BRB Nos. 99-0947
and 99-0947A

WOODIE WEST	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
GREENVILLE SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert J. Young, III and Timothy J. Young (Young, Richaud & Myers), New Orleans, Louisiana, for claimant.

Ronald T. Russell (Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

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 employer appeals the Supplemental Decision and Order Awarding Attorney Fees (98-LHC-2562) 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 fitter/welder, injured his back and neck, and perforated his left ear drum at work on January 2, 1997, after falling off a boat and landing on a metal dock. As a result of the work injury, the administrative law judge found that claimant additionally suffers from a binaural hearing loss and benign positional vertigo (dizziness). Employer voluntarily paid claimant his salary in lieu of compensation from January 3, 1997, through July 2, 1997, temporary total disability benefits from July 3, 1997, through July 1, 1998, and temporary partial disability benefits from July 2, 1998, and continuing. It is uncontested that claimant cannot return to his usual work. Claimant returned to work in a light duty capacity in employer's tool room from February 1997 through June 6, 1997, but quit because he was in pain. Dr. Collipp subsequently kept claimant off work from July 3, 1997, through November 10, 1997, when he released him to return to work in a light duty capacity.

The administrative law judge awarded claimant temporary total disability benefits from July 3, 1997, through November 10, 1997, based on Dr. Collipp's recommendation that claimant remain off work for this period. However, the administrative law judge denied claimant benefits from February 1997, through July 2, 1997, finding that employer established the availability of suitable alternate employment by providing claimant light duty work in its tool room from February 1997, through June 6, 1997, and that there was no medical evidence to support claimant's continued unemployment from June 6, 1997, through July 2, 1997. The administrative law judge also denied benefits subsequent to November 10, 1997, finding that claimant could have returned to light duty work in employer's tool room on November 11, 1997, at the same pre-injury wages.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $24,920, representing 178 hours of attorney services at $140 per hour[1] and $2,372.79 in expenses. Employer objected to certain travel time on February 9 and 10, 1999, and also asserted that the administrative law judge should award a fee commensurate with claimant's limited degree of success.[2] In his Supplemental Decision

[1]The administrative law judge agreed with employer that the hourly rate of $140 requested by Ms. Etienne is excessive and reduced it to $110 per hour, but awarded the requested hourly rate of $140 to the other two attorneys. Supplemental Decision and Order at 2.

[2]As a result of claimant's binaural hearing impairment, the administrative law judge

and Order, after disallowing 33.8 hours and expenses requested prior to July 22, 1998, the date the case was referred to the Office of Administrative Law Judges, the administrative law judge awarded an attorney's fee of $16,217.50 and expenses in the amount of $1,830.24. In doing so, the administrative law judge did not reduce the fee based on the degree of claimant's success, and awarded in its entirety the travel time requested on February 9 and 10, 1999.

On appeal, claimant challenges the administrative law judge's denial of benefits after June 6, 1997, except for the period during which the administrative law judge awarded claimant temporary total disability benefits from July 3, 1997, through November 10, 1997. Employer responds in support of the administrative law judge's decision to which claimant replies. 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 $16,000 is unreasonable in light of the amount of benefits awarded, and that the administrative law judge abused his discretion in awarding all travel time requested on February 9 and 10, 1999. Claimant's counsel responds in support of the administrative law judge's fee award.

We first address claimant's challenge to the administrative law judge's finding that employer established the availability of suitable alternate employment by offering claimant a light duty job in its tool room. Claimant contends that the light duty job in employer's tool room is not suitable, as he is restricted from driving by Dr. Wright and employer's job is located 30 miles from his home. Claimant also contends that this job is not suitable in light of Dr. Wright's testimony that simply moving one's head up or down will trigger dizziness in persons afflicted with claimant's balance disorder. Where, as in the instant case, it is uncontested that a claimant is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The burden then shifts to employer to demonstrate within the geographic area where claimant resides the reasonable availability of jobs which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). One way that employer can meet this burden is by providing claimant

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awarded claimant scheduled permanent partial disability benefits under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). This award resulted in a gain of $10,131.84.

with a suitable light duty job within its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). In order for its offer of a light duty job to be suitable, the job must be accessible to the claimant given the restrictions on his ability to drive. *See Diamond M. Drilling Co. v. Marshall [Kilsby]*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978); *Sampson v. FMC Corp.*, 10 BRBS 929 (1979).

The administrative law judge found that employer established the availability of suitable alternate employment by providing claimant a light duty job in its tool room. In doing so, the administrative law judge did not adequately address whether the job is suitable in view of claimant's vertigo. In this regard, the administrative law judge stated only "Dr. Wright, Claimant's treating ENT [ear, nose, and throat doctor or otolaryngologist], while asserting he would not release Claimant to drive due to Claimant's permanent vertigo problems, has refused to comment on Claimant's ability to return to work." Decision and Order at 20. As the administrative law judge did not discuss this opinion in terms of whether the job employer offered claimant is suitable given claimant's driving limitations, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment based on this job. *See Kilsby*, 577 F.2d at 1003, 8 BRBS at 658; Decision and Order at 20; Cl. Ex. 23 at 27-31, 66-69. On remand, the administrative law judge should reconsider whether employer's offer of light duty employment located 30 miles away from claimant's home is suitable in light of Dr. Wright's opinion, and he also should consider whether this job is suitable in light of Dr. Wright's testimony that simply moving one's head up or down will trigger dizziness in persons afflicted with claimant's balance disorder.

Claimant further contends that the administrative law judge erred in finding employer's light duty job suitable based on the opinions of Drs. Collipp, Frothingham, and the functional capacities evaluation, since they do not take into account claimant's dizziness. While Dr. Wright evaluated and treated claimant for his ear and balance problems, Drs. Collipp and Frothingham evaluated and treated claimant for his neck and back problems. We affirm the administrative law judge's finding that, from an orthopedic standpoint, the job in employer's tool room was within claimant's abilities. Dr. Collipp did not see anything that would prevent claimant from returning to light duty work in employer's tool room after the functional capacities evaluation was performed in November 1997, and Dr. Frothingham did not differ with Dr. Collipp's opinion regarding claimant's ability to return to work in November 1997. *See* Decision and Order at 7, 10, 17-19; Emp. Exs. 8 at 28-29, 9 at 32. Moreover, the functional capacities evaluation stated that claimant's return to work was to be determined by a physician. *See* Emp. Ex. 10 at 5. Thus, the administrative law judge's finding, that the opinions of Drs. Collipp and Frothingham establish, from an orthopedic standpoint, that claimant is capable of performing the light duty job in employer's facility, is affirmed as supported by substantial evidence.

Turning to employer's appeal of the administrative law judge's award of an attorney's fee, we agree that the case must be remanded for the administrative law judge to consider the amount of the fee in terms of claimant's degree of success. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court held that the attorney's fee awarded in fee-shifting statutes should be commensurate with the degree of success obtained in a given case. This rule applies to cases arising under the Act. *See 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).

In the instant case, the administrative law judge merely noted in response to employer's objection that claimant was awarded additional benefits in this claim, and that he was unwilling to make a reduction in the requested fee based solely on the dollar amount of the award as such would discourage competent counsel from representing prospective claimants. We vacate the administrative law judge's award of an attorney's fee and remand this case to the administrative law judge for further consideration. Inasmuch as claimant achieved only limited success in pursuing his claims, the administrative law judge must more fully consider this factor in entering a fee award.[3] 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 Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT); *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT). Under the Act, the *Hensley* test requires that the administrative law judge award a reasonable fee based on the degree of claimant's success, consistent with the regulatory criteria of 20 C.F.R. §702.132 and after consideration of employer's objections. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (19930.

[3]If the degree of claimant's success changes as a result of the proceedings on remand, this factor also should be considered by the administrative law judge.

With regard to employer's remaining contention, we affirm the administrative law judge's award of travel time on February 9 and 10, 1999, in its entirety, as within his discretion.[4] *See generally Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995).

Accordingly, the administrative law judge's finding that the light duty job in employer's tool room constitutes suitable alternate employer is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's fee award is vacated, and the case is remanded for the administrative law judge to reconsider the amount of the attorney fee in light of claimant's success.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]Employer objected to claimant's counsel's travel time from New Orleans, Louisiana, to Jackson, Mississippi, and from Jackson back to New Orleans on February 9, 1999, and from New Orleans to Greenville, Mississippi, and back to New Orleans on February 10, 1999, because, employer asserts, claimant's counsel had advised employer's counsel on February 9 that she would be spending the night in Jackson and proceeding to Greenville from Jackson on February 10. Thus, employer did not want to reimburse claimant's counsel for the trip back to New Orleans from Jackson on February 9 or the trip from New Orleans to Jackson on February 10. The administrative law judge was unwilling to find that the time was not correct since employer offered no proof in support of its objection. Supplemental Decision and Order at 2.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge