BRB Nos. 93-2346

HERBERT MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CERES GULF, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Revised and Supplemental Motion for Reconsideration of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney's Fee of Marilyn C. Felkner, District Director, Seventh Compensation District, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey Stafford Lang, A Law Corporation), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Revised and Supplemental Motion for Reconsideration of Administrative Law Judge A.A. Simpson, Jr., and the Compensation Order-Award of Attorney's Fee of District Director Marilyn C. Felkner, 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 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 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

On March 27, 1991, claimant twisted his back while working as a longshoreman for employer. After receiving conservative treatment, and being off work for approximately three

weeks, claimant attempted to return to his usual work on April 15, 1991. Upon his return, however, claimant experienced increasing back pain, and, after working for a disputed number of days during April and May 1991, was again unable to work. Claimant attempted to return to his usual job a second time on July 22, 1991, but worked for only six days before he allegedly had to quit due to increasing back pain. Employer voluntarily paid claimant temporary total disability benefits from March 27, 1991 through April 14, 1991, and from May 12, 1991 until July 21, 1991. Claimant, who has not worked since July 31, 1991, sought additional compensation under the Act.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from March 27, 1991, through December 10, 1991, permanent total disability compensation from December 11, 1991, until June 5, 1992, and permanent partial disability compensation thereafter based on his determination that employer established the availability of suitable alternate employment paying the minimum wage as of that time. The administrative law judge also held employer liable for claimant's medical expenses pursuant to Section 7, 33 U.S.C. §907, including the services rendered by Dr. Phillips, whom the administrative law judge found was claimant's initial free choice of physician.

Subsequently, in a Decision and Order Denying Motion for Reconsideration dated August 12, 1993, the administrative law judge reaffirmed his prior finding that claimant was temporarily totally disabled during the period from March 28, 1991 through December 10, 1991, but awarded employer a credit for 6 days of wages claimant earned in July 1991, as reflected in Ex. 6. In a Decision and Order Denying Revised and Supplemental Motion for Reconsideration dated August 16, 1993, the administrative law judge rejected employer's assertion that it should be entitled to a credit for an additional 23 days of wages claimant earned during the period of temporary total disability, finding that the evidence employer submitted in support of this assertion was insufficient to justify altering his prior Decision and Order Denying Motion for Reconsideration. Thereafter in a Compensation Order-Award of Attorney's Fee dated January 24, 1994, over employer's objections, the district director awarded claimant's counsel the entire requested fee of $3,500, representing 28 hours of work at $125 per hour.

On appeal, employer challenges both the administrative law judge's award of temporary total disability and his refusal to award a credit for all of the days of wages claimant earned during the period in which claimant was allegedly temporarily totally disabled. In addition, employer challenges the administrative law judge's finding that claimant's permanent disability is causally related to the work accident and alternatively his determination of claimant's post-injury wage-earning capacity. Employer further maintains that the administrative law judge erred in holding it liable for Dr. Phillips' medical treatment, asserting that claimant had, in effect, chosen Dr. Woessner, who referred him to Dr. Steiner, as his initial free choice of physician, that there was no refusal of treatment by these physicians, and that claimant did not request a change in physicians to Dr. Phillips. Lastly, in a supplemental appeal, employer challenges the district director's attorney's fee award, contending that entries for 10 of the 28 hours claimed in the underlying fee petition submitted by claimant's counsel were not sufficiently specific to allow the district director to determine the compensability of the services claimed and that accordingly the fee award should be overruled or

modified to reflect the reduction of these entries. Claimant responds, urging affirmance of the administrative law judge's decisions and the district director's award of attorney's fees.

After review of the administrative law judge's Decision and Order in light of the record, we initially affirm his award of temporary total disability compensation from March 28 to December 10, 1991. Contrary to employer's assertions, the fact that claimant worked some days during this period does not preclude the administrative law judge from concluding that claimant was unable to perform his usual work duties where, as here, the administrative law judge credited claimant's testimony that he was only able to perform this work in severe pain, Tr. at 41-45. *See Houghton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in pert. part*, 19 BRBS 15 (1986).[1] Moreover, the fact that Dr. Steiner opined that claimant would be able to perform "plenty of jobs" in his capacity as a longshoreman with seniority, Tr. at 189, does not affect this determination inasmuch as it does not establish that claimant was able to perform his usual longshore work and employer made no attempt to establish the availability of suitable alternate employment during the period in question. As employer has failed to establish any reversible error made by the administrative law judge, his award of temporary total disability compensation is affirmed. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 343 (1988).

The administrative law judge's refusal to grant employer a credit for the wages claimant earned during the period of temporary total disability beyond the six days approved in his Decision and Order Denying Motion for Reconsideration, *see* Ex. 6, is also affirmed. In his Decision and Order Denying Revised and Supplemental Motion for Reconsideration, after considering the wage information employer referenced to support its assertion that it should be afforded a credit for an additional 23 days of wages, Cx. 2, the administrative law judge found this evidence insufficient to justify altering his prior Decision and Order Denying Motion for Reconsideration, noting that he had previously accepted claimant's testimony that he had attempted to work during this time period but was unable to continue due to pain. Inasmuch as employer has failed to establish that the administrative law judge's credibility finding was either inherently incredible or patently unreasonable, we affirm this determination. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We also affirm the administrative law judge's finding that claimant's permanent disability is causally related to the work injury. The administrative law judge is not bound to accept the opinion of any particular medical expert, but is free to accept or reject all or any part of any medical evidence as he sees fit, *see Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir.

[1]Although not specifically relied upon by the administrative law judge, we note that Dr. Phillips' deposition testimony that when he examined claimant on September 12, 1991, he believed he was unable to perform his usual longshore work due to a herniated disc pulposus, Cx. 3 at 8-9, and Dr. Phillips,' October 24, 1991, report, Ex. 8 at 9, which indicates that claimant's pain was severe and disabling provides additional evidentiary support for the administrative law judge's conclusion.

1990). Employer argues that Dr. Steiner's July 1991 opinion that claimant was capable of returning to his regular employment in conjunction with his hearing testimony attributing claimant's current inability to perform his former work solely to his pre-existing degenerative disc disease, Tr. at 175-178, is sufficient to establish that claimant sustained no permanent disability related to his work injury. The administrative law judge, however, rationally concluded to the contrary based on his crediting of the opinion of Dr. Phillips, claimant's treating physician, and the corroborating opinion of Dr. Murray. The opinion of Dr. Phillips attributed claimant's disabling back pain to a ligament tear caused by the March 27, 1991 work injury, Ex. 8 at 8, 25, and was corroborated in part by Dr. Murphy's December 12, 1991, opinion that the work-related accident at least precipitated claimant's symptoms, Cx. 4 at 31. These opinions provide substantial evidence to support the administrative law judge's finding that as of the time claimant reached permanency he remained unable to perform his usual work due to the effects of the work injury. As employer has failed to establish any reversible error made by the administrative law judge in making this determination, we affirm the administrative law judge's finding that claimant's permanent disability is causally-related to the work injury. *See Thompson*, 26 BRBS at 53; *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

We also reject employer's contention that in awarding permanent partial disability compensation, the administrative law judge erred in determining claimant's post-injury wage-earning capacity by not crediting the vocational testimony of Ms. Coffin and Mr. Stokes concerning claimant's ability to obtain land-based crane-operator positions paying a salary within the range of $11 to $21 per hour. The administrative law judge, however, drew reasonable inferences and rationally found that employer had not demonstrated that positions operating cranes were suitable for claimant or that suitable positions performing only crane operator work were realistically available. Inasmuch as employer has not demonstrated reversible error in the administrative law judge's conclusions in this regard, his finding that claimant had a residual post-injury wage-earning capacity of $170 per week based on the security guard and assembler control technician positions identified by employer's vocational expert, Ms. Coffin, is affirmed. Consequently, the award of permanent partial disability compensation is also affirmed.

Citing *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988), employer also contends that the administrative law judge erred in holding it liable for Dr. Phillips' medical treatment. Employer avers that although claimant was initially seen by Dr. Woessner at employer's suggestion, because he continued to receive treatment by Dr. Woessner past the period of emergency and was subsequently referred by Dr. Woessner to Dr. Steiner, who thereafter treated claimant for approximately 7 months, claimant, had, in effect chosen Drs. Woessner and Steiner as his initial free choice of physician. Accordingly, employer asserts that the administrative law judge erred in concluding that claimant was not obligated to request a change in physicians to Dr. Phillips. We affirm the administrative law judge's finding that employer is liable for the treatment provided by Dr. Phillips. It was not unreasonable for the administrative law judge to infer from the testimony of employer's insurance representative, Mr. Benefield, who stated that claimant repeatedly asked whether he could choose his own physician, Tr. at 157-158, that claimant had not been given the opportunity to make a choice. The administrative law judge could reasonably conclude that if claimant believed he had done so he would not have repeatedly asked about his right to so choose. Decision and Order at 18. Inasmuch as the testimony of Mr. Benefield and claimant, Tr. at 46-47, provides substantial evidence to support the administrative law judge's finding that neither Dr. Woessner nor Dr. Steiner was claimant's initial free choice of physician, we affirm the administrative law judge's finding that

claimant was not required to obtain authorization for a change in physician. *See generally 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); *Bulone v. Universal Terminal & Stevedoring Co.*, 8 BRBS 515, 517 (1978), *overruled on other grounds*, *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Inasmuch as employer does not otherwise contest the compensability of Dr. Phillips' services, we affirm the administrative law judge's finding that employer is liable for Dr. Phillips' treatment. *See generally Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 307-308 (1989); *see also Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

Lastly, employer challenges the district director's attorney's fee award, contending that the underlying fee petition was not sufficiently specific for the district director to determine the compensability of the services claimed. We reject this assertion, inasmuch as the district director specifically considered employer's objection in this regard and rationally concluded that the fee petition submitted was sufficiently specific to comply with the requirements of the applicable regulation, 20 C.F.R. §702.132 *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155, 163 (1988). Accordingly, the attorney's fee awarded by the district director is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Decision and Order Denying Motion for Reconsideration, and Decision and Order Denying Revised and Supplemental Motion for Reconsideration are affirmed. The district director's Compensation Order-Award of Attorney's Fee is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge