BRB Nos. 00-477
and 00-477A

CALVIN WATIS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CARGILL, INCORPORATED	)	DATE ISSUED: Jan. 30, 2001
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Denial of Employer's Motion to Supplement the Record, the Decision and Order, and the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

George J. Nalley, Jr. (George J. Nalley, Jr., A Professional Law Corporation), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees, and employer appeals the Decision and Order and the Denial of Employer's Motion to Supplement the Record (99-LHC-538) of Administrative Law Judge C. Richard Avery 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).

Claimant, a shiploader, injured his back at work on June 14, 1996. The administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption that his back injury is work-related, and that employer did not rebut it. Assuming, *aguendo*, that employer established rebuttal, the administrative law judge found that the evidence as a whole supports a finding that claimant's back injury is work-related. The administrative law judge thus awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge also found that claimant did not establish his *prima facie* case of total disability, and, alternatively, that employer established the availability of suitable alternate employment by offering claimant a modified shiploader position in its facility with no loss in wage-earning capacity to claimant. Thus, the administrative law judge denied disability benefits. The administrative law judge summarily denied employer's post-hearing Motion to Supplement the Record with new medical evidence.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $12,009.37, representing 68.625 hours of attorney services at $175 per hour, and $770.20 in expenses. Employer objected to the hourly rate, and asserted that the administrative law judge should award a fee commensurate with claimant's limited degree of success since the administrative law judge's award resulted in an award of only $1,800 in medical benefits. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded an attorney's fee of $3,002.35, and expenses of $767.70, reducing the fee request by 75 percent because of claimant's limited success. On appeal, claimant challenges the administrative law judge's denial of disability benefits and the reduction of the attorney's fee requested. In its cross-appeal, employer challenges the administrative law judge's finding that claimant's injury is work-related, and the consequent award of medical benefits. Employer also asserts error in the administrative law judge's denial of its post-hearing Motion to Supplement the Record.

We first address employer's contention that the administrative law judge erred in finding that claimant established that his back injury is work-related. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999). Claimant's testimony, if credible, may establish that the alleged accident in fact occurred which could have caused the injury. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *See*

Prewitt, 194 F.3d 684, 33 BRBS 187 (CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96 (CRT)(5th Cir. 2000)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge found that claimant established his *prima facie* case. Contrary to employer's contention, the administrative law judge acted within his discretion in finding that an accident in fact occurred since he concluded that there was no reason to disbelieve claimant's testimony that he slipped and twisted his back at work. *See Hampton*, 24 BRBS 141; Decision and Order at 8-9; Tr. at 21-24. Moreover, the fact that there were no witnesses to the accident, that claimant failed to radio anyone at the time of the accident, and that claimant worked for two days after the accident does not establish that the accident did not occur. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). We thus affirm the administrative law judge's invocation of the Section 20(a) presumption.

We also affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption. Contrary to employer's contention, that claimant may have "popped" his back while assisting in the lifting of a lawn mower prior to the work injury and that claimant did not tell his doctors of the lawn mower incident does not establish the absence of causation, as employer must produce evidence that the work injury did not aggravate a prior back injury. *See Prewitt*, 194 F.3d 684, 33 BRBS 187 (CRT), Decision and Order at 9; Tr. at 95, 106, 110. As employer offered no evidence sufficient to rebut the Section 20(a) presumption, the administrative law judge's finding that claimant's back injury is work-related is affirmed.

Employer also contends that the administrative law judge erred in awarding medical benefits. The Act does not require that an injury be economically disabling

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[1]Employer's reliance on *Pigrenet v. Boland Marine & Mfg. Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981)(*en banc)* is misplaced. In *Pigrenet*, the court affirmed the administrative law judge's finding that claimant's injury was not work-related as supported by substantial evidence based on the administrative law judge's finding that claimant's testimony, the only relevant evidence regarding the work-relatedness of claimant's injury, was not credible. In the instant case, we affirm the administrative law judge's finding that claimant's injury is work-related as supported by substantial evidence based on the administrative law judge's finding that he had no reason to disbelieve claimant on this issue.

in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); 33 U.S.C. §907. In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary for the treatment of claimant's work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Employer does not challenge the propriety of any specific medical treatment, and based on our affirmance of the administrative law judge's finding that claimant's back injury is work-related, we affirm the award of reasonable and necessary work-related medical expenses.

We next address employer's challenge to the administrative law judge's denial of its post-hearing Motion to Supplement the Record. The administrative law judge has the discretion to hold the record open after a hearing for the receipt of additional evidence. 20 C.F.R. §702.347. In the instant case, the record was held open for 30 days after the hearing on September 8, 1999, for the submission of Dr. Steiner's deposition. Thus, the record closed on October 8, 1999. Thereafter, on December 6, 1999, employer filed a Motion to Supplement the Record with new evidence consisting of a normal magnetic resonance imaging of claimant's lumbar spine dated October 29, 1999, and Dr. Steiner's opinion dated December 1, 1999, stating that claimant can now return to his usual work and has reached maximum medical improvement. Contrary to employer's contention, the administrative law judge was not required to accept the evidence it submitted outside of the 30 days in which, and beyond the scope for which , the record was held open. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989). Thus, we affirm the administrative law judge's summary denial of employer's Motion to Supplement the Record. Based on our affirmance of the administrative law judge's denial of employer's Motion to Supplement the Record, we affirm the administrative law judge's finding that there is no evidence in the current record supportive of a finding that claimant's condition is permanent. *See* Decision and Order at 10; Emp. Ex. 6.

In his appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish his *prima facie* case of total disability, or if he did, that employer established the availability of suitable alternate employment by offering him a modified shiploader position in its facility. Claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). In denying disability benefits, the administrative law judge relied on the testimony of employer's plant superintendent, Mr. Leeth, that claimant is able to return to his usual work. The administrative law

[2]If employer wishes the administrative law judge to consider the medical evidence attached to its Motion to Supplement the Record, it may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

judge, however, did not fully discuss all relevant evidence regarding claimant's ability to return to his usual work. First, the administrative law judge erred in not comparing the physical requirements of a shiploader to claimant's restrictions. *See generally Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). The administrative law judge erred in not discussing and weighing Mr. Leeth's testimony that accommodations would have to be made in order for claimant to return to his usual work. Moreover, the administrative law judge did not discuss and weigh the opinion of Mr. Stokes, employer's vocational expert, that claimant could return to his usual work if accommodations were made. Tr. at 119. If accommodations are necessary, then claimant cannot return to his former job. Thus, we vacate the administrative law judge's finding that claimant did not establish his *prima facie* case of total disability, and remand this case to the administrative law judge for a discussion and weighing of all relevant evidence with regard to this issue. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring); Decision and Order at 9-12; Emp. Ex. 1(a); Cl. Exs. 6 at 44, 7 at 17; Tr. at 17-19, 80-113, 119, 167.

Once claimant establishes his *prima facie* case of total disability, the burden shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic job opportunities which he, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). One way that employer can meet this burden is by providing claimant with a suitable light duty job within its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). In the instant case, the administrative law judge alternatively

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[3]Claimant is restricted from lifting over 20 pounds and crawling. Cl. Ex. 7 at 17. He may occasionally bend, kneel, and squat. The shiploader position, among other things, requires two men on ship and one man on the K-2, a floating work platform owned by employer, to put the control station on the vessel in order to avoid back injuries. Emp. Ex. 1(a); Cl. Ex. 6 at 44.

[4]Mr. Leeth testified that claimant could return to his usual work if accommodations, such as using a utility person or the second shiploader on duty to shovel spillage and pull up the button box, were made. Tr. at 167. The administrative law judge acted within his discretion in crediting Mr. Leeth's testimony over that of claimant and employer's former production supervisor, Mr. Thomey, since claimant appeared to exaggerate the extent of manual labor required in his job as a shiploader and since Mr. Thomey was not claimant's supervisor and equivocated in his recollection of events. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 11 n. 4; Tr. at 17-19, 80-113.

found that employer established the availability of suitable alternate employment by offering claimant a modified shiploader position in its facility based on Mr. Leeth's testimony that claimant failed to report to work as a light duty modified shiploader after repeatedly being requested to do so. The administrative law judge, however, did not discuss Mr. Leeth's testimony that no modified shiploader position was offered to claimant, claimant's testimony that he was not offered such a job by employer, and Mr. Stokes's testimony that he was unaware of an offer by employer to claimant to return him to work at its facility as a modified shiploader. Thus, we vacate the administrative law judge's alternative finding that employer established the availability of suitable alternate employment. On remand, if the administrative law judge finds that claimant is unable to return to his usual employment due to his work-related back injuries, the administrative law judge should discuss and weigh all relevant evidence above in determining whether employer established the availability of suitable alternate employment by offering claimant a position in its facility or on the open market through its labor market survey. *See generally Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Gremillion*, 31 BRBS 163; Decision and Order at 9-12; Emp. Ex. 5; Tr. at 32-33, 41, 115-151, 179-180. If, on remand, the administrative law judge finds that employer established the availability of suitable alternate employment, he must determine claimant's post-injury wage-earning capacity. The administrative law judge also must determine whether claimant sustained a loss in wage-earning capacity and thus is entitled to partial disability benefits.

Turning to claimant's appeal of the administrative law judge's award of an attorney's fee, we agree with claimant that the amount of the fee awarded by the administrative law judge to claimant's counsel cannot be affirmed since the outcome on remand may change. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court stated that the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). In the instant case, the Board has vacated the denial of disability compensation and remanded the case for reconsideration of the extent of claimant's disability. Pursuant to this disposition, we vacate the fee award and remand the case for reconsideration of the amount of the attorney's fee award, in light of the decision on remand.

Accordingly, the administrative law judge's Denial of Employer's Motion to Supplement the Record is affirmed. The administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees are vacated with respect to the administrative law judge's findings regarding the extent of claimant's disability and the administrative law judge's award of an attorney's fee, and the case is remanded to the administrative law judge for further consideration of these issues consistent with this opinion.

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[1]That claimant's actual earnings have not decreased is not determinative, as the issue involves his wage-earning *capacity*. 33 U.S.C. §908(h).

In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge