BRB Nos. 92-2219
and 92-2219A

AREL S. PRICE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
BRADY-HAMILTON STEVEDORE COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Denying Modification and the Supplemental Order Awarding Attorney's Fees of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Modification and claimant cross-appeals the Supplemental Order Awarding Attorney's Fees (84-LHC-2803) of Administrative Law Judge Thomas Schneider 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time that this case has been before the Board. Claimant sustained a work-related injury on March 27, 1979, while working as a stevedore. The parties stipulated that claimant was injured in the course and scope of his employment and that he was temporarily totally disabled from March 28, 1979, until August 25, 1981, and from November 14, 1982, until December 5, 1982. The parties further stipulated that claimant's condition reached maximum medical improvement on August 26, 1981. Claimant sought permanent partial disability compensation under the Act. 33 U.S.C. §908(c)(21), (h). In a Decision and Order dated August 6, 1986, Administrative Law Judge Brissenden found that during the year preceding claimant's injury, claimant worked 39 weeks as a longshoreman and 13 weeks as a commercial fisherman. Finding that these two jobs did not involve comparable skills, Judge Brissenden calculated claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), as $570.42 and determined that because his wage-earning capacity pre-injury was 49.5 hours per week and his wage-earning capacity post-injury had decreased by 16.38 hours or 41.47 percent, he was entitled to permanent partial disability benefits on the basis of a loss in wage-earning capacity of $236.55 per week.[1] Claimant appealed the administrative law judge's determination of his average weekly wage under Section 10(a) rather than Section 10(c), 33 U.S.C. §910(c), and argued that the administrative law judge erred in failing to include his loss of earnings as a fisherman in determining his post-injury wage-earning capacity. The Board affirmed both determinations. *Price v. Brady-Hamilton Stevedoring Co.*, BRB No. 86-2722 (July 31, 1989)(unpublished).

Claimant thereafter appealed to the United States Court of Appeals for the Ninth Circuit. In an unpublished decision, the Ninth Circuit reversed the administrative law judge's average weekly wage determination, holding that claimant's average weekly wage should have been calculated under Section 10(c) rather than 10(a), and that his earnings as a commercial fisherman should have been included in the calculation. Accordingly, the court modified the average weekly wage, consistent with the stipulations of the parties, to reflect that claimant's average weekly wage properly calculated was $627.88 and remanded for recalculation of the permanent partial disability award based on this average weekly wage. *Price v. Director, OWCP*, No. 89-7030 (9th Cir. July 25, 1990)(unpublished). Thereafter, employer moved for modification, contending that claimant has a greater post-injury wage-earning capacity than at the time of the initial award. A hearing was held before Administrative Law Judge Schneider on employer's modification petition.

In his Decision and Order Denying Modification, Judge Schneider found that modification was not warranted as employer failed to establish a change in claimant's wage-earning capacity. In addition, he calculated the permanent partial disability compensation due pursuant to the Ninth Circuit's remand instructions, finding claimant entitled to $196.01 per week, based on 66 2/3 percent

[1]Although the administrative law judge initially determined that claimant was entitled to compensation based on a loss of wage-earning capacity of $235.44, he corrected what was apparently a mathematical error in his Ruling and Order On Motion for Reconsideration and modified his prior decision to reflect claimant's entitlement to compensation based on a $236.55 per week loss in wage-earning capacity.

of the difference between his average weekly wage of $627.88 and his wage-earning capacity of $333.87. In addition, he awarded claimant penalties and interest, as well as $25 in milage plus one day's wages as costs incurred for attending a deposition scheduled by employer.

In the present appeal, employer contends that in denying modification, Judge Schneider employed an incorrect legal standard. Employer further argues that the administrative law judge erred by calculating the permanent partial disability award inconsistent with Judge Brissenden's intent, and in awarding claimant lost wages for attending a pre-trial deposition. Claimant responds, urging affirmance, and cross-appeals the administrative law judge's Supplemental Order Awarding Attorney's Fees. Employer replies, reiterating the arguments in its Petition for Review and responds to claimant's cross-appeal. Claimant replies to employer's response.

MODIFICATION

Employer argues that in denying modification the administrative law judge erred by requiring employer to prove that claimant had been retrained, acquired new job skills, and had experienced a "significant" increase in his wage-earning capacity. Employer also asserts that the administrative law judge erred by failing to consider claimant's increase in gross earnings as compared with those of an average A-man and erred in failing to grant modification based on claimant's increase in his average hours following his injury.

Section 22 of the Act, 33 U.S.C. §922, allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Metropolitan Stevedore Co. v. Rambo*,___U.S.___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995). *See also Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). After considering the administrative law judge's Decision and Order in light of the record evidence, employer's arguments are rejected. Employer correctly asserts that the administrative law judge erred to the extent his decision suggests that employer was required to show a significant increase in claimant's wage-earning capacity. *See Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). We nonetheless affirm his denial of modification, however, because his overall analysis comports with applicable law, and his finding that employer failed to establish a change in claimant's wage-earning capacity is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359.

In considering whether modification was warranted, the administrative law judge noted initially that although both parties recited figures and ran through formulas that give the illusion of precision, the estimate of wage-earning capacity is not such a precise procedure under the statutory language of Section 8(h) of the Act. After considering factors relevant to determining claimant's post-injury wage-earning capacity under Section 8(h), the administrative law judge essentially concluded that claimant's increased wages and hours post-injury did not reflect a change in his wage-earning capacity but rather inflation[2] and a transient change in the economy, *i.e.*, greater work

[2]The administrative law judge extrapolated from the intervening 64 percent increase in the

availability.[3] Moreover, he rationally determined, based on the record before him, that there were other intangible factors, such as claimant's inability to work at night and as a commercial fisherman, which continue to support the initial finding of lost wage-earning capacity and which were not reflected in employer's calculations. Inasmuch as the findings made by the administrative law judge are rational, supported by substantial evidence, and consistent with the Supreme Court's recognition in *Rambo* that modification must be based on a change in claimant's wage-earning capacity and not every variation in actual wages or transient change in the economy, ___ U.S at ___, 115 S.Ct. at 2150, 30 BRBS at 5 (CRT), we affirm his denial of modification in this case. *See generally*, *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

LOSS OF WAGE-EARNING CAPACITY

We also reject employer's alternate argument that Judge Schneider erred in calculating the award of permanent partial disability benefits on remand from the United States Court of Appeals for the Ninth Circuit. Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). In the initial Decision and Order in this case, Judge Brissenden found that prior to the 1979 work injury claimant was capable of working full-time either as a commercial fisherman or longshoreman or some combination of the two jobs for an average of 39.5 hours per week, while his wage-earning capacity post-injury decreased by 16.38 hours per week or 41.47 percent. Thereafter, he multiplied that percentage by claimant's average weekly wage, which he determined was $570.42 per week based solely on his longshore earnings, and determined that claimant was entitled to permanent partial disability benefits based on a loss of wage-earning capacity of $236.55 (41.47 percent of $570.42) per week.

On appeal, employer reiterates the argument it made below, that inasmuch as Judge Brissenden determined that claimant had a loss in wage-earning capacity of $236.55 based on 41.47 percent of the $570.42 average weekly wage, and the Ninth Circuit's decision changed only the average weekly wage, claimant's loss of wage-earning capacity should have been calculated on remand in the same manner, *i.e.*, by multiplying his 41.47 percent loss in hours by the new $627.88 average weekly wage, yielding a loss of wage-earning capacity of $260.38 and a compensation rate

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National Average Weekly Wage since the time of claimant's injury, that claimant would have been earning $1,029.72 had he not been injured, and determined that claimant's actual post-injury earnings of $1,000.99 per week remained slightly less than that amount.

[3]In rejecting employer's evidence, the administrative law judge put particular emphasis on the fact that the record was unclear regarding whether claimant's increased hours are permanent. He noted that in two of claimant's highest years, 1988 and 1989, he had been working as a boatsman, a new job which was ultimately determined to be too difficult for him to handle physically, and credited claimant's testimony that there had been a general increase of work availability in his particular category from 1987 to 1990.

of $173.59. On remand, however, Judge Schneider rationally concluded that inasmuch as claimant can no longer work as a commercial fisherman, his residual wage-earning capacity could not properly be calculated by multiplying the percentage of his lost hours times the average weekly wage including his earnings as a fisherman. Rather, consistent with claimant's position below, Judge Schneider determined that claimant's loss of wage-earning capacity was properly calculated based on the difference between his $627.88 average weekly wage and the residual wage-earning capacity of $333.87 ($570.42- $236.55 = $333.87) from Judge Brissenden's decision based solely on his earnings as a longshoreman.

The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to the claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Inasmuch as Judge Schneider's calculation of claimant's loss in wage-earning capacity based on the residual wage-earning capacity in Judge Brissenden's calculation rationally accounts for the fact that claimant retains no capacity to work as a commercial fisherman, his calculation of the award of permanent partial disability compensation is affirmed. *See generally Abbott v. Louisiana Ins. Guaranty Ass'n*, 889 F.2d 626, 23 BRBS 3 (CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

AWARD OF LOST WAGES FOR DEPOSITION

We agree with employer that the administrative law judge exceeded his authority in awarding claimant one day's lost wages for attending a pre-hearing deposition at employer's insistence. There is no authority under the Act, applicable regulations, or case law to support the administrative law judge's award of these costs.[4] Section 28(d) of the Act, 33 U.S.C. §928(d), the only statutory provision authorizing the administrative law judge to assess litigation costs,[5] provides that where an attorney's fee is awarded against an employer or carrier there may be a further assessment against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing *at the instance of claimant*. 33 U.S.C. §928(d) (emphasis added). Inasmuch as the administrative law judge's award of lost wages was not part of an attorney's fee award and these costs were incurred by claimant's attendance at employer's instance, Section 28(d) cannot support the administrative law judge's award of these costs. *See Love v. Potomac Iron Works*, 16 BRBS 249, 250 (1984)(similar rationale applied in reversing award of claimant's travel costs in the absence of an attorney's fee award).

In addition, Section 25 of the Act, 33 U.S.C. §925, and 20 C.F.R. §702.342 of the regulations provide that "[w]itnesses . . . whose depositions are taken shall receive the same fees . . .

[4]The administrative law judge's award of $25 in transportation costs to claimant is not challenged on appeal.

[5]Section 26 of the Act, 33 U.S.C. §926, allows a court to assess litigation costs under certain circumstances, but does not apply to administrative law judges. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993).

as witnesses in courts of the United States. *See* 28 U.S.C. §§1821(b), 1920. Under this provision, a witness is limited to an attendance fee of $40 per day for each day's attendance absent contractual or explicit statutory authority to the contrary. *See Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987). There is no federal case authority to support an award of lost wages to a witness. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991)(expert witness under fee shifting statute of 42 U.S.C. §1988 bound by the limits of Section 1821(b)); *Exxon Chemical Patents, Inc. v. The Lubrizol Corp.*, 131 F.R.D. 668 (S.D. Tex. 1990)(losing party not required to pay prevailing party's physician expert $750 in lost income); *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989)(application of *Crawford Fitting* precluded prevailing party in sex discrimination action from obtaining expert expenses beyond limits imposed in 28 U.S.C. §§1821(b), 1920). Moreover, the general rule is that a party is not entitled to witness fees and *per diem* expenses relating to taking his own testimony. *See* C. Wright, A. Miller & M. Kane, 10 *Federal Practice and Procedure Civil* 2d §2678, at 376 (1983 and Supp. 1992). Accordingly, we reverse the administrative law judge's award of lost wages to claimant for attending the pre-hearing deposition in the present case.

ATTORNEY'S FEE

Turning to claimant's arguments on cross-appeal, we agree with claimant that the administrative law judge's disallowance of the 1 hour requested at $150 per hour for the preparation of counsel's fee petition cannot be affirmed. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, recently held that attorneys are entitled to a reasonable fee for time spent preparing fee applications under the Act, as in other federal fee-shifting statutes, because uncompensated time spent on petitioning for a fee automatically diminishes the value of the fee eventually received. *Anderson v. Director, OWCP*,___ F.3d___, No. 94-70750 (9th Cir. Aug. 5, 1996). Accordingly, consistent with the Ninth Circuit's decision in *Anderson*, we vacate the administrative law judge's disallowance of this time and modify his Supplemental Order Awarding Attorney's Fees to reflect claimant's counsel's entitlement to an additional $150 for the one hour claimed in preparation of the fee petition.

Accordingly, the administrative law judge's award of one day's lost wages to claimant for attending a deposition is reversed. In all other respects, the administrative law judge's Decision and Order Denying Modification is affirmed. The administrative law judge's Supplemental Order Awarding Attorney's Fees is modified as stated herein but is, in all other respects, affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge