mr. Danville's testimony was not supported by any documentation, and thus rejected the new figures. Thus, he concluded that the testimony was neither necessary nor reasonable, and he rejected the costs associated with Mr. Danville's testimony. In regard to the necessity of a witness, the Board has specifically held that an administrative law judge may not deny the costs and fees of a particular witness merely because the claimant was not successful on the particular issue for which the witness's evidence was offered. *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981). Rather, the standard is whether claimant's attorney thought the witness was necessary so as to adequately protect claimant's interests. Therefore, even though the administrative law judge did not find Mr. Danville's testimony to be probative on the issue of claimant's earnings from his auto detailing business, on remand, the administrative law judge must consider whether claimant's attorney reasonably thought his testimony and report were necessary to protect claimant's interests. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If employer

is liable for an attorney's fee, costs are assessed on a reasonableness basis, once necessity is established. *Id.*

Accordingly, the administrative law judge's decision that claimant is entitled to temporary total disability benefits for the periods from June 4, 1997 to January 27, 1998, and July 28, 1998 to September 29, 1998, is vacated, and the case is remanded to the administrative law judge for further consideration of the extent of claimant's temporary disability for all relevant time periods. We affirm the administrative law judge's finding that claimant had an average weekly wage of $221.64 from longshore work in the year preceding the 1997 injury, as well as his finding regarding claimant's average annual earnings from his auto detailing business. On remand, the administrative law judge should determine the amount, if any, of claimant's loss of earning managerial earning capacity due to the injury. The administrative law judge's finding that Jones is the responsible employer is vacated, and the case is remanded for further consideration consistent with this opinion. Finally, although the administrative law judge's method for reducing claimant's fee award to account for limited success was rational, the Order Awarding Attorney's Fees and Costs and the Order Denying Attorney's Fees and Costs on Reconsideration are vacated. On remand, the administrative law judge should reconsider claimant's entitlement to an attorney's fee for pre-tender offer services and for any additional success claimant obtains on remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge