BRB No. 00-0798

HERBERT ZENON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORT COOPER/T. SMITH STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED: March 30, 2001
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand from the United States Court of Appeals for the Fifth Circuit, Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, and Supplemental Decision and Order Awarding Attorney Fees of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown (Law of Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Kenneth G. Engerrand and Michael D. Williams (Brown Sims, P.C.), for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Upon Remand from the United States Court of Appeals for the Fifth Circuit, Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, and Supplemental Decision and Order Awarding Attorney Fees (93-LHC-0645) of Administrative Law Judge Ainsworth H. Brown 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).

On October 2, 1988, claimant fell and injured his left shoulder during the course of his employment for employer as a walking foreman. Claimant's shoulder injury required surgery in April 1991 and September 1991. The parties stipulated that claimant's subsequent release to light duty work would allow claimant's return to his usual employment as a walking foreman under normal circumstances. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from October 10, 1988, to April 23, 1989, and from April 15, 1991, to February 17, 1992, when employer terminated its compensation payments. Claimant has not returned to work.

In September 1992, claimant's treating physician, Dr. Bryan, opined that claimant could return to work as a walking foreman with the restriction, *inter alia*, that he not climb or descend a ladder with more than eight rungs. In his initial decision, the administrative law judge interpreted the meaning of "under normal circumstances," pursuant to the parties' stipulation. The administrative law judge found that claimant is unable to perform the usual duties of a walking foreman, which occasionally requires climbing ladders with more than eight rungs, and that employer did not establish the availability of suitable alternate employment until April 22, 1993, when employer offered claimant a position as a walking foreman tailored to Dr. Bryan's work restrictions. The administrative law judge next determined that claimant's condition reached maximum medical improvement on September 30, 1992. The administrative law judge rejected employer's evidence of suitable alternate employment before April 22, 1993, on the basis that the positions required climbing more than eight ladder rungs. Finally, claimant was awarded compensation under the schedule for a 20 percent arm impairment. 33 U.S.C. §908(c)(1).

Employer appealed and claimant cross-appealed the administrative law judge's decision to the Board, BRB Nos. 94-0450/A. The administrative law judge's decision, however, was administratively affirmed on September 12, 1996, pursuant to Pub. L. No. 104-134, 110 Stat. 1321 (1996). Both parties appealed the administrative law judge's decision to the United States Court of Appeals for the Fifth Circuit. In its decision, *Zenon v. Port Cooper/T. Smith Stevedoring Company, Inc.*, No. 96-60788 (5th Cir. May 24, 1999), the court interpreted "under normal circumstances" in the parties' stipulation as modifying "walking foreman" and held

that the administrative law judge appeared to misinterpret the phrase as modifying "release." The court therefore reversed the administrative law judge's finding that a release to light duty would not *per se* establish that claimant could return to work as a walking foreman. The court remanded for the administrative law judge to determine the date claimant was released for light duty at which time, the court held, compensation for temporary total disability ends, pursuant to the terms of the parties' stipulation. The court also held that claimant's temporary disability compensation would otherwise end on the date of maximum medical improvement, September 30, 1992, should the administrative law judge find on remand that claimant was never released to perform light duty work.

The court also vacated the administrative law judge's award for permanent total disability benefits, 33 U.S.C. §908(a), from the date of maximum medical improvement to the date employer established the availability of suitable alternate improvement, April 22, 1993. The court held that the parties only stipulated to claimant's entitlement to compensation for temporary total disability until claimant is able to return to work. The court held that claimant must, therefore, establish his entitlement to permanent disability benefits; specifically, the court held that the administrative law judge must address employer's contention that claimant's shoulder impairment is not related to his work injury. If the administrative law judge were to find the shoulder impairment work-related, the court affirmed the administrative law judge's finding that employer's April 22, 1993, offer of a job as a walking foreman tailored to Dr. Bryan's restrictions establishes the availability of suitable alternate employment. Finally, the court noted the parties' agreement on appeal that the administrative law judge erred in finding claimant entitled to a scheduled award for his shoulder impairment, which would be compensated under the Act as an unscheduled injury. *See* 33 U.S.C. §908(c)(21).

In his decision on remand, the administrative law judge found that claimant's shoulder injury is work-related. He found that claimant was never released to return to work as a walking foreman "under normal circumstances" as that phrase was interpreted by the court. Thus, the administrative law judge found claimant entitled to compensation for temporary total and permanent total disability until April 23, 1993. In lieu of the scheduled award for claimant's shoulder impairment, which was reversed on appeal, the administrative law judge found claimant entitled to a continuing award for permanent partial disability from April 23, 1993, based on the difference between the parties' stipulated average weekly wage of $623.19 and the wage offered to claimant by employer on April 22, 1993.[1] *See* 33 U.S.C. §908(c)(21), (h).

[1]The administrative law judge, however, did not state the amount of this wage.

On claimant's motion for reconsideration, the administrative law judge vacated the award of permanent partial disability benefits, and awarded claimant continuing compensation for permanent total disability from October 1, 1992, the day after claimant's shoulder condition reached maximum medical improvement. The administrative law judge found there is no record evidence establishing the exact availability of work pursuant employer's April 22, 1993, job offer or of its pay rate. Employer's motion for reconsideration of the administrative law judge's order granting reconsideration was summarily denied.

In a supplemental decision, the administrative law judge awarded claimant's attorney a fee of $5,845 for work performed before him after the case was remanded by the Fifth Circuit, representing 29.225 hours at $200 per hour. Moreover, the administrative law judge granted claimant's motion to enhance the prior fee award due to the delay in payment. The administrative law judge augmented the previous award to reflect counsel's current rate of $200.[2]

On appeal, employer challenges the administrative law judge's finding on reconsideration that its April 22, 1993, job offer to claimant does not establish the availability of suitable alternate employment, asserting that this award is contrary to the holding of the Fifth Circuit. Employer further contends that the administrative law judge erred in finding that the wages of this position are not established in the record, and that the Fifth Circuit's decision precludes an award under Section 8(c)(21). Employer also challenges the administrative law judge's decision to augment the initial fee award.

[2]The prior fee award, entered in February 1994, was for 176.25 hours at $160 per hour.

Employer contends that the affirmance by the United States Court of Appeals for the Fifth Circuit of the administrative law judge's finding in his initial decision that employer's job offer on April 22, 1993, establishes the availability of suitable alternate employment and its conclusion that, as a result of employer's job offer, claimant has no loss of wage-earning capacity due to his shoulder condition is the law of the case on these issues. Accordingly, employer argues that the administrative law judge erred on remand by readdressing employer's job offer and claimant's post-injury wage-earning capacity. In its decision, the Fifth Circuit specifically affirmed, as supported by substantial evidence, the administrative law judge's finding in his initial decision that employer's job offer established the availability of suitable alternate employment, *Zenon*, slip op. at 9-10,[3] and this holding constitutes the law of the case.[4] *See Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *see also Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999).

In his motion for reconsideration, however, claimant specifically did not contend, nor did the administrative law judge find, that the job at employer's facility was not suitable alternate employment. Rather, the administrative law judge discussed the job in terms of the absence of evidence of the number of hours claimant would work and the rate of pay he would receive. Finding evidence lacking on these issues, the administrative law judge determined that employer did not establish the amount of claimant's post-injury wage-earning capacity based on this job, and in the absence of such evidence, he awarded claimant total disability benefits. We thus turn to employer's contentions regarding the issue of wage-earning capacity.

In its decision, the Fifth Circuit stated that, contingent upon a finding of causation, claimant is entitled to a permanent partial disability award for his shoulder injury. *Zenon*, slip op. at 10. In its next paragraph, the court noted the parties' agreement that the administrative law judge erred in awarding claimant a scheduled award for his shoulder injury, but summarily stated, "[t]he *bona fide* job offer from Port Cooper precludes [claimant]

[3]The court noted claimant's contention that employer's offer was not made in good faith and does not constitute suitable alternate employment as defined by the Fifth Circuit. The court affirmed the administrative law judge's factual finding that the job is suitable alternate employment, as "the record is replete with evidence suggesting that the job offer matched Zenon's abilities." *Zenon*, slip op. at 9-10.

[4]The law of the case doctrine would not apply if the claim were reopened under Section 22 of the Act, 33 U.S.C. §922, which permits the fact finder to correct mistakes of fact based on consideration of new evidence, cumulative evidence or further reflection on the evidence originally submitted. *See O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972). In this case, however, claimant agreed to withdraw his petition for modification until the present remand proceedings are resolved.

from recovering permanent partial disability payments for this non-scheduled injury. *See Welch v. Leavey*, 397 F.2d 189, 191 (5th Cir. 1968) [*cert. denied*, 393 U.S. 1049 (1969)]." *Zenon*, slip op. at 10.

We reject, for two reasons, employer's contention that this latter statement definitively establishes that claimant is not entitled to permanent partial disability benefits based on a loss of wage-earning capacity. First, the court acknowledged claimant might be entitled to a permanent partial disability award if it is established that his shoulder impairment is work-related. Second, the mere fact that employer establishes suitable alternate employment at its facility does not establish that claimant does not have a loss in wage-earning capacity. The actual wages paid by the job in employer's facility do not necessarily establish claimant's post-injury wage-earning capacity. *See generally* *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). Indeed, the case cited by the Fifth Circuit, *Welch, supra*, acknowledges that higher post-injury wages do not preclude an award of permanent partial disability benefits, if the claimant's actual earnings do not fairly and reasonably represent his wage-earning capacity in his injured state. *Welch*, 397 F.2d at 192, *citing Burley Welding Works v. Lawson*, 141 F.2d 964 (5th Cir. 1944); *see* 33 U.S.C. §908(h); *see also* *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Inasmuch as the court did not discuss the wages paid by the position offered by employer or analyze claimant's wage-earning capacity pursuant to Section 8(h) of the Act, we cannot construe the court's summary statement as establishing that claimant sustained no loss of wage-earning capacity.

Alternatively, employer contends that the administrative law judge erred by placing the burden of proof on employer to establish claimant's wage-earning capacity, and by finding that there is no evidence from which the administrative law judge could reasonably calculate claimant's post-injury wage-earning capacity as a walking foreman for employer. Section 8(h) provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If they do not, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Penrod Drilling Co.,* 905 F.2d 84, 23 BRBS 108(CRT). As part of its burden of demonstrating suitable alternate employment, employer must establish the general number of hours claimant would be expected to work and a general rate of pay for the position. *See generally Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT).

Contrary to the administrative law judge's finding that there is no evidence of record establishing the pay rate of employer's offered position as a walking foreman, or evidence which would allow a reasonable estimation of claimant's wage-earning capacity, there is sufficient record evidence to satisfy employer's limited burden in this regard. As conceded by claimant in his motion for reconsideration, the record contains evidence of a pay rate of $17.35 per hour for a walking foreman at the Port of Houston effective January 15, 1993. CX 13(j); Claimant's Motion for Reconsideration at 5. Moreover, the record contains the testimony of a former walking foreman for employer, O.R. Emanuel, and the number of hours he was employed yearly through 1992.[5] Tr. at 181-199; CX 13(g). The administrative law judge did not address this evidence in his decision on reconsideration. Accordingly, we must vacate the administrative law judge's award of total disability benefits, and remand this case to the administrative law judge for consideration of claimant's post-injury wage-earning capacity in light of the evidence of record and the factors enumerated in Section 8(h).

Employer next argues that the administrative law judge erred in granting counsel's request for augmentation of the hourly rate charged for work performed between October 1990 and November 1993, while the case was initially pending before the Office of Administrative Law Judges. First, employer maintains that augmentation of an attorney's fee is not authorized under the Act. Employer also asserts that augmentation is inappropriate given claimant's limited success in the instant case.

Employer's initial contention lacks merit. The Board has previously held that in light of the Supreme Court's decisions in *Missouri v. Jenkins,* 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), concerning the definition of a "reasonable fee" in fee-shifting statutes, it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Accordingly, when the question of delay is timely raised, the body awarding the fee must consider this factor. *Allen v. Bludworth Bond Shipyard,* 31 BRBS 95

[5]In his initial decision, the administrative law judge determined that inasmuch as claimant declined to return to work for employer, claimant could not establish that the job offer was not a full time position. The administrative law judge stated that claimant could seek to "readjust" his compensation if he established that the offer was not a full-time job. Decision and Order at 4. The administrative law judge is entitled to draw such reasonable inferences from the facts and evidence.

(1997). If enhancement of the fee for delay is warranted, the fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates or employ any other reasonable means to compensate claimant's counsel for the delay. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and the payment of his fee. *Id.*

In the present case, the administrative law judge found that augmentation of the hourly rate was warranted for the services rendered between October 1990 and November 1993, which were the subject of the administrative law judge's fee award in February 1994. While the administrative law judge rationally concluded that augmentation for delay is appropriate, we agree with employer that the augmented hourly rate must be reconsidered on remand after the administrative law judge has determined claimant's post-injury wage-earning capacity and, therefore, the extent of claimant's success in prosecuting his claim.[6] *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's Decision and Order Upon Remand, Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, and Supplemental Decision and Order Awarding Attorney Fees are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]We note that regardless of claimant's ultimate success on remand, claimant succeeded in obtaining total disability benefits until April 22, 1993, after employer had terminated its voluntary payment of compensation for temporary total disability on February 17, 1992.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge