

SONNY DICKERSON)
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 Claimant-Respondent)
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 v.)
) DATE ISSUED: _____
 SEACO)
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 Self-Insured)
 Employer-Petitioner)
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 and)
)
 STRACHAN SHIPPING COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of Edith Barnett, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), North Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer SEACO.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer Strachan Shipping Company.

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

PER CURIAM:

Employer (SEACO) appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (94-LHC-65, 94-LHC-66) of Administrative Law Judge Edith Barnett 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 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. §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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant began working as a longshoreman in 1975. He worked with a regular gang and normally was assigned to work at Strachan Shipping Company (Strachan). On April 26, 1992, claimant's regular gang was not called for work, so he signed on with another gang to work at SEACO. While there, he was latching some cargo when he slipped on a grease spot and fell approximately eight feet, landing on the turnbuckle and the ground. Tr. at 16, 18, 24-25. Claimant injured his back and his legs in the fall and remained out of work until November 1992. He worked for several weeks, but pain prevented him from continuing. Emp. Ex./ST 6.¹ Claimant returned to work in early 1993, but was injured on April 27, 1993, at Strachan's facility when his leg became numb, gave out and caused him to fall approximately eight feet into the hold of a ship. Emp. Ex./ST 4; Tr. at 30. In this instance, claimant injured his ankle and exacerbated his back pain, but did not sustain a new back injury. Emp. Ex./ST 35; Tr. at 31. Claimant has not worked since April 1993. SEACO voluntarily paid temporary total disability benefits during claimant's periods of disability, but later terminated benefits, arguing that any continuing disability claimant may have is due to the injury sustained at Strachan's facility.² Emp. Exs./SE 2, 4, 9, 11; Emp. Ex./ST 6. Claimant filed a claim for permanent total disability benefits against both employers. Cl. Ex./SE 26; Cl. Ex./ST 8.

¹Because two employers and two injuries were involved in this case, there are four sets of exhibits. Claimant's and employer's exhibits in the case against Strachan are labeled Cl. Ex./ST and Emp. Ex./ST, and the exhibits in the case against SEACO are marked Cl. Ex./SE and Emp. Ex./SE, respectively.

²SEACO paid temporary total disability benefits from April 26 through November 12, 1992, and from December 31, 1992, through March 24, 1993, and it paid temporary partial disability benefits from March 10 through July 20, 1993. Emp. Exs./SE 2, 5, 9; Emp. Ex./ST 6.

The administrative law judge found that claimant is permanently disabled. She then determined that claimant satisfied his burden of showing that he cannot return to his usual work.³ Decision and Order at 25. She also determined that none of the jobs employers presented constituted suitable alternate employment for claimant; therefore, she concluded that claimant is entitled to permanent total disability benefits. Decision and Order at 29. Additionally, the administrative law judge determined that SEACO is the employer responsible for claimant's benefits and that it is not entitled to a credit for either holiday or vacation pay, as the record is insufficient to support SEACO's claim that it made such payments to claimant. She also concluded SEACO is not entitled to a credit for container royalty payments it made, as those payments are made in accordance with the union contract. Decision and Order at 30. SEACO appeals the decision, and claimant and Strachan respond, urging affirmance.⁴ BRB No. 97-734.

Thereafter, claimant's counsel filed a petition for an attorney's fee in the amount of \$29,681.05. After considering the petition and employer's objections, the administrative law judge awarded claimant's counsel a total fee of \$28,774.55. The only charges from the fee request the administrative law judge denied were 2.8 hours of services (\$906.50) explicitly identified as work performed in the case against Strachan. Supp. Decision and Order. SEACO appeals the award, challenging it as being excessive, unreasonable, and premature. Claimant responds, urging affirmance. BRB No. 97-734S.

SEACO first contends that claimant is not permanently totally disabled but in fact can return to his usual work, or alternatively, to some suitable alternate employment. Additionally, SEACO contends the administrative law judge erred in denying it a credit for holiday, vacation, and container royalty payments it made to claimant during his period of

³Additionally, the administrative law judge listed her findings of claimant's permanent work restrictions. They are:

no pushing, pulling, or twisting; intermittent squatting, climbing, kneeling for no more than three hours per day; intermittent crawling; continuous standing for no more than four hours per day; intermittent sitting for no more than six hours per day, intermittent walking, lifting and bending for no more than four hours per day; driving a motor vehicle for no more than one to three hours per day, and lifting no more than 20 to 50 pounds. He is capable of working 8 hours per day. . . .

Decision and Order at 25 (citing Cl. Ex./SE 7).

⁴Strachan specifically urges affirmance of the administrative law judge's finding that SEACO is the responsible employer. Strachan was a party to the case before the administrative law judge but is not affected by the appeal, as SEACO does not challenge that finding. Strachan admits its response brief was filed "out of an abundance of caution." Strachan Brief at 11.

disability. In response, claimant argues there is substantial evidence to support the administrative law judge's findings and that this case is directly on point with *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, 96 F.3d 1438 (table), 30 BRBS 74 (CRT) (4th Cir. 1996), thereby supporting the denial of a credit.

Initially, we reject SEACO's contention that the administrative law judge erred in finding that claimant is unable to return to his usual work. Under the Act, the claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Initially, claimant demonstrates a *prima facie* case of total disability by establishing his inability to perform his usual work due to the injury. See *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). If the claimant meets his burden, then the employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that the claimant's disability is, at most, partial. *Trans-State Dredging*, 731 F.2d at 199, 16 BRBS at 74 (CRT). There is substantial evidence of record, most particularly the opinions of Drs. Poletti and Schimenti, whom the administrative law judge credited, Decision and Order at 24-26, which supports the finding that claimant cannot return to his usual work. Specifically, claimant was diagnosed with multiple levels of bulging discs and multiple levels of degenerative disc disease with an increased posterior disruption at L5-S1, Cl. Ex./ST 3; Emp. Exs./ST 35, 37, 42, 44, which Dr. Poletti states prevents claimant from returning to his usual work as a longshoreman. Cl. Ex./SE 7; Emp. Exs./ST 35-38, 44. Dr. Schimenti agreed and advised permanent restrictions similar to those set by Dr. Poletti. Cl. Ex./ST 5. Therefore, we affirm the administrative law judge's determination that claimant cannot return to his usual work as a longshoreman. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

In the alternative, SEACO contends it established the availability of suitable alternate employment for claimant, thereby making his disability partial instead of total. Once a claimant demonstrates a *prima facie* case of total disability, an employer may show that the disability is at most partial by establishing the availability of realistic job opportunities which the claimant is capable of performing given his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 199, 16 BRBS at 74 (CRT); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The United States Court of Appeals for the Fourth Circuit, which has appellate jurisdiction over this case, requires an employer to demonstrate that a range of jobs exists and is reasonably available. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988).

The record in this case contains evidence from five vocational rehabilitation consultants. Three of them found over 30 jobs which they believe claimant is capable of performing. Emp. Exs./SE 21-22; Emp. Exs./ST 51-52, 57, 66. Another consultant, Mr. Yuhas, suggested a few positions but advised a more thorough investigation. Emp. Ex./ST 53. The remaining consultant, Ms. Hutchinson, concluded that claimant is unable to return to the workforce in light of his physical limitations and his below average verbal and

mathematical abilities. Cl. Ex./SE 24; Tr. at 70. The administrative law judge credited Ms. Hutchinson's "careful analysis" over the opinions of the other vocational counselors. Decision and Order at 29. She also considered all the positions identified as alternate employment but rejected them for various reasons that are rational and supported by substantial evidence.⁵ See *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988) (jobs not considered suitable because precise nature of duties and availability not in record); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988) (credit claimant's expert because employer's experts failed to consider claimant's deficiency of basic skills). Thus, the credited evidence supports the administrative law judge's determination that claimant is unemployable and, therefore, totally disabled. See *Mendez*, 21 BRBS at 24.

Employer's specific disagreement with the administrative law judge's conclusion that claimant is totally disabled is that none of the doctors so opined; that is, they all believed claimant could return to some type of employment, Cl. Ex./ST 3; Emp. Exs./ST 35-36, 65 at 20,26, and one even approved a number of the positions identified by the vocational specialists. Emp. Exs./ST 51-52. Contrary to SEACO's argument, the question of the extent of a claimant's disability is an economic as well as a medical concept, and thus it cannot be measured by a claimant's physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *Quick v. Martin*, 397 F.2d

⁵The administrative law judge conducted a very thorough review of the vocational evidence. Decision and Order at 27-30. She credited the opinion of the union president that there is no such thing as "light duty" longshore work, and then she rejected all longshore work based on her finding that claimant cannot return to his usual work. *Id.* at 25, 27-29. With regard to land-based jobs, the administrative law judge found that many of the identified positions required training or verbal and math skills beyond claimant's abilities, as testing revealed that claimant has a below average IQ and only elementary level educational skills. Decision and Order at 27; Cl. Ex./SE 24; Emp. Ex./ST 53. Others of the land-based positions, she found, violated his physical restrictions, and still others were not sufficiently described. See n.3, *supra*. Therefore, the administrative law judge rationally rejected the alternate positions identified by both employers. Decision and Order at 27-29.

644 (D.C. Cir. 1968). Therefore, an administrative law judge may find a claimant to be totally disabled despite medical findings of partial impairment. The determination of whether a claimant can perform the identified alternate employment requires consideration of the specific physical restrictions set by the doctors, not merely their anatomical ratings, as well as consideration of other factors. *Trans-State Dredging*, 731 F.2d at 199, 16 BRBS at 74 (CRT); *Turner*, 661 F.2d at 1031, 14 BRBS at 156; *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Consequently, we reject employer's contention that the administrative law judge erred in awarding total disability benefits.

Next, SEACO contends it is entitled to a credit for vacation, holiday and container royalty payments it made to claimant during his period of disability. Claimant cites *Branch* as support for affirming this aspect of the decision. In *Branch*, the Board held that an employer is not entitled to a credit for post-injury payments made from the holiday/vacation fund or the container royalty fund, as those payments were made pursuant to the union contract and were not intended to be "in lieu of compensation." *Branch*, 28 BRBS at 55. The Fourth Circuit affirmed the Board's decision in an unpublished decision, holding that these payments, while they would be considered "wages" if the claimant was working, are not "wages" when received post-injury, and the employer is not entitled to a credit for amounts paid under the union contract.⁶ *Branch*, 30 BRBS at 77-78 (CRT). Thus, vacation, holiday and container royalty payments a claimant earns prior to his injury are properly included in calculating his average weekly wage. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Such payments received during periods of disability, however, do not constitute wages within the meaning of Section 2(13), 33 U.S.C. §902(13), and have no impact on claimant's post-injury wage-earning capacity, as they do not establish he can earn wages in spite of his disability. *Eagle Marine Services v. Director, OWCP [Wolfskill]*, 115 F.3d 735, 31 BRBS 49 (CRT) (9th Cir. 1997).

In this case, the administrative law judge found with regard to holiday and vacation pay that employer failed to put forth sufficient evidence to establish that claimant received such payments during his period of disability. Decision and Order at 30. The administrative law judge noted SEACO's citation to exhibit 20 and correctly stated that none of the exhibits numbered 20 pertains to this topic. SEACO's Exhibit 19 is a one page computer-generated summary of "non-work hours" and "contribution" which may be the evidence to which employer was referring. The summary is not explained and does not state how much claimant was paid. Strachan's Exhibit 11 adds a column to this sheet called "container royalty distributions." In any event, there is no evidence concerning the payment of holiday or vacation funds to claimant. Therefore, we affirm the administrative

⁶Pursuant to the Fourth Circuit's Local Rule 36(c), the citation of an unpublished decision "is disfavored. . . ." Nevertheless, Local Rule 36(c) provides that an unpublished decision with precedential value may be cited in relation to a material issue in a case if there is no published opinion that would serve as well (if all other parties are served with a copy of the decision).

law judge's finding that SEACO has failed to sufficiently develop the record on this matter. *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996) (party with the onus of proving its position must present more convincing evidence than opposing party).

Concerning container royalty pay, the administrative law judge stated that such payments are made in accordance with the contract and, therefore, no credit is available. Decision and Order at 30. As in *Branch*, the container royalty payments here were made in accordance with the union contract during claimant's period of disability. Emp. Ex./ST 70. Consequently, the payments are not considered post-injury wages, and we affirm the administrative law judge's finding that SEACO is not entitled to a credit for these payments. *Eagle Marine*, 115 F.3d at 735, 31 BRBS at 49 (CRT).

Finally, SEACO challenges the administrative law judge's fee award. It objects to the hourly rates awarded and to the approval of specific entries, including services performed by paralegals, alleged duplicate services by two attorneys, alleged charging for overhead expenses, and for charging for the services of Mr. Yuhas and Ms. Hutchinson, two vocational consultants. After reviewing the record, the fee petition and the objections, we reject employer's challenges to the fee award. The administrative law judge adequately explained her reasons for awarding a fee based on the stated hourly rates. Supp. Decision and Order at 2-3. The administrative law judge also rationally rejected the challenge to a fee for both attorneys' time at the hearing and to the fee for the post-hearing brief as excessive. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds). Employer has not established an abuse of discretion in this regard. Further, paralegal work is compensable, and if clerical employees perform work normally performed by attorneys or paralegals then that work also is compensable. *Quintana v. Crescent Wharf & Whse. Co.*, 18 BRBS 254 (1986); *Staffile v. International Terminal Operating Co., Inc.* 12 BRBS 895 (1980).

We also reject employer's challenge to the award of expenses for the services of Mr. Yuhas and Ms. Hutchinson. Mr. Yuhas's work, as noted by the administrative law judge, was used by all parties,⁷ and the administrative law judge referenced her reliance on Ms. Hutchinson's report in rendering the decision. The administrative law judge rationally found these expenses recoverable in view of claimant's success in establishing his entitlement to permanent total disability benefits. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). With regard to SEACO's contention that charges for overnight delivery are not recoverable and should be allotted to overhead, we note that SEACO did not raise this objection before the administrative law judge and cannot raise it now for the first time on appeal. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Finally, we reject SEACO's contention that the administrative law judge erred in

⁷SEACO objected to the expense of Mr. Yuhas's services because claimant did not offer his report into evidence. Rather, his report ultimately was offered by Strachan.

awarding this fee prematurely. An administrative law judge can award an attorney's fee during the pendency of an appeal, but the award is not enforceable until the compensation order becomes final. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order awarding benefits and attorneys' fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge