BRB Nos. 97-621
and 97-621A

MARK ROSENBERG	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Granting Attorney Fees of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler Douglas Drachler & McKee), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals[1] the Decision and Order and employer appeals the

[1]By Order dated March 21, 1997, the Board dismissed claimant's appeal as untimely filed. Upon claimant's Motion for Reconsideration of this Order, the Board vacated its Order dismissing claimant's appeal and reinstated claimant's appeal on the Board's docket on June 5, 1997.

Supplemental Decision and Order Granting Attorney Fees (95-LHC-0902) of Administrative Law Judge Paul H. Teitler 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 February 24, 1993, claimant injured his back while working as a lasher for employer. Employer voluntarily paid claimant temporary total and temporary partial disability benefits for various periods through June 30, 1994. The administrative law judge found that claimant was temporarily partially disabled from February 24, 1994, to June 21, 1995, but that thereafter claimant's post-injury wage-earning capacity is at least $1,303.62 per week, his stipulated pre-injury average weekly wage. Consequently, the administrative law judge found that claimant has no present loss in his post-injury wage-earning capacity but may in the future sustain a loss in wage-earning capacity due to his injury; therefore, he awarded claimant a nominal award of $1 per week. The administrative law judge denied claimant's motion for reconsideration.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $27,923.71, representing 110.8 hours at $175 per hour, 1.5 hours at $125 per hour, 41 hours at $60 per hour, and $5,886.21 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied, seeking an additional fee of $915.47, representing 4.3 hours at $175 per hour and 2.3 hours at $60 per hour, and expenses in the amount of $24.97. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded claimant's counsel an attorney's fee of $24,345, representing 102.1 hours at $175 per hour, 1.5 hours at $125 per hour, 22.4 hours at $60 per hour, and $4,946.12 in expenses.

On appeal, claimant challenges the administrative law judge's finding that he has no present loss in wage-earning capacity, as his actual post-injury earnings, which are 55 percent less than his stipulated pre-injury average weekly wage of $1,303.62 per week, fairly and reasonably represent his post-injury wage-earning capacity. In its appeal, employer contests the administrative law judge's award of an attorney's fee, contending that the administrative law judge's award of a fee in

excess of $24,000 was unreasonable in light of the amount of benefits awarded.

We first address claimant's challenge to the administrative law judge's finding that claimant has suffered no loss in his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(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); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). 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. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT). The party seeking to prove that claimant's actual post-injury earnings do not fairly and reasonably represent his post-injury wage-earning capacity bears the burden of proof. *See, e.g.*, *Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT).

After consideration of claimant's contentions on appeal, employer's response, and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's finding that claimant suffered no loss in his post-injury wage-earning capacity. In so finding, the administrative law judge initially determined that claimant's actual post-injury earnings do not fairly and reasonably represent his post-injury wage-earning capacity, properly placing the burden of proof on employer to so prove. *See, e.g., Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT); Decision and Order at 34-37. The administrative law judge then considered the availability of employment which claimant could perform post-injury within his physical restrictions and concluded that claimant was capable of performing the positions of frontman-slingman, holdman, lasher, boardman, dockman-stickerman, button pusher, basic clerk-dock, gate checker, dock supervisor, strad operator, casual foreman, and winch driver. Decision and Order at 35-36. Contrary to claimant's contention, the administrative law judge acted within his discretion in concluding that claimant is capable of performing these positions after rationally crediting the opinions of employer's vocational expert, Mr. Tomita, and claimant's vocational expert, Mr. Shafer, as supported by the opinions of employer's manager, Mr. Norris, and claimant's co-worker, Mr. Bullis, that these jobs are within claimant's physical restrictions as recommended by his doctors, Drs. Bradley and Curtis, over claimant's testimony that he is physically unable to perform all of these jobs.[2] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331,

[2]Based on the recommendations of Drs. Bradley and Curtis, the administrative law judge found claimant capable of lifting 50-52 pounds, that he can work overhead, that he can bend and twist on an infrequent basis, as defined by Dr. Bradley, and

8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 34-37; Tr. at 109, 123-124, 126-129, 133-136, 151-167, 190-197, 226-230, 237-241. The administrative law judge then determined that claimant's post-injury wage-earning capacity is at least $1,303.62 per week after concluding that a sufficient number of hours is available to claimant in these jobs so that claimant is capable of earning his stipulated pre-injury average weekly wage.[3] Consequently, the administrative law judge's finding that claimant has no loss in his post-injury wage-earning capacity and that claimant is now capable of earning at least $1,303.62, as much post-injury as he earned pre-injury, is affirmed. *See generally*

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that he can sit and stand but that he have the ability to shift positions as needed. Decision and Order at 31-32; Tr. at 237-241.

[3]In his determination, the administrative law judge considered that claimant had to "check out" of jobs prior to the end of shift and must periodically "pass up" jobs because of sleep disturbances. Decision and Order Granting Clarification and Denying Reconsideration at 3-4. The administrative law judge found claimant capable of performing 25 percent of the available holdman and lasher jobs based on the testimony of Mr. Shafer to that effect. Decision and Order at 37; Tr. at 202. Additionally, the administrative law judge found claimant capable of performing 50 percent of the frontman-slingman positions based on Mr. Bullis' testimony. Decision and Order at 37; Tr. at 110-111. The administrative law judge excluded the hours claimant could have worked as a casual foreman and as a driver. Decision and Order at 37.

Penrod Drilling Co. v. Johnson, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). We, therefore, affirm the administrative law judge's finding that claimant has no present loss in wage-earning capacity.[4]

Turning to employer's appeal of the administrative law judge's award of an attorney's fee, we agree with employer that the fee award of over $24,000 must be reconsidered in light of the Supreme Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Court held that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case. In the instant case, the administrative law judge concluded that claimant prevailed to the extent that no reduction in the total fee award is dictated by *Hensley*, after noting that claimant prevailed on each individual issue, though perhaps not to the level of financial benefit which claimant may have wished. Supplemental Decision and Order at 2. Although the administrative law judge applied the first inquiry of *Hensley* in that he considered the issues on which claimant prevailed, he did not address the fee in light of the second inquiry of *Hensley* which requires that the level of success be considered. We, therefore, vacate the administrative law judge's award of an attorney's fee and remand this case to the administrative law judge for further consideration. In awarding a fee, the administrative law judge must take into account the limited results obtained in this case. Although the most useful starting point for determining a reasonable attorney's fee is the number of hours reasonably expended on the case, multiplied by a reasonable hourly rate, the inquiry does not end there, as this may result in an unreasonable fee given the results obtained. *See Hensley*, 461 U.S. at 424; *see also Farrar v. Hobby*, 506 U.S. 103 (1992); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. The administrative law judge's Supplemental Decision and Order Granting Attorney Fees is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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[4]The administrative law judge's nominal award is affirmed as unchallenged on appeal. *See Metropolitan Stevedore Co. v. Rambo,* 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge