BRB No. 07-0640

B. M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED: 01/31/2008
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order, Erratum, and Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Leonard A. Washofsky, Metairie, Louisiana, for claimant.

Lance S. Ostendorf (Ostendorf, Tate, Barnett & Wells, LLP), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Erratum, and the Supplemental Decision and Order Awarding Attorney Fees (2005-LHC-00616) of Administrative Law Judge Lee J. Romero, Jr., 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

[1] Employer filed a motion for oral argument in this case. Claimant responded in opposition to the motion. Employer's motion for oral argument is denied. *See* 20 C.F.R. §§802.304-802.306.

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 law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related injuries to his left shoulder, left arm, and neck on November 11, 1999, during the course of his employment for employer as a power mechanic. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from the date of injury through August 14, 2002, and permanent partial disability from August 15, 2002, through May 31, 2006, based on a loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Claimant requested a hearing to address employer's reduction in August 2004 of his weekly compensation rate from $563.31 to $549.97. Employer contended that claimant has a greater post-injury wage-earning capacity than he alleges, and that claimant misrepresented his income to employer thereby subjecting him to forfeiture of benefits pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j). Employer also asserted that claimant failed to cooperate with its vocational consultants. The parties stipulated that claimant is unable to return to his usual work for employer and that claimant's work injuries have reached maximum medical improvement.

The administrative law judge found that employer did not demonstrate that claimant failed to cooperate with employer's vocational consultants. The administrative law judge found that employer did not identify the availability of suitable alternate employment that pays more than $300 per week, which claimant stipulated he could earn. Accordingly, claimant was awarded ongoing benefits for permanent partial disability at a rate of $563.31 per week.[2] Claimant also was awarded continuing medical benefits for his work injuries under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge rejected employer's contention that claimant's benefits should be forfeited or reduced under Section 8(j), finding that claimant did not willfully or knowingly underreport income to employer.

[2] In his Erratum, the administrative law judge corrected a clerical error in his decision to award claimant compensation for permanent partial disability from August 15, 2002, to August 25, 2003, based on two-thirds of the difference between claimant's average weekly wage of $1,144.96 and a post-injury wage-earning capacity of $252, or $595.31 per week, and from August 26, 2003, based on two-thirds of the difference between claimant's average weekly wage of $1,144.96 and a wage-earning capacity of $300, or $563.31 per week.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $17,835.16, representing 84.15 hours of attorney time at $200 per hour and costs of $1,005.16. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge addressed employer's objections to the fee petition, and awarded claimant's counsel the requested fee of $17,835.16.

On appeal, employer challenges the administrative law judge's findings that it did not demonstrate that claimant failed to cooperate with its vocational consultants and that claimant does not have a post-injury wage-earning capacity higher than $300 per week. Employer also challenges the administrative law judge's finding that claimant's benefits should not be forfeited or reduced pursuant to Section 8(j). Finally, employer challenges the administrative law judge's fee award. Claimant responds, urging affirmance of the administrative law judge's decision and fee award.

Employer first argues that claimant failed to cooperate with its vocational consultants inasmuch as he failed to inform them that he owned a truck-leasing business, asserting that this information would have affected the consultants' assessment of claimant's transferrable skills.[3] Claimant must reasonably cooperate with an employer's rehabilitation specialist, and a failure to do so may be considered in evaluating the extent of claimant's disability. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C. J., dissenting on other grounds), *aff'd on recon.*, 17 BRBS 160 (1985) (Ramsey, C. J., dissenting on other grounds).

Claimant testified that he had purchased and leased two 18-wheel trucks to a company that provided the driver. Tr. at 170. In his decision, the administrative law judge summarized claimant's deposition testimony regarding his ownership of his truck-leasing business, BKM Enterprises (BKM). Claimant acknowledged at his September 12, 2001, deposition that he owned BKM, but stated it was losing money and the sole truck he owned at that time was not operational and needed repairs. EX 1 at 7-8. Claimant testified at his September 30, 2004, deposition that BKM had failed and that he

[3] Employer does not challenge the administrative law judge's finding that the jobs it identified in its labor market survey are not suitable for claimant. Thus, we reject employer's argument that claimant's failure to apply for any of these positions is relevant to claimant's wage-earning capacity. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Employer's allegation that claimant did not cooperate on the basis that he intentionally underperformed on academic tests will not be addressed as employer did not raise this argument before the administrative law judge. *See* Employer's Post-Trial Brief at 9-11.

planned to sell the two trucks he owned. EX 2 at 35-36. Claimant was interviewed by employer's vocational consultants Angela Harold in November 2001 and Nancy Favaloro in April 2004. They testified that they did not question claimant concerning his involvement in a business, nor did he offer any information concerning BKM. Tr. at 253-254, 280. The administrative law judge found that as claimant discussed BKM at his depositions, knowledge of the business was manifest to employer during the time employer conducted its labor market surveys. Decision and Order at 25. The administrative law judge therefore concluded that employer failed to establish that claimant did not cooperate with its vocational consultants. In adjudicating a claim, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge's finding that claimant's ownership of BKM was manifest to employer, and therefore to its vocational consultants, is supported by substantial evidence and rational inasmuch as claimant acknowledged ownership of BKM at his depositions. Therefore, we reject employer's contention of error.

Employer next argues that the administrative law judge erred by finding that it failed to establish that claimant's post-injury wage-earning capacity is higher than $300 per week. Employer contends that claimant's prior ownership of BKM and his current job managing his son's business, Bayou Boys Seafood & Produce (Bayou Boys), establish that he possesses skills and abilities which demonstrate a wage-earning capacity greater than $300 per week. Under Section 8(c)(21) an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. It is well established that the party contending that the employee's actual post-injury earnings are not representative of his residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In this case, the administrative law judge credited claimant's testimony that he does not work 40 hours a week and the absence of medical evidence restricting claimant to part-time work to find that claimant's wages of $252 per week at Bayou Boys do not represent his wage-earning capacity. Decision and Order at 26. The administrative law judge found that claimant is restricted to light to medium work with a 25-pound lifting restriction and that claimant's academic abilities are below high school level. *Id*. at 27. The administrative law judge rejected the positions employer identified in its labor market surveys on the basis either that the jobs are not within claimant's work restrictions, that there is insufficient information to determine whether the jobs are within

claimant's restrictions, or that the wage rate paid by the identified positions is below claimant's conceded post-injury wage-earning capacity of $300 per week. *Id*. at 27-29. Accordingly, the administrative law judge found that claimant has a post-injury wage-earning capacity of $300 per week.

Employer does not challenge the administrative law judge's rejection of the positions it contended established the availability of suitable alternate employment, nor does employer dispute claimant's testimony that BKM is a defunct business. Employer contends claimant has a wage-earning capacity higher than $300 per week based on his work at Bayou Boys. Bayou Boys sells fresh and cooked seafood to take-out customers. Tr. at 120-125. Claimant testified that he manages this business and is paid $252 per week. Tr. at 161-163, 175-176; *see also* Tr. at 139-141. Employer did not proffer any wage evidence supporting its contention regarding a higher earning capacity such as, for example, evidence of the wages paid to a manager of a business establishment similar to Bayou Boys. While the administrative law judge did not address the contention that the skills ands abilities required to manage Bayou Boys establish that claimant has a greater wage-earning capacity, in the absence of any evidence of the actual wages paid for performing a similar job, employer's argument must be rejected as the mere description of claimant's current job duties at Bayou Boys cannot meet employer's burden of demonstrating an alternative higher wage-earning capacity.[4] *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). Accordingly, we affirm the administrative law judge's continuing award of compensation for permanent partial disability based on a post-injury wage-earning capacity of $300 per week.

Employer next contends that claimant is subject to the forfeiture provisions of Section 8(j) of the Act. Section 8(j) permits an employer to request that a disabled claimant report his post-injury earnings. Once the inquiry is made, the claimant must complete and return the form within 30 days of receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly omitted or understated. 33 U.S.C. §908(j); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); 20 C.F.R. §§702.285-702.286. Section 8(j)(1), (2) of the Act provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from

[4] In his decision, the administrative law judge summarized Ms. Harold's testimony that she was informed in January 2006 prior to her undertaking a labor market survey that claimant was working at Bayou Boys. Decision and Order at 16; *see* Tr. at 63.

> employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who--
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

33 U.S.C. §908(j) (1)-(2) (1994).

In this case, claimant completed and signed on March 23, 2005, six LS-200 forms for the annual periods beginning November 10, 1999, through March 2005. EX 5 at 1-6. Claimant reported no earnings from the date of injury through August 23, 2002; thereafter he reported earnings based on weekly wages of $252 from Jay's Auto Sales (Jay's) from August 23, 2002, to January 7, 2005, and from Bayou Boys since January 11, 2005. The administrative law judge excused claimant's failure to list the gross income from BKM for the years 1999-2003. Decision and Order at 33-34. The administrative law judge found a cumulative business loss for BKM during these years totaling $9,957. *See* EX 10 at 4, 16, 22, 34, 44; *see also* Tr. at 187-192. Moreover, claimant acknowledged at his September 2001 deposition, when he was asked about any other income, that BKM was losing money. EX 1 at 7. The administrative law judge further found that claimant stated at his September 2004 deposition that BKM was defunct. EX 2 at 35-36. The administrative law judge found that claimant's deposition testimony and his income tax returns establish no intent to deceive employer about his ownership of BKM and that this business lost money. The administrative law judge concluded that claimant's benefits are not subject to forfeiture based on his failure to list the gross income from BKM on the LS-200 forms, since claimant did not knowingly and willfully omit this information.

The administrative law judge next addressed employer's contention that claimant worked simultaneously for Jay's and Bayou Boys from August 2004 until he stopped working at Jay's in January 2005, and that he was paid a salary by each employer during this period. Decision and Order at 34. The administrative law judge found that claimant and his wife credibly testified that while claimant performed services for Bayou Boys while employed at Jay's, claimant did not have specified hours at either employer, and he

was not paid for the services he performed at Bayou Boys prior to January 11, 2005. Tr. at 100-105, 161-162, 177-178, 210-212, 221-223. The administrative law judge found that evidence of claimant's working during the same period at both Jay's and Bayou Boys is insufficient to establish that claimant concurrently received wages from both employers, and that claimant's uncompensated work at Bayou Boys is not relevant under Section 8(j).

The administrative law judge also addressed claimant's banking records from 1997 to 2004 to ascertain whether claimant received more money than he reported to employer on the LS-200 forms. Decision and Order at 34-35. Employer asserted that for the years 2000-2004 claimant's bank deposits exceed the funds attributable to claimant's earnings from Jay's and Bayou Boys and the disability compensation claimant received under the Act and from the Social Security Administration. *See* EX 8. The administrative law judge found employer's evidence rebutted by the testimony of claimant and his wife that the banking account additionally reflects income earned by several of their children and deposited into the account. Tr. at 76-79, 90-91, 106-108. The administrative law judge found their testimony supported by claimant's son's income tax records showing a refund which corresponds to a direct deposit into claimant's bank account. *Compare* CX 8 at 2-3 *with* EX 8 at 124. The administrative law judge concluded that the funds deposited by claimant's children reasonably explain the discrepancy between the money claimant deposited into the account and the total amount of money deposited into the account. Finally, the administrative law judge found that claimant's spending patterns, such as taking a vacation to Las Vegas, do not establish that he underreported income to employer.

The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Employer has not raised any reversible error in the administrative law judge's conclusion that it failed to establish that claimant is subject to the forfeiture provisions of Section 8(j). The testimony of claimant and his wife and family members, considered together with their federal income tax returns constitute substantial evidence in support of the conclusion that claimant did not willfully omit his earnings from BKM, that claimant did not receive concurrent salaries at Jay's and Bayou Boys, and that claimant reasonably explained the discrepancy between his bank deposits and the amount of these deposits attributable to his earnings and disability payments. The administrative law judge's decision to credit this evidence is within his discretion as the fact-finder. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Therefore, we affirm the administrative

law judge's finding claimant is not subject to the forfeiture provisions of Section 8(j). *See Cheetham v. Bath Iron Works Co.*, 38 BRBS 60 (2004); *see also Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en ba*nc 31 BRBS 109 (1997).

Employer also challenges the administrative law judge's attorney's fee award, asserting that counsel is not entitled to a fee since the administrative law judge erred by awarding claimant compensation, and that the administrative law judge erred in awarding the requested hourly rate and number of hours. We reject employer's contention that counsel is not entitled to a fee inasmuch as we have affirmed the award of benefits. 33 U.S.C. §928. We also reject employer's allegations regarding the amount of the fee. Employer contends that the administrative law judge erred by failing to consider whether the attorney's fee should be reduced due to claimant's degree of success inasmuch as the amount of past due compensation awarded claimant was less than $3,000. The administrative law judge found that claimant prevailed on all the issues contested at the hearing. Specifically, claimant was successful in establishing entitlement to continuing compensation for permanent partial disability from August 26, 2003, based on a post-injury wage-earning capacity of $300, and he prevailed against employer's contentions that claimant's compensation should be reduced or forfeited under Section 8(j) and for failing to cooperate with employer's vocational consultants. In light of claimant's complete success on all issues contested before the administrative law judge, the amount of past due compensation owed claimant as a result of the administrative law judge's decision is an insufficient basis for reducing counsel's requested attorney's fee. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Employer also contends that the hourly rate awarded is too high and that various itemized entries should be reduced or disallowed. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). The administrative law judge explicitly found the hourly rate requested reasonable pursuant to the regulatory criteria. Moreover, the administrative law judge rationally rejected employer's reliance on the hourly rate of $150 awarded in *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). We affirm the hourly rate of $200 awarded to claimant's counsel as the administrative law judge applied the regulatory criteria and employer has not shown that the administrative law judge abused his discretion in this regard. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *see also Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). Similarly, the administrative law judge adequately addressed employer's challenge to various itemized entries as excessive, and we decline to disturb his determinations that

the entries at issue are compensable. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Accordingly, the administrative law judge's Decision and Order, Erratum, and Supplemental Decision and Order Awarding Attorney's Fee are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge