BRB No. 05-0911

LOUIE L. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANSON CONSTRUCTION COMPANY	)	DATE ISSUED: 07/28/2006
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
CONNOLLY PACIFIC COMPANY	)	
	)	
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision and Order Denying Reconsideration and Awarding Attorney's Fees, and Second Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Howard D. Sacks and Robert W. Nizich, San Pedro, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (Trovillion, Inveiss, Ponticello & DeMakis), San Diego, California, for Manson Construction Company and Seabright Insurance Company.

Michael D. Doran (Samuelson, Gonzalez, Valenzuela & Brown), San Pedro, California, for Connolly Pacific Company and Alaska National Insurance Company.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Manson Construction Company (Manson) appeals the Decision and Order Awarding Benefits, Decision and Order Denying Reconsideration and Awarding Attorney's Fees, and Second Order Denying Reconsideration (2003-LHC-1865) of Administrative Law Judge William Dorsey 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. *O'Keeffe v. Smith, Hinchman & 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, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained cervical and lumbar spine injuries while working as a pile-driver for Manson on November 1, 2001. He received conservative treatment of his spinal injuries from Dr. Marinow who determined, on November 4, 2002, that claimant reached maximum medical improvement. At that time, Dr. Marinow noted that he expected claimant to experience flare-ups of neck pain for which he recommended an ongoing supply of medications. He also concluded that claimant's cervical and lumbar spine conditions restricted him from heavy work such as pile-driving and he advised claimant against returning to his usual employment. Dr. Rosco subsequently concurred with Dr. Marinow's assessment that claimant had reached maximum medical improvement but he further concluded that claimant was capable of returning to his usual

work as a pile-driver. Based on Dr. Rosco's assessment, Manson discontinued its payment of disability benefits.

Claimant thereafter attempted a return to pile-driving work with Connolly Pacific Company (Connolly) on February 28, 2003. Claimant stated that he experienced an overall increase in the level of pain in his head, neck and shoulders during his working hours which subsided following periods of rest at home. However, he was laid off after only four days of work when Connolly discovered that claimant had an open compensation claim. On March 17, 2003, Dr. Nelson opined that claimant was temporarily totally disabled and unable to return to work as a pile-driver. Claimant then returned to Dr. Marinow who opined, on May 8, 2003, that claimant's condition and the nature and extent of his ultimate disability was identical to what it was as of November 4, 2002, when he previously determined that claimant had reached maximum medical improvement. Dr. Marinow also concluded that claimant sustained only a temporary flare-up in the level of his pre-existing symptoms as a result of his employment with Connolly.

On January 15, 2004, Dr. Delman's review of claimant's medical treatment and observation of claimant's movements without obvious restriction led him to conclude that claimant's attempt to return to pile driving with Connolly was appropriate. He also concluded that claimant's work at Connolly had aggravated claimant's cervical spine injury, and he agreed with Dr. Nelson's prior assessment that claimant was temporarily totally disabled after working for Connolly. After Dr. London examined claimant on January 16, 2004, he concluded that claimant had not suffered a new injury as a result of his employment with Connolly.

Meanwhile, claimant took part in a vocational rehabilitation program, and labor market surveys conducted on October 29, 2003, and February 4, 2004, identified a variety of unskilled entry level jobs in claimant's locale which were within his physical restrictions, experience and overall abilities. In between these surveys, claimant obtained permanent employment as of August 15, 2003, working at the Habra Boys and Girls Club. Claimant filed a claim seeking additional benefits for his work-related injuries. Manson responded, arguing that Connolly is the employer liable for the additional benefits sought in this case. Manson and Connolly each filed applications for Section 8(f) relief, 33 U.S.C. §908(f), based on claimant's pre-existing permanent disability as a result of a lower back injury and surgeries stemming from 1985 and 1997 accidents. The Director, Office of Workers' Compensation Programs (the Director), opposed only Manson's request for Section 8(f) relief.

In his decision, the administrative law judge found claimant entitled to total disability benefits from November 4, 2002, through August 21, 2003, and permanent partial disability benefits thereafter. With regard to employer liability, the administrative

law judge found that claimant sustained a temporary exacerbation of his November 1, 2001, work-related back condition, but no new permanent disability, as a result of his four days of employment with Connolly. He therefore found that Connolly is liable for temporary total disability benefits for the period between March 5, 2003, and May 8, 2003, and that Manson is otherwise liable for all other disability and medical benefits, including total disability benefits from May 8, to August 21, 2003, and the continuing award of permanent partial disability benefits from August 22, 2003. The administrative law judge also denied Manson's claim for Section 8(f) relief. In subsequent decisions, the administrative law judge denied Manson's two requests for reconsideration and awarded claimant's counsel attorney's fees totaling $55,450, representing 69 hours for Mr. Nizich and 167 hours for Mr. Sacks at an hourly rate of $235, plus $1,136.12 in costs.

On appeal, Manson challenges the administrative law judge's determinations that it, rather than Connolly, is the responsible employer, that it is not entitled to Section 8(f) relief, and that it is liable for the entire attorney's fee awarded in this case. Claimant, Connolly, and the Director all respond urging affirmance of the administrative law judge's decisions in this case.

Manson argues that the administrative law judge erred in finding that it is the responsible employer in this case. Manson contends that pursuant to the standard set out in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), Connolly is the responsible employer because claimant's condition did not progress to the point of maximum disability until after his four days of employment with that employer. In this regard, Manson argues that claimant's condition was permanently worsened following his injury with Connolly as demonstrated by his decreased range of motion, his increased work restrictions, and his diminished work capacity immediately following that incident.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury, and, accordingly, the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see also Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th

Cir. 2001). The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

After reciting the relevant case law pertaining to the responsible employer issue, including the Ninth Circuit's decision in *Price*, 339 F.3d 1102, 37 BRBS 89(CRT), the administrative law judge found that Manson is liable for claimant's ongoing permanent partial disability benefits under the Act since claimant suffered "no new permanent disability as a result of his employment for four days at Connolly." Decision and Order at 6. Specifically, the administrative law judge found that claimant merely sustained "a flare-up of his pre-existing condition while working for Connolly," rather than "an aggravation that worsened his disability in any measurable or functional way." Decision and order at 7. As such, the administrative law judge concluded that no liability "attaches to Connolly beyond that for temporary total disability for the two months between the end of claimant's work there and his return to his baseline condition." Decision and Order at 6.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *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); *see also Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge credited the opinion of claimant's treating physician, Dr. Marinow, that claimant sustained a temporary flare-up of his back condition as a result of his four days of employment with Connolly and thereafter returned to his "previous, static condition," which resulted from his November 1, 2001, work injury at Manson, as corroborated by the statements of Drs. London and Nelson, that claimant suffered no new types of symptoms resulting from his employment with Connolly, over the contrary opinion of Drs. Rosco and Delman. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). As the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, *Price*, 339 F.3d 1102, 37 BRBS 89(CRT), and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue, *Buchanan*, 33 BRBS 32; *see also Delaware River Stevedores, Inc. v. Director, OWCP*,

279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002), his determination that Manson is the responsible employer, with the exception of the two-month temporary flare-up due to claimant's four days of work for Connolly, is affirmed. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT). Accordingly, the administrative law judge's determinations that Connolly's liability is limited to two months of temporary total disability benefits from March 5, 2003, through May 8, 2003, and that Manson is otherwise liable for periods of permanent total disability from November 4, 2002, through August 21, 2003, and permanent partial disability benefits thereafter are affirmed.

Manson next argues that the administrative law judge erred by denying its claim for Section 8(f) relief, as claimant's ultimate disability is materially and substantially greater because of his pre-existing lumbar fusions. It maintains that, in contrast to the administrative law judge's findings, the record contains ample evidence regarding the quantification of claimant's pre-existing and ultimate disabilities to enable the administrative law judge to make the requisite finding for entitlement to Section 8(f) relief. In response, the Director notes that the administrative law judge properly rejected the opinions of Drs. Marinow, London and Delman as legally insufficient to establish the contribution element since they failed to quantify the level of disability claimant would have suffered from his 2001 injury alone. The Director also contends that employer's evidence regarding contribution is legally deficient as it addressed only claimant's level of physical impairment and not his economic disability. The Director therefore urges affirmance of the administrative law judge's denial of Section 8(f) relief. In its reply brief, Manson argues that the Board should not address the Director's assertion that its evidence of contribution is deficient because it does not relate to claimant's economic disability as the Director raised it for the first time on appeal.

In a claim for permanent partial disability benefits, Section 8(f) of the Act limits employer's liability to 104 weeks if employer establishes that claimant suffers from a manifest pre-existing permanent partial disability, and shows, by medical evidence or otherwise, that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor* [*Quan*], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The Ninth Circuit has not found it necessary to precisely define the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f), *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT), but has found that evidence that the current level of disability is the result of a combination of the pre-existing condition and the work injury is sufficient to establish the contribution

element. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). Employer must establish that the current disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d 664, 33 BRBS 04(CRT).

In the instant case, the administrative law judge's denial of Manson's request for Section 8(f) relief because it did not establish the contribution element accords with these standards. Specifically, the administrative law judge concluded, after a review of the relevant evidence, that "this record is silent about what disability the claimant would have suffered if his only injury were the cervical one" he sustained while working with Manson, such that it shows that claimant's "current permanent disability is due solely to the work injury at Manson." Second Order on Reconsideration at 4. In this regard, the administrative law judge found that none of the physicians of record, most notably Drs. Marinow, Delman and London, articulated "what the injury at Manson alone would have been." Decision and Order on Reconsideration at 6. Consequently, the administrative law judge found that Manson did not prove that "claimant's 1985 and 1997 injuries made his current disability more serious than it otherwise would have been" based solely on the injury he sustained while working for Manson. Second Order on Reconsideration at 4. As the administrative law judge's findings that Manson did not establish that the work injury alone did not cause claimant's permanent partial disability and that the ultimate permanent partial disability materially and substantially exceeded the disability that resulted from the work injury alone are rational and supported by substantial evidence, they are affirmed. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT). Consequently, the administrative law judge's denial of Section 8(f) relief is affirmed.[1] *Id.; see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Manson next contends that the administrative law judge's award of an attorney's fee is not commensurate with the limited degree of success obtained in this litigation. Manson also argues that claimant's use of two attorneys resulted in duplicative and excessive hours, and that the fee petition otherwise contains entries that are excessive and unreasonable. Manson further contends that counsel's use of the quarter-hour billing unit in this case is inappropriate. Lastly, Manson argues that the administrative law judge erred in holding it solely liable for the attorney's fees, positing that Connolly should be liable for any attorney's fees related to its liability for benefits.

[1] In light of our affirmance of the administrative law judge's denial of Manson's claim for Section 8(f) relief, we need not address the Director's contention that employer failed to establish that claimant has a greater "economic disability" as opposed to merely a greater physical disability. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

The administrative law judge initially rejected Manson's "limited degree of success" argument as the record established that "the matter came to trial because Manson controverted the liability claim." Decision and Order on Reconsideration at 6. The record establishes that Manson discontinued claimant's total disability payments as of January 23, 2003, following Dr. Roscoe's January 8, 2003, assessment that claimant could return to his usual work, and that it thereafter actively controverted its liability for additional benefits. Decision and Order at 3. Moreover, the administrative law judge found that claimant prevailed on all of the issues identified in his pre-trial statement, except interest and penalties. The administrative law judge thus concluded that claimant achieved great success against Manson as it was found responsible for the award of future medical care under Section 7, 33 U.S.C. §907, as well as the ongoing award of permanent partial disability benefits. As the administrative law judge's finding is rational, it is affirmed.

The administrative law judge next rationally rejected employer's assertions that the use of two attorneys by claimant resulted in duplicative and excessive hours for he concluded that both attorneys "actively participated in this prosecution." Decision and Order on Reconsideration at 8; *see O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000) (nothing objectionable to several attorneys participating in the litigation of a claim where the complexity of the case or other factors warrant it). Similarly, the administrative law judge rejected Manson's general contention that counsel's use of quarter-hour billing increments mandated a wholesale reduction in the requested hours of attorney services as vague. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Moreover, the administrative law judge rationally found that the majority of Manson's other objections to specific billing entries were "repetitive and unpersuasive." Decision and Order on Reconsideration at 11-12. Nevertheless, he made reductions in the number of hours sought by counsel for entries which he found represented duplicative, excessive, and/or unreasonable services. Furthermore, the administrative law judge rationally reduced the requested costs from $1,449.62 to $1,136.12 on the grounds that certain costs were "general office overhead." *See generally Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting). Accordingly, the administrative law judge's findings in this regard are affirmed.

Manson's last assertion, *i.e.*, that it should not be responsible for an attorney's fee for work related to the award of temporary total disability benefits against Connolly, is insufficient to establish that the administrative law judge abused his discretion on the facts presented. On appeal, Manson has not identified any specific charges which relate solely to the successful claim against Connolly. As the administrative law judge's application of the last employer rule to his determination regarding liability for an attorney's fee in this case is permissible, *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), his finding that Manson is liable for all reasonable and necessary attorney's fees is affirmed. *See also Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

Consequently, as Manson's assertions are insufficient to meet its burden of proving that the administrative law judge abused his discretion in awarding an attorney's fee in this case, *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997), his award of an attorney's fee totaling $55,450 payable by Manson is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Decision and Order Denying Reconsideration and Awarding Attorney's Fees, and Second Order Denying Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge