BRB Nos. 00-839
and 00-839A

DARRYL LE DUCE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	
	)	
Self-Insured	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and Order Denying Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postal (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for Ceres Corporation.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer Ceres Corporation (Ceres or employer) appeals, and claimant cross-appeals, the Decision and Order on Remand and Order Denying Reconsideration (96-LHC-1795, 96-LHC-1796) of Administrative Law Judge John C. Holmes 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).

This case is on appeal to the Board for the second time. Claimant, a heavy equipment operator, injured his neck and arms on April 10 and 21, 1995, while working for employer. Claimant worked for I.T.O. on April 25, 1995, and was unable to work after this date; he sought permanent total disability benefits. Employer voluntarily paid claimant temporary total disability benefits from April 25, 1995, through May 2, 1996. Initially, the administrative law judge awarded claimant temporary total disability benefits from May 3 through September 26, 1996, and permanent partial disability benefits from September 27, 1996, the date of employer's labor market survey, and continuing. The administrative law judge found that claimant reached maximum medical improvement on May 9, 1996, and that claimant did not establish that he diligently sought alternate employment. Moreover, the administrative law judge found that claimant's compensation benefits should not be suspended under Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), due to claimant's alleged failure to undergo certain medical treatment. Finally, the administrative law judge dismissed I.T.O. from the proceedings, finding Ceres to be the responsible employer, as he concluded that claimant's disability is due to the natural progression of the injuries claimant sustained with Ceres, and not to any incident occurring on April 25, 1995, with I.T.O. Upon motions for reconsideration filed by employer, I.T.O., and claimant, the administrative law judge modified his award to temporary total disability benefits from May 3 to 9, 1996, the date of maximum medical improvement, and permanent partial disability benefits from May 10, 1996, and continuing. The administrative law judge summarily rejected employer's second motion for reconsideration.

In *LeDuce v. Ceres Corp.*, BRB Nos. 98-874/A (Mar. 15, 1999)(unpublished), the Board vacated the administrative law judge's findings that Ceres is the responsible employer, as the administrative law judge did not discuss relevant medical evidence. The Board also vacated the finding that maximum medical improvement was reached on May 9, 1996, as the administrative law judge erred in finding that the parties stipulated to this date and did not address pertinent medical evidence, and the conclusion that partial disability benefits began

on the date of maximum medical improvement, rather than the date jobs were shown to be available. The Board affirmed the finding that employer established suitable alternate employment based on Mr. Dennis's labor market survey, but vacated the determination that claimant failed to establish due diligence as it was not based on a proper legal standard. Finally, the Board affirmed the finding that claimant did not unreasonably refuse surgery, but vacated the administrative law judge's finding concerning claimant's participation in physical therapy as it relates to Section 7(d)(4). On each of these issues, the case was remanded for further consideration. The Board, *en banc*, summarily denied employer's motion for reconsideration. *LeDuce v. Ceres Corp.*, BRB Nos. 98-874/A (Aug. 18, 1999)(Order).

On remand, after discussing the issues and evidence pursuant to the Board's decision, the administrative law judge awarded claimant temporary total disability benefits from May 3 through September 26, 1996, and permanent partial disability benefits from September 27, 1996, and continuing, again finding Ceres to be the responsible employer. With the exception of changing the date permanent partial disability benefits began, the administrative law judge reinstated his prior findings. The administrative law judge denied the motions for reconsideration filed by employer and claimant.

Claimant's counsel subsequently filed a petition for an attorney's fee for work performed before the Board in BRB Nos. 98-874/A, requesting a total fee of $11,125, representing 44.5 hours of work at an hourly rate of $250. Employer objected to the hourly rate of $250, and asserted that claimant's counsel could not be awarded a fee for time spent (28 hours) preparing his Petition for Review and brief because claimant's appeal was ultimately unsuccessful, and that time spent (16.5 hours) on claimant's response brief was excessive, or alternatively, should not be awarded because it was in defense of claimant's counsel's fee award and did not benefit claimant. Employer also asserted that the fee petition lacked detail as to the nature of the services provided and was not accurate as all services provided, with one exception, were in increments of full hours. On June 22, 2000, the Board awarded claimant's counsel a fee of $8,900, representing 44.5 hours of work at an hourly rate of $200 to be paid directly to claimant's counsel by employer. *LeDuce v. Ceres Corp.*, BRB Nos. 98-874/4A (Jun. 22, 2000)(Order). On July 7, 2000, employer filed a timely motion for reconsideration of the Board's order awarding the attorney's fee, and requested that its motion be consolidated with its appeal of the administrative law judge's award of benefits on remand. By Order dated September 20, 2000, the Board granted this motion. Subsequent to its filing of the motion for reconsideration of the attorney's fee award, employer submitted to the Board a copy of a 1994 Maryland appellate court opinion involving claimant's counsel, and represented that claimant's counsel had been disbarred for two years for misconduct as a result of the outcome in that case. *See Attorney Grievance Comm'n of Maryland v. Eisenstein*, 635 A.2d 1327 (Md. 1994). Thereafter, claimant's counsel requested that employer's counsel be sanctioned for this submission.

In the present appeal, employer challenges the administrative law judge's findings on remand that it is the responsible employer, that permanent partial disability benefits commence on the date of the labor market survey, and that claimant's benefits should not be suspended under Section 7(d)(4). Claimant appeals the administrative law judge's finding that he did not establish reasonable diligence in seeking alternate employment. Employer and claimant filed response briefs in support of their positions.

Employer first contends that the administrative law judge erred in finding that it is the responsible employer and in dismissing I.T.O. from the proceedings, alleging that the evidence establishes that claimant suffered a new injury while employed by I.T.O. on April 25, 1995, subsequent to claimant's injuries with employer on April 10 and 21, 1995. Moreover, employer contends that the administrative law judge erred in rejecting Dr. Weiner's opinion on the basis that Dr. Weiner had not reviewed claimant's magnetic resonance imaging films (MRIs), when in fact Dr. Weiner did review the films. The employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of that injury. If, however, a subsequent work injury aggravates or accelerates claimant's condition resulting in disability, the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997).

The administrative law judge found that claimant did not sustain a distinct injury after April 21, 1995, and that claimant's pain and disability after that date were due to the natural progression of his injuries with Ceres. The administrative law judge acknowledged that Dr. York gave two seemingly contradictory opinions regarding the effects of claimant's employment after April 21. Nonetheless, the administrative law judge rationally found that Dr. York's opinion that claimant's condition is not related to conditions of work after April 21 is supported by Dr. Hunt's opinion to that effect, as well as by claimant's testimony that he was in pain after April 21, that his symptoms would wax and wane, and that his symptoms were progressing after the initial two injuries. The administrative law judge accorded little weight to Dr. Weiner's undated opinion that it was medically reasonable to conclude that all three events were significant in precipitating symptoms in claimant's pre-existing degenerative spinal disease, finding that Dr. Weiner's opinion was not reasoned because it appeared to be based upon employer's counsel's letter to the physician as well as claimant's deposition and did not indicate that the physician reviewed claimant's MRIs or based his opinion on them.[1] The administrative law judge also found that Dr. Weiner's opinion was

[1]Although Dr. Weiner previously reviewed claimant's MRIs, as employer correctly asserts, the physician does not state he relied upon them in expressing his opinion.

based on the erroneous belief that the April 25 incident involved a "rocky ride" when this was contrary to claimant's testimony, which the administrative law judge credited, that it was a regular and simple ride and that claimant's arm hurt when he was transitioning from ramp to dock, the smooth part of the trip.

The administrative law judge acted within his discretion in crediting the opinions of Drs. York and Hunt, as well as claimant's testimony, to support his finding that claimant did not suffer an aggravation or new injury on April 25, 1995. As the administrative law judge's finding that claimant's disability resulted from the natural progression of the injuries with Ceres is thus supported by substantial evidence, we affirm the conclusion that Ceres is the responsible employer. The administrative law judge therefore did not err in dismissing I.T.O. from this case. *See McKnight*, 32 BRBS 165; *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order on Remand at 4-7; Emp. Exs. 2, 55, 56 at 55, 75 at 21-22, 76; I.T.O. Exs. 1, 2; Cl. Ex. 4B at 55; Tr. at 127-129, 160-163, 165-166.

With regard to the date claimant's partial disability commenced, employer argues that the administrative law judge erred in not applying its labor market survey retroactively to the date jobs were shown to be available, rather than using the date of the survey as the date claimant's total disability became partial. Once claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). Employer may meet its burden of establishing the availability of suitable alternate employment by relying on a retrospective labor market survey so long as the jobs were available during the "critical period" during which claimant was able to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991). The date suitable alternate employment is established marks the end of claimant's entitlement to total disability benefits. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

The administrative law judge did not apply the labor market survey retroactively to December 1995 because claimant subsequently underwent a work hardening program after he reached maximum medical improvement in May 1996, and employer did not establish that the medical restrictions before and after May 1996 were the same. The administrative law judge thus found that the date of employer's labor market survey, September 27, 1996, is the first date on which employer established the availability of suitable alternate employment. The administrative law judge stated that employer did not establish that the jobs available in December 1995 were still available in May 1996, and he was unwilling to assume that the positions remained open for over nine months. As claimant applied for two positions in the

labor market survey in September 1996, however, the administrative law judge found that employer established the availability of suitable alternate employment on the date of the labor market survey. We affirm the administrative law judge's findings that employer established the availability of suitable alternate employment on September 27, 1996, based on the date of its labor market survey, and that partial disability benefits begin on this date, as these findings are rational and supported by substantial evidence. *See generally Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Tarner*, 731 F.2d 199, 16 BRBS 74(CRT); Decision and Order on Remand at 9; Order Denying Reconsideration at 2-3; Emp. Ex. 57.

Claimant contends in his cross-appeal that the administrative law judge erred in finding that he did not establish reasonable diligence in seeking alternate employment. In order to defeat employer's showing of the availability of suitable alternate employment and retain eligibility for total disability benefits, claimant must establish he diligently sought, but was unable to obtain, alternate employment opportunities. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Tarner*, 731 F.2d 199, 16 BRBS 74(CRT); *see also Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). In the instant case, the administrative law judge rationally found that claimant did not establish that he diligently sought alternate employment as he applied for only seven jobs in six months, did not seek jobs in the classified advertisements, and did not follow up on the available jobs to which he applied.[2] *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Tarner*, 731 F.2d 199, 16 BRBS 74(CRT); Decision and Order on Remand at 9-10; Order Denying Reconsideration at 3; Emp. Exs. 7, 8; Cl. Ex. 1 at 51-59, 66-68, 70-71; Tr. at 97-101, 134-139. We affirm the administrative law judge's finding that claimant did not establish reasonable diligence in the pursuit of alternate employment as it is rational and

[2]Contrary to claimant's contention, the duty to exercise reasonable diligence is not necessarily linked to the jobs identified in employer's labor market survey; employer has no duty to inform claimant of identified positions, as the administrative law judge correctly noted on remand. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); Decision and Order on Remand at 10; Order Denying Reconsideration at 3; Cl. Br. at 11-14. Rather, claimant must establish that he diligently tried to obtain employment similar to the jobs employer demonstrated were reasonably available in claimant's community. *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT).

supported by substantial evidence. Based on our affirmance of the administrative law judge's findings that employer established the availability of suitable alternate employment on September 27, 1996, and that claimant did not establish reasonable diligence in the pursuit of alternate employment, we affirm the administrative law judge's award of total disability benefits through September 26, 1996, and partial disability benefits thereafter.

Employer's final argument regarding claimant's disability benefits concerns the date disability shifted from temporary to permanent. Employer argues that the administrative law judge erred in awarding permanent disability benefits from the date suitable alternate employment was established rather than from the date of maximum medical improvement. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In the instant case, the administrative law judge awarded temporary disability benefits through September 26, 1996, despite his finding, which no party challenges on appeal, that claimant reached maximum medical improvement on May 9, 1996. As the date claimant's condition reaches maximum medical improvement delineates the onset of permanent disability, we modify the administrative law judge's award to hold that claimant is entitled to permanent total disability benefits from May 9, 1996 to September 26, 1996.

Employer further argues that the administrative law judge erred in not suspending compensation benefits to claimant as claimant refused to undergo reasonable medical treatment, *i.e.*, a work hardening program, as required by Section 7(d)(4). Moreover, employer contends that the administrative law judge did not apply the correct standard under Section 7(d)(4). Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of compensation to an employee during any period in which he unreasonably refuses to submit to medical or surgical treatment, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4). Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on employer to establish that claimant's refusal to undergo medical treatment is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing on the individual claimant. *See Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 109 (1995); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting). In the instant case, the administrative law judge found that claimant did not refuse to submit to work hardening, although he did not participate with the utmost effort, based on the daily reports of J. Zauckus and the statement of Ms. Alberti that she would not call claimant uncooperative. As the administrative law judge's finding that claimant did not

refuse to undergo work hardening is supported by substantial evidence, we affirm it.[3] *See generally Dodd*, 22 BRBS 245; Decision and Order on Remand at 7-8; Emp. Ex. 34; Tr. at 244.

Turning to employer's motion for reconsideration of the attorney's fee awarded by the Board in BRB Nos. 98-874/A, employer asserts that the Board erred in summarily rejecting its objections to claimant's counsel's fee petition. We agree, and now consider employer's contention that the fee awarded is excessive given 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). Under the Act, the *Hensley* test requires that the Board award a reasonable fee based on the degree of claimant's success, consistent with the regulatory criteria of 20 C.F.R. §802.203, and after consideration of employer's objections. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

We grant employer's motion for reconsideration, and we disallow all time requested for drafting claimant's Petition for Review and brief in the amount of 28 hours. No additional benefits were awarded on remand as a result of claimant's initial appeal. Claimant's initial appeal unsuccessfully challenged the administrative law judge's findings regarding suitable alternate employment, average weekly wage, and wage-earning capacity. Although claimant's challenge on appeal to the administrative law judge's finding regarding diligence was successful in that he obtained a remand, he was ultimately unsuccessful on remand before the administrative law judge and on this appeal before the Board. Moreover, although claimant's compensation benefits were not suspended under Section 7(d)(4), this issue was raised by employer and thus was not related to claimant's appeal.

[3] Any error in the administrative law judge's conclusion that Section 7(d)(4) is not applicable to work hardening programs is harmless, as he made alternative findings which we affirm.

We allow all time spent by claimant's counsel in preparing his response brief, as it successfully defended the administrative law judge's fee award before the Board over employer's objections. *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). We reject employer's remaining objections to claimant's counsel's fee petition. 20 C.F.R. §802.203(d)(1). We also deny claimant's counsel's request for sanctions against employer's counsel for submitting the *Eisenstein* case to the Board and representing that claimant's counsel had been disbarred for two years.[4] Counsel does not specify the sanctions he seeks, and there is no provision in the Act or regulations authorizing such an action. *See generally Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 907, 29 BRBS 43(CRT)(5th Cir. 1995); 20 C.F.R. §802.202. Consequently, we vacate the Board's previous award of an attorney's fee in BRB Nos. 98-874/A, and we modify it to reflect an award of an attorney's fee in the amount of $3,300, representing 16.5 hours at an hourly rate of $200 payable directly to claimant's counsel by employer.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Denying Reconsideration are modified to reflect that claimant's permanent disability benefits begin on the date of maximum medical improvement on May 9, 1996. In all other respects, the Decision and Order on Remand and Order Denying Reconsideration awarding benefits are affirmed. The Board's Order awarding an attorney's fee in BRB Nos. 98-874/A is modified to reflect an award of an attorney's fee in the reduced amount of $3,300 payable to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203. Claimant's counsel's request for sanctions against employer's counsel is denied.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4]Counsel was not disbarred; he was suspended for two years for mishandling a Longshore Act claimant's escrow account.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge