BRB Nos. 97-0608
and 97-0608A

BRIAN CODD	)	
	)	
Claimant-Respondent Cross-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent Cross-Petitioner	)	
	)	
SOUTH STEVEDORING	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees and Costs of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Richard Mark Baker (Cantrell, Green, Pekich, Cruz, McCort & Baker), Long Beach, California, for claimant.

James P. Allecia, Long Beach, California, for employer Stevedoring Services of America and carrier Homeport Insurance Company.

Douglas M. Marshall, Newport Beach, California, for employer South Stevedoring and carrier Signal Mutual Indemnity Association.

Michael S. Hertzig (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration, and Stevedoring Services of America (SSA) cross-appeals the Supplemental Decision and Order Awarding Attorney Fees and Costs (95-LHC-873, 874) of Administrative Law Judge Samuel J. Smith 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 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 & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant, on May 2, 1994, suffered a work-related back injury during the course of his employment with SSA. On September 12, 1994, claimant suffered an injury to his left knee and lower back while working for South Stevedoring (South). Subsequent to these injuries, claimant filed two separate claims seeking benefits under the Act against SSA and South respectively. SSA voluntarily paid claimant temporary total disability compensation and medical benefits for his back injury from May 2, 1994 through July 24, 1994. *See* 33 U.S.C. §§907, 908(b). South voluntarily paid claimant temporary total disability compensation and medical benefits for his knee injury from November 15, 1995 through March 14, 1996. *Id.* These claims were consolidated into one case for purposes of disposition.

The case was initially assigned to Administrative Law Judge David W. Di Nardi. On April 26, 1995, the Director filed with Judge Di Nardi an appearance letter stating that he would not oppose the granting of Section 8(f), 33 U.S.C. §908(f), relief with regard to claimant's injury while working for SSA, and, if injury and disability were found, he would

not oppose the granting of Section 8(f) relief with regard to claimant's injury while working for South. Additionally, the Director stated that while he did not intend to appear at the hearing, his non-appearance was not to be construed as abandonment; moreover, the Director requested that all orders, motions, stipulations, evidentiary exhibits and other documents be served upon him. Subsequent to the Director's appearance letter, on August 8, 1995, all the parties, including the Director, received notice that the case was reassigned to Administrative Law Judge Samuel J. Smith (the administrative law judge).

Claimant and both employers agree that at a pre-hearing conference held on-the-record which they attended on November 7, 1995,[1] the administrative law judge, in an off-the-record discussion, disclosed to the parties that he had previously represented SSA in a case styled *Codd v. Crescent Wharf and Warehouse/dba Stevedoring Services of America*, Case No. 83-LHC-969, OWCP No. 18-3015, involving claimant herein. That case arose as a result of a back injury claimant suffered in 1979 while working for Crescent Wharf and Warehouse (Crescent/SSA), the predecessor to SSA. A Decision and Order Awarding Benefits was issued in 1983, awarding claimant permanent partial disability compensation, and Crescent/SSA relief under Section 8(f) of the Act.[2] *See* South Ex. 20. It was disclosed that while in private practice, Administrative Law Judge Smith represented Crescent/SSA during modification proceedings on this claim, filing a petition on behalf of employer in 1989, which was granted by an administrative law judge in 1991.[3] *See* South Exs. 75-76. It is thus undisputed that claimant, SSA and South had notice prior to the formal hearing

[1]A transcript of this pre-hearing conference was produced.

[2]Medical records concerning claimant's 1979 injury, as well as the 1983 decision with regard to this claim, were submitted along with both SSA's and South's Section 8(f) applications.

[3]The 1991 Decision and Order approving Crescent/SSA's petition for modification stated that the decision shall be effectuated by the district director. *See* South Ex. 75. Thereafter, the district director issued a compensation order on May 6, 1991. SSA appealed this order to the Board, but later moved to withdraw the appeal. The Board granted this motion on August 14, 1996.

that the administrative law judge had previously represented Crescent/SSA with regard to claimant's 1979 claim and that none of these parties objected to the administrative law judge's adjudication of the instant case. Although the Director received notice, he was not represented at the pre-hearing conference and was not separately informed of the administrative law judge's disclosure.

A formal hearing in this matter was held before the administrative law judge on March 20 and 21, 1996. In his initial Decision and Order Awarding Benefits, issued on June 25, 1996, the administrative law judge, relying on *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995), found that claimant was entitled to concurrent disability awards. With respect to the May 2, 1994 work-related injury, the administrative law judge awarded claimant temporary total disability compensation from May 3, 1994 through August 1, 1994, *see* 33 U.S.C. §908(b), temporary partial disability compensation from August 2, 1994 through August 15, 1994, *see* 33 U.S.C. §908(e), and permanent partial disability compensation from August 16, 1994 through September 12, 1994, and from February 28, 1996 and continuing, payable by SSA. *See* 33 U.S.C. §908(c)(21), (h). With respect to the September 12, 1994 work-related injury, the administrative law judge determined that South was liable for claimant's award of temporary total disability compensation from September 13, 1994 through February 27, 1996, *see* 33 U.S.C. §908(b), and permanent partial disability from February 28, 1996 and continuing. *See* 33 U.S.C. §908(c)(21), (h). In addition, the administrative law judge awarded both SSA and South relief under Section 8(f) of the Act.

Thereafter, South filed a timely motion for reconsideration with the administrative law judge. In an Order to Show Cause, issued on July 24, 1996, the administrative law judge ordered the Director to respond to South's motion, as the motion might have an impact on the liability of the Special Fund. The Director filed a response on September 13, 1996. Subsequently, on October 16, 1996, the Director filed a motion to vacate the administrative law judge's decision and for disqualification of the administrative law judge. The Director based his motion on the administrative law judge's prior representation of Crescent/SSA in the modification proceeding with respect to claimant's 1979 claim.

In his Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration, the administrative law judge initially found that the Director's motion was untimely pursuant to Section 556(b) of the Administrative Procedure Act (APA), 5 U.S.C. §556(b). Nevertheless, the administrative law judge considered the merits of the Director's motion in order to avoid further delay from a potential appeal. Relying on *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164 (2d Cir. 1992), the administrative law judge first determined that the rules governing the disqualification of federal court judges contained in 28 U.S.C. §455 do not apply to administrative law judges. Next, the administrative law judge considered the grounds for disqualification set forth in the APA and found that his adjudication of claimant's case evidenced no personal bias, and that he had no *ex parte* knowledge or information of the present case which influenced him in any way, particularly with regard to the issue of Section 8(f) relief, as the Director had previously conceded that Section 8(f) relief was

appropriate as to each employer. Further, the administrative law judge unequivocally denied that he has performed any legal representation since becoming an administrative law judge. Thus, the administrative law judge, in denying Director's motion, concluded that his disqualification was neither appropriate nor mandated by the APA. Lastly, the administrative law judge denied claimant's request that sanctions be imposed upon the Director under Rule 11 of the Federal Rules of Civil Procedure, and his request for an attorney's fee payable by the Director under Section 26 of the Act, 33 U.S.C. §926.[4]

Subsequent to the administrative law judge's initial Decision and Order Awarding Benefits, claimant's counsel sought an attorney's fee of $30,712.50, representing 175.5 hours at $175 per hour, and $4,703.57 in expenses for worked performed before the administrative law judge in connection with the claims against SSA and South. Thereafter, SSA and South filed objections to the fee petition; SSA contended that its liability for any fee award should be limited to the services performed by counsel prior to the date of claimant's work-related injury at South, September 12, 1994, and South asserted that the

[4]With regard to South's motion for reconsideration, the administrative law judge modified his initial Decision and Order Awarding Benefits, and found that claimant was entitled to concurrent awards of permanent partial disability compensation from SSA and temporary total disability compensation from South for the period from September 13, 1994 through February 27, 1996. The administrative law judge concluded that receipt of these concurrent awards violated neither the maximum compensation provision of Section 8(a) of the Act, 33 U.S.C. §908(a), nor the maximum compensation provision of Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1). Lastly, the administrative law judge denied South's request for an offset for the amount of permanent partial disability compensation SSA paid to claimant. None of the findings with regard to the award of benefits are challenged on appeal.

liability for an attorney's fee and costs should be shared equally between it and SSA.[5] Rejecting each contention, the administrative law judge ordered claimant's counsel to submit a supplemental fee petition, identifying to the extent possible the specific injury to which each itemized service was related; the administrative law judge determined that the fee liability for those tasks which could not be attributed to a specific injury would be split equally between the employers. Claimant's counsel complied with the administrative law judge's order and filed a supplemental fee petition, attributing various itemizations to either SSA or South, where possible.

On March 24, 1997, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees and Costs, wherein the administrative law judge awarded claimant's counsel an attorney's fee of $26,250, of which SSA was to be liable for $12,171.25 and South $14,078.75; in addition, the administrative law judge ordered SSA to pay claimant's counsel costs in the amount of $2,231.79, and South to pay claimant's counsel $2,471.78 in costs. On March 27, 1997, SSA filed a motion for reconsideration of the Supplemental Decision and Order Awarding Attorney Fees and Costs, requesting that the employers be allowed an opportunity to file written line-by-line objections to claimant's counsel's supplemental fee petition. On April 1, 1997, SSA filed its line-by-line objections with the administrative law judge. In a Decision on Petition for Reconsideration of the Supplemental Decision and Order Awarding Attorney Fees and Costs, the administrative law judge denied SSA's motion for reconsideration, finding that SSA had the opportunity to submit written line-by-line objections with regard to the allocation of fees in its original response to claimant's counsel's fee petition.

[5]In his Decision and Order Awarding Benefits, the administrative law judge suggested that in responding to claimant's counsel's fee petition, SSA and South should discuss the issue as to how any award of fees and costs should be apportioned between the two employers. *See* Decision and Order Awarding Benefits at 34.

On appeal, the Director contends that the administrative law judge erred as a matter of law in failing to vacate his Decision and Order Awarding Benefits and to disqualify himself from adjudicating the instant claim, since he had represented Crescent/SSA as a private attorney in a previous claim filed by claimant herein. BRB No. 97-0608. Claimant, as well as SSA and South, respond, urging affirmance of the administrative law judge's Decision and Order Awarding Benefits.[6] Specifically, all three parties contend, *inter alia*, that the Director's motion to disqualify the administrative law judge and vacate the administrative law judge's decision was untimely.[7] In its appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Costs, SSA contends that the administrative law judge erred in not allowing it an opportunity to file amended objections to claimant's counsel's amended fee petition. In his response to SSA's appeal, claimant declined to file a brief, stating that since the sole issue with regard to an attorney's fee and costs concerns the allocation of payment between the two employers, claimant is not adversely affected. BRB No. 97-0608A.

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[6]SSA filed with the Board a motion to remand this case to the administrative law judge, stating that it wished to seek modification of the administrative law judge's Decision and Order Awarding Benefits in order to relieve the Special Fund from liability for permanent partial disability benefits to claimant. The Director opposed the motion, asserting that its appeal regarding the administrative law judge's ability to hear the case should be decided prior to further proceedings. This motion was denied by the Board in an Order issued on November 26, 1997. SSA may file its petition upon issuance of this decision.

[7]In his response to the Director's appeal, claimant asserts that he is entitled to fees and costs payable by the Director pursuant to the Equal Access to Justice Act. However, as claimant raised this contention in a response brief and not in a cross-appeal, we decline to address it. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *see also Burgo v. General Dynamics Corp.*, 122 F.3d 140 (2d Cir. 1997).

For the reasons that follow, we affirm the administrative law judge's denial of the Director's motion seeking to disqualify the administrative law judge from adjudicating this case and vacate his initial decision. In his decision denying the Director's motion for disqualification, the administrative law judge initially determined that the rules governing the disqualification of federal judges do not apply to administrative law judges. The Director concedes that these rules are inapplicable to administrative proceedings; however, the Director asserts that the rules are instructive to the instant case. Under 28 U.S.C. §455(a), a federal judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." Specifically, a federal judge must disqualify himself where he has "personal knowledge of disputed evidentiary facts concerning the proceeding," *see* 28 U.S.C. §455(b)(1), or "[w]here in private practice, he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it . . . ." 28 U.S.C. §455(b)(2). While these standards may be instructive, the case law supports the administrative law judge's conclusion that this high standard cannot apply to administrative law judges who are employed by the agency whose actions they review. "Otherwise, ALJs would be forced to recuse themselves in every case." *See Greenberg*, 968 F.2d at 167.

All parties herein acknowledge the applicability of the APA to the issue of whether the administrative law judge in the case at bar must disqualify himself. Section 556(b) of the APA provides in pertinent part:

> The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. §556(b); *see also* 29 C.F.R. §18.31. Thus, under the APA, a motion for disqualification must be accompanied by an affidavit and must be filed in a timely fashion.

In his decision below, the administrative law judge found that, based on his possession of the administrative file concerning claimant's 1979 claim, the Director had constructive knowledge of the administrative law judge's prior representation of Crescent/SSA either on June 21, 1995, when South's counsel had the entire file photocopied, or on August 8, 1995, when the Director received the Notice of Pre-Hearing Conference before the administrative law judge. The administrative law judge concluded that the Director's October 16, 1996 motion for disqualification and accompanying affidavit were thus untimely filed pursuant to Section 556(b) of the APA, as they were filed fourteen months after the August 8, 1995 notice, seven months after the formal hearing, and four months after the issuance of the initial decision in this matter.

In support of his contention that his motion was timely, the Director contends that his motion for disqualification was filed as soon as practicable after he learned of the administrative law judge's prior representation of Crescent/SSA. The Director notes that he did not participate in the instant case until after the administrative law judge's July 24, 1996 Order to Show Cause ordered him to do so. On August 14, 1996, the Board issued an Order granting SSA's motion to withdraw its appeal of the district director's 1991 compensation order concerning claimant's 1979 claim. The Director asserts that it was only then that he had cause to investigate the relationship between claimant's 1979 claim and the claim herein. Upon learning of the administrative law judge's prior representation of Crescent/SSA, the Director filed his motion for disqualification, less than two months after the administrative law judge requested the Director's participation in the instant case.

As set forth above, Section 556(b) of the APA requires that a request for recusal of an agency employee, with supporting affidavits, be timely so that the party cannot wait to see the result of the proceeding before substantiating the allegations of bias. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir.), *cert. denied*, 116 S.Ct. 94 (1995). The general rule governing disqualification of both federal judges and agency employees requires that such a request be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. *Marcus v. Director, OWCP*, 548 F.2d 1044 (D.C. Cir. 1976). The attempt to disqualify a judge after a trial has commenced will not "be listened to unless it is shown affirmatively that the party was not aware of the objection, and was in no fault in not knowing it." *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 516 (4th Cir. 1974), *citing Coltrane v. Templeton*, 106 F. 370, 377 (4th Cir. 1901).

In the instant case, as the administrative law judge found, the administrative file relating to claimant's 1979 injury was in the Director's possession at all times, and this injury was referenced in both employer's Section 8(f) applications, which the Director approved. The Director chose not to directly participate in the case, and his motion for disqualification was filed after the administrative law judge issued his decision, the merits of which no party attacks. Under these circumstances, we cannot say the administrative law judge erred in finding the petition untimely. In any event, despite finding that Director's motion to vacate decision and for disqualification was untimely filed under the APA, the administrative law judge did, nevertheless, address the merits of the Director's petition. We hold that the administrative law judge's denial of the Director's motion based on the merits of the issues is rational and in accordance with law.

Section 556(b) of the APA states that an administrative law judge may at any time disqualify himself, and allows the filing of a sufficient affidavit of "personal bias or other disqualification." 5 U.S.C. §556(b). Noting that the Director made no allegation of bias or prejudice, the administrative law judge first found that, in fact, he exhibited no personal bias in the adjudication of the instant case. Next, the administrative law judge, after examining the Director's allegations of other grounds for disqualification, found that he had no recollection of claimant's previous case, and that even if he did, it was inconceivable that

this information would be relevant to the instant case, as his prior involvement concerned only modification proceedings relating to claimant's 1979 injury. Since the Director had conceded Section 8(f) relief regarding the two subsequent injuries at issue in the present claims, the administrative law judge concluded that his prior representation of Crescent/SSA imparted no relevant *ex parte* information with regard to the issues in the instant case.[8] Further, the administrative law judge unequivocally denied any allegation that he had performed any legal representation since becoming an administrative law judge. Lastly, the administrative law judge found grounds for disqualification lacking under Section 554(d) of the APA,[9] since he had no *ex parte* information, nor was his decision influenced by any such information. *See* Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration at 10-15. Based upon these findings, the administrative law judge thus denied the Director's motion.

The Director contends that the administrative law judge's prior representation of one of the employers in the instant case, and the fact that the administrative law judge had personal knowledge and actively litigated matters related to issues before him for adjudication, provides sufficient grounds to support his motion for disqualification. The Director argues that assuming there was no evidence of personal bias on the part of the administrative law judge, the administrative law judge, by adjudicating the instant case, created an appearance of impropriety and a danger to the Act's reputation for integrity so

[8]The administrative law judge noted that even under the federal rules governing disqualification, 28 U.S.C. §455(b)(1), (2), he did not err in hearing the instant case as he had no personal knowledge of disputed evidentiary facts concerning the proceeding, and he had not served as a private lawyer in the specific matter in controversy. *See* Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration at 13.

[9]Section 554(d) of the APA prevents an administrative law judge from adjudicating a particular case where the administrative law judge had previously "engaged in the performance of investigative or prosecuting functions for an agency" in that case or a factually related case. 5 U.S.C. §554(d).

great that the Board must vacate the administrative law judge's decision, disqualify him from adjudicating the case, and remand the case for a new hearing before a different administrative law judge. The Director further argues that while the rules governing disqualification of federal judges under 28 U.S.C. §455 do not apply to administrative law judges, they are instructive to the instant matter. Claimant, SSA and South object to the Director's request, stating that the administrative law judge exhibited no bias or prejudice in adjudicating the instant case and that to relitigate the case would be unconscionable in terms of the cost and time each party would have to expend.

Critical to our analysis of the disqualification issue is the fact that the Director has never alleged any personal bias on the part of the administrative law judge, either in his conduct of the hearing or in his decisions. Indeed, all the other parties in the instant case have opposed the Director's motion to vacate and for disqualification. Since there is no contention of personal bias on the part of the administrative law judge, the issue becomes whether there existed "other" grounds for disqualification of the administrative law judge pursuant to Section 556(b) of the APA. In this regard, we agree with the administrative law judge that the injuries suffered by claimant in May and September 1994 are separate and distinct from the 1979 injury experienced by claimant. Claimant's prior injury is relevant only to the issue of Section 8(f) relief, which the Director conceded. Therefore, the administrative law judge had no *ex parte* information with regard to the issues which arose in the instant case based on his prior representation of Crescent/SSA, and any recollection the administrative law judge had concerning the prior case could not have been relevant to the instant case. Even if they were applicable, the federal rules governing disqualification of judges supports the administrative law judge's decision not to disqualify himself, as the administrative law judge had no personal knowledge of disputed evidentiary facts concerning the instant proceeding, and had not served as a private lawyer in the specific matter in controversy. *See* 28 U.S.C. §455(b)(1), (2).

We would be remiss, however, if we did not note the administrative law judge's questionable judgment in deciding to adjudicate the instant case. The principle that a party should not be a judge in his own case represents a venerable tradition in Anglo-American legal history. *American General Ins. Co. v. Federal Trade Commission*, 589 F.2d 462, 463 (9th Cir. 1979). The assurance of fundamental fairness in administrative proceedings "require[s] at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit." *TWA v. CAB*, 254 F.2d 90, 91 (D.C. Cir. 1958). Based on his prior representation of Crescent/SSA, the administrative law judge, by adjudicating the instant case, ran the risk of creating the appearance of impropriety and infecting his decisions with invalidity. *See American General Insurance*, 589 F.2d at 465. On the facts presented to us, however, the administrative law judge's denial of the Director's motion to vacate decision and for disqualification is rational and is in accordance with law. As there is no dispute between any of the parties, including the Director, with regard to the merits of the case, we agree with claimant and the employers that it would be unconscionable to require them to relitigate this case. Accordingly, we reject the Director's contention of error, and we affirm the administrative law judge's

decision on this issue.

Lastly, in its appeal, SSA challenges the administrative law judge's award of an attorney's fee to claimant's counsel; specifically, SSA asserts that the administrative law judge erred in failing to allow it the opportunity to file objections to claimant's supplemental fee petition. We agree. In his initial Decision and Order Awarding Benefits, the administrative law judge suggested that in their responses to claimant's counsel's fee petition, SSA and South should discuss the issue as to how any award of fees and costs should be apportioned between the two employers. *See* Decision and Order Awarding Benefits at 34. Thereafter, in its objections to counsel's fee petition, SSA contended that its liability for any fee award should be limited to services performed by counsel prior to the date of claimant's work-related injury at South, September 12, 1994. South asserted that the liability for claimant's counsel's attorney's fee and costs should be shared equally between it and SSA. In an order issued March 3, 1997, the administrative law judge rejected both contentions, and ordered claimant's counsel to submit a supplemental fee petition, identifying to the extent possible, the specific injury to which each itemized service was related; the administrative law judge determined that fee liability for those tasks which could not be attributed to a specific injury would be split equally between SSA and South.

On March 20, 1997, claimant's counsel complied with the administrative law judge's order and submitted a supplemental fee petition, attributing various itemized tasks to either SSA or South, where possible. Where tasks were unable to be attributed to either one or the other employer, the fee petition apportioned liability equally between SSA and South. On March 24, 1997, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees and Costs, wherein the administrative law judge awarded claimant's counsel an attorney's fee of $26,250, of which SSA was to be liable for $12,171.25 and South $14,078.75; in addition, the administrative law judge ordered SSA to pay claimant's counsel costs in the amount of $2,231.79, and South to pay claimant's counsel $2,471.78 in costs. On March 27, 1997, SSA filed a motion for reconsideration of the Supplemental Decision and Order Awarding Attorney Fees and Costs, requesting that the employers be allowed an opportunity to file written line-by-line objections to claimant's counsel's supplemental fee petition. On April 1, 1997, SSA filed its line-by-line objections with the administrative law judge. In a Decision on Petition for Reconsideration of the Supplemental Decision and Order Awarding Attorney Fees and Costs, the administrative law judge denied SSA's motion for reconsideration, finding that SSA had the opportunity to submit written line-by-line objections with regard to the allocation of fees in its original response to claimant's counsel's fee petition.

It is well established that due process requires that an employer be given a reasonable time to respond to a fee request. *See Todd Shipyards Corp. v. Director, OWCP,* 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978). In the instant case, subsequent to claimant's counsel's initial fee petition, SSA and South raised their contentions generally as to how the liability for fees and costs were to be apportioned between them. After claimant's counsel, pursuant to the administrative law judge's directive, filed his supplemental fee petition on March 20, 1997,

specifically apportioning liability between the two employers, the administrative law judge issued his award of an attorney's fee four days later without allowing SSA and South the time or the opportunity to respond to the specific charges sought against them. As SSA was not afforded a reasonable opportunity to respond to the specific supplemental fee petition filed by claimant's counsel at the request of the administrative law judge, we vacate the administrative law judge's fee award and remand for the administrative law judge to reconsider the fee after allowing SSA a reasonable time to file a response to counsel's supplemental fee petition.

Accordingly, the administrative law judge's Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and Decision on Petition for Reconsideration is affirmed, the Supplemental Decision and Order Awarding Attorney Fees and Costs is vacated, and the case is remanded to the administrative law judge for reconsideration in accordance with the opinion herein.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge