NIKOLAI D. DONCEV	)	BRB Nos. 93-2467
	)	and 93-2467A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
	)	
NIKOLAI D. DONCEV	)	BRB No. 94-0376
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Decision on Motions for Reconsideration, Supplemental Decision and Order Awarding Attorney Fees, and Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees of Daniel L. Stewart, Administrative Law Judge, and the Compensation Order Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

Donald G. Cline (Law Offices of Cline & Fox), San Diego, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision and Order on Motions for Reconsideration and employer appeals the Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees (90-LHC-1387, 90-LHC-1388) of Administrative Law Judge Daniel L. Stewart 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). Employer additionally appeals the Compensation Order Award of Attorney Fees (Case Nos. 18-24824, 18-32757) of District Director Joyce L. Terry.[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and may be set aside only if shown by the challenging party 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 marine electrician, sustained a right shoulder injury on August 3, 1983, and a back injury on October 13, 1986, while working for employer. Initially, employer voluntarily paid benefits to claimant, but ceased its payments on the basis that claimant is no longer disabled. Before the administrative law judge, claimant alleged that he is permanently totally disabled due to his right shoulder and back injuries, and that, as a result of those injuries, he presently suffers a memory loss, psychiatric impairment, and mild adult diabetes.

In his Decision and Order, the administrative law judge determined that while claimant sustained right shoulder and back injuries in 1983 and 1986 respectively, the evidence is insufficient to establish that either injury has resulted in a memory loss, a psychiatric impairment, or diabetes. The administrative law judge next found that claimant was capable of performing the suitable alternate employment positions listed in a labor market survey dated February 28, 1989, that claimant reached maximum medical improvement on October 27, 1989, and that, as of that date, claimant could have returned to his former job with employer without restrictions. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from November 18, 1986 to February 27, 1989, and temporary partial disability benefits from February 28, 1989 to October 26, 1989. Moreover, the administrative law judge concluded that claimant is entitled to future medical treatment, if necessary, for his right shoulder and lower back conditions, and that claimant's counsel is entitled to an attorney's fee payable by employer. Both claimant and employer subsequently filed motions for reconsideration which were denied by the administrative law judge.

[1]In an Order dated November 29, 1993, the Board consolidated for purposes of decision claimant's appeal of the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order on Motions for Reconsideration, BRB No. 93-2467, employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of the Supplemental Decision, BRB No. 93-2467A, and employer's appeal of the district director's Compensation Order Award of Attorney Fees, BRB No. 94-376. 20 C.F.R. §802.104.

Thereafter, claimant's counsel filed a fee petition with the administrative law judge, requesting a fee of $7,750, representing 62 hours of services rendered at an hourly rate of $125. In a Supplemental Decision and Order, the administrative law judge, after noting that employer had not filed objections to this fee petition, awarded the fee requested by counsel.
Employer thereafter filed a motion for reconsideration of the administrative law judge's attorney's fee award; in a Decision on Motion for Reconsideration, the administrative law judge, after addressing employer's objections to counsel's fee request, once again awarded counsel the requested fee of $7,750.

Claimant's counsel additionally sought an attorney's fee for work performed before the district director. On September 29, 1993, the district director awarded claimant's counsel $2,500, representing 20 hours of services performed at an hourly rate of $125.

On appeal, claimant asserts that the administrative law judge erred in failing to inform the parties of his intention to reject their stipulation regarding claimant's ability to return to his usual employment duties with employer; alternatively, claimant argues that the administrative law judge's findings on this issue are not supported by substantial evidence. Employer responds, urging affirmance of the decision.[2] In its appeals, employer challenges its liability for counsel's fees for work performed before both the administrative law judge and the district director.

Claimant on appeal contends that the administrative law judge erred in failing to inform the parties that their stipulation regarding claimant's inability to resume his usual employment duties would not be accepted. We agree. In his decision, the administrative law judge found that claimant and employer each submitted a list of stipulations and that he would adopt only those upon which the parties agreed. In a footnote, the administrative law judge stated that even though employer had checked a box indicating that claimant cannot return to his former job, "this is not employer's actual contention in this matter," citing to Employer's Proposed Decision and Order submitted post-hearing. *See* Decision and Order Awarding Benefits at 3 n.3.

The Board has consistently held that an administrative law judge may not reject stipulations without giving the parties prior notice that he will not automatically accept the stipulations and an opportunity to present evidence in support of the stipulations. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225, 228 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). In the instant case, employer's counsel signed two stipulation forms, in October 1991 and January 1993, and on both occasions, employer checked the stipulation that claimant is unable to return to his former job. Claimant submitted the same stipulation form to the administrative law judge, checking the same box as employer checked, which was item number

[2]Claimant's and employer's requests to maintain this appeal before the Board for a period of 60 days beyond September 12, 1996 is rendered moot by our disposition of this case.

16(f), which states, "claimant cannot return to (his/her) former employment." Employer also filed an LS-18 form in 1990, listing nature and extent of disability as an issue, and filed several detailed pre-hearing statements asserting claimant had a residual wage-earning capacity equal to "at least" a specific amount. None of these documents contradicts the stipulation form. Thereafter, in its post-hearing Proposed Decision and Order, employer summarily indicated that claimant is not precluded from returning to his regular work as of January 1, 1990. *See* Emp.'s Proposed Decision and Order at 35-36.

Inasmuch as the record contains a clear and unambiguous statement by both parties through the date of the formal hearing agreeing to claimant's inability to return to his usual work for employer, we hold that the administrative law judge erred by not providing the parties notice prior to issuance of his decision that the stipulation would not be accepted. We therefore vacate the administrative law judge's determination that claimant is capable of resuming his usual employment duties with employer as of October 27, 1989, and we remand the case for the administrative law judge to allow the parties the opportunity to present additional evidence in support of their positions regarding this issue. *See Dodd*, 22 BRBS at 245.

In its appeals, employer challenges the attorney's fee awards issued by both the district director and the administrative law judge. In each instance, employer argues that, since it did not controvert any aspect of the claim, the administrative law judge erred in finding that claimant prevailed in his claim, and that the fee awards should accordingly be reversed. Claimant responds, urging affirmance of the district director's and the administrative law judge's attorney's fee awards.

The administrative law judge found that liability for claimant's medical treatment was at issue and that, as early as February 26, 1990, employer asserted in a pre-hearing statement that no agreement on any issues had been reached between the parties. The administrative law judge ultimately awarded medical benefits to claimant, noting that employer conceded the issue only a few weeks before the hearing, which was three years after the case had been transferred to the Office of Administrative Law Judges. Contrary to employer's contention, counsel is thus entitled to an attorney's fee since establishing claimant's entitlement to future medical expenses constitutes a successful prosecution of the case.[3] *See Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker)*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991); *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987). Accordingly, claimant's counsel is entitled to an attorney's fee payable by employer. As employer does not challenge the amount of the fee awards, the awards entered by the administrative law judge and district director are affirmed.

Accordingly, the administrative law judge's finding that claimant is capable of resuming his usual employment duties with employer as of October 27, 1989 is vacated, and the case remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits and Decision on Motions for Reconsideration of the administrative law judge are

[3]The fact that employer overpaid its liability for disability benefits does not alter this result, as advance compensation payments do not offset liability for medical treatment. *Aurelio v. Louisiana Stevedores, Inc.* 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

affirmed. The Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge, and the Compensation Order Award of Attorney Fees of the district director, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge