BRB No. 04-0179

PIPER L. PARKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY PERSONNEL COMMAND/MWR	)	DATE ISSUED:Oct. 27, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits, Erratum, Supplemental Decision and Amended Order Awarding Benefits on Reconsideration, and Supplemental Decision Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Janmarie Tokar and James G. Fongemie (McTeague, Higbee, Case, Cohen, Whitney & Tokar), Topsham, Maine, for claimant.

Lawrence P. Postal (Seyfarth Shaw LLC), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Erratum, Supplemental Decision and Amended Order Awarding Benefits on Reconsideration, and Supplemental Decision Awarding Attorney's Fees (2001-LHC-0287, 1875) of Administrative Law Judge Daniel F. Sutton 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 will not be set aside unless shown by the challenging party 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 injured her right wrist on May 25, 1995, during the course of her employment for employer as a cook/waitress at Brunswick Naval Air Station. Claimant was able to continue working for employer until October 1995, when she was restricted to one-handed duty. Claimant returned to work in December 1995 to supervise a few holiday parties; thereafter, claimant was out of work until January 26, 2000, when employer provided claimant alternate employment washing and folding towels in its gymnasium. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from October 1995 to January 2000. Claimant received medical treatment for her right wrist and hand during this period, which included surgical decompression in February 1996 and arthroscopic debridement in January 1998.

On December 26, 2000, claimant slipped and fell outside employer's gymnasium. Claimant's right wrist became more symptomatic after the fall and she sought additional medical treatment. Employer authorized Dr. Kalvoda, an orthopedic surgeon, to treat the December 2000 injury. Dr. Kalvoda referred claimant to Dr. Vigna, a neurologist, who diagnosed carpal tunnel syndrome. On April 4, 2001, Dr. Kalvoda performed a right endoscopic carpal tunnel release. Claimant returned to work a few weeks after the surgery with improved symptomatology. Employer challenged its liability under the Act for the April 2001 surgery and the resulting period of temporary total disability.

In his decision, the administrative law judge found that claimant sustained a new injury on December 26, 2000, which aggravated her pre-existing right wrist condition. The administrative law judge credited, *inter alia*, the opinions of Drs. Kalvoda and Vigna, to find that the April 2001 carpal tunnel surgery was reasonable and necessary in light of claimant's symptoms, history and test results, and given the subsequent improvement in her right wrist condition. The administrative law judge rejected employer's contention that the claim for reimbursement of claimant's medical costs for the surgery and for compensation is barred pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4), because claimant refused employer's demand made the day before the scheduled surgery that she first undergo an examination by a physician of employer's choosing. The administrative law judge rejected employer's contention that it is not liable for the surgical costs because Drs. Kalvoda and Vigna failed to file attending physicians' reports, as required under Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2). The administrative law judge also rejected employer's contention that it is entitled to a credit for its alleged overpayment of compensation for the May 1995 right wrist injury against its liability for benefits for the 2000 injury. *See* 33 U.S.C. §914(j). Alternatively, the administrative law judge rejected employer's evidence that suitable alternate employment was available to claimant by August 11, 1997. Finally, the administrative

law judge determined claimant's average weekly wage for the December 26, 2000, injury by relying on claimant's wages as of the date of injury.[1]

Claimant's counsel filed an attorney's fee petition with the administrative law judge requesting a fee of $19,415.75.[2] Employer filed objections to the fee request. In his Supplemental Decision Awarding Attorney's Fees, the administrative law judge discussed employer's objections to the fee petition and disallowed two hours expended for travel and $314 for facsimile and telephone costs. The administrative law judge awarded claimant's counsel a fee of $19,000.75, and costs of $4,486.78.

On appeal, employer challenges the administrative law judge's award of compensation and medical benefits, his disallowing employer a credit for its alleged overpayment of compensation for claimant's May 1995 work injury, and the administrative law judge's average weekly wage determination. Employer also challenges the attorney's fee award. Claimant responds, urging affirmance of the administrative law judge's decisions in all respects.

We initially address employer's contention that, pursuant to Section 14(j) of the Act, it is entitled to credit its alleged overpayment of compensation for claimant's 1995 wrist injury against compensation payable for the 2000 injury. Employer voluntarily paid claimant compensation for temporary total disability from October 1995 until claimant returned to part-time work for employer in January 2000. At the hearing on February 2, 2002, employer submitted a labor market survey conducted on October 5, 2001, which it asserted established the availability of suitable alternate employment as of August 11, 1997, when it contended that claimant's May 1995 right wrist injury reached maximum medical improvement. Employer therefore argued that it is entitled to credit its overpayment of compensation for temporary total disability from August 11, 1997, to January 2000 against

[1] In his Erratum, the administrative law judge corrected a clerical error to find that claimant's compensation rate is $193.60. In his Supplemental Decision, the administrative law judge granted employer's motion for reconsideration and found that the Erratum failed to order employer to compensate claimant at the rate of $193.60 per week, and he found that compensation for temporary total disability is payable by employer from April 4 to May 9, 2001.

[2] The fee request was for 4.6 hours of attorney time at $145 per hour for James Fongemie; 62.7 hours of attorney time for Janmarie Tokar at $195 per hour, prior to January 1, 2003; 22.3 hours for Ms. Tokar at $220 per hour after January 1, 2003; 12.85 hours at $65 per hour for a senior paralegal; 14.20 hours at $55 per hour for a junior paralegal; and costs of $4,800.78.

its liability for compensation from April 4 to May 9, 2001, for claimant's December 26, 2000, right wrist injury.

The administrative law judge rejected employer's contention. He found that claimant's May 1995 injury reached maximum medical improvement on August 11, 1997, and that claimant sustained a new injury when she slipped and fell at work on December 26, 2000. The administrative law judge found that, pursuant to the Board's decision in *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), employer is not entitled to reduce its liability for compensation payments owed for the December 2000 work injury by taking credit for overpayment of compensation made as a result of the May 1995 work injury. Alternatively, the administrative law judge rejected employer's retrospective labor market survey as evidence of suitable alternate employment inasmuch as employer voluntarily paid claimant compensation for the May 1995 injury and it made no attempt to establish the availability of suitable alternate employment until a dispute arose with claimant over the compensability of her April 4, 2001, carpal tunnel release surgery.

Section 14(j) of the Act provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). The Act, therefore, allows employer a credit of its advance compensation only if unpaid installments of compensation remain owing. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992). In *Vinson*, 27 BRBS 220, the Board interpreted Section 14(j) as not allowing employer to credit an overpayment of compensation made as a result of one work-related injury against a subsequent work injury which was unrelated to the first injury because Section 14 as a whole references only a single compensable injury. The Board further held that an employer's voluntary payments of compensation to claimant for a prior injury could not rationally be deemed as "advance" payments of compensation for a subsequent work injury that had yet to occur. *Vinson*, 27 BRBS at 223. Similarly, in *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), the decedent was awarded permanent partial disability compensation pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), and the claimant was awarded death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. The Board held, and the Fifth Circuit affirmed, that employer cannot credit pursuant to Section 14(j) excess disability payments to decedent's estate against its liability for death payments to the claimant, because disability benefits cannot be viewed as an advance payment of compensation on the subsequent death claim. *Liuzza*, 35 BRBS at 114-117.

Pursuant to *Vinson* and *Liuzza*, we hold that the administrative law judge correctly denied employer a credit under Section 14(j) for its alleged overpayments of compensation for claimant's 1995 work injury against its compensation liability to claimant for her December 2000 work injury. The rationale in *Vinson* applies equally to this case, notwithstanding employer's contention that *Vinson* is distinguishable because claimant's 1995 and 2000 work injuries involved the same body part. As discussed in *Vinson,* Section 14 references only a single injury, and, moreover, employer's payments of compensation to claimant for the 1995 work injury, which terminated upon claimant's return to work in January 2000, cannot rationally be deemed as "advance" payments of compensation for the subsequent December 2000 work injury that had yet to occur. Accordingly, we hold that employer cannot credit its alleged overpayment of compensation for the 1995 injury against its compensation liability for the December 2000 injury and we affirm the administrative law judge's finding in this regard.[3] *Vinson,* 27 BRBS 220.

Employer next argues that the administrative law judge erred by not finding claimant's claim for reimbursement of medical costs and for compensation for her April 4, 2001, right wrist surgery barred by Section 7(d)(4). Employer contends that claimant unreasonably refused its request that she undergo a medical examination by a physician of employer's choosing.

[3] Since we affirm the administrative law judge's finding that employer is not entitled to a credit for any overpayment of compensation for the 1995 injury, we need not address employer's contention that the administrative law judge erred by rejecting its evidence of suitable alternate employment. Any error the administrative law judge may have made in stating that employer cannot retrospectively establish the availability of suitable alternate employment is harmless. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4). Pursuant to the plain language of Section 7(d)(4), we reject employer's contention that this section provides a basis by which it can avoid liability for the cost of claimant's wrist surgery. This section sanctions a claimant by suspending *compensation* during such time as she is found to have unreasonably refused to submit to an examination by a physician of employer's choosing. Compensation under the Act does not include the cost of medical care provided to treat claimant's work injury. *See* 33 U.S.C. §902(12); *see also Marshall v. Pletz*, 317 U.S. 383 (1943); *cf. Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297 (5th Cir. 1992)(for purposes of enforcement of an award, medical benefits are "compensation" when employer must reimburse claimant for medical expenses she paid).

With regard to the compensation benefits which the administrative law judge awarded for the period following the surgery, the Board has held that Section 7(d)(4) sets forth a dual test for determining whether compensation payments may be suspended as a result of a claimant's failure to undergo an examination. *See Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). Initially, the burden of proof is on employer to establish that the claimant's refusal to undergo the examination is unreasonable. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify her refusal. *Id.; Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting). For purposes of this test, reasonableness of refusal is an objective inquiry, while justification is a subjective inquiry focusing narrowly on the individual claimant. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

In his decision, the administrative law judge found that the facts do not establish any refusal by claimant to submit to a specific medical examination. The administrative law judge credited evidence that before and after her April 2001 surgery claimant consistently complied with employer's requests that she appear for examinations with Drs. Russell, Ross, and Babbitt. *See* EXs 24, 48, 66. The administrative law judge further found that employer demanded on the day before the scheduled surgery that claimant postpone her surgery until an additional examination could be scheduled. The administrative law judge found that claimant reasonably refused to postpone her surgery. The administrative law judge found that a reasonable person would have elected to proceed with the surgery given claimant's six-year history of right wrist pain, limitations,

and lost work despite two prior surgeries, physical therapy and acupuncture, and the recommendation by two well-qualified physicians that carpal tunnel surgery would relieve her symptoms. Decision and Order at 13; *see, e.g.*, CXs 16-18. The administrative law judge therefore rejected employer's assertion that claimant's compensation should be suspended pursuant to Section 7(d)(4). The administrative law judge's finding that claimant reasonably proceeded with her scheduled surgery is rational and supported by substantial evidence. We, therefore, affirm the administrative law judge finding that Section 7(d)(4) is not a bar to claimant's receipt of compensation following her surgery. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Employer also contends that it is not liable for medical costs associated with claimant's wrist surgery because Drs. Kalvoda and Vigna failed to file attending physician reports, as required under Section 7(d)(2) of the Act. The administrative law judge excused their failure to file reports because employer had actual knowledge and approved of Dr. Kalvoda's treatment. The administrative law judge found that employer did not show any prejudice resulting from the absence of the medical reports and that claimant's treatment and surgery was reasonable and necessary. Decision and Order at 14-15.

Under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2); *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pert. part*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422.[4] The authority to determine whether non-compliance with Section 7(d)(2) may be excused rests solely with the district director and not the administrative law judge. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1995)(McGranery, J., concurring in part and dissenting in part); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). Therefore, this case must be remanded to the district director for consideration of this matter, as the authority to excuse untimely filing is a discretionary decision which rests with the district director and there is no evidence that the district director considered this issue. *Toyer*, 28

[4] The implementing regulation, Section 702.422(b), 20 C.F.R. §702.422(b), states in pertinent part:

> For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act . . . .

BRBS at 353-54. We vacate the administrative law judge's award of medical expenses for the treatment provided by Drs. Kalvoda and Vigna, and we remand the case to the district director for a decision as to whether their failure to file attending physician reports should be excused under the terms of Section 7(d)(2) and Section 702.422(b) of the regulations.[5]

Employer next avers that the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), is erroneous. Employer contends that Section 10(a) of the Act, 33 U.S.C. §910(a), is applicable since claimant worked for substantially all of the year immediately preceding her December 2000 injury.

Section 10(a) looks to the actual wages of the injured worker who is employed for substantially the whole year prior to the injury as the monetary base for the determination of the amount of compensation, and is premised on the injured employee's working substantially the entire year prior to the injury.[6] Section 10(c) is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[7] *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). In his decision, the administrative law judge credited claimant's earnings as listed on employer's First Report of Injury, Form LS-202, for her December 26, 2000, injury, which stated that at the date of her injury claimant was

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[5]Employer also contends that it cannot be ordered to pay the medical costs incurred by claimant's private health insurer. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 109, *decision on recon. en banc*, 31 BRBS 13 (1997). This issue is not ripe for review as the administrative law judge did not order employer to pay any medical bills paid by claimant's private health insurer. *See* Decision and Order at 15, 19; *see generally Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

[6]Section 10(a) states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

[7]No party argues that Section 10(b) is applicable in this case.

earning $6.76 per hour, and that she had an average daily wage of $54.08, a weekly rate of $290.40, and a yearly rate of $14,108. EX 7. Based on this form, the administrative law judge found that claimant's average weekly wage at the time of her injury was $290.40.

We reject employer's contention that the administrative law judge should have applied Section 10(a). While Section 10(a) may be applied when an employee has worked substantially the whole of the year immediately preceding her injury, for this or another employer, it requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. In this case, claimant's payroll records fail to show the actual number of days claimant worked during the year preceding her injury. Such evidence is necessary to determine claimant's average daily wage. EX 88; *see Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999)(decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). As the record lacks the necessary evidence for application of its formula, Section 10(a) cannot be applied. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 (1st Cir. 2004).

The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Id.; Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Fox v. West State Inc.*, 31 BRBS 118 (1997). It is well established that the administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c); the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Fox*, 31 BRBS at 124.

The administrative law judge accepted the information contained on employer's uncontradicted Form LS-202 as establishing claimant's average weekly wage as $290.40. In his findings of fact, the administrative law judge credited claimant's testimony that she retuned to work in January 2000 for employer part-time, and that she gradually increased the number of hours she worked over the next year until in January 2001 she attained the same earning level as prior to her May 1995 injury. Decision and Order at 5; *see* Tr. at 32. In arriving at an approximation of claimant's earning capacity at the date of injury, it is proper for a Section 10(c) computation to reflect an increase in wages claimant received before the injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). Employer's contention that claimant's average weekly wage should be based on claimant's wages from the entire year prior to her injury would not reflect the steady increase in the number of hours worked. The use of claimant's earnings at the time of injury fully compensates claimant for the earnings she lost due to her injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905

(1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). As the administrative law judge's calculation of average weekly wage under Section 10(c) reasonably approximates claimant's annual earning capacity at the time of injury, we reject employer's assertion of error, and we affirm the administrative law judge's decision, as it is supported by substantial evidence. *See Preston*, 380 F.3d 597; *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT);[8] *Story*, 33 BRBS 111.

We next address employer's appeal of the attorney's fee award. Employer contends that the administrative law judge erred by awarding claimant's counsel a fee payable by employer because employer did not have the opportunity to have the controversy resolved at an informal conference before the district director prior to the matter's being referred to the administrative law judge for a hearing. In the alternative, employer contends that if it is liable for claimant's attorney's fees, the fee should be limited by employer's settlement offer, which employer asserts exceeded claimant's ultimate recovery.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). In this case, the administrative law judge found employer liable for an attorney's fee under Section 28(a) because claimant successfully established entitlement to medical care and temporary total disability compensation after employer controverted her entitlement to benefits related to her December 2000 wrist injury. Supp. Decision and Order at 4. The administrative law judge found that the lack of an informal conference before the district director does not preclude an award of an attorney's fee under Section 28(a). *Id*. at 2-3.

We affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee under Section 28(a). Employer did not pay any benefits to claimant after she filed her claim on March 30, 2001. This claim was successfully prosecuted, and the administrative law judge therefore properly held employer liable for claimant's attorney's fee pursuant to Section 28(a). *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). We reject employer's contention that it is not liable for claimant's attorney's fee due to the absence of an informal conference, as an informal

[8]In *Hall*, the United States Court of Appeals for the Fifth Circuit stated that it will be an "exceedingly rare case" where the claimant's actual earnings at the date of injury are wholly disregarded and that "typically," a claimant's wages at the date of injury will best reflect his earning capacity. *Hall*, 139 F.3d at 1031, 32 BRBS at 96(CRT).

conference is not a prerequisite to employer's fee liability pursuant to Section 28(a).[9] Therefore, as it is in accordance with law, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(a) and we need not address employer's contention concerning Section 28(b).

Employer next challenges the administrative law judge's award of a fee for attorney time for services rendered before a claim was filed on March 30, 2001, for claimant's December 26, 2000, work injury, and time expended establishing claimant's entitlement to additional compensation for her May 1995 work injury. Specifically, claimant's attorney requested a fee for 2.3 hours of attorney time expended before March 30, 2001, and employer alleges that claimant did not prevail in her assertion of entitlement to temporary partial disability compensation after she returned to part-time work for employer in January 2000. In regard to its latter objection, employer also argues that time expended rebutting employer's evidence of suitable alternate employment and expenses associated with retaining the services of a vocational rehabilitation expert are not compensable.

In his supplemental decision, the administrative law judge found that the claim related to the 1995 work injury was consolidated with the claim for the December 2000 work injury, and that the contested issues were interrelated. The administrative law judge found interrelated employer's overpayment/credit and vocational rehabilitation/ suitable alternate employment issues, and he found that claimant's attorney successfully defended against employer's arguments on these issues. The administrative law judge concluded that all of claimant's attorney's services are compensable since addressing both work injuries was essential to resolving the contested issues, and claimant prevailed in establishing claimant's entitlement to medical benefits and compensation for the December 2000 work injury.

We reject employer's contention that the administrative law judge erred by not reducing the fee for time expended prior to March 30, 2001. The administrative law judge did not address any claim claimant may have made for temporary partial disability benefits preceding the December 2000 work injury. The sole issue addressed by the

[9] The administrative law judge also correctly stated that the holding of an informal conference is within the discretion of the district director and therefore the absence of such does not preclude employer's liability for a fee under Section 28(b). *See National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *Contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that an informal conference is a prerequisite to fee liability under Section 28(b)).

administrative law judge concerned claimant's entitlement to medical benefits and compensation for her December 2000 work injury, issues on which claimant fully prevailed. Claimant's ultimate success on these issues before the administrative law judge renders employer liable for all necessary work performed leading to that success. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineeering Co.*, 35 BRBS 1 (2001) (*en banc*). The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

In this case, the administrative law judge summarized employer's contentions that the fee should be reduced. The administrative law judge rationally found, in response to employer's objections, that the 1995 and 2000 right wrist injuries were interrelated, and that claimant was fully successfully in defending against employer's contention that it is entitled to credit against its liability for the December 2000 work injury an overpayment of compensation for claimant's 1995 work injury, and fully successful in establishing claimant's entitlement to compensation and medical benefits for the 2000 work injury. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). As the administrative law judge rationally found that addressing both injuries was essential to resolving the contested issues on which claimant prevailed, we hold that the administrative law judge was not required to reduce the fee award for time expended by claimant's counsel prior to claimant's filing a claim for the December 2000 work injury. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Stratton*, 35 BRBS at 8. As the administrative law judge's findings are rational and in accordance with law, we reject employer's contention that the administrative law judge insufficiently reduced the requested fee. Moreover, due to the related nature of the claims, the administrative law judge properly awarded claimant the cost of her vocational counselor. *O'Kelley*, 34 BRBS at 44.

Employer next asserts that claimant's counsel did not exercise billing judgment in that claimant's counsel requested a fee of $19,415.75 and costs of $4,800.78, but claimant was awarded less than $3,000 in compensation as well as medical expenses. The administrative law judge found that given the intensity with which the issues in this claim were litigated, claimant's attorney reasonably believed at the time the work was performed that her services were necessary to establish entitlement. Supp. Decision at 5-6. We affirm the administrative law judge's finding that employer actively litigated claimant's entitlement to compensation and medical benefits for her December 2000 work injury, and his conclusion that, in response thereto, claimant's counsel exercised reasonable billing judgment. *See Barbera*, 245 F.3d at 289-290, 35 BRBS at 32(CRT); *O'Kelley*, 34 BRBS at 44.

Employer also contends that the awarded hourly rates of $195 and $220 to Ms. Tokar, and of $55 and $65 for paralegal services are excessive. We reject employer's contention. Section 732.132 of the regulations, 20 C.F.R. §702.132, provides that the award of an attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n.*, 22 BRBS 434 (1989). In this case, the administrative law judge stated he was not persuaded by employer's unsupported allegations that the requested rates are excessive. The administrative law judge found, based on his experience with work performed in Maine, that the requested rates are reasonable, and that it was reasonable for Ms. Tokar to increase her hourly rate in 2003 to $220 based on the annual increases since 1999 in the national average weekly wage. Supp. Decision at 4; *see Newport News Shipbuilding & Dry Dock Co. v. Brown* 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). As the administrative law judge rationally considered the applicable rate in the geographic locality involved, the experience of the attorney, and the rise in the national average weekly wage, employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on his determination as to the proper hourly rate for Ms. Tokar and for paralegal work. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251, 253 (1998)(decision on recon. *en banc).*

Finally, we reject employer's contention that certain entries on the fee petition fail to adequately describe the nature of the time expended. A review of claimant's fee petition reveals that counsel's entries are sufficiently specific to satisfy the regulatory criteria. *See Forlong v. American Security & Trust Co.,* 21 BRBS 155 (1988); 20 C.F.R. §702.132(a). The fee petition also fulfills claimant's counsel's burden to provide a complete, sworn statement of the extent and character of the necessary work done, the professional status of each person performing such work, and the normal billing rate for such person, and we reject employer's assertion that claimant's counsel has a greater burden of proof to establish the compensability of the services when employer files an objection. *See generally National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); 20 C.F.R. §702.132. Furthermore, the administrative law judge adequately addressed employer's challenge to various itemized entries on appeal, considered the response of claimant's attorney, and stated the grounds by which employer's objections were rejected. As employer has not met its burden of showing that the administrative law judge abused his discretion in this regard, the number of hours awarded by the administrative law judge is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Accordingly, we vacate the administrative law judge's finding that the failure of Drs. Kalvoda and Vigna to file reports should be excused under the terms of Section 7(d)(2) of the Act. We remand this case to the district director for consideration of this issue in the first instance. In all other respects, the administrative law judge's award of benefits is affirmed. The administrative law judge's Supplemental Decision Awarding Attorney's Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge