BRB No. 97-618

ERNEST R. McKNIGHT, JR.	)	
	)	
Claimant-Respondent	)	DATE ISSUED:_____
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
CAROLINA SHIPPING COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Harriet McBryde Johnson, Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/Liberty Mutual Insurance Company.

Shari S. Miltiades, Savannah, Georgia, for employer/Travelers

Insurance Company.

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

PER CURIAM:

Employer and Liberty Mutual appeal the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (95-LHC-351) of Administrative Law Judge Edith Barnett 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).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

[1]Not having received the record in this case, on December 17, 1997, the Board dismissed the appeal, subject to reinstatement on the Board's docket once the record was complete, and remanded the case to the district director for reconstruction of the record. On March 4, 1998, after it received the reconstructed record from the district director, the Board reinstated the appeal.

Claimant began his career as a longshoreman on the Charleston, South Carolina waterfront in 1978. In 1984, while loading bales, he injured his left knee.[2] He was treated by Dr. Bowles, who diagnosed a Grade I medial lateral ligament strain. Travelers Ex. 2 at 12-13; Travelers Ex. 5; Tr. at 8-9. Claimant treated with Dr. Bowles until January 1985 when he returned to his usual work without restrictions.[3] Travelers Ex. 2 at 12-13. Employer voluntarily paid claimant temporary total disability benefits. Liberty Mutual Exs. 2-3. In 1986, claimant's knee gave way and he fell, injuring his wrist. The evidence indicates that this accident did not affect his knee condition. Travelers Ex. 2 at 12-14; Tr. at 12-13. In 1987, claimant was loading tanks on a rail on the waterfront for COSCO. After what he called a "strenuous" day of work, claimant's knee began to ache and swell. Tr. at 15, 28. He was examined by Dr. Izard, Dr. Bowles' partner, and was told to continue to work and to take aspirin for the pain. Travelers Ex. 2 at 15. In July and August 1987, claimant was examined by Dr. Birnbach. She diagnosed bursitis of the left medial knee and patellar femoral tendonitis of the left knee, both of which had improved by August 1987. Her only recommendations were to use ice, to take medications and to exercise. Travelers Ex. 2 at 18-19.

Claimant began treating with Dr. Addington, an orthopedic surgeon, in May 1988. Dr. Addington first related the pain to the 1987 work day, but later changed his opinion and related claimant's condition to his 1984 injury. Dr. Addington diagnosed possible degenerative torn medial meniscus, some subpatellar roughness and patella femoral syndrome. On April 5, 1989, he performed an arthroscopy on claimant's left knee and confirmed his earlier suspicions, as surgery revealed a torn medial meniscus, early degenerative joint disease and mild chronic synovitis. Travelers Ex. 8. Claimant recovered and was released to return to his usual work on May 15, 1989. *Id.* He then filed a claim for benefits under the Act. He did not receive any further treatment for his knee; however, in 1993 and 1994, his knee was evaluated by Drs. Thompson and Brilliant, respectively. Cl. Ex. 11; Liberty Mutual Ex. 11; Travelers Ex. 2 at 17; Travelers Ex. 5-6; Tr. at 33-34.

The administrative law judge reviewed the evidence of record, credited claimant's testimony and the opinions of Drs. Addington and Brilliant and found that claimant's knee surgery and condition are the natural result of his 1984 knee injury,

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[2]Liberty Mutual was on the risk at this time.

[3]Between January 1985 and January 1990, claimant worked for many different companies, including, but not limited to Southern Stevedoring, Palmetto Shipping, Ryan-Walsh Stevedoring, Southeast Atlantic Cargo, Chiquita Brands, and Maersk Container Service. Liberty Mutual Ex. 13; Tr. at 25, 36.

i.e., there was no intervening injury. Decision and Order at 11. She gave less weight to Dr. Thompson's opinion, stating that he was not a treating physician, and noting that, nevertheless, his opinion does not rule out the 1984 injury as the cause of claimant's knee problems. *Id.* at 12. The administrative law judge also found that the claim for benefits was filed in a timely manner and that claimant's disability could be rated at 15 percent for the period between December 26, 1989, and August 4, 1994, and at 25 percent thereafter. Decision and Order at 14-15. Further, she awarded claimant temporary partial disability benefits from December 26, 1989, through January 14, 1994, and permanent partial disability benefits thereafter. The administrative law judge awarded benefits based on claimant's average weekly wage at the time of his surgery in 1989 rather than his average weekly wage at the time of the 1984 injury because the torn meniscus led to the development of arthritis which was discovered in 1989. Employer and Liberty Mutual appeal the award. Employer and Travelers respond, favoring Liberty Mutual's arguments in part, but urging affirmance of the finding that there was no intervening injury in 1989. Claimant responds, urging affirmance in the entirety.

In a supplemental decision, the administrative law judge awarded claimant's counsel an attorney's fee in the amount of $11,302.52. Employer and Liberty Mutual appeal the fee award, and claimant responds, urging affirmance.

Responsible Employer/Intervening Cause

Liberty Mutual first contends the administrative law judge erred in finding there was no intervening injury in this case. Specifically, it argues that the day claimant spent lashing tanks for COSCO in 1987 constitutes an intervening accident, relieving it of liability for post-1984 disability benefits. Moreover, it asserts that any knee problems claimant suffered after 1984 were caused by his strenuous work unloading banana boats for another employer. *See* Liberty Mutual Ex. 13; Tr. at 25, 36. Claimant argues that his knee was never the same after the 1984 injury and that he experienced repeated bouts of pain and swelling in the knee. Additionally, he stated that his knee often gave way and he often stubbed his toes and dragged his feet. Tr. at 11-15. Claimant also argues that there were no subsequent injuries, only stressful hard days of his usual work. Travelers argues there was no intervening injury in 1989 at employer's facility and that the knee condition must be related to either the 1984 injury or to the 1987 incident.[4]

In a case involving multiple injuries, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or aggravation of a prior injury. If the claimant's disability results from the natural progression of the first injury, then the claimant's employer at the time of the first injury is the responsible employer. If his employment thereafter aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, claimant has sustained a new injury and the employer at that time is the employer responsible for the payment of benefits thereafter. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP,* 698 F.2d 1235 (9th Cir. 1982). Thus, a work-related aggravation of a pre-existing injury is compensable in itself under the Act and is considered a new injury. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

[4]Travelers was on the risk between January 5, 1989, and January 5, 1990. Tr. at 5.

In this case, it is undisputed that claimant sustained an injury to his left knee while working for employer in 1984. Dr. Bowles diagnosed the injury as a ligament strain and, after two months of treatment, released claimant to return to his usual work, concluding that claimant's knee recovered with no residuals. Travelers Ex. 2 at 12-13. Nevertheless, two of the three physicians who discussed the etiology of claimant's torn meniscus, Drs. Addington and Brilliant, related it to his 1984 knee injury. Dr. Addington, in 1989, rated claimant as having a 15 percent permanent partial disability and stated that although the cause could not be determined with absolute certainty, he believed that claimant's torn meniscus was an old injury and stated, with a reasonable degree of certainty, that it is "compatible" with the history of a 1984 injury. Travelers Ex. 8. In 1994, Dr. Brilliant found a medial meniscectomy with osteoarthritis secondary to an old injury, and he rated claimant's impairment at 25 percent. Although he noted questions surrounding the cause of claimant's problems in 1989, he stated with a reasonable degree of certainty that claimant's current problems relate to his 1984 injury. Travelers Exs. 5-6. Dr. Thompson, the third physician, agreed there was no way to determine when the meniscus tore and that it was an old injury, but he attributed the condition to two post-1984 incidents and to hard physical labor. He then rated claimant as having a seven or eight percent impairment of the leg. Cl. Ex. 11; Liberty Mutual Ex. 11; Travelers Ex. 2 at 17.

It is within the administrative law judge's authority to evaluate and draw inferences from the medical evidence of record. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the evidence of record reveals a specific injury in 1984, a painful work day in 1987, surgery in 1989, and continuous employment in heavy labor. Claimant testified there was no injury after 1984; Dr. Addington stated that claimant's 1989 knee condition was compatible with his 1984 injury; and Dr. Brilliant stated that the two were related. This evidence was credited by the administrative law judge. Thus, substantial evidence supports the administrative law judge's determination that claimant's current condition is related to his 1984 knee injury. Additionally, as the administrative law judge noted, Dr. Thompson mentioned other possible causes, but he did not rule out a connection between claimant's work-related injury and his disability. Based on this evidence, the administrative law judge rationally found claimant's knee problems were related to his 1984 work injury. Consequently, we affirm the administrative law judge's determination that claimant's 1989 surgery and disability are related to his 1984 work injury. *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992) (subsequent exacerbation of injury in heavy work for other employers did not overpower and nullify causal relationship with initial injury); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989).

Timeliness

Employer and Liberty Mutual next contend that the claim for benefits was not filed in a timely manner and that the administrative law judge erred in finding otherwise. Liberty Mutual contends that claimant filed his claim for benefits in 1990, more than one year after he ceased treating with Dr. Addington on May 9, 1989, and certainly more than one year after he learned he would have continuing problems with his knee (between 1984 and 1987). Claimant asserts that the time for filing did not begin to run until April 1989 when Dr. Addington performed arthroscopy and discovered the full extent of the knee condition. Further, claimant argues that the claim was filed via letter prior to the actual signing and filing of the LS-203 claim form in May 1990.

Section 13(a) of the Act provides a claimant with one year after he becomes aware of the relationship between his traumatic injury and his employment within which he may file a claim for compensation for the injury. 33 U.S.C. §913(a); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). A claim need not be filed on any particular form to satisfy Section 13, as long as it discloses the claimant's intent to assert a right to compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988); *see also I.T.O. Corp. of Virginia v. Pettus,* 73 F.2d 523, 30 BRBS 6 (CRT) (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 49 (1996). Any letter or notice to the district director which asserts the right to compensation is sufficient. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). If voluntary payments were made, as here, claimant has one year from the last payment to file, unless he was unaware of the true nature, extent and impact of his injury. *Morales v. General Dynamics* Corp., 16 BRBS 293 (1984) *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985).

In this case, claimant's counsel sent a letter to the district director on May 8, 1989, one month after surgery, which stated that the letter is to provide "notice of claim[.]" Cl. Ex. 2. The letter continued, stating that claimant "now seeks compensation for" medical expenses, temporary total disability and permanent partial disability and an attorney's fee.[5] *Id.* In a letter dated September 11, 1989,

[5]Liberty Mutual conceded that this letter provides employer sufficient knowledge of the injury under Section 12(d) of the Act. 33 U.S.C. §912(d); Decision and Order at 12.

counsel noted the delay in receiving information from Dr. Addington because he is no longer in practice and counsel declared claimant's wish to "reserve his claim in full pending receipt of the medical documentation." Cl. Ex. 3. A third letter, dated February 8, 1990, documented receipt of the medical information and listed the benefits to which claimant believes he is entitled. Cl. Ex. 4. Finally, on May 23, 1990, claimant signed and filed the LS-203 form, noting at the signature line that the claim was "previously filed." Cl. Ex. 5. Employer and Travelers filed a notice of controversion on June 5, 1989, and a first report of injury on June 7, 1989. Liberty Mutual Exs. 4-5.

The administrative law judge found that claimant's May 1989 letter clearly indicated an intent to seek compensation. Decision and Order at 14. She also concluded that claimant was not aware of the full extent of his injury until arthroscopic surgery revealed the harm in April 1989. Based on the language of the May 1989 letter and the fact that Travelers interpreted it as a claim and filed appropriate responses, the administrative law judge determined that the letter constituted a timely claim for compensation. Decision and Order at 14.

We affirm the administrative law judge's determination as it is supported by substantial evidence. She rationally determined from the medical records and claimant's continued employment that he did not know the full extent, character and impact of his injury until Dr. Addington performed arthroscopic surgery in April 1989. She also found that claimant had no loss in wage-earning capacity until this time and, in effect, that claimant's condition was misdiagnosed. *See Parker*, 935 F.2d at 20, 24 BRBS at 98 (CRT); *Gregory*, 25 BRBS at 187. These conclusions are supported by substantial evidence, based on the facts that, prior to April 1989, claimant continued to work in his usual employment and that, although his knee had been examined by several doctors before April 1989, none had diagnosed a torn meniscus until Dr. Addington discovered it during surgery. All previous diagnoses were less serious and were treated conservatively. Therefore, as claimant became aware of the full extent of his injury in April 1989, the time for filing a claim based on this injury did not begin to run until April 1989. 33 U.S.C. §913(a); *Thompson*, 82 F.3d at 130, 30 BRBS at 33 (CRT); *Parker,* 935 F.2d at 20, 24 BRBS at 98 (CRT).

Further, we reject Liberty Mutual's argument that claimant did not file a claim for compensation until more than one year after he became aware of his disability. Because a claim need not be filed on any particular form, Liberty Mutual's reliance on the filing date of the LS-203 form is misplaced. *Vodanovich*, 27 BRBS at 286; *Gregory*, 25 BRBS at 188. Claimant's May 1989 letter to the district director set forth a clear intent to seek compensation for the surgery and disability resulting from the injury. Therefore, we hold that the administrative law judge rationally found that

claimant's claim for compensation was originally asserted in this letter and not on the LS-203 form. *See Pettus*, 73 F.3d at 523, 30 BRBS at 6 (CRT). Accordingly, we affirm the administrative law judge's determination that the claim was filed in a timely manner.

Disability

Liberty Mutual next contends the administrative law judge erred in awarding claimant temporary partial disability benefits for a 15 percent impairment from December 26, 1989, through January 14, 1994, and continuing permanent partial disability benefits for a 25 percent impairment thereafter.[6] Travelers joins Liberty Mutual's argument, and claimant urges affirmance.

Claimant herein returned to work on May 15, 1989. The issues here involve the nature and extent of his partial disability thereafter. A knee injury resulting in permanent partial disability is compensated pursuant to the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2). Compensation is limited to that set forth in the schedule, and economic factors are not relevant. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915 (4th Cir. 1998); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985); *Conteh v. Greyhound Lines, Inc.*, 8 BRBS 874 (1978). Scheduled awards generally commence on the date of maximum medical improvement and run for the proportionate number of weeks attributable to loss of use of the scheduled body part at the full compensation rate. *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

An award of benefits for a temporary partial disability under Section 8(e), 33 U.S.C. §908(e), is based on a claimant's reduced earning capacity, similar to an award under Section 8(c)(21), 33 U.S.C. §908(c)(21). *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). A claimant with a scheduled injury which has not yet reached maximum medical improvement can receive temporary partial disability benefits if he is still receiving treatment. *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791 (1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979). However, the record herein does not contain, nor did claimant present, any evidence of a reduced wage-earning capacity, Cl. Brief at 12 n.10, and the administrative law judge did not make any findings concerning a loss in claimant's wage-earning capacity. Moreover, claimant returned to his usual work on May 15,

[6]Employer and Liberty Mutual do not challenge the administrative law judge's award of temporary total disability benefits.

1989, after he ceased treatment with Dr. Addington. By the time the administrative law judge awarded benefits in this case in December 1996, claimant's knee condition had reached maximum medical improvement, and the record demonstrates that claimant has not received any treatment for his knee since 1989. Therefore, the record does not contain evidence supporting the award of temporary partial disability benefits, through January 14, 1994.

In addition, claimant cannot receive an ongoing permanent partial disability award in view of the fact that claimant's injury is to a scheduled member. *Potomac Electric Power Co. v. Director, OWCP (PEPCO),* 449 U.S. 268, 14 BRBS 363 (1980). Pursuant to *PEPCO,* any permanent partial disability award must be made under Section 8(c)(2), and the record contains evidence of medical impairment sufficient to support such an award. While the administrative law judge's award of permanent partial disability benefits is based on medical impairment and not loss of earning capacity, however, it is incorrectly ordered as a continuing award. Under the schedule, claimant is entitled to benefits for a limited number of weeks. *Gilchrist*, 135 F.3d at 915; *see* 33 U.S.C. §908(c)(2). The administrative law judge determined that claimant's impairment was 15 percent until August 4, 1994, and this figure was the basis for the temporary partial award. In August 1994, Dr. Brilliant rated claimant's knee impairment at 25 percent. Dr. Thompson rated claimant as having a seven or eight percent impairment. Thus, depending on which doctor's disability rating is ultimately accepted, claimant could receive at most 72 weeks of permanent partial disability benefits. In no instance would the award be continuous as set by the administrative law judge. Therefore, we vacate the awards of temporary partial and permanent partial disability benefits, and we remand this case to the administrative law judge for reconsideration of the nature and extent of claimant's disability.

Moreover, on remand, the administrative law judge also must reconsider the evidence pertaining to the date on which claimant's condition reached maximum medical improvement. Permanent disability is one that has continued for a lengthy time and appears to be of lasting or indefinite duration, as opposed to one that merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, he need not look only for a statement regarding maximum improvement, but he may use the date the doctor assessed the claimant with an impairment rating, as that may be sufficient evidence of permanency. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds). In this case, Dr. Addington rated claimant's impairment in 1989, well before Dr. Thompson addressed maximum medical improvement in 1994. Thus, the

administrative law judge did not consider all relevant evidence on the permanency of claimant's condition. Consequently, we also vacate the finding that maximum medical improvement occurred on January 14, 1994, and we remand the case for further consideration of all evidence relevant to this matter.

Average Weekly Wage

Liberty Mutual contends the administrative law judge erred in awarding benefits based on claimant's 1989 average weekly wage instead of his 1984 average weekly wage. Claimant argues that the administrative law judge properly determined his average weekly wage, as the full extent of his injury was not known until 1989. Both positions are supported by case law, and thus the Board must determine which approach to apply in this case, as it arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has yet to address the specific issue presented.

The United States Court of Appeals for the Ninth Circuit has determined that, in a case involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the permanent disability becomes manifest, rather than at the time of the accident. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The Ninth Circuit reasoned that latent traumatic injuries are similar to occupational diseases, as the effect of the injury or disease is not known until a disability becomes manifest. Thus, the court held that claimant Johnson was not "injured" until several years after her accident when her disability became manifest, and it used this later date for purposes of determining her average weekly wage. *Id.* In *Kubin,* a case arising under the District of Columbia Workmen's Compensation Act, the Board affirmed an administrative law judge's use of claimant's earnings at the time his injury became disabling, reasoning this result was consistent with *Johnson* and the *Johnson* court had relied upon the definition of injury enunciated by the District of Columbia Circuit in *Stancil v. Massey,* 436 F.2d 234 (D.C. Cir. 1970). In the present case, following the holding in *Johnson* would result in our affirming the administrative law judge's use of claimant's earnings in 1989.[7]

[7]If a claimant's disability is caused by an aggravation due to the claimant's return to work, average weekly wage is determined at the time of the last aggravation. *See, e.g., Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In this case, as we have affirmed the finding that claimant's disability is the result of the initial injury, the line of cases addressing average weekly wage where claimant sustained an aggravation does not apply.

The United States Courts of Appeals for the Second and Fifth Circuits, however, have held that in traumatic injury cases, the time of the injury is the date the event causing the injury occurred; thus, average weekly wage is determined at the time of the initial injury, and not when any latent effects become manifest. *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195 (CRT) (5th Cir. 1997); *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985); *see also Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). The courts reasoned that this interpretation is consistent with the plain language of the Act. Pursuant to these decisions, claimant's average weekly wage should be based on his earnings at the time of the 1984 injury, as this injury is the cause of his disability. In any event, there can only be one average weekly wage for a given injury. *Id.*; *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981).

In this case, the parties stipulated to claimant's 1984 and 1989 average weekly wages. The administrative law judge related claimant's 1989 surgery and permanent partial disability to the 1984 injury, specifically finding there was no subsequent injury. Nonetheless, she relied on *Johnson* and *Kubin* and the analogy with occupational disease cases to conclude that claimant is entitled to benefits based on his 1989 average weekly wage, as the full extent of his disability did not become manifest until that time. In order to decide this case, we must determine whether to follow the reasoning of *Johnson* or that of *LeBlanc/Morales*.

Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation. . . ." 33 U.S.C. §910 (emphasis added). The Ninth Circuit in *Johnson* relied on a prior holding that the "time of injury" for purposes of calculating average weekly wage in an occupational disease case referred to the date the disability became manifest, *see Todd Shipyards Corp. v. Black,* 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984), noting this holding was codified in 1984 by the enactment of Section 10(i), 33 U.S.C. §910(i)(1994).[8] The court relied on a similar

[8]Section 10(i) states:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between

definition of injury developed in timeliness cases, *see, e.g., Stancil,* 436 F.2d at 276, and concluded that this definition is equally applicable in determining average weekly wage in cases of traumatic injury. Thus, the court held that the date of an "accident" is not the date of "injury," and claimant is "injured" only when his earning capacity is impaired, finding this result consistent with the purpose of Section 10.

In *LeBlanc,* the United States Courts of Appeals for the Fifth Circuit specifically addressed *Johnson,* disagreeing with that court's conclusion and stating its agreement with the earlier decision of the Second Circuit in *Morales.* Both courts reasoned that the statute is clear that "time of injury" means the time of the accident causing the traumatic injury; thus, they held claimant's awareness of the full extent of his injury is not relevant to the determination of average weekly wage in a traumatic injury case. *LeBlanc*, 130 F.3d at 161-162, 31 BRBS at 198 (CRT); *Morales*, 769 F.2d at 68, 17 BRBS at 134 (CRT). In *LeBlanc*, claimant sustained an injury in 1987 after which he missed several months of work before returning to his usual work. Several years later, in 1992, he became unable to perform his usual work due to his injury. The court rejected use of the date of the manifestation of the full disability as the time for determining the claimant's average weekly wage, stating that such an analysis is limited to instances involving occupational diseases. *LeBlanc*, 130 F.3d at 162, 31 BRBS at 198 (CRT). The court noted that in enacting Section 10(i) in 1984, Congress specifically defined a different "time of injury" for occupational diseases, but did not change the approach to "time of injury" in traumatic injury cases. *Id.* Thus, the court rejected the manifestation approach taken by the Ninth Circuit in *Johnson.* In *Morales*, a claimant sustained an injury in 1970, underwent surgery and returned to work. In 1979, doctors discovered post-traumatic arthritis in the claimant's knee which was attributed to the 1970 injury and which increased his disability. As there was only one accidental injury and no evidence of an aggravation in the intervening years, the court determined that the claimant's 1970 average weekly wage was the appropriate one on which to base the additional benefits. *Morales*, 769 F.2d at 67-68, 17 BRBS at 131, 134 (CRT).

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the employment, the disease, and the death or disability.

We agree with the reasoning of the Fifth and Second Circuits, as the rationale espoused in *LeBlanc* and *Morales* better applies the plain language of the Act than does that set forth in *Johnson*. Specifically, in view of Section 10(i) "deeming" the time of injury to be the date of manifestation in the case of an occupational disease that does not immediately result in disability or death, the better interpretation of "time of injury" in traumatic injury cases is the time when the accident causing injury occurred.[9] Therefore, we will follow the holding of the Fifth and Second Circuits in *LeBlanc* and *Morales* in cases before the Board except in cases arising in the Ninth Circuit, where *Johnson* controls. Accordingly, we hold that the administrative law judge erred in awarding claimant disability benefits based on his 1989 average weekly wage. Although the full extent of claimant's disability became manifest in 1989, the administrative law judge found, and we affirmed, that claimant's disability is the result of his 1984 work injury. As 1984 is thus the date of injury, claimant's average weekly wage must be determined at that time. Consequently, we modify the administrative law judge's decision to reflect that claimant's permanent partial disability benefits must be based upon his 1984 average weekly wage, which was stipulated by the parties to be $204.07. *LeBlanc*, 130 F.3d at 162, 31 BRBS at 198 (CRT); *Morales*, 769 F.2d at 68, 17 BRBS at 134 (CRT).

Attorney's Fee

[9]Section 10 states that average weekly wage should be calculated as of the time of injury, "[e]xcept as otherwise provided by this chapter." Section 10(i) thus is an exception to the general rule.

Claimant's counsel filed an application for a fee with the administrative law judge for a total of 55.3 hours at an hourly rate of $200, resulting in a fee of $11,060, plus $242.52 in costs. Employer objected to the hourly rate, asserted that the total time requested was excessive,[10] and argued that a fee would be premature as the decision process is not final. The administrative law judge found that an hourly rate of $200 is reasonable and is consistent with the rates charged by longshore attorneys in the Charleston area, and she noted that employer fully contested the claim. The administrative law judge stated that payment of the fee would be premature prior to completion of the appellate process but that a fee award was not premature. Finally, because she found the petition met the regulatory criteria, she granted the requested fee.

Employer contends the administrative law judge erred in awarding a fee based on an hourly rate of $200, stating it is excessive and not consistent with the rates charged in the relevant geographic area of Charleston, South Carolina. Employer also contends the administrative law judge failed to consider specific entries in the petition, and it identifies some entries to which it objects. Finally, employer contends that the award is excessive in relation to the amount of benefits awarded and that the fee award is premature as the amount of benefits has not been finally determined. Claimant responds, urging affirmance. Attached to her response is an affidavit explaining the fee petition in answer to some of employer's objections. In

[10]Employer did not object to specific entries in the petition, stating "[i]t is difficult and virtually impossible to comment upon every entry of time by the Claimant's attorney." Instead, it objected to the excessiveness of the total time given the lack of complexity of the case and the fact that counsel also sought a fee for 79.5 hours before the district director. Thus, employer only asked the administrative law judge to carefully scrutinize each entry or require counsel to provide further information to support each entry.

reply, employer argues that the affidavit is new evidence and should not be considered.[11]

We reject employer's arguments. The administrative law judge found that $200 is a reasonable hourly rate, as is within her discretion, *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), and although she did not scrutinize every entry in claimant's fee petition in her decision, we note that employer did not challenge specific entries of the petition in its objections before the administrative law judge. Therefore, it cannot raise these specific objections for the first time on appeal. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Moreover, we reject the argument that the fee award is premature. An administrative law judge need not wait until there is a final successful prosecution before entering an award, but may award an attorney's fee during the pendency of an appeal. However, the award is not enforceable until the compensation order becomes final. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). In any event, employer's related argument that the award may be excessive when the amount of benefits is considered has merit. In light of our decision to vacate the award of benefits and remand the case for further consideration, we shall also vacate the fee award and permit the administrative law judge to reconsider the attorney's fee in light of the benefits awarded on remand. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's awards of disability benefits and an attorney's fee are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the decisions are affirmed.

SO ORDERED.

ROY P. SMITH

[11]Employer correctly states that counsel's affidavit was not "in evidence" before the administrative law judge. We need not address whether this response to employer's objections is "evidence," as it has no effect on our disposition of employer's arguments regarding the fee.

Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge