BRB Nos. 00-0250
and 00-0257

ALEKSEY BEREZIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED: Nov. 14, 2000
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE, COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, Supplemental Order Awarding Fees and Costs, and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Attorney's Fees Award of Anne Beytin Torkington, Administrative Law Judge, and the Compensation Order-Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Ronald W. Atwood, Portland, Oregon, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, Supplemental Order Awarding Fees and Costs, and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Attorney's Fees Award (98-LHC-2774) of Administrative Law Judge Anne Beytin Torkington, and the Compensation Order-Approval of Attorney Fee Application (Case No. 14-123820) of District Director Karen P. Staats 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). 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained an injury to his left knee on October 4, 1996, while working as a marine machinist for employer. The parties stipulated that claimant reached maximum medical improvement on June 2, 1997. The administrative law judge found that claimant established that he is unable to perform his usual employment. Ms. Heffner, a vocational counselor hired by the Department of Labor, obtained a machinist trainee position for claimant at Bridge City tools; claimant began working there on May 4, 1998, and was so employed at the time of the formal hearing. With regard to the availability of suitable alternate employment prior to May 4, 1998, the administrative law judge found that employer identified only one actual assembler position that was both suitable for and realistically available to claimant, but that employer also demonstrated the general availability of similar assembler positions during the period after claimant was released to work. The administrative law judge, therefore, awarded claimant temporary total disability benefits from October 5, 1996 through March 24, 1997, temporary partial disability benefits from March 25, 1997 through June 2, 1997, and permanent partial disability benefits for a ten percent impairment of the right leg thereafter. 33 U.S.C. §908(b), (c)(2), (e).

On reconsideration, the administrative law judge rejected claimant's contention that she erred in finding that claimant was obligated to seek suitable alternate employment before he reached maximum medical improvement. The administrative law judge also rejected claimant's contention that she contravened Ninth Circuit precedent, as enunciated in *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), by finding that one specific alternate position, combined with evidence of the general availability of similar suitable alternate employment, satisfies employer's burden of demonstrating that claimant is not totally disabled.

Claimant's counsel subsequently filed a fee petition for work performed at the

administrative law judge level, requesting a fee of $ 10,662.50, for 52 hours of services rendered at $200 per hour for attorney work, 3.5 hours of services rendered at $75 per hour for legal assistant work, and $3,854.44 in costs for expert fees, serving subpoenas and photocopying. In her Supplemental Decision, the administrative law judge awarded claimant's counsel $9,562.50 for 48.75 hours of work at a hourly rate of $190, four hours of legal assistant work at $75 per hour, and $3,504.59 in costs based on counsel's limited success on the claim. On reconsideration, the administrative law judge granted the full amount of the costs requested for the expert witness fee, as well as the cost for the background check of employer's medical expert.

Claimant's counsel also filed a fee petition for work performed before the district director, requesting a fee of $2,820 for 11.75 hours at the rate of $200 per hour for attorney services, three hours at the rate of $75 per hour for legal assistant services, and costs in the amount of $245. The district director awarded counsel $1,936.05, representing 8.33 hours at $185 per hour for attorney services, two hours at a rate of $75 for legal assistant service, and $245 in costs.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment, and that he did not diligently seek alternate employment, as well as the reduction in the requested attorney's fee. BRB No. 00-0250. Claimant also appeals the district director's fee award. BRB No. 00-0257. Employer responds, urging affirmance in all respects.

Claimant first contends that the administrative law judge erred in finding that employer's identification of one specific available job, as well as evidence of the general availability of similar jobs, is sufficient to satisfy its burden of establishing the availability of suitable alternate employment. Once, as here, the claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to establish the availability of specific jobs claimant can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also* *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Claimant does not challenge the administrative law judge's factual determinations regarding the suitability and availability of the specific and general positions, but challenges her legal conclusion that such an evidentiary showing is sufficient to establish that claimant is not totally disabled.

In *Bumble Bee,* the United States Court of Appeals for the Ninth Circuit held that employer could not establish:

> the availability of jobs that [claimant] could perform by simply showing that [claimant] could perform "sedentary" work. A claimant may be physically able to perform sedentary work, but lack the dexterity, technical skills, or verbal skills necessary to perform the sedentary jobs that are actually available. Therefore, the employer must point to *specific* jobs that the claimant can perform.

629 F.2d at 1329-1330, 12 BRBS at 662 (emphasis in original). The court further rejected as evidence of a "specific job" employer's offer of a security guard position at its facility, stating there was a dispute about the job's requirements and claimant's ability to perform the job, as well as about the job's availability. *Id.* Thus, the court affirmed the award of total disability benefits.

Despite its relatively brief discussion of the issue of suitable alternate employment, the Ninth Circuit's decision in *Bumble Bee* has attracted much attention, most notably in *New Orleans [Gulfwide] Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). *See also Bunge Corp. v. Carlisle*, 227 F.3d 934 (7th Cir. 2000). In *Turner*, the court prefaced its discussion of suitable alternate employment with this statement: "If *Bumble Bee* is interpreted to mean that the employer must prove that there are specific jobs that the claimant can perform and can secure, such that the employer becomes an employment agency, we reject such a standard." *Id*., 661 F.2d at 1040, 14 BRBS at 163. The court then stated that the "stringent" *Bumble Bee* standard would require an employer to secure specific positions for a claimant in order to establish that the claimant was not totally disabled. *Id.*, 661 F.2d at 1042, 14 BRBS at 164. The Fifth Circuit rejected this burden of proof, and provided its standard that an employer must meet to prove the existence of suitable alternate employment:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?

Id., 661 F.2d at 1042-1043, 14 BRBS at 165. The court stated that the second question requires a determination of whether there exists a reasonable likelihood, given claimant's age, education, and vocational background that he would be hired if he diligently sought the job. Interestingly, the Ninth Circuit itself, in reiterating the standard for establishing suitable alternate employment, cited *Turner* in conjunction with *Bumble Bee* in its decision in

Hairston, 849 F.2d at 1194, 21 BRBS at 122(CRT).[1] Moreover, like the Fifth Circuit, the Ninth Circuit has recognized that an employer need not find an alternate position for claimant. *Stevens*, 909 F.2d at 1260, 23 BRBS at 95(CRT).

In *P&M Crane v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), the Fifth Circuit, citing *Turner*, held that employer may establish suitable alternate employment by introducing evidence of only one, specific, available job, as well as general evidence of other available jobs in the community, where the claimant "may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." The

[1]Thus, it is possible that the Fifth Circuit read too much into the *Bumble Bee* decision. From the Board's decision in the case, it is clear that the employer's evidence of suitable alternate employment consisted of the job offer at its facility and a doctor's opinion that claimant was capable of performing sedentary work. *Hansen v. Bumble Bee Seafoods*, 7 BRBS 680 (1978). The Ninth Circuit's rejection of the employer's offer of evidence that claimant could perform sedentary work, therefore, is just as susceptible to the interpretation that the employer cannot meet its burden of showing merely that the claimant possesses the physical capacity to engage in certain activities. Such a showing is plainly insufficient to satisfy employer's burden of establishing suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). The Ninth Circuit emphasized the word "specific," not the word "jobs" and its explanation of its rejection of employer's evidence seems to indicate that an employer must identify the availability of jobs that are within claimant's physical, educational and vocational capabilities, which, in fact, is the test also utilized by the Fifth Circuit. *See infra.*

Fifth Circuit rejected the Fourth Circuit's holding in *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), that the identification of only one job is legally insufficient to establish the availability of suitable alternate employment, as employer must establish that a "range of jobs" exists. *But see Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19, 1994) (5th Cir. 1994)(unpublished) (in discussing *P & M Crane*, court stated that more must be shown than the mere existence of a single job the claimant can perform; where one specific job has been identified and no general employment opportunities also are proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified);[2] *see also Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998). The Fifth Circuit again rejected its interpretation of the *Bumble Bee* standard, which the Fifth Circuit believes requires an employer to secure specific vacancies for an injured employee. *P&M Crane*, 930 F.2d at 430, 24 BRBS at 121(CRT).

In the instant case, the administrative law judge first observed, correctly, that the facts herein are distinguishable from *Lentz* and *Diosdado* in that in those cases only one job was identified as being suitable for the claimant. Thus, we reject claimant's contention that the rationale of *Lentz* is controlling in this case. *See generally Holland*, 32 BRBS at 179. The administrative law judge found that of the jobs identified in the labor market survey of March 17, 1998, performed by Mr. Katzen, employer's vocational specialist, only the Precision Tools assembler position was suitable for claimant. Decision and Order at 10. The administrative law judge further found, however, that both Mr. Katzen, and Mr. Stipe, claimant's vocational expert, agreed that similar assembler production work was generally available to claimant between March 25, 1997, the day after claimant was released to work with restrictions by his treating physician, and May 3, 1998, the day prior to the day claimant started his current employment. Tr. at 142-143, 177; EX 24 at 75; Decision and Order at 17. The administrative law judge concluded that inasmuch as the Ninth Circuit has not specifically addressed the factual situation presented herein, she would follow the lead of the Fifth Circuit in *P&M Crane*. Thus, she concluded that employer met its burden of establishing the availability of suitable alternate employment. Order Denying Recon. at 3-5.

We affirm the administrative law judge's decision in this regard, as we hold that the credited evidence is sufficient to establish suitable alternate employment. Contrary to claimant's contention, this result is consistent with the Ninth Circuit's holding in *Bumble Bee*. Regardless of the Fifth Circuit's discussion of the case, it is clear that, in the context of

[2]The rules of the Fifth Circuit state that unpublished opinions issued prior to January 1, 1996, are precedent. U.S. Ct. of App. 5th Circuit Rule 47.5.3.

the facts presented, the *Bumble Bee* court was rejecting employer's argument that the opinion of a physician that the claimant could perform sedentary work was sufficient evidence of suitable alternate employment. *See* n.1, *supra*; *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). In requiring evidence of "specific" jobs, the court did not hold that employer must obtain a job for claimant; rather it is consistent with the court's opinion to require that the employer establish the availability of an actual job, as opposed to theoretical job opportunities, which is suitable given claimant's restrictions and other factors relevant to claimant's ability to compete for a position. *See Bumble Bee*, 629 F.2d at 1329-1330, 12 BRBS at 662.

The administrative law judge found that employer in this case met this burden through the position identified at Precision Tools, having rejected other positions as not suitable for, or not reasonably available to, claimant. Her findings with regard to this position are not challenged; thus, employer described one specific job opportunity, giving the administrative law judge sufficient information to determine that the job was in fact suitable and available. The administrative law judge also found that the vocational experts for both parties testified that there were similar assembler jobs available in the community during the relevant time period, thus establishing the availability of multiple positions like the one specifically described. We hold that this evidence, taken together, is sufficient to meet employer's burden of establishing suitable alternate employment, as employer has demonstrated the availability of suitable job opportunities based on evidence of specific job requirements. Employer's evidence in this case is sufficient to prove that suitable alternate work was "realistically and regularly available" during the period at issue. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If such positions are not truly suitable or available, this fact would be borne out by a diligent, yet unsuccessful, job search. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see generally Stevens*, 909 F.2d at 1256, 23 BRBS at 89(CRT).

We further reject claimant's contention that the administrative law judge erred in finding he was not diligent in seeking alternate employment. Claimant contends he was not required to seek alternate employment before he reached maximum medical improvement, and that after his condition became permanent, it was his intention to return to longshore work so that he need not have sought other employment. If employer establishes the availability of suitable alternate employment, as in the instant case, claimant can rebut that showing by demonstrating that, despite a diligent effort, he was unable to secure a position. *See Palombo,* 937 F.2d at 70, 25 BRBS at 1(CRT). If claimant is medically able to work, but his condition is not yet permanent, the appropriate award is one for temporary partial disability in the event that employer establishes the availability of suitable alternate employment. *See* 33 U.S.C. §908(e), (h); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000). Thus, we reject claimant's contention that he

was not required to seek work prior to his condition's reaching maximum medical improvement. Moreover, if an employer is not willing to hire someone whose condition is not yet stabilized, this fact will become apparent upon a diligent job search. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997). Claimant may not retain entitlement to total disability benefits merely by alleging that he did not seek work because he was unsure if he would be hired, or because he preferred another type of work to that identified by employer.

Finally, we reject claimant's contention that the administrative law judge erred in finding that he was not entitled to a longer period in which to obtain an alternate job, due to his lack of fluency in English. The administrative law judge, who had the opportunity to hear claimant testify at the hearing, found him conversant in English, as did the vocational experts. The administrative law judge rationally found that without proof that claimant had searched for and been denied a job based on his language skills, claimant's contention in this regard must fail. Accordingly, as claimant's challenges to the administrative law judge's findings that employer established suitable alternate employment and that claimant did not diligently seek alternate employment are without merit, we affirm the administrative law judge's award of temporary partial and permanent partial disability compensation for the period commencing March 25, 1997.

Claimant also challenges the fee awards of the administrative law judge and the district director. The administrative law judge reduced the fee requested by 5 hours, and the hourly rate from $200 to $190, in part due to claimant's limited success. Claimant contends that the full fee requested should be awarded if he prevails on the substantive issues raised in this appeal. Inasmuch as we have affirmed the administrative law judge's decision, we reject claimant's contention and affirm the administrative law judge's fee award.

With regard to the district director's fee award, claimant contends that the district director erred in reducing the fee request by one-third due to claimant's limited success in pursuing his claim before the administrative law judge. The district director found that claimant was fully successful on the issue of average weekly wage and the applicability of Section 14(e). Due to the increase in average weekly wage, claimant obtained additional temporary total disability benefits. However, the administrative law judge awarded claimant a shorter period of temporary total disability benefits due to her finding that employer established suitable alternate employment, and also denied claimant's claim for permanent total disability benefits, awarding instead permanent partial disability benefits. The district director found that, due to the lack of full success, the fee awarded should be two-thirds of that requested.

We affirm this finding. Contrary to claimant's contention, it is his ultimate success that is relevant in determining a fee award, and not merely his success before the district director, as the district director lacks the authority to issue a final award on a disability claim

when the parties are not in agreement. *See generally Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); 20 C.F.R. §702.316. Moreover, the district director rationally accounted for claimant's limited success by reducing the fee request in proportion to the success achieved. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983)*; Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). As claimant has not established an abuse of discretion in this regard, we affirm the district director's fee award.

Accordingly, the decisions of the administrative law judge and the district director are affirmed in all respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge