BRB Nos. 93-2288
and 93-2505

JIMMY F. FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, and the Compensation Order Award of Attorney's Fee of N. Sandra Ramsey, District Director, United States Department of Labor.

D. A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Paul B. Howell (Franke, Rainey, & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-2337) of Administrative Law Judge Lee J. Romero, Jr., and the Compensation Order Award of Attorney's Fee (OWCP No. 6-127554) of District Director N. Sandra Ramsey 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.

[1]In an Order dated November 10, 1993, the Board consolidated for purposes of decision employer's appeal of the administrative law judge's Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees, BRB No. 93-2288, with its appeal of the district director's Compensation Order Award of Attorney's Fee, BRB No. 93-2505. *See* 20 C.F.R. §802.104.

§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 may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his head, neck, and back when a can of welding rods struck him on the head on October 18, 1989, during the course of his employment as a pipefitter. Employer voluntarily paid claimant temporary total disability benefits. 33 U.S.C. §908(b). Claimant returned to light duty work with restrictions in employer's pipe shop from December 12, 1990 to January 16, 1991. On January 17, 1991, employer transferred claimant to a pipe fitting position in its engine room; claimant, however, refused to report to this new job, stating that its duties were too strenuous. Subsequently, claimant moved to Macon, Georgia and began working as a warehouseman at the Macon Beauty Supply store and, later, as a car salesman.

In his Decision and Order, the administrative law judge initially found that while the position in employer's pipe shop constituted suitable alternate employment, that position was no longer available to claimant as of January 17, 1991. Next, the administrative law judge credited claimant's testimony in concluding that the position offered to claimant in employer's engine room did not constitute suitable alternate employment. Lastly, the administrative law judge found that, although the jobs identified by employer in Macon, Georgia, did not establish the availability of suitable alternate employment, claimant's employment as a warehouseman was suitable alternate employment paying claimant an inflation-adjusted weekly wage of $262.14. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for various periods of time between January 5, 1990, and October 30, 1990, and permanent partial disability compensation thereafter. Employer's motion for reconsideration was subsequently denied.

Thereafter, the administrative law judge issued a Supplemental Decision and Order in which he awarded claimant's counsel an attorney's fee of $9,663.80. On September 1, 1993, the district director awarded claimant's counsel a fee of $2,574.50.

On appeal, employer challenges the administrative law judge's decision to reject the jobs that it identified as being suitable for claimant, specifically the position obtained by claimant in employer's pipe shop, the light duty position offered in employer's engine room, and the jobs found by its vocational expert in Macon, Georgia. Finally, employer challenges the administrative law judge's Supplemental Decision and Order and the district director's Compensation Order awarding attorneys' fees. Claimant responds, urging affirmance of the award of benefits and attorneys' fees.

Where, as in the instant case, claimant is unable to perform his usual employment duties, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing based upon his age, education, work experience and physical restrictions and could realistically secure if he

diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In order to meet its burden by offering claimant a job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Employer initially contends that the administrative law judge erred in determining that the position that claimant worked from December 12, 1990 to January 16, 1991, in its pipe shop did not constitute suitable alternate employment, notwithstanding that it transferred claimant to another position on January 17, 1991. We disagree. The Board has consistently held that while a job in employer's facility may constitute suitable alternate employment, *see Darden*, 18 BRBS at 224, to do so, the job must be actually available to claimant. *See Mendez v. National Steel & Shipbuilding, Co.*, 21 BRBS 22 (1988). Since employer informed claimant that, as of January 17, 1991, he was to report to its engine room, employer withdrew the opportunity for light duty work in its pipe shop; accordingly, suitable alternate employment in that shop was no longer available as of January 17, 1991. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989). We therefore affirm the administrative law judge's finding that, when employer removed the opportunity for light duty work in its pipe shop, that position no longer constituted suitable alternate employment since it was no longer available to claimant.

Employer further avers that the administrative law judge erred by failing to find that the subsequent light duty job in its engine room offered to but refused by claimant on January 17, 1991, constituted suitable alternate employment. In finding that this position was unsuitable for claimant, the administrative law judge specifically credited claimant's testimony that he had, on three occasions subsequent to his injury, unsuccessfully attempted to return to light duty work in employer's engine room under the restrictions placed upon him by Dr. Ray.[2] Additionally, the administrative law judge found that it was doubtful that claimant could perform the overhead work required by this position, inasmuch as Dr. Ray had previously opined that overhead activity aggravated claimant's condition. It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In this case, the administrative law judge's decision to rely upon the testimony of claimant, as supported by the opinion of Dr. Ray, regarding his inability to perform the position offered in employer's engine room, is not inherently incredible or patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's determination that the position in employer's engine room does not satisfy employer's burden of establishing the availability of suitable alternate employment since this

[2]Dr. Ray treated claimant after his injury from November 1989 until January 1991; the restrictions he placed upon claimant consisted of light to medium work with no excessive bending, lifting limit of 50 pounds occasionally and 25-35 pounds frequently, and no duties requiring overhead work as this would aggravate claimant's back. CXS 6, 8.

position is unsuitable for claimant. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Employer next argues that the administrative law judge erred in finding that claimant's loss in wage-earning capacity should be based on the wages he earned in his position as a warehouseman in Macon, Georgia. Specifically, employer contends that, in calculating claimant's permanent partial disability award, the administrative law judge should have utilized the positions identified by its vocational expert, Ms. Ford, who testified as to the availability of suitable alternate employment in the Macon, Georgia area paying weekly wages higher than those which claimant was earning as a warehouseman. We disagree. In order for employment opportunities to be considered realistic, employer must establish their nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). In the instant case, the administrative law judge rejected the positions identified by Ms. Ford in the Macon, Georgia area because Ms. Ford provided insufficient job descriptions. *See* EX 20. Given the absence of the jobs' requirements, the administrative law judge is unable to determine if claimant is physically capable of performing the jobs. *See generally P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 122 (CRT); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). We therefore affirm the administrative law judge's determination that the labor market survey of Ms. Ford is insufficient to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Lastly, employer challenges the attorney's fee awards rendered by both the district director and the administrative law judge. Employer initially contends that the district director and the administrative law judge erred in awarding claimant's counsel attorneys' fees since the administrative law judge's Decision and Order awarding benefits is on appeal and reversal by the Board would result in no "successful prosecution" by claimant's counsel. Initially, as the administrative law judge awarded claimant temporary total and ongoing permanent partial disability benefits, which we have affirmed, employer's "successful prosecution" contention must fail. Additionally, it is well established that a fact-finder may render an attorney's fee determination when he issues his decision in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). Any such award of attorney's fees does not become effective and is thus not enforceable until all appeals are exhausted. *Id.* We therefore reject employer's contention of error, and we affirm the district director's and administrative law judge's determination that employer is liable for claimant's counsel's fee. *See* 33 U.S.C. §928.

Employer alternatively contends that, based on its evidence of jobs with a higher wage-earning capacity than that found by the administrative law judge, claimant's success has been minimal, requiring a reduction in the fee awarded. We reject this contention, as we have affirmed the award of benefits and employer has not demonstrated that the fee awards are unreasonable. We therefore affirm the fees awarded by the district director and the administrative law judge.

Accordingly, the Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees of the administrative law judge, and the Compensation Order Award of Attorney's Fee of the district director, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge