BRB Nos. 88-4066
and 88-4066A

JACK R. BAGGETT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Motion to Re-open Record (I), Order on Reconsideration, Order Denying Motion for Reconsideration, Order Denying Motion to Re-open the Record (II), and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Joseph S. Russo, Jefferson, Louisiana, for claimant.

Clare W. Trinchard (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for self-insured employer.

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

DOLDER, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits, Order Denying Motion to Re-open Record (I), Order on Reconsideration, Order Denying Motion for Reconsideration, Order Denying Motion to Reopen the Record (II), and Supplemental Decision and Order Awarding Attorney Fees (86-LHC-1368) of Administrative Law Judge Quentin P. McColgin 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). An award of an attorney's fee 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 October 19, 1982, claimant, an electrician, was injured during the course of his employment when a disconnect box fell approximately four feet onto his left hand. Claimant worked only sporadically from the date of this work-related incident until January 1983, at which time he underwent surgery on his finger; claimant has not worked since that time. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), for various periods of time following claimant's work accident. Thereafter, claimant sought permanent total disability benefits under the Act.

In his Decision and Order Awarding Benefits, the administrative law judge determined that claimant was entitled to temporary total disability compensation from the date of his work-related injury through June 27, 1985, except for those intervals during which claimant was employed, and permanent partial disability benefits thereafter for 124.8 weeks, based upon a finding that claimant had sustained a 40 percent impairment to his left arm. 33 U.S.C. §908(c)(1). Thereafter, on April 30, 1987, the administrative law judge denied employer's motion to re-open the record to admit a physician's report, stating that the motion was untimely and the report proffered was beyond the scope of the post-hearing evidence authorized at the formal hearing.

Subsequently, in his Order on Reconsideration dated August 19, 1988, the administrative law judge, finding that the evidence established that claimant's injury extended beyond his arm and encompassed both his left shoulder and chest wall, determined that he had erroneously limited claimant to an award pursuant to the schedule; the administrative law judge, therefore, vacated his prior award under Section 8(c)(1) of the Act and, after finding that employer had established the availability of suitable alternate employment at the federally mandated minimum wage of $3.35 per hour, awarded claimant compensation pursuant to Section 8(c)(21). 33 U.S.C. §908(c)(21). The administrative law judge additionally concluded that the onset date of claimant's permanent partial disability was January 7, 1986, the date upon which a position in employer's light duty work program became available to claimant. Employer's subsequent motion for reconsideration of the administrative law judge's Order on Reconsideration was denied by the administrative law judge in an Order Denying Motion for Reconsideration dated September 15, 1988.

Lastly, in an Order Denying Motion to Reopen the Record dated November 8, 1988, the administrative law judge denied employer's motion to reopen the record for the purpose of submitting evidence of the hourly rate of pay for the position found by the administrative law judge to constitute suitable alternate employment.

Claimant's counsel thereafter requested an attorney's fee of $25,356.25, representing 280.75 hours of services performed at

$125 per hour, and 194.75 hours of services performed at $75 per hour; additionally, counsel sought reimbursement for $1,932.36 in costs. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel a fee of $11,625, representing 155 hours of services performed at a rate of $75 per hour, plus costs of $1,807.36

On appeal, claimant contends that the administrative law judge erred: (1) in not finding him permanently totally disabled; (2) in terminating his temporary total disability benefits prior to November 11, 1986; (3) in failing to award him compensation for disfigurement as the result of the amputation of his finger; and (4) in reducing the attorney's fee sought. Employer cross-appeals, contending that the administrative law judge erred in awarding claimant compensation pursuant to Section 8(c)(21) rather than compensation under Section 8(c)(1) of the Act, and in denying employer's motion to reopen the record.

I. Suitable Alternate Employment

Where, as in the instant case, claimant is unable to perform his usual employment, he 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 meet this burden, the employer must show that there are jobs reasonably available in the geographical area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, and which he 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). Employer can meet its burden of establishing suitable alternate employment by supplying light duty work to claimant which is necessary and which claimant is capable of performing. See Darden v. Newport News Shipbuilding and Dry Dock, 18 BRBS 224 (1986)

Claimant initially avers that the administrative law judge erred in finding that employer had established the availability of suitable alternate employment based upon positions available in employer's light duty program. Specifically, claimant contends that these light duty positions constitute sheltered employment since they are not available to non-handicapped workers; in the alternative, claimant contends that, pursuant to his physical restrictions, he is physically incapable of performing the light duty positions offered by employer and has no real wage-earning capacity on the open market.

After review of the record, we hold that the administrative law judge's determination that claimant is not permanently totally disabled is rational and supported by substantial evidence. In his decision, the administrative law judge concluded that employer had established the availability of suitable alternate employment through the testimony of Mr. Koch, employer's workers' compensation program manager, Dr. Rosen, and Dr. Kaye, claimant's treating physician. Specifically, the administrative law judge noted that Mr. Koch testified that claimant was offered three light duty employment positions on three occasions, including employment as a gate guard.[1] See November 21, 1986, Transcript at 89-100. Drs. Rosen and Kaye opined that claimant was physically capable of performing the duties of a gate guard. See RX-1, 2. Based upon this uncontroverted testimony, the administrative law judge concluded that employer's offer of employment to claimant did not constitute sheltered employment and that employer had established the availability of suitable alternate employment, as claimant was capable of performing the gate guard position offered by employer. See generally P & M Crane, 930 F.2d at 424, 24 BRBS at 116 (CRT). Lastly, the administrative law judge determined that claimant, in failing to pursue the employment opportunities offered by employer, failed to establish reasonable diligence in attempting to secure suitable alternate employment. See, e.g., Roger's Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). Inasmuch as these findings are rational and supported by the record, we affirm the administrative law judge's determination that employer has established the availability of suitable alternate employment and his consequent finding that claimant is not permanently totally disabled.[2] See, e.g., Peele v. Newport News Shipbuilding and Dry Dock Co., 20 BRBS 133 (1987).

II. Permanent Partial Disability

In its appeal, employer contends that the administrative law judge erred in ultimately awarding claimant permanent partial disability compensation pursuant to Section 8(c)(21), rather than Section 8(c)(1), of the Act. 33 U.S.C. §908(c)(1), (21). It is well-established that where a claimant's disability is covered under the schedule enumerated in Sections 8(c)(1) - (20), he may not elect to receive compensation under Section 8(c)(21) of the

[1]Claimant declined these offers of employment, contending that he was disabled from any employment.

[2]We note that once employer has established the availability of suitable alternate employment by offering claimant a job within employer's own facility, the employer need not show that claimant can earn wages in the open market. See Darden, supra, 18 BRBS at 224.

Act. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 14 BRBS 363 (1980). The Board has held, however, that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, claimant may receive a Section 8(c)(21) award; in such cases, however, claimant is limited to one award for the combined effect of his conditions, since he sustained only one compensable injury which has affected other parts of the body. See Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988); Thompson v. Lockheed Shipbuilding & Construction Co., 21 BRBS 94 (1988). In the instant case, claimant was diagnosed as having sustained a tear of the palmer plate of the interphalangeal joint of his left little finger resulting in a swan-neck deformity, tenderness, and laxity of the volarplate mechanism; following surgery to repair this deformity, claimant's finger became infected and, after a second surgical procedure, was ultimately amputated. Claimant experienced continued pain and stiffness in his left hand for which he underwent physical therapy and three stellate ganglion blocks. Thereafter, claimant underwent a surgical sympathectomy, which involved opening claimant's chest in order to remove his T1 - T4 sympathetic ganglion. Following this operation, claimant, while experiencing less pain in his hand, commenced experiencing pain in both his shoulder and chest. Claimant subsequently continued to treat with a number of physicians regarding his complaints of pain.

In his Decision and Order, the administrative law judge, after setting forth and discussing the voluminous medical testimony regarding claimant's continued complaints of pain, credited the testimony of Dr. Kaye in concluding that claimant's work-related disability was limited to his left arm. Specifically, the administrative law judge stated:

> Dr. Kaye testified that he used the terms "left arm" and "left upper extremity" interchangeably. It is clear, then, that claimant's disability is limited to his left arm.

Decision and Order Awarding Benefits at 14. The administrative law judge therefore awarded claimant permanent partial disability compensation, pursuant to Section 8(c)(1), for a work-related disability to his left arm. Thereafter, in his Order On Reconsideration, the administrative law judge accepted without discussion claimant's contention that:

> the evidence established that claimant's injury extended beyond the arm itself and encompassed both his left shoulder and chest wall as well as other parts of the body.

See Order on Reconsideration at 1. Pursuant to this statement, the administrative law judge vacated his award of benefits pursuant to Section 8(c)(1) and awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act.

Our review of the record in the instant case indicates that although it is clear that claimant's initial hand injury progressed to affect other parts of his body, including his chest and shoulder, it is not clear that claimant's loss in wage-earning capacity is due to restrictions other than those necessitated by the impairment of his hand and arm. Specifically, Dr. Kaye, whom the administrative law judge credited in his initial Decision and Order, discussed claimant's complaints regarding his hand, arm and shoulder, but rated only the impairment to claimant's arm. See CX-46; JX-2; Kaye deposition at 23-24, 37. Similarly, Dr. Rosen, who in 1986 diagnosed claimant's condition as involving his left upper extremity, thereafter referred only to claimant's hand and arm when discussing claimant's disability. See CX-79; JX-1; Rosen deposition at 4, 12-16, 24. Due to this conflicting evidence, we conclude that the administrative law judge erred when, in his Order on Reconsideration, he summarily found that claimant was entitled to permanent partial disability compensation under Section 8(c)(21) without discussing the relevant evidence and specifying the evidence upon which he relied. Hearings of claims arising under the Act are required by the Administrative Procedure Act to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, in rendering a decision, an administrative law judge must analyze and discuss the medical evidence of record, adequately detail the rationale behind his decision, and specify the evidence upon which he relied. See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988). Based upon the administrative law judge's failure in the instant case to explicitly set forth the medical evidence on which he relied in finding claimant entitled to an unscheduled award under Section 8(c)(21), we conclude that remand of this case to the administrative law judge is necessary. On remand, the administrative law judge must consider and discuss the medical evidence of record and explicitly set forth the evidence on which he ultimately relies in reaching a determination as to whether the schedule or Section 8(c)(21) is applicable in the instant case.

III. Date of Partial Disability.

Claimant next challenges the administrative law judge's decision to commence his permanent partial disability award on January 7, 1986. As set forth in our discussion of suitable alternate employment, once a claimant establishes that he is unable to perform his usual employment, claimant has established a

prima facie case of total disability, thus shifting the burden of proof to employer to establish the availability of suitable alternate employment. See P & M Crane, 930 F.2d at 424, 24 BRBS at 116 (CRT). Claimant's total disability does not become partial until the date that employer establishes the availability of suitable alternate employment. See Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991), vacating on recon. BRB No. 88-1721 (January 29, 1991)(unpublished). In his Order on Reconsideration, the administrative law judge determined that employer established the availability of suitable alternate employment as of January 6, 1986, and that, thus, claimant's award of permanent partial disability compensation should commence as of that date. As it is uncontroverted that employer commenced its light duty work program in January 1986, that claimant was informed of the availability of light duty work in January 1986, and that claimant was requested to present himself at employer's facility on January 7, 1986, regarding these positions, we affirm the administrative law judge's determination that employer established the availability of suitable alternate employment as of January 6, 1986, and his consequent finding that claimant is entitled to an award of permanent partial disability compensation commencing January 7, 1986, as these findings are rational and are supported by the record.

IV. Request to Reopen the Record

Employer argues that the administrative law judge erred in denying its motion to reopen the record to permit it to submit wage information which would establish that the hourly rate paid to gate guards was higher than the federally mandated minimum wage rate of $3.35, as found by the administrative law judge. Specifically, employer contends that wage information regarding the gate guard position was presented at the formal hearing but was left out of the transcript because it was erroneously included in an "off the record" discussion.

Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. Thus, although the administrative law judge has great discretion concerning the admission of evidence, Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988), the administrative law judge must fully inquire into matters that are fundamental to the disposition of the issues in the case. Durham v. Embassy Dairy, 19 BRBS 105 (1986). The failure to inquire into a matter which is fundamental to the disposition of the issues in the case violates Section 702.338 of the regulations. Gray & Co., Inc. v. Highlands Insurance Co., 9 BRBS 424 (1978).

In the instant case, the administrative law judge, in calculating claimant's loss of wage-earning capacity prior to

awarding claimant compensation pursuant to Section 8(c)(21), found that no evidence had been submitted regarding the rate of pay for the employment positions contained in employer's light-duty work program; subsequently, the administrative law judge utilized the federal minimum wage in effect as of January 1986 to calculate claimant's post-injury wage-earning capacity. See Order on Reconsideration at 2. Thereafter, employer moved to reopen the record in order to establish the hourly rate of pay for the suitable alternate employment position which it had established was available to claimant; the administrative law judge, without discussion of the merits of employer's request, denied this motion on November 8, 1988, stating that jurisdiction over claimant's case now resided with the Board. As the instant case must be remanded to the administrative law judge for reconsideration as to the applicable subsection to be used to calculate claimant's benefits, we hold that the administrative law judge, on remand, must additionally address employer's contentions regarding the wage rate applicable to positions which are available for claimant.[3]

V. Disfigurement.

Claimant additionally contends that the administrative law judge erred by failing to award him compensation for the disfigurement to his hand caused by the amputation of his finger. However, neither claimant's pre-hearing statement nor the transcript of the formal hearing state that an award for disfigurement was at issue. We therefore decline to consider this issue as it is raised for the first time on appeal. See Moore v. Paycor, Inc., 11 BRBS 483 (1979).

VI. Attorney's Fee.

Lastly, claimant challenges the amount of the attorney's fee and the hourly rate awarded by the administrative law judge.

[3]We note that employer's contention regarding this issue will be rendered moot if, on remand, the administrative law judge determines that claimant is to be awarded compensation pursuant to Section 8(c)(1). Employees found to be entitled to permanent partial disability compensation pursuant to the schedule set forth in Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), are to receive two-thirds of their average weekly wage, at the time of their injury, for a specific number of weeks, regardless of whether their earning capacity has been impaired. Employees found to be entitled to compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), however, are to receive compensation based upon the difference between their pre-injury average weekly wage and their post-injury wage-earning capacity. See Potomac Electric Power Co., 449 U.S. at 268, 14 BRBS at 363.

Specifically, claimant contends that the administrative law judge erred in reducing both the number of hours sought for services performed on claimant's behalf and the hourly rate requested for those services.

Initially, we reject claimant's contentions regarding the number of hours ultimately approved by the administrative law judge for work performed before him. The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. See, e.g., Cabral v. General Dynamics Corp., 13 BRBS 97 (1981). In the instant case, the administrative law judge reduced, from 45.5 to 22.75, the number of hours sought by counsel for preparation prior to the formal hearing, stating that the former figure was excessive "as this amount of preparation was not evident at the formal hearing," see Supplemental Decision and Order at 2; additionally, the administrative law judge reduced, from 73.5 hours to 60 hours, the time sought researching and preparing a post-hearing memorandum. Claimant's assertions on appeal are insufficient to meet his burden of proving that the administrative law judge abused his discretion by reducing the time requested for the services rendered before him. Thus, we decline to reinstate the time disallowed by the administrative law judge. See generally Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

Claimant additionally contends that the administrative law judge erred in reducing his requested hourly rate from $125 to $75. We disagree. The administrative law judge, after taking into consideration the legal community in which the case was tried, the complexity of the case, and the expertise of counsel, determined that an hourly rate of $75 was appropriate in the instant case. We affirm this rate, and hold that claimant's assertion that the rate awarded does not conform to the reasonable and customary charges in the area based on a 1967 survey multiplied by inflation is insufficient to meet claimant's burden of proving that the administrative law judge abused his discretion. See generally Mijangos, supra; LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc., 10 BRBS 317 (1979). We, therefore, affirm the administrative law judge's award of an attorney's fee.

Accordingly, the administrative law judge's award of permanent partial disability compensation pursuant to Section 8(c)(21) of the Act is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this decision. In all other respects, the administrative law judge's Orders are affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting in part and concurring in part:

Although I concur in my colleagues' decision not to address claimant's claim for a disfigurement award, as well as their decision to affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment as of January 6, 1986, his consequent determination that claimant's permanent partial disability award should commence on January 7, 1986, and his award of an attorney's fee, and their decision to remand the case for the administrative law judge to reconsider the issue of claimant's post-injury wage-earning capacity, I must respectfully dissent from their decision to vacate the administrative law judge's award of permanent partial disability pursuant to Section 8(c)(21) of the Act. I would affirm the administrative law judge's determination that claimant is entitled to an award of compensation under Section 8(c)(21), as that finding is supported by substantial evidence.

Claimant sustained a work-related injury to the little finger of his left hand on October 19, 1982. Following this injury, claimant began a medical odyssey which, if not thoroughly documented, would defy the imagination. Specifically, claimant's finger was first placed in a splint; thereafter, surgery was performed on the finger. Following his initial surgery, claimant's finger became infected and required a second surgical procedure; thereafter, on March 21, 1983, claimant's finger was amputated. As claimant continued to experience discomfort in his hand, claimant underwent three stellate ganglion blocks which failed to alleviate his pain; ultimately, on July 26, 1983, claimant underwent a thoracodorsal sympathectomy which involved the opening of claimant's chest in order to operate on claimant's sympathetic nerve pathways. Although this procedure apparently reduced the discomfort that claimant experienced in his left hand, claimant subsequently complained of pain in his shoulder and in

the area of the incision in his chest wall. These complaints persisted through the date of the hearing.

That claimant's medical treatment resulted in effects beyond his hand or arm thus is well documented in the record before us; I note, for example, that claimant has submitted 97 exhibits in support of his claim for compensation, while the transcripts of the three days of hearings contain 673 pages. Numerous physicians who have treated claimant since his initial injury have recorded impressions that claimant's difficulties extend beyond his arm. Dr. Kaye, while rating claimant's disability to his left upper extremity, additionally noted joint fibrosis of the hand and fingers as well as a shoulder-hand syndrome. See CX-46, 68. Dr. Rosen diagnosed dystrophy in claimant's left upper extremity. See CX-79. These medical opinions are, in my opinion, supportive of the administrative law judge's decision to award claimant compensation pursuant to Section 8(c)(21) of the Act. See Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988). Thus, I would affirm the administrative law judge's determination that claimant is entitled to compensation pursuant to Section 8(c)(21).

ROY P. SMITH
Administrative Appeals Judge