BRB Nos. 93-1103
and 93-1103A

ROBERT MATTICH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
JONES WASHINGTON STEVEDORING COMPANY	)	DATE ISSUED: __________________
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi, Seattle, Washington, for claimant.

Carol J. Molchior (Madden & Crockett), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits and claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-1897) of Administrative Law Judge Paul A. Mapes 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 only be set aside if shown 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).

Claimant, a longshoreman who suffered from arthritis in both knees, more severely in the left, was involved in a work-related automobile accident on March 16, 1990, in which he injured his lower right extremity including his right knee. Claimant underwent a total left knee replacement on

June 4, 1990, and a total right knee replacement on September 10, 1990. Employer voluntarily paid claimant temporary total disability compensation from March 17, 1990 through May 25, 1990, based on an average weekly wage of $1,006.24. Claimant sought additional temporary total and permanent partial disability compensation and medical benefits under the Act for his injuries to both knees.[1]

The administrative law judge determined that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that the work-related accident aggravated the condition in both knees and accelerated the need for surgery based on the opinions of claimant's two treating physicians, Drs. Waltman and Hoover. Although the administrative law judge found that employer had not rebutted the presumption that the accident at least temporarily aggravated claimant's knee conditions, he found that employer did rebut the presumption that the accident accelerated the need for surgery with the opinions of Drs. Waltman and Skeith. After weighing the evidence as a whole, however, the administrative law judge concluded that claimant established that the right knee injury accelerated the need for both of claimant's knee surgeries, and that although this aggravation of claimant's disability was only temporary, this did not relieve employer of liability. The administrative law judge therefore awarded claimant temporary total disability benefits from March 16, 1990 until September 1, 1991, and permanent partial disability benefits thereafter for a 20 percent loss of use in each leg under Section 8(c)(2) and (19) of the Act. 33 U.S.C. §908(c)(2), (19). In a Supplemental Decision and Order and Order Granting Motion for Reconsideration, the administrative law judge awarded claimant's attorney a fee, but substantially reduced the amount requested.

On appeal, employer contends that the administrative law judge erred in invoking Section 20(a) to presume that the March 16, 1990, accident accelerated claimant's need for knee surgery and to presume that the aggravation of his left knee was the natural or unavoidable result of claimant's work-related right knee injury. Employer also contends that the administrative law judge erred in relying on patently unreasonable testimony. Claimant responds, urging that the administrative law judge's findings regarding causation be affirmed.

On cross-appeal, claimant contends that the administrative law judge erred in determining that he is entitled only to compensation for a 20 percent permanent physical impairment of each leg and in substantially reducing the requested fee. Employer responds, contending that claimant's contentions are without merit.

Citing *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), employer initially contends that the administrative law judge erred in employing Section 20(a) to presume that the work-related accident aggravated the condition in both of claimant's knees and accelerated the need for knee surgery in the absence of evidence sufficient to

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[1]Claimant contends that as he injured his right knee in the accident, he was no longer able to favor this knee, and that this further aggravated the arthritic condition in his left knee. Transcript at 77.

establish these propositions under a preponderance of the evidence standard.

Contrary to employer's assertions, claimant is not required to introduce evidence sufficient to prove his *prima facie* case under Section 20(a) by a preponderance of the evidence. The Supreme Court's decision in *Greenwich Collieries* does not address or alter the quantum or proof necessary to establish invocation or rebuttal under Section 20(a); it merely held that application of the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), by easing claimant's burden of proving the validity of his claim. *Greenwich Collieries*, 114 S.Ct. at 2257, 2259, 28 BRBS at 46, 48 (CRT); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(Decision on Recon.). Thus, contrary to employer's assertions, claimant was not required to introduce affirmative evidence establishing that the work-related accident in fact produced his harm in order to invoke Section 20(a); he was only required to introduce evidence that it could have done so and claimant clearly satisfied this burden based on the medical opinions of Drs. Waltman and Hoover in this case.[2] *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990)(referring to minimal requirements necessary to invoke Section 20(a)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Although employer contends that it was error for the administrative law judge to have based his invocation finding on the inconsistent and equivocal testimony of Drs. Waltman and Hoover, the administrative law judge's decision to credit these medical opinions, after considering the inconsistencies employer cites in its brief, was a proper exercise of the administrative law judge's discretionary authority. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Inasmuch as claimant established invocation of the Section 20(a) presumption, the burden shifted to employer to establish that claimant's knee problems and resultant surgery were not caused or aggravated by the work injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). On appeal, employer does not contest the administrative law judge's finding that employer failed to introduce evidence sufficient to establish that the March 1990 work accident did not at least temporarily aggravate claimant's right and left knee conditions. Employer, however, does assert that after finding that employer introduced evidence sufficient to establish rebuttal of the presumption that the work-related accident accelerated the need for replacement of claimant's knee joints, the administrative law judge erred in determining that employer bore the ultimate burden of persuasion.

In his Decision and Order at 4, the administrative law judge cites *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), for the proposition that after the Section 20(a)

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[2]Contrary to employer's assertions, the administrative law judge properly found that although claimant's left knee was not directly injured in the work accident, he was entitled to the presumption that it was aggravated or was the natural or unavoidable result of the work injury pursuant to Section 20(a) in light of claimant's testimony that his right knee injury caused him to shift his weight onto his already painful left knee and Dr. Dunn's deposition testimony that such a situation could cause increased stress on claimant's left knee. Ex. 46 at 26. *See generally Kubin v. Pro-Football Inc.*, 29 BRBS 117, 118-120 (1995).

presumption is rebutted employer bears the ultimate burden of persuasion in his recitation of the applicable legal standard. This proposition is no longer valid in light of the holding in *Greenwich Collieries*. *See Holmes*, 29 BRBS at 21 n.3. We nonetheless affirm the administrative law judge's finding that the March 16, 1990, work accident accelerated the need for surgery of both of claimant's knees, however, because when he evaluated the evidence as a whole the administrative law judge did not employ the *Parsons* standard. He determined, consistent with *Greenwich Collieries,* that claimant met his burden of establishing that the need for surgery in both knees was, in fact, accelerated by the work accident. In making this determination, the administrative law judge meticulously evaluated all of the evidence, discussed the discrepancies and possible biases in Dr. Waltman's and Dr. Hoover's testimony which employer alleges causes their testimony to be incredible,[3] and rationally concluded based primarily on his crediting of Dr. Dunn's and claimant's testimony[4] that the work accident did, in fact, accelerate the need for claimant's surgery. Inasmuch as the testimony of Dr. Dunn and claimant provide substantial evidence to support the administrative law judge's determination and employer has failed to establish any reversible error committed by the administrative law judge, we affirm his finding that claimant's work-related knee injury accelerated the need for both of his surgeries. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Employer's contention that it should be relieved of all liability as the knee surgeries were inevitable also must fail. An employment injury need not be the sole cause of a disability; rather if the employment injury aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

While we affirm the administrative law judge's finding that the work injury aggravated claimant's pre-existing condition and led claimant to have the surgery, we agree with employer that inasmuch as the effects of the work-related injury were temporary, the administrative law judge erred in holding it liable for claimant's permanent disability benefits. Relying on the opinions of Drs. Hoover, Dunn, and Waltman, the administrative law judge found in his Decision and Order at 11 n.6, that the work-related aggravation of claimant's pre-existing knee condition was only

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[3]The administrative law judge found that the reports of Drs. Waltman and Hoover were to be viewed with a certain degree of skepticism because of inconsistencies between their ultimate conclusion that the work-related injury accelerated the need for surgery and their earlier testimony, the fact that Dr. Waltman viewed himself as claimant's advocate, and the fact that Dr. Hoover had apparently been swayed to change his earlier opinion that claimant needed surgery even prior to his work injury based on a letter from claimant's wife. *See* Decision and Order at 11.

[4]Dr. Dunn testified that the decision to have knee surgery is primarily based on pain, Ex. 46 at 4-5, and claimant testified that it was only after the work-related accident occurred that his pain became so severe as to prompt him to request surgery, Tr. at 120.

temporary in nature, but that this conclusion did not operate to relieve employer of liability. Inasmuch, however, as two of the three doctors he credited in reaching this conclusion, Drs. Hoover and Dunn,[5] stated that claimant's residual impairment post-surgery was due in whole to his pre-existing degenerative arthritis, we conclude that the administrative law judge erred in holding employer liable for claimant's post-surgical permanent physical impairment, as his post-surgical disability is not causally related to the work injury. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 7 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). Accordingly, the administrative law judge's finding that employer is liable for claimant's scheduled permanent partial disability compensation is reversed.

In light of our determination that claimant's permanent residual impairment subsequent to his surgery is not compensable, we need not address claimant's assertions on cross-appeal that the administrative law judge should have found he has a 30 percent impairment of each leg instead of the 20 percent he awarded. Accordingly, we direct our attention to claimant's argument relating to the administrative law judge's award of an attorney's fee.

Claimant's counsel sought an attorney's fee of $12,185.28, representing 52 hours of attorney work at an hourly rate of $150, a bonus fee of $2,500, and costs of $1,885.28, for work performed before the administrative law judge. The administrative law judge rejected claimant's attorney's request for the "bonus fee," allowed 40 of the total hours claimed, and disallowed a $40 court reporter cost associated with taking the deposition of employer's claims examiner, having determined that the deposition itself was unnecessary. Accordingly, the administrative law judge awarded claimant's counsel a fee of $6,000, representing 40 hours at $150 per hour, plus costs of $1,845.28.

Claimant appeals the administrative law judge's fee award, contending that as enhanced fees are allowable under the Act, the administrative law judge erred in failing to award the requested "bonus" fee. Claimant further avers that the administrative law judge erred in reducing the hours claimed by 25 percent and in disallowing the 2.5 hours claimed for deposing employer's claims examiner as unnecessary. Employer responds, urging affirmance.

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[5]Dr. Hoover stated in a report dated February 5, 1991, that although the accident claimant had may have hastened the time when surgery was performed, claimant's post-surgery residual disability was due entirely to his pre-existing degenerative arthritis. Ex. 29; Cx. 1 at 12-13. Dr. Dunn deposed that claimant's work-related accident had no effect on the degree of impairment he suffers post-surgery. Ex. 46 at 23. Although the administrative law judge's reliance on Dr. Waltman's opinion to conclude that the effect of claimant's work injury was temporary was misplaced because Dr. Waltman opined that claimant's work-related accident accelerated the process of claimant's knee impairment and probably resulted in a "less good result," Cx. 4 at 69, we deem it unnecessary to remand for reconsideration of this evidence because the administrative law judge repeatedly found Dr. Waltman's opinion entitled to little weight throughout his decision based on the inconsistent nature of his testimony and the fact that he viewed himself as claimant's advocate. *See, e.g.*, Decision and Order at 7, 11.

We affirm the fee award made by the administrative law judge. Contrary to claimant's assertions, the decision of the United States Supreme Court in *City of Burlington v. Dague*, 505 U.S. 557 (1992), holding that contingency fee enhancement is improper under federal fee-shifting statutes, applies to cases under the Longshore Act. *See generally Anderson v. Director, OWCP*, No. 94-70750 (9th Cir. August 5, 1996); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Accordingly, the administrative law judge properly found that counsel's risk of non-payment did not justify the award of the bonus fee in this case. We also affirm the administrative law judge's determination that the complexity of the issues involved, the results obtained, and employer's ability to pay, did not warrant imposition of a bonus fee as a rational exercise of his discretionary authority and reject claimant's unsupported assertions to the contrary. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16, (1993).

The administrative law judge's 25 percent reduction in the hours claimed is also affirmed. His determination that the number of hours claimed should be reduced by 25 percent because the total number of hours spent by counsel exceeded the amount that other experienced longshore attorneys typically report for cases of comparable complexity and nature by one-quarter is within his discretionary authority.[6] *See generally Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 1539 (1994). Moreover, in disallowing the 2.5 hours and $40 in costs requested associated with the deposition of employer's claim's examiner, Mr. Fornier, the administrative law judge did not abuse his discretion, having in essence determined that counsel could not have reasonably viewed this work as necessary as Mr. Fornier had no direct knowledge about the case, any information he knew could have been obtained by a simple interrogatory which could have been prepared in one-half hour, and it appeared that the deposition may have been intended, at least in part, to harass employer's claim's examiner.[7] Supp. Decision and Order at 4; *see generally Hardick v. Campbell Industries*, 12 BRBS 265 (1980). Inasmuch as claimant has failed to establish that the administrative law judge abused his discretion in awarding the reduced fee, the fee awarded by the administrative law judge is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly the administrative law judge's award of permanent partial disability benefits is reversed. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed. The Supplemental Decision and Order Awarding Attorney's Fees is also affirmed.

SO ORDERED.

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[6]The administrative law judge attributed this in part to counsel's minimum quarter-hour billing method.

[7]This determination was apparently based on employer's assertions in its objections that claimant's attempt to conduct this deposition at the last minute prior to the hearing and to have Mr. Fornier produce vaguely described records through a *subpoena duces tedum* was neither reasonable nor necessary.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge