

CLYDE MOODY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>APR 14, 2005</u>
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-1637) of Administrative Law Judge Richard K. Malamphy 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 if they 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).

Claimant injured his right knee on July 5, 2001, during the course of his employment for employer as a welder. Claimant underwent arthroscopic surgery, and employer voluntarily paid compensation for temporary total disability from October 3, 2001, to January 7, 2002. 33 U.S.C. §908(b). Claimant returned to work for employer as a welding machine mechanic. On May 16, 2002, claimant complained of left knee pain to Dr. Stiles, his treating physician. An MRI of the left knee in July 2002 showed evidence of a meniscus tear. Dr. Stiles opined that this condition arose after claimant returned to work due to his putting extra stress on his left knee following his right knee injury and surgery. Claimant sought authorization from employer before undergoing left knee surgery. Employer initially refused to authorize surgery. Employer subsequently agreed to authorize surgery, but it asserted that claimant's knee condition was caused by a work-related left knee injury in 1999 for which claimant had not filed a claim. Claimant requested a hearing to address the issue of which work injury caused his left knee condition. At the hearing, employer asserted as a defense that this issue is not ripe for adjudication because there is not an outstanding claim for compensation or medical expenses for the left knee condition.

In his decision, the administrative law judge accepted the parties' stipulations that, *inter alia*, a timely claim for compensation was filed by claimant for the July 5, 2001, work injury to the right knee. The administrative law judge found that compensation benefits are barred for claimant's February 1999 left knee injury because claimant did not file a claim under the Act for this injury until 2002. *Id.* at 4; *see* 33 U.S.C. §913. The administrative law judge, however, credited the opinion of Dr. Stiles to find that claimant's current left knee condition was caused by his compensating for his work-related July 2001 right knee injury. *Id.* at 5. The administrative law judge rejected employer's contention that the issue of the cause of claimant's left knee condition was not ripe for adjudication. He ordered employer to provide claimant "appropriate benefits" for claimant's left knee condition, and claimant's attorney was directed to file an attorney's fee petition.

On appeal, employer challenges the administrative law judge's finding that the causation issue was ripe for adjudication. Employer also challenges the administrative law judge's directing claimant's counsel to file an attorney's fee petition, contending that claimant did not obtain an economic benefit as a result of the proceedings before the administrative law judge. Claimant responds, urging affirmance.

Employer first argues that the administrative law judge was prohibited from issuing an advisory opinion addressing claimant's entitlement to compensation should he elect to undergo surgery on his left knee. Employer cites as persuasive authority *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 477(ALJ) (1999), in which another administrative law judge determined that he did not have the authority to address the amount that the Special Fund must reimburse the employer, pursuant to a previously entered

award of Section 8(f) relief, 33 U.S.C. §908(f), inasmuch as the one-year period had passed for seeking modification of the claim.¹ In rendering this determination, the administrative law judge in *Brown* found that he did not have the authority to issue declaratory orders outside the parameters of the Act and its implementing regulations. Moreover, as employer did not timely seek modification of the previous decision awarding Section 8(f) relief, the Act did not provide a basis for the administrative law judge to issue the order employer sought. *Brown*, 33 BRBS at 480-481(ALJ).

In this case, there is no issue that the claim for compensation for claimant's July 5, 2001, work injury is timely. Decision and Order at 2. Moreover, the case was properly before the administrative law judge for a formal hearing, as the district director correctly referred the claim to the Office of Administrative Law Judges because an issue of fact was raised by virtue of the parties' disagreement as to which work injury caused claimant's left knee condition. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994); *see* CXs 11; 12. Thus, we reject employer's contention that, pursuant to *Brown*, the administrative law judge did not have authority to address which work injury caused claimant's left knee condition. The case was properly before the administrative law judge to address an issue of fact on a timely filed, unadjudicated claim. *See generally Intercountry Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975).

We also reject employer's contention that the issue was not ripe for adjudication. The administrative law judge rejected employer's contention that, since there is no claim for compensation or medical expenses, whether claimant's left knee condition is related to the February 1999 or July 2001 work injury is not a justiciable issue. In *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit concluded that the doctrine of ripeness has a justifiable place in longshore cases, and it discussed the "traditional ripeness analysis." *Chavez*, 961 F.2d at

¹ In *Brown*, 33 BRBS 477(ALJ), employer voluntarily paid claimant compensation for various periods of temporary total and partial disability utilizing a higher average weekly wage than that ultimately found applicable. In 1991, Administrative Law Judge Malamphy issued a decision awarding claimant compensation for temporary total disability from June 30 to July 26, 1989, and for temporary partial disability from July 27 to October 22, 1989. In a 1994 decision, Administrative Law Judge Neusner awarded claimant permanent partial disability benefits commencing January 13, 1989, and employer Section 8(f) relief. In the third proceeding, employer and the Director disputed the amount the Special Fund must reimburse employer due to its paying claimant compensation for temporary disability past the date of maximum medical improvement and at a higher average weekly wage than found applicable.

1414, 25 BRBS at 141(CRT). The court explained that the first prong of the test, the fitness of issues, is determined by whether the issues are “purely legal” and “sufficiently developed factually,” and the second prong, the hardship on the parties, is determined by whether there is a “direct and immediate hardship [which] would entail more than possible financial loss.” *Id.*, 961 F.2d at 1414-1415, 25 BRBS at 141-142(CRT).

In this case, claimant testified that Dr. Stiles recommended surgery for his left knee condition, which employer refused to authorize because of the February 1999 work-related left knee injury.² Tr. at 19; *see also* CX 11. Claimant’s counsel agreed with the administrative law judge’s statement that claimant sought a finding that his left knee condition is related to the July 2001 work injury because claimant timely filed a claim for this injury, and he would be entitled to compensation while he was unable to work after undergoing surgery to treat this condition. Tr. at 22. The surgery was recommended by claimant’s treating physician, Dr. Stiles, and claimant had previously sought authorization for the operation from employer. This situation is distinct from *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994), in which the employer sought dismissal of any claim for future medical benefits pursuant to Section 33(g). The Board held that the issue was not ripe for adjudication because the dismissal of a nonexistent claim for future medical benefits was neither an issue fit for review nor a hardship that outweighed the interest of postponing the adjudication of the issue until an actual claim for medical benefits was filed. *Parker*, 28 BRBS at 341-342. In this case, in contrast, claimant sought and ultimately obtained authorization for surgery, and he submitted evidence addressing the cause of his left knee condition, including the medical reports and deposition testimony of Dr. O’Connell, who examined claimant’s left knee at employer’s request. CXs 4, 7-9. Thus, the first prong of the ripeness test is met inasmuch as the cause of the claimant’s left knee condition is a legal issue that was sufficiently developed factually for the administrative law judge to render a finding. Moreover, as claimant was unable to work for approximately three months following arthroscopic surgery on his right knee, he reasonably sought in advance a determination of the relationship of his knee condition to the work injury before electing to undergo surgery. The potential hardship to claimant of not receiving compensation while recovering from surgery is sufficient reason for the administrative law judge to address which work injury caused claimant’s left knee condition prior to claimant’s proceeding with the recommended operation. Accordingly, we affirm the administrative law judge’s finding that the issue of the cause of claimant’s left knee condition was ripe for adjudication. *See Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 141-143(CRT); *Parker*, 28 BRBS at 341-342. As employer does not challenge the administrative law judge’s

² The claim for medical benefits, however, is not affected by which injury caused the knee condition, as medical benefits cannot be time-barred. *See generally Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

finding that claimant's left knee condition is related to the July 5, 2001, work injury, this finding is affirmed.

Employer next contends that the administrative law judge should not have ordered claimant's counsel to submit a petition for an attorney's fees, because claimant has yet to obtain "compensation" within the meaning of Section 28 of the Act.³ 33 U.S.C. §928.

We agree with employer's contention insofar as it is not liable for an attorney's fee until claimant actually receives compensation for temporary total disability while convalescing from work-related left knee surgery. An attorney's fee may be recovered only if claimant actually receives increased compensation or other benefits from his pursuit of the claim. A purely tactical victory does not entitle claimant to an attorney's fee. *Adkins v. Kentland Elkhorn Coal Co.*, 109 F.3d 307 (6th Cir. 1997); *Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). In this case, claimant will not receive any additional compensation until he elects to undergo surgery for his left knee condition. We reject employer's contention that the administrative law judge did not have the authority to order claimant's counsel to submit an attorney's fee application; however, employer is not liable for an attorney's fee until such time as it pays claimant additional compensation pursuant to the administrative law judge's finding that claimant's left knee condition is related to the July 2001 work injury.

³ The administrative file does not include a supplemental decision awarding an attorney's fee.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge