BRB Nos. 92-1893
and 92-1893A

J. B. MARTIN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	)
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Decision and Order on Motion for Reconsideration of James J. Butler, Administrative Law Judge, United States Department of Labor.

Dorsey Redland, San Francisco, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and Decision and Order on Motion for Reconsideration (90-LHC-863) of Administrative Law Judge James J. Butler 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 if they 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).

Claimant injured his back, left elbow and left shoulder while working for employer as a

general laborer on December 18, 1987. Claimant has not worked since that date. Employer voluntarily paid temporary total disability benefits at a weekly rate of $616.96 from December 19, 1987 through April 20, 1988, and from July 5, 1988 through April 28, 1989. In the Decision and Order, the administrative law judge found that the December 1987 injury aggravated claimant's underlying back condition and that claimant reached maximum medical improvement on December 28, 1990. The administrative law judge found that claimant could perform two cashier jobs identified by the vocational consultant, Sylvia Oberti, on March 30, 1990, and that therefore employer established the availability of suitable alternate employment.

The administrative law judge found that the maximum compensation rate as provided by Section 6(b)(1), 33 U.S.C. §906(b)(1), is applicable to payments of temporary total disability, and he awarded claimant temporary total disability benefits at the applicable maximum compensation rate from December 18, 1987 through March 29, 1990. 33 U.S.C. §908(b). The administrative law judge awarded claimant temporary partial disability benefits from March 30, 1990 through December 27, 1990, and permanent partial disability benefits from December 28, 1990 and continuing. 33 U.S.C. §908(c)(21), (e).

The administrative law judge found that employer's failure to pay temporary total disability benefits at the maximum rate after September 30, 1988, renders it liable for a Section 14(e) penalty for ten percent of the difference between the amount employer paid and the applicable maximum rate. 33 U.S.C. §914(e). The administrative law judge denied claimant payment of past medical expenses, but awarded future medical expenses pursuant to 33 U.S.C. §907. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), and awarded claimant's counsel an attorney's fee of $17,868.01, including costs.

Employer moved for reconsideration, contending that cost of living increases under Section 10(f), 33 U.S.C. §910(f), do not apply to periods of temporary total disability, and that therefore it should not be required to pay the new maximum rate after October 1, 1988, and should not be assessed a Section 14(e) penalty. In a Decision and Order on Motion for Reconsideration, the administrative law judge modified his original decision, noting that after October 1, 1989, the weekly compensation rate no longer exceeded the statutory maximum, and that therefore employer was required to pay claimant the statutory maximum compensation rate only from December 18, 1987 through September 30, 1989. From October 1, 1989 to March 29, 1990, claimant is entitled to temporary total disability benefits at two-thirds of his actual average weekly wage. The administrative law judge further stated he had not applied Section 10(f) to increase the compensation rate, as Section 10(f) is limited to cases of permanent total disability or death, but that the statutory maximum rate provided by Section 6(b)(1) does apply to periods of temporary total disability to increase the rate to the new maximum each year. The administrative law judge reaffirmed his assessment of the Section 14(e) penalty.

On appeal, employer contends that the administrative law judge erred in finding that the maximum compensation rate under Section 6(b)(1) is applicable to periods of temporary total disability. BRB No. 92-1893. Claimant responds, urging affirmance. On cross-appeal, claimant

contends that the administrative law judge erred in finding that employer established suitable alternate employment, erred in denying past medical expenses, and erred in reducing the requested attorney's fee. BRB No. 92-1893A.[1] Employer responds, urging affirmance.

In its appeal, employer contends that the administrative law judge erred in subjecting its payments of temporary total disability benefits to the maximum compensation rate pursuant to Section 6(b)(1). Employer contends that neither Section 10(f) nor Section 6(b)(1) applies to periods of temporary total disability. Employer therefore also contends it should not be assessed a Section 14(e) penalty for failing to pay benefits at the statutory maximum rate.

By its terms, as the administrative law judge properly noted, Section 10(f) cost of living adjustments do not apply to periods of temporary total disability.[2] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT)(9th Cir. 1990); *see also Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990). Moreover, the Board has held that the increase in the Section 6(b)(1) compensation rate does not apply to temporary total disability benefits. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Section 6(c) provides:

> Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(c). The Board has held that the term "newly awarded" refers to the time benefits commence. *Puccetti*, 24 BRBS at 31-32. Thus, in the year a claimant first receives temporary total disability benefits, he is entitled to benefits at the maximum compensation rate as he is "newly

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[1]In an Order dated June 26, 1992, the Board dismissed claimant's appeal, BRB No. 92-1578, as premature as the administrative law judge had not yet ruled on employer's Motion for Reconsideration. Following the issuance of the administrative law judge's Decision and Order on Motion for Reconsideration, employer filed a timely notice of appeal which the Board acknowledged as BRB No. 92-1983. Claimant filed a timely notice of cross-appeal, 20 C.F.R. §802.205(b), which the Board did not acknowledge. Nonetheless, the parties filed briefs relative to this cross-appeal. We hereby acknowledge claimant's cross-appeal and assign it the Board's docket number, BRB No. 92-1893A.

[2]Section 10(f) states that:

> Effective October 1 of each year, the compensation or death benefits payable for *permanent total disability or death* arising out of injuries subject to this chapter shall be increased by the lesser of--

an amount equal to the percentage increase in the national average weekly wage or 5 percent. 33 U.S.C. §910(f) (1988) (emphasis added).

awarded" compensation; thereafter, with each successive October 1, because he is not currently receiving permanent total disability or death benefits, he is not entitled to the new maximum rate.

In this case, claimant is entitled to temporary total disability from the date of his injury, and thus is "newly awarded" compensation at this time. The fact that claimant was not actually receiving compensation at the time the new maximum rate went into effect on October 1, 1988, is not relevant to this inquiry, contrary to claimant's contention, as benefits are payable from the date of injury. We therefore reverse the administrative law judge's finding that increases in the maximum rate pursuant to Section 6(b)(1) are applicable to temporary total disability benefits and his finding that employer is liable for a Section 14(e) penalty for failure to increase the temporary total disability payments to reflect the new maximum rate. The decision is modified to reflect employer's liability for temporary total disability benefits at the compensation rate of $616.96 from December 19, 1987 through September 30, 1989.

On cross-appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. The administrative law judge found that claimant could perform the two service station cashier jobs identified by Ms. Oberti as they are within claimant's restrictions and compatible with his skills. The jobs are described as "light," permitting flexible sitting and standing. The administrative law judge considered the restrictions imposed on claimant by his treating physician, Dr. Blackwell, which included no lifting or carrying over 25 pounds, and no bending, lifting, twisting and stooping. Dr. Blackwell opined claimant could perform "semi-sedentary work" which will allow him to sit, stand, and walk in variable periods during the day. Tr. at 250-251. The administrative law judge found that claimant cannot do a "great deal" of driving. Decision and Order at 9. The administrative law judge also found that Ms. Oberti considered Dr. Blackwell's restrictions in identifying the jobs in her survey. The administrative law judge concluded that claimant could perform the two cashier jobs because they allow flexibility in sitting and standing and do not require skills beyond the basic skills claimant possesses.

Claimant contends that the administrative law judge erred in finding that he could perform the cashier jobs because they are located in Union City and Castro Valley, 43 and 38 miles, respectively, from claimant's home (*i.e.*, in Oakland, California), and would require a "great deal" of driving, of which claimant is not capable. Employer responds that claimant exaggerates the driving distances, and that he told Ms. Oberti that he could drive for an hour without discomfort. Claimant also contends that the description of the cashier jobs as "light" is too general to allow a determination regarding their suitability as the specific physical requirements of the job are not listed. Claimant also asserts that Ms. Oberti did not inform the prospective employers that claimant had suffered a back injury or that he scored low in the aptitude tests. Finally, claimant contends that the administrative law judge did not consider claimant's diligent attempts to secure suitable alternate employment, noting that claimant unsuccessfully tried to find work with 24 employers from April through October 1990.

Once claimant establishes he is unable to perform his usual work, he has established a *prima*

facie case of total disability, and employer has the burden to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). The administrative law judge rationally determined that the physical requirements of the cashier jobs are within claimant's restrictions based on the description of the jobs as "light," the fact that they permit sitting and standing as needed, and Ms. Oberti's consideration of Dr. Blackwell's restrictions in identifying the jobs. *See Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991). Moreover, contrary to claimant's contention, the vocational expert is not required to contact potential employers to inquire whether they would hire someone of claimant's general age, background, and disability. *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 6 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

The administrative law judge, however, did not determine whether the commuting distance to the jobs affects the suitability of the cashier jobs. In rejecting the rental car driver and parking lot attendant positions as suitable alternate employment, the administrative law judge relied in part on claimant's testimony that he cannot perform work which involves a great deal of driving.[3] Decision and Order at 9. In light of the conflicting evidence on the issues of claimant's ability to drive and the commuting distance to the identified jobs, we must vacate the administrative law judge's finding that employer established suitable alternate employment. On remand, the administrative law judge should address the suitability of the cashier jobs in light of the conflicting evidence on this issue. *See generally Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992).

If, on remand, the administrative law judge reaffirms his finding that claimant can perform the cashier jobs, he must address whether claimant exercised due diligence in obtaining alternate work. Even if employer shows the availability of suitable alternate employment, claimant can nevertheless establish his entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure such employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Palombo*, 937 F.2d at 73, 25 BRBS at 5-8 (CRT); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990). Claimant does not have to seek the exact jobs identified by employer to establish due diligence. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8 (CRT).

In this case, evidence of record consisting of the list of 24 prospective employers claimant contacted and claimant's testimony that a few of these employers told him they would not hire someone with a cane, and that others did not respond to his calls, could establish claimant exercised due diligence in unsuccessfully attempting to find work. *See* Cl.'s Ex. 25; Tr. at 82-83. On remand,

[3]The administrative law judge also rejected these jobs because they had requirements that exceeded the restrictions placed by Dr. Blackwell.

the administrative law judge should address this evidence, and make appropriate findings regarding the nature and sufficiency of claimant's efforts. *Palombo*, 937 F.2d at 75, 25 BRBS at 9 (CRT).

Claimant next contends that the administrative law judge erred in denying past medical expenses. Claimant seeks reimbursement of $2,210.44 for treatment by Dr. Blackwell from January 5, 1989 to January 11, 1991, and of $1,291.34 for treatment by his chiropractor, Dr. Sclamberg, from May 20, 1988 to August 30, 1988. The administrative law judge denied payment of these bills, finding that claimant submitted evidence in the "form of copies of statements from what appear to be medical providers but there is no indication of the services provided or the total paid to each provider." Decision and Order at 10-11. The administrative law judge stated claimant is obliged to submit evidence of past medical expenses verifying that treatment took place and that the requested amount was incurred. The administrative law judge stated that he cannot order the employer or carrier to pay amounts he is unable to quantify for unidentifiable services. Claimant contends that the outstanding bills are documented in Claimant's Exhibits 21 and 22, and states that employer offered no evidence that the treatment was not for claimant's work injury.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment...for such period as the nature of the injury of the process of recovery may require." The bills of Drs. Sclamberg and Blackwell overall are sufficiently specific to permit an award of medical expenses. The bills list the date of a service, a brief description of the service, and the fee for each service. No argument was raised that the bills claimant submitted for his treatment with Drs. Blackwell and Sclamberg are not related to treatment for claimant's December 18, 1987 injury. We therefore reverse the administrative law judge's finding that the bills are insufficiently specific to support an order of payment. On remand, the administrative law judge must reconsider employer's liability for these medical bills. If the administrative law judge requires additional information to make specific calculations, he may reopen the record to obtain it. *See* 20 C.F.R. 702.338.

Claimant also challenges the administrative law judge's award of an attorney's fee. On May 14, 1991, claimant submitted an attorney's fee petition for $33,923.62, representing 162.7 hours for attorney services at an hourly rate of $150, 44.75 for paralegal services at an hourly rate of $55, and 66.43 hours for legal assistant services at an hourly rate of $40, plus $4,400.17 in costs. Employer submitted objections to the fee petition, to which claimant responded.

The administrative law judge stated that he considered claimant's counsel skill in the preparation and presentation of the case, and the experience and ability of, and fee awards made to, attorneys in similar cases. The administrative law judge found that claimant's counsel is an acknowledged expert in the field of longshore compensation, and that therefore an hourly rate of $150 is appropriate. He found, however, that "the time spent on trial preparation and marshalling evidence for what was essentially a simple back claim does not reflect the economy of time spent which should be expected." Decision and Order at 12. The administrative law judge found that there was much duplication and excessive billing for time spent on review, organization and

summary of evidence, and billing as professional services time spent on clerical tasks. The administrative law judge stated that he agreed with employer's objections that much of the work performed was duplicative and unnecessary, and incorporated by reference employer's objection to the fee petition which he "adopt[ed] in its entirety because it coincides entirely with [his] considered view of the issue." Decision and Order at 12. The administrative law judge concluded that claimant is entitled to an attorney's fee of $17,868.01 representing 85 hours of attorney services at an hourly rate of $150 an hour, 21.5 hours at an hourly rate of $55 for paralegal services, 8.5 hours for legal assistant services at an hourly rate of $40, and $3,595 in costs.

Claimant contends that the administrative law judge's reduction of the fee request in the exact amount requested by employer without a detailed explanation is arbitrary and an abuse of discretion. Claimant further contends that the case was not routine and was vigorously contested by employer. The amount of an attorney's fee award is discretionary, and may be set aside only if the challenging party establishes that it is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock*, 12 BRBS 272 (1980).

Generally, the administrative law judge should not adopt one party's pleading as his findings, *see generally Orange v. Island Creek Coal Co.*, 3 BLR 1-636 (1981), and should specify the entries he is reducing and give reasons for it. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 287-288 (1990) (Lawrence, J., concurring and dissenting on other grounds). In this case, however, the administrative law judge stated that the number of hours claimed was not warranted for a case of this nature, and that the fee petition contains duplicative and excessive billing. The administrative law judge further cautioned against "overlawyering" and stated that the fee inquiry should not "dwarf the case in chief," citing *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 377 (3d Cir. 1987). Decision and Order at 12. As stated by Justice Powell in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), "billing judgment" must be exercised. *See also Riverside v. Rivera*, 477 U.S. 561 (1986). Given the administrative law judge's general consideration of the relevant criteria, 20 C.F.R. §702.132, and his finding that the fee requested was excessive, we affirm the administrative law judge's attorney's fee award as claimant has not established an abuse of discretion. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395, 402 (1990).

Accordingly, the administrative law judge's finding that claimant is entitled to temporary total disability benefits from October 1, 1988 through September 30, 1989 at the maximum rate in effect that year is reversed, as is the assessment of a Section 14(e) penalty. The administrative law judge's award of permanent partial disability benefits, and his denial of payment for past medical expenses are vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Law Judge