

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 April 2012

Case No.: 2010-LHC-00453

In the Matter of:

RAYMOND PALAGYI,
Claimant,

v.

PITTSBURGH & CONNEAUT
DOCK CO.,
Employer,

and

THE SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LTD.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Lawrence P. Postol, Esq.,
For Employer/Carrier,

Steven C. Schletker, Esq.,
For Claimant,

Matthew P. Sallusti, Esq.
For Director, OWCP

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER GRANTING SECTION 8(f) RELIEF AND

AWARDING ATTORNEY'S FEES

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"),¹ and the implementing regulations found at 20 C.F.R. Part 702. The Act provides compensation to individuals engaged in maritime employment who suffer a work-related injury resulting in disability or death.

PROCEDURAL HISTORY

Claimant filed a claim for workers' compensation benefits under the Act on April 6, 2009. (EX 1). He alleged work-related injuries to both shoulders, including, but not limited to, a torn rotator cuff, and both hands/wrists/upper extremities, including, but not limited to, aggravation of bilateral carpal tunnel syndrome. (*Id.*). On April 28, 2009, Employer controverted Claimant's right to compensation. (EX 3). The parties failed to resolve the dispute informally; so on December 15, 2009, the matter was referred to the Office of Administrative Law Judges for a formal hearing.

On May 25, 2010, I issued a notice informing the parties of a hearing scheduled on September 14, 2010. On July 28, 2010, I received notice from the parties that they had settled their dispute. The parties did not enter into a Section 8(i) settlement, but instead executed stipulations resolving the issues pending in the claim. The parties stipulated as follows:

1. Claimant suffered bilateral shoulder injuries and bilateral carpal tunnel as a result of cumulative work on February 4, 2009;
2. Claimant was injured in Conneaut, Ohio, loading and unloading coal for ships on navigable waters;
3. Claimant's claim and Employer's notice of controversion were timely;
4. Claimant's average weekly wage is \$612.04;
5. Claimant's residual earning capacity is \$300.00 per week;
6. Claimant is entitled to compensation for temporary partial disability in the amount of \$208.04 per week from February 4, 2009 to July 22, 2010;
7. Claimant reached maximum medical improvement on July 23, 2010;
8. Claimant is entitled to compensation for permanent partial disability in the amount of \$208.04 from July 23, 2010 and continuing;
9. Employer shall reimburse Claimant for \$719.00 in medical expenses;
10. The issue of Section 8(f) is reserved;

¹ 33 U.S.C. § 901 *et seq.*

11. Claimant's attorney is entitled to reasonable attorneys' fees to be determined by the Department of Labor, to be paid by Employer, with Employer reserving the right to object to Claimant's attorney's request for attorneys' fees; and
12. The above stipulations resolve all issues as to liability and compensation up to and including July 23, 2010.

On September 15, 2010, I issued an order adopting the parties' stipulations, awarding compensation, and reserving the issue of Section 8(f) relief. I ordered that Employer pay Claimant (a) \$208.04 per week from February 4, 2009 to July 22, 2010 for temporary partial disability; (b) \$208.04 per week from July 23, 2010 and continuing for permanent partial disability; and (c) \$719.00 in co-pays. I also ordered that Employer shall have until October 19, 2010 to submit evidence and a brief on the 8(f) issue, and that the Director shall have until November 19, 2010 to respond. Finally, I ordered that Claimant's attorney, Steven C. Schletker ("Petitioner") is entitled to reasonable attorney's fees, subject to Employer's objections.

The parties have filed their briefs regarding the applicability of Section 8(f). Petitioner has filed his attorney fee petition, and a supplemental fee petition, to which Employer has submitted its objections.

ISSUES

There are only two issues remaining in this case. First, whether Employer is entitled to Section 8(f) relief. Second, what are Petitioner's reasonable attorney's fees?

STATEMENT OF THE CASE

This claim arises from injuries Claimant sustained while working as a mechanic at Employer's loading dock in Conneaut, Ohio. As a mechanic, Claimant worked on heavy machinery, such as pay-loaders and bulldozers, and used to load and unload coal and ore off of ships. He worked for Employer for thirty-two years, with his last day being February 4, 2009.

Claimant has a history of carpal tunnel syndrome and shoulder injuries. In August 2002, D. Patrick Williams, D.O., referred Claimant to Donna Mahoney, a Board-certified hand therapist, for a functional capacity evaluation. (EX 10). Claimant presented with a diagnosis of carpal tunnel syndrome. He had undergone carpal tunnel release procedures in 1999 and 2000. Therapist Mahoney performed various tests, and noted that Claimant "has decreased sensation on his right thumb, index, long, and ring

fingers," which has "led to decreased fine motor skills which impact his profession." Claimant's right hand scored in the thirtieth percentile on the Valpar Upper Extremity Range of Motion test, whereas his left hand scored in the eightieth percentile. According to Therapist Mahoney, Claimant's right hand pinch and grip strengths should be five to ten percent stronger than his left, but the testing demonstrated that his right hand was actually weaker. Claimant stated that he frequently switched to his left hand when performing fine motor work.

Therapist Mahoney suggested that Claimant avoid prolonged use of vibratory tools, repetitive torquing movements which cause shoulder pain, and repetitive shoulder height and above lifting. She gave Claimant an eleven percent impairment rating including strength, and a five percent impairment rating excluding strength. Employer paid Claimant an eighteen percent impairment rating for permanent partial disability of his right arm. (EX 10 at 31).

Claimant had an MRI of his cervical spine performed on October 31, 2003. The radiologist interpreted the MRI as revealing spondylosis. (EX 10 at 32).

In a treatment note dated September 9, 2004, J.H.T. Chilicott, M.D., noted that Claimant "has a history of right carpal tunnel surgery, two surgeries which failed." (EX 10 at 33). He reported that Claimant "has persistent problems with numbness and tingling involving the right thumb, right index finger, right middle finger and half of the right index finger." Consistent with Therapist Mahoney's diagnosis, Dr. Chilicott noted that Claimant's right hand was weak, and that he was right handed. Dr. Chilicott diagnosed Claimant with "right carpal tunnel syndrome, chronic," and noted that "[h]e does have areas of numbness and muscle wasting involving the thenar eminence."

Claimant saw Dr. Williams on July 16, 2007 for a follow-up evaluation. (EX 10 at 34). Dr. Williams noted that in addition to the carpal tunnel, Claimant "states he is used to dealing with a lot of bilateral shoulder pain and crepitus over the past couple years." In Dr. Williams's opinion, not much could be done at this point regarding Claimant's carpal tunnel. (EX 10 at 35).

Claimant presented to Patrick Hergenroeder, M.D., on August 30, 2007. (EX 10 at 36). He complained of pain in both shoulders, with the right shoulder being more painful than the left, although the left shoulder had more clicking and popping. Dr. Hergenroeder noted Claimant's history of carpal tunnel, and symptoms of continuous numbness in the right hand and intermittent numbness in the left hand. Based on x-rays, Dr. Hergenroeder diagnosed Claimant with "severe A/C joint arthritis at both

shoulders." He planned to perform surgery on Claimant's right shoulder in the near future, with the left shoulder to follow.

Dr. Hergenroeder performed surgery on Claimant's right shoulder on September 11, 2007. (EX 10 at 37). On September 20, 2007, Dr. Hergenroeder saw Claimant for a follow-up and noted that he was "doing quite well after his arthroscopic surgery." He planned to perform surgery on the left shoulder by September 28, 2007, and noted that "I think we also ought to add a left endoscopic carpal tunnel release to that." The left shoulder surgery and carpal tunnel release were in fact performed by Dr. Hergenroeder on September 28, 2007. (EX 10 at 41-44).

Claimant was placed on work restrictions by Dr. Williams on February 16, 2009. Dr. Williams restricted Claimant from using vibration tools, repetitive torquing, and overhead lifting. (EX 5). In a treatment note dated March 30, 2009, Dr. Williams noted that "[r]ecently [Claimant's] company has been bought out by another company that states he must be 100% in order to work. [Claimant] has had ongoing carpal tunnel syndrome despite previous surgical intervention." (EX 6). Dr. Williams also completed disability paperwork for Claimant, in which he noted Claimant's carpal tunnel syndrome and work restrictions. (EX 6 at 3). He stated that Claimant's condition was permanent, and that in his judgment, it will affect Claimant's "alertness, coordination, or thinking reactions in regard to safety." (*Id.*).

On April 19, 2010, Employer described Claimant's mechanic job and asked Dr. Williams whether Claimant was able to perform those duties. (EX 7). On May 20, 2010, Dr. Williams responded, and stated that Claimant could not because "I do not feel [Claimant] can perform heavy lifting, pounding, fine manipulations, or use of vibratory tools due to his hand numbness and weakness." (EX 7 at 2).

On August 24, 2010, Employer's attorney provided Dr. Williams with Claimant's pertinent medical records and asked him four yes-or-no questions. (EX 13). The questions are as follows:

1. Would you agree that [Claimant], before February 4, 2009 [the date of the work-related injury for which Claimant filed this claim], had permanent disabilities in both shoulders and both hands/wrists, and those conditions are permanent, and indeed, make the hands/wrists and shoulders more prone to further injury?

2. Would you agree [Claimant's] work on February 4, 2009 aggravated and worsened his permanent conditions in his hands/wrists and shoulders?

3. Would you agree that if [Claimant] had normal hands/wrists and shoulders with no pre-existing conditions, the work on February 4, 2009 alone would not have resulted in a disability, which would have prevented [him] from returning to his regular job as a mechanic[?] That is, if he only had the February 4, 2009 work injury alone, with no pre-existing conditions, would he have been able to return to his regular mechanics job he was working on February 4, 2009?

4. The parties selected July 23, 2010 as the date of maximum medical improvement. Is that a reasonable date?

(EX 5 at 2-3). After each question, Employer provided spaces for Dr. Williams to check yes or no. If he answered no, Employer provided him space to explain his answer. Dr. Williams answered yes to all the questions.

Dr. Hergenroeder performed a third surgery on Claimant on September 23, 2010. (EX 10 at 45). This time, the surgery was for a torn left rotator cuff. According to Dr. Hergenroeder, the left shoulder had recently become more painful, and an MRI confirmed the tear.

LAW AND ANALYSIS

I. Section 8(f) Relief

Section 8(f) of the Act provides in pertinent part:

(1) In any case in which an employee having an existing permanent partial disability suffers injury . . . [resulting in] permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (a) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the

remainder of the compensation that would be due out of the special fund established in section 944 of this title. . . .²

Section 8(f) shifts part of the liability for permanent partial or permanent total disability from the employer to the special fund when the disability is not due solely to the injury that is the subject of the claim.³ If the employer demonstrates entitlement to Section 8(f) relief, its liability will be limited to the first 104 weeks of permanent disability payments with additional payments made by the special fund.⁴

Under the “aggravation rule,” where a work-related injury worsens or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the work-related injury alone, the entire resulting disability is compensable.⁵ Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule.⁶ Thus, the goal of Section 8(f) is “the prevention of employer discrimination against handicapped workers.”⁷ Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have.⁸ In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed in favor of the employer.⁹

In order to qualify for relief under Section 8(f), an employer must show: “(1) that the claimant had a preexisting permanent partial disability; (2) that this preexisting permanent partial disability was in existence prior to the employment injury at issue;

² 33 U.S.C. §§ 908(f)(1)-(2)(A).

³ *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

⁴ 33 U.S.C. §§ 908(f)(1), 944.

⁵ See *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986) (en banc); *Johnson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 160 (1989).

⁶ See *C&P Tele[h]one Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977).

⁷ *Lawson v. Suwannee Fruit Co.*, 336 U.S. 198, 201 (1949); see also *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082, 1084 (4th Cir. 1980) (stating that “Section 8(f) is intended to encourage the employment of handicapped workers, by protecting an employer who hires a handicapped worker from paying total disability compensation for an injury that would have been a partial disability but for pre-existing conditions.”).

⁸ See *Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839 (9th Cir. 1982). See also H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4705-06.

⁹ See *Director v. Todd Shipyard Corp.*, 625 F.2d 317 (9th Cir. 1980); *Maryland Shipbuilding*, 618 F.2d at 1084.

and (3) that the current disability is not due solely to the recent employment injury.”¹⁰ In permanent partial disability cases, the employer must also show that the claimant’s disability is materially and substantially greater than that which would have resulted from the new injury alone.¹¹ The employer bears the burden of proving each element by a preponderance of the evidence.¹²

A. Pre-Existing Partial Disability

Employer must first establish that Claimant had a pre-existing partial disability. In *Lawson v. Suwannee Fruit & Steamship Company*,¹³ the Supreme Court held that the term “disability” in Section 8(f) is not used as a term of art, but rather should be interpreted in a broader, more usual sense, that encompasses non-industrial caused disabilities. In *C&P Telephone Company v. Director, OWCP*,¹⁴ the court of appeals for the D.C. Circuit held that an employee has a pre-existing disability “wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly-increased risk of employment-related accident and compensation liability.” The “cautious employer” test has been widely adopted by the circuit courts of appeal,¹⁵ including the Sixth Circuit,¹⁶ which has appellate jurisdiction over this case.¹⁷

Here, the record reveals that Claimant had a history of carpal tunnel syndrome and severe shoulder arthritis. He had carpal tunnel release procedures in 1999, 2000, and 2007, and surgery on both shoulders in 2007. Employer paid Claimant workers’ compensation benefits for an eighteen percent impairment of his right arm in 2003. That Claimant’s February 4, 2009 work-related injury is an aggravation of an earlier work-related injury does not prevent Employer from establishing that Claimant’s prior injury resulted in a pre-existing partial disability.¹⁸ I find that Claimant’s carpal tunnel syndrome qualifies as a pre-existing disability for which a cautious employer would

¹⁰ *Morehead Marine Services, Inc., v. Washnock*, 135 F.3d 366, 373 (6th Cir. 1998) (citing *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 729-32 (6th Cir. 1989)).

¹¹ 33 U.S.C. § 908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 887 (5th Cir. 1997).

¹² *Washnock*, 135 F.3d at 373; *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 50 (1st Cir. 1997).

¹³ 336 U.S. 198, 206 (1949).

¹⁴ 564 F.2d 503, 513 (D.C. Cir. 1977).

¹⁵ See *Washnock*, 135 F.3d at 374 n.3 (citing cases from circuits that have adopted the cautious employer test).

¹⁶ *Id.* at 374.

¹⁷ 33 U.S.C. § 921(c) (“Any person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals for the circuit in which the injury occurred. . .”).

¹⁸ *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d 440, 442 (3d Cir. 1979).

have been motivated to discharge Claimant due to an increased risk of workers' compensation liability. Accordingly, Employer has established the first element of Section 8(f) relief.

B. Manifest

In the Sixth Circuit, the second element of Section 8(f) relief is that the pre-existing partial disability was in existence prior to the work-related injury.¹⁹ The Board and other circuits require that the pre-existing partial disability be manifest to the employer.²⁰ Section 8(f) does not contain a requirement that the pre-existing disability be manifest to the employer; rather, the Board and the circuits that apply the requirement do so "upon the assumption that a windfall would result from allowing an employer, who has no information about an employee's disability, to shift payments of benefits to the special fund, since discrimination can only occur where a prospective employer was aware that the applicant is handicapped."²¹

In *American Ship Building*, the Sixth Circuit declined to apply the manifest requirement, and reasoned as follows:

Whether or not that reasoning of those decisions [applying the manifest requirement] is sound, it appears to have gone largely unnoticed that congressional emphasis has shifted from concern with discrimination against handicapped workers to actively encouraging their employment. . . . It seems to us that in this context the manifest condition rule is counterproductive; that a rule which tells a prospective employer that he need not worry about whether an applicant is handicapped is the one that best encourages hiring handicapped workers.²²

Accordingly, the court held that Section 8(f) should be enforced as written, that is, without a manifest requirement. In order to prevent fraud, however, the Sixth Circuit does require the employer to "establish that the condition *manifested itself* to someone prior to the second injury."²³

Even the courts that apply the manifest requirement allow the element to be satisfied by actual or constructive knowledge. That is, where medical records exist from

¹⁹ *Washnock*, 135 F.3d at 373; *American Ship Building*, 865 F.2d at 732.

²⁰ *See American Ship Building*, 865 F.2d at 729 n.3 (citing cases applying the manifest requirement).

²¹ *Id.* at 732.

²² *Id.*

²³ *Id.* (emphasis in original).

which the condition is objectively determinable, the manifest requirement will be satisfied.²⁴

Here, the record reveals that Claimant's carpal tunnel syndrome existed prior to the February 4, 2009, work-related injury, and that it manifested itself to Drs. Williams, Chilcott, and Hergenroeder, as well as to Therapist Mahoney. Thus, the Sixth Circuit's standard is satisfied. Employer has also established, however, that Claimant's pre-existing disability was manifest, in that (a) Employer had actual knowledge of the injuries, and (b) the record contains medical records documenting the injuries. Accordingly, Employer has established the second element of Section 8(f) relief.

C. Contribution

The third element of Section 8(f) relief is that the claimant's current disability is not solely due to the work-related injury that is the subject of the claim.²⁵ Thus, in order for Section 8(f) to apply, the claimant's pre-existing permanent disability must contribute to the current disability.²⁶ In addition, where the claimant's current disability is permanent partial, in addition to showing that current disability is not solely due to the work-related injury, the employer must show that the current disability is materially and substantially greater than that which would have resulted from the work-related injury alone.²⁷ The employer is "entitled to establish the contribution element by medical or *other* evidence."²⁸

Here, Employer has submitted a list of questions to Dr. Williams in an attempt to satisfy this element. Employer relies on question three in particular, which asks as follows:

Would you agree that if [Claimant] had normal hands/wrists and shoulders with no pre-existing conditions, the work injury on February 4,

²⁴ See *Menacho v. General Dynamics Co.*, 12 BRBS 790, 793 (1980) ("Thus, since knowledge of claimant's prior back injury was objectively determinable from Dr. Needles' medical records when claimant was hired, his existing permanent partial disability was manifest. . .") (citing *Delinski v. Brandt Airflex Corp.*, 9 BRBS 206 (1978) and *DeNichilo v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 723 (1977)).

²⁵ 33 U.S.C. § 980(f); *Washnock*, 135 F.3d at 373.

²⁶ See *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996).

²⁷ 33 U.S.C. § 908(f); see also *American Ship Building*, 865 F.2d at 728 ("[W]hen an employee having an existing permanent partial disability is injured, with the result that the injury and preexisting condition in combination result in materially and substantially greater permanent partial disability or in total disability, payment is apportioned between the employer and the special fund, with the employer responsible, at most, for 104 weeks of compensation.").

²⁸ *Sproull*, 86 F.3d at 900.

2009 alone would not have resulted in a disability, which would have prevented [Claimant] from returning to his regular job as a mechanic[?] That is, if he only had the February 4, 2009 work injury alone, with no pre-existing conditions, would he have been able to return to his regular mechanics job he was working on February 4, 2009?

Dr. Williams responded in the affirmative. (EX 13).

In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*,²⁹ the Fourth Circuit held that in order to show that a claimant's ultimate disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone, in the absence of the pre-existing condition, the employer "must quantify the type and extent of the disability that claimant would have suffered without the pre-existing condition." The court explained that this is necessary for the "adjudicative body [to have] a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater."³⁰

The Director asserts that Employer is not entitled to Section 8(f) relief because Dr. Williams' answer to Employer's question does not meet the *Carmines* standard. The Fourth Circuit elaborated on the *Carmines* standard in *Newport News Shipbuilding & Dry Dock Co. v. Cherry*.³¹ In *Cherry*, the employer attempted to satisfy the third element for 8(f) relief with a letter by a doctor who opined that if the claimant "had had a normal back, his [work-related injury] would have resolved with no permanent disability."³² The court rejected the judge's finding that the employer failed to offer quantification evidence, and noted that in submitting such a letter, the employer "appropriately sought to satisfy the quantification requirement of *Carmines*."³³

Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Ward*,³⁴ the doctor opined that "[i]f he [had] a normal back when he suffered the 1989 [work-related] injury . . . he would have been able to return to light duty shipyard work. However, the cumulative effect [of the injuries] have disabled [the claimant] from even light duty shipyard work."³⁵ The court held that the doctor's "assessments of [the claimant's]

²⁹ 138 F.3d 134, 139 (4th Cir. 1998).

³⁰ *Id.* (quoting *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 185-86 (4th Cir. 1993)).

³¹ 326 F.3d 449 (4th Cir. 2003).

³² *Id.* at 444.

³³ *Id.*

³⁴ 326 F.3d 434 (4th Cir. 2003).

³⁵ *Id.* at 441.

injuries constitutes the type of evidence that *Harcum I* and *Carmines* deemed relevant to the quantification aspect of the Contribution Element.”³⁶

Pursuant to *Carmines*, *Cherry*, and *Ward* I find that Dr. Williams’ opinion, if credible, is sufficient to establish that Claimant’s current permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. According to Dr. Williams, if Claimant did not have the pre-existing carpal tunnel and shoulder injuries, he would not now be disabled to the extent that he would be prevented from working; that is, his current disability is “materially and substantially” greater because of his pre-existing disabilities.

However, “in assessing whether the Contribution Element has been met, a [judge] may not ‘merely credulously accept the assertions of parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based.’”³⁷ In *Cherry*, although the physician offered the type of evidence required by *Carmines*, the court nevertheless upheld the judge’s discrediting of the opinion as “pure conjecture.”³⁸ Similarly, in *Ward*, the court upheld the judge’s discrediting of the doctor’s opinion because his “assertions [were] generalized and his overall conclusion [lacked] any supporting explanation.”³⁹

Here, I am troubled that Dr. Williams has not offered any explanation for his opinion that if Claimant had only the February 4, 2009, injury, without any pre-existing disability, Claimant would be able to return to work. However, I find that Dr. Williams’ opinion is consistent with the medical evidence in the record, and thus I accept his opinion. The medical evidence in the record shows that Claimant had a long history of carpal tunnel syndrome and shoulder problems, which progressed to the point that Claimant was no longer able to perform the necessary functions of his mechanic job. Thus, the medical evidence substantiates Dr. Williams’ opinion that Claimant’s inability to perform his job duties was not solely due to the February 4, 2009, injury, and that his pre-existing carpal tunnel and shoulder arthritis materially and substantially contributed to his current permanent partial disability.

³⁶ *Id.*

³⁷ *Id.* at 439.

³⁸ *Cherry*, 326 F.3d at 454.

³⁹ *Ward*, 326 F.3d at 442.

D. Section 8(f) Conclusion

Employer has established by a preponderance of the evidence (a) that Claimant had a pre-existing disability in the form of carpal tunnel syndrome and shoulder arthritis; (b) which were in existence and manifest to Employer prior to the February 4, 2009, work injury; and (c) that Claimant's ultimate permanent partial disability is not solely due to the February 4, 2009, injury, and is materially and substantially greater than that which would have resulted from the February 4, 2009, injury alone without the pre-existing disability. Accordingly, Employer is entitled to Section 8(f) relief.

II. Attorney's Fees

Section 928 of the Act authorizes the award of a "reasonable attorney's fee" to a successful Claimant's attorney.⁴⁰ Under the regulations, the fee petition must be in writing and include:

1. A complete statement of the extent and character of the necessary work performed;
2. An hourly breakdown of the time spent in the particular activity;
3. A description of the professional status of each person performing the work, e.g. attorney, paralegal, law clerk, or other legal assistant as opposed to their actual name or initials; and,
4. The normal billing rate for such person, and the hours devoted by each such person to each category of work.⁴¹

"Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . ." ⁴² The United States Supreme Court has stated that there is a "strong presumption" in favor of applying the "lodestar method" to federal fee-shifting provisions.⁴³ The Sixth Circuit applies the

⁴⁰ 33 U.S.C. § 928(a).

⁴¹ See 20 C.F.R. § 702.132(a); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977); *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); *Forlong v. American Sec. & Trust Co.*, 21 BRBS 155 (1988).

⁴² 20 C.F.R. §702.132(a).

⁴³ *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); see also *Parks v. Eastern Assoc. Coal Co.*, 24 B.L.R. 1-177 (2010) (stating "the Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the 'lodestar' amount.") (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986)).

lodestar method to fee-shifting cases under Section 928 of the Act.⁴⁴ The lodestar method equals the “number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”⁴⁵

The parties have stipulated that Petitioner is entitled to a reasonable attorney’s fee. Petitioner submitted a fee petition on August 1, 2010. Employer objected on August 26, 2010; and on September 23, 2010, Petitioner responded to Employer’s objections and submitted a supplemental attorney fee petition for time spent defending his fee petition. On October 22, 2010, Employer objected to Petitioner’s reply to its objections and to his supplemental attorney fee petition.

In his fee petition, Petitioner requests a total of \$18,741.53, based on 74.6 hours at hourly rates of \$225.00 and \$250.00 per hour for a total of \$18,582.50 in attorney fees, plus \$159.03 in costs. In his supplemental fee petition, Petitioner requests \$3,150.00, based on 12.6 hours at \$250.00 per hour, which increased the total amount requested to \$21,891.53.

A. Reasonableness of Billing Rate

The first step in calculating the lodestar is determining the reasonable hourly rate. “To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.”⁴⁶ Rates awarded in other cases cannot establish the prevailing market rate, but they can provide inferential evidence of it.⁴⁷ “[C]ourts are permitted to, and indeed should, consider prior fee awards in determining the proper attorney’s fee rate.”⁴⁸

Here, Petitioner requested an hourly rate of \$225.00 per hour for the entries in 2009, and \$250.00 per hour thereafter. (Fee Petition, Exhibit B). Petitioner raised his hourly rate to \$250.00 per hour effective January 1, 2010. (Fee Petition at 6). In support of his hourly rate, Petitioner asserted that he concentrates his practice in Jones Act and Admiralty law, and that “a reasonable hourly rate for someone of the undersigned’s background, experience, and expertise for work performed before an administrative law judge in a Longshore case of this complexity in this community is \$250.00 and

⁴⁴ See *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Harmon v. McGinnis, Inc.*, No. 07-3073, 2008 WL 344707, at *1 (6th Cir. Feb. 7 2008).

⁴⁵ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

⁴⁶ *B&G Mining*, 522 F.3d at 663.

⁴⁷ *Id.* at 664.

⁴⁸ *Harmon*, 2008 WL 344707, at *3.

above.” (*Id.*). In further support of his hourly rate, Petitioner attached several cases in which he was awarded fees ranging from \$200.00 to \$250.00 per hour. (Fee Petition, Exhibits D-G).

Employer objected to Petitioner’s requested hourly rate, and argued that, pursuant to *Westmoreland Coal Co. v. Cox*,⁴⁹ a Fourth Circuit black lung case, Petitioner’s fee petition is defective in that he does not disclose the rate he charges his paying clients. (Employer’s Objection to Fee Petition at 2-3). Employer misreads *Westmoreland*. Contrary to Employer’s position, *Westmoreland* did not hold that an attorney’s hourly rate *must* be based solely on what he charges his paying clients, although the court noted that “evidence of what attorneys earn from paying clients for similar services in similar circumstances”⁵⁰ should be factored into the inquiry. Rather, the *Westmoreland* court—acknowledging “[t]he highly regulated markets governed by fee-shifting statutes[, which] are undoubtedly constrained and atypical”—held that an attorney’s hourly rate can be drawn from a “range of sources,” such as “evidence of the fees he has received in the past, or affidavits of other lawyers who might not practice black lung law, but who are familiar with the type of work in the relevant community,” as well as fee awards from “other administrative proceedings of similar complexity.”⁵¹ Even so, in his reply to Employer’s objections, Petitioner asserted that “[t]he rates set forth in the fee application, \$225.00 per hour in 2009 and \$250.00 per hour in 2010, are the undersigned’s normal billing rates for all clients,” and that “[t]he undersigned does not have clients who pay less than the rates requested from the Employer.” (Petitioner’s Reply at 3).

Considering Petitioner’s high level of expertise in this specialized area of law, fee awards from past Longshore cases (including those of Petitioner), and Petitioner’s representation that his requested rates are his rates for all clients, I find that Petitioner’s requested hourly rates of \$225.00 per hour for services rendered in 2009 and \$250.00 per hour for services rendered in 2010 are reasonable.

B. Billing Judgment/*Hensley v. Eckerhart*

Employer also asserts that Petitioner’s fee should be limited to no more than \$7,000.00 pursuant to the Supreme Court’s decision in *Hensley v. Eckerhart*.⁵² According to Employer, “no paying client would pay more than \$7,000 at the ALJ level in attorney

⁴⁹ 602 F.3d 276 (4th Cir. 2010).

⁵⁰ *Id.* at 289.

⁵¹ *Id.* at 290.

⁵² 461 U.S. 424 (1983).

fees and costs for amount of work, and the result in this case, and thus that should be the limit of the billing judgment.” (Employer’s Objections at 6).

In *Hensley*, the respondents/plaintiffs brought a three count complaint against the petitioners/defendants. The respondents eventually prevailed on one of the three counts, and sought attorney’s fees for all hours spent on the case, including hours spent in pursuit of unsuccessful claims. The district court awarded substantially all of the respondents’ fee request, and declined to eliminate from the award those hours spent on unsuccessful claims. The Eighth Circuit affirmed.

The Supreme Court reversed, and reasoned that “‘billing judgment’ is an important component in fee setting. . . . Hours that are not properly billed to one’s *client* also are not properly billed to one’s *adversary* pursuant to statutory authority.”⁵³ The Court further reasoned that in cases where a plaintiff brings multiple unrelated claims based on distinct legal theories and facts, time spent by an attorney on an unrelated failed claim cannot be deemed to have been “expended in pursuit of the ultimate result achieved.”⁵⁴ Thus, the Court held as follows:

[T]he extent of a plaintiff’s success is a crucial factor in determining the proper amount of attorney’s fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.⁵⁵

The Board applied *Hensley* to fee awards under the Act in *Bullock v. Ingalls Shipbuilding, Inc.*⁵⁶ In *Bullock*, the Board noted that “in *Hensley* the Court did not define the ‘success’ of an action in terms of the monetary amount awarded, but, rather, in terms of how successful the plaintiff was in achieving the claims asserted.”⁵⁷ The Board further noted that “[i]n cases under the Longshore Act . . . while the amount of benefits awarded is a relevant factor in determining the amount of an attorney’s fee award,

⁵³ *Id.* at 434.

⁵⁴ *Id.* at 435.

⁵⁵ *Id.* at 440.

⁵⁶ 27 BRBS 90 (1993).

⁵⁷ *Id.* at 96.

claimant's success must also be measured against the amount of benefits voluntarily paid by employer."⁵⁸ Thus, in *Bullock*, although the claimant prevailed in obtaining benefits under a different section than he originally preferred, the Board nevertheless held that claimant's results were "excellent" under *Hensley* given that employer paid no benefits voluntarily.⁵⁹

Similarly here, Employer controverted all entitlement to benefits, and argued that as Claimant's injuries were not causally related to his employment, he was entitled to nothing. (EX 3). Because of Petitioner's successful prosecution of this claim, Claimant received \$208.04 per week from February 4, 2009 to July 22, 2010 for temporary partial disability; \$208.04 per week from July 23, 2010 and continuing for permanent partial disability; \$719.00 in medical co-pays; as well as continuing health insurance. I therefore find that Claimant has won "substantial relief" under *Hensley*, and that contrary to Employer's assertion, *Hensley* does not mandate a reduction of attorney's fees in this case.

C. Attorney's Fees: Specific Entries

An attorney is entitled to compensation for all necessary work performed.⁶⁰ The test is whether at the time the attorney performed the work in question, he or she could have reasonably regarded the work as necessary to establish entitlement.⁶¹ Entries that are unnecessary, excessive, or duplicative may be disallowed.⁶² Time spent by an attorney performing clerical duties is not compensable.⁶³ The claimant's attorney may be awarded fees for time spent defending the fee petition.⁶⁴

Here, in his fee petition, Petitioner has submitted nearly sixteen pages of detailed time entries from December 18, 2009 to July 30, 2010, totaling 74.6 hours. (Fee Petition, Exhibit B). Employer has objected to substantially all of these entries as excessive or clerical in nature. (Employer's Objection to Fee Petition at 7-12). In total, Employer argues that approximately forty-six hours should be struck as excessive or clerical.

⁵⁸ *Id.*

⁵⁹ *Id.* at 97.

⁶⁰ 20 C.F.R. §702.132 (stating that "[a]ny fee approved shall be *reasonably commensurate with the necessary work done. . .*").

⁶¹ *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981); *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978).

⁶² *Edwards v. Todd Shipyards Co.*, 25 BRBS 49 (1991); *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987).

⁶³ *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980).

⁶⁴ *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982).

Petitioner filed a reply to Employer's objections, and specifically responded to each of Employer's objections to his time entries. (Petitioner's Reply at 6-28). Taking into consideration Employer's arguments, and the responses and explanations of Petitioner, I find that the compensable hours should be reduced to reflect a mild degree of excessiveness and a clerical element to some work performed by Petitioner. Accordingly, I reduce Petitioner's hours by 7.5 (roughly ten percent) and find that 67.1 of the 74.6 hours requested in the Fee Petition are compensable.

Petitioner sought an additional \$3,150.00 in fees, based on 12.6 hours at the rate of \$250.00 per hour, for defending his fee petition against Employer's objections. (Petitioner's Supplemental Fee Petition). Although time spent preparing a fee petition is not compensable, time spent defending a fee petition is compensable.⁶⁵ Employer objects to Claimant's supplemental attorney fee request on the grounds that "the rules do not allow for a reply brief," that Petitioner's reply was merely curing defects in his original fee petition, and that 12.6 hours is "grossly excessive." (Employer's Objection to Petitioner's Supplemental Fee Petition). I reject Employer's argument with respect to the rules not allowing a reply brief because Employer specifically requested that Petitioner respond to its objections when it requested he reveal what he charges his paying clients, to which Petitioner obliged in his reply. Moreover, I do not find that Petitioner's initial fee petition was defective; therefore, I reject Employer's second argument. Finally, I find that 12.6 hours is a reasonable amount of time for the reply, given Employer's myriad arguments against and objections to the initial fee petition. Employer objected to nearly every one of Petitioner's time entries, and Petitioner spent nearly twenty-two pages responding to each objection. Accordingly, I find that 12.6 hours is reasonable for defending the fee petition.

In sum, I have subtracted 7.5 hours from Petitioner's initial fee petition and have not subtracted any time from his supplemental fee petition. Petitioner's initial fee petition was based 2.5 hours at \$225.00 per hour and 72.1 hours at \$250.00 per hour, which I have already found reasonable. Because I reduced the initial fee petition by 7.5 hours, I will subtract the hours reduced proportionally from the hours billed at the different rates. Thus, I will subtract .25 hours from the hours billed at \$225.00 per hour (leaving 2.25 hours) and 7.25 hours from the hours billed at \$250.00 per hour (leaving 64.85 hours). Accordingly, Petitioner is entitled to \$16,718.75 in fees from his initial fee petition, which, together with the \$3,150.00 from his supplemental petition, equals \$19,868.75.

⁶⁵ *Id.*

D. Expenses

In cases where an attorney's fee is awarded, "reasonable and necessary costs and expenses incurred during the course of a proceeding by a claimant may also be assessed against the employer."⁶⁶ Here, Petitioner has requested reimbursement in the amount of \$159.03 for expenses incurred in his representation of Claimant in this case. Having reviewed the expenses (Fee Petition, Exhibit B), I find that they were necessary for the proper preparation of Claimant's case, and are therefore recoverable. Accordingly, Petitioner is entitled to reimbursement in the amount of \$159.03 for expenses.

E. Attorney's Fee Conclusion

Petitioner has established that reasonable hourly rates of \$225.00 per hour during 2009 and \$250.00 per hour in 2010. He has also established that he reasonably expended a total of 67.1 hours representing Claimant in this case, and 12.6 hours defending his fee petition. In total, Petitioner is entitled to \$19,868.75 in attorney's fees. He has also established entitlement to \$159.03 in expenses, which, together with the \$19,868.75 in attorney's fees, equals a total amount of \$20,027.78.

ORDER

THEREFORE, it is HEREBY ORDERED that Employer's motion for Special Fund Relief pursuant to Section 8(f) of the Act is **GRANTED**. It is FURTHER ORDERED that Employer shall pay Petitioner, Steven C. Schletker, \$20,027.78 in attorney's fees and expenses pursuant to Section 928 of the Act.

A

JOSEPH E. KANE
Administrative Law Judge

⁶⁶ *Bradshaw v. McCarthy, Inc.*, 3 BRBS 195, 202 (1976).