

ROOSEVELT EZELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECT LABOR,)	DATE ISSUED: <u>MAR 17, 2003</u>
INCORPORATED)	
)	
and)	
)	
THE GRAY INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand, and Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

H. Edward Sherman (Law Offices of H. Edward Sherman), New Orleans, Louisiana, for claimant.

Robert S. Reich and Lawrence R. Plunkett, Jr. (Reich, Meeks & Treadway, L.L.C.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand, and Order Denying Motion for Reconsideration (95-LHC-2763) of Administrative Law Judge Clement J. Kennington 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965); 33 U.S.C. §921(b)(3). This is the second time this case is before the Board.

To recapitulate the facts, Direct Labor, Inc. is a company that supplies labor for Chet Morrison Contractors. Claimant worked for employer as a rigger from June 27 through September 7, 1994. On the date of injury, August 10, 1994, he was assigned to work as a rigger on an oil production facility in the Bayou Penchant Oilfield, which was surrounded by water and marsh and accessible only by boat via various canals. Claimant suffered a work-related back injury, when, while riding on a boat returning from this site, the boat took a sharp turn and claimant struck his back against the side of the boat. After being treated at a hospital, claimant returned to light-duty work the following day at his usual wages. Employer referred claimant to an orthopedist, Dr. Walker, who diagnosed claimant as suffering from a lumbar spine contusion and recommended that claimant be limited to light-duty activities with no lifting or handling objects more than 30 to 40 pounds, and only occasional bending, stooping and twisting.

Claimant's light-duty position with employer was supervised by Cindy Matherne, employer's health and safety director, who assigned claimant to work in the purchasing trailer under the supervision of Craig Guidry, employer's purchasing manager, performing such tasks as emptying trash, sweeping the floor, and making coffee. Ms. Matherne also encouraged claimant to perform work in employer's yard whenever his tasks in the trailer were completed, but advised claimant not to perform any work in the yard that caused him discomfort, even if it was within Dr. Walker's restrictions. Ms. Matherne monitored claimant's medical condition, accompanying him to his medical appointments. Although claimant complained to Dr. Walker that his work activities were causing him pain, claimant never specified the tasks that caused him pain, and admitted that he never directly complained to Ms. Matherne, Mr. Guidry or any supervisor that the work he performed in the yard was too difficult for him.

After leaving work on September 7, 1994, claimant secured a letter from Dr. Walker stating his physical restrictions and gave it to his wife, who then gave it to employer. Thereafter, claimant did not return to work for employer, and he has not been gainfully employed since September 7, 1994, although employer continued to leave open for claimant its light-duty position at claimant's usual pay rate. Claimant continued treatment with Dr. Walker until January 19, 1995, when Dr. Walker, noting a lack of effort or malingering with respect to claimant's functional capacities evaluation with non-physiological findings, opined in his report that surgery would not

¹While Direct Labor is the responsible employer, for convenience these companies are jointly referred to as "employer" herein, as no distinction is made between duties assigned by Direct Labor and Chet Morrison during the relevant period of employment.

benefit claimant, that claimant would not progress under his care, and that claimant should be referred elsewhere for additional treatment. Dr. Walker maintained claimant on light-duty restrictions for an additional month. Claimant thereafter filed a claim under the Act seeking permanent total disability compensation.

In his initial Decision and Order, the administrative law judge determined that claimant's injury occurred on navigable waters while in the course of his employment and thus concluded, pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), that claimant was covered under the Act. The administrative law judge next found that claimant reached maximum medical improvement on January 19, 1995, based on the report of Dr. Walker. Thereafter, he determined that employer established the availability of suitable alternate employment by virtue of its light-duty position, and therefore found that claimant was entitled to temporary total disability compensation from August 10, 1994, until January 19, 1995, based on an average weekly wage of \$307.50. 33 U.S.C. '908(b). Lastly, the administrative law judge determined that claimant was not entitled to reimbursement for the treatment of Dr. Vogel, but is otherwise entitled to medical benefits for treatment of his work-related injury under Section 7 of the Act, 33 U.S.C. '907.

In subsequent post-decision orders, the administrative law judge denied claimant's requests to submit additional exhibits into the record, and denied claimant's motion for reconsideration. In a Supplemental Decision and Order awarding an attorney's fee, the administrative law judge disallowed all entries for services performed prior to the time the case was transferred to the Office of Administrative Law Judges, and due to claimant's minimal success, disallowed 90 percent of the remaining hours requested by counsel. Thus, he awarded claimant's counsel an attorney's fee of \$3,100, and \$17,079.18 in costs.

Both parties appealed the administrative law judge's decision to the Board. On appeal, the Board vacated the administrative law judge's decision and remanded the case for a determination as to whether claimant was "transiently and fortuitously" on navigable water at the time of his injury, in light of the then-recent holding of the United States Court of Appeals for the Fifth Circuit in *Bienvenu v. Texaco*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*). *Ezell v. Direct Labor Inc.*, 33 BRBS 19, 23 (1999). The Board instructed the administrative law judge, on remand, that if he determined that claimant was not covered pursuant to *Perini* and *Bienvenu*, then he must consider whether claimant's overall employment duties independently satisfied the status requirement under Section 2(3) of the Act, 33 U.S.C. '902(3).

²Since it was undisputed that claimant's injury occurred on navigable water, the Board held that the situs requirement under Section 3(a) of the Act, 33 U.S.C. '903(a)(1994), was met. *Ezell*, 33 BRBS at 23 n. 5.

Ezell, 33 BRBS at 23. Considering the merits of the case, in the interest of judicial economy, the Board affirmed the administrative law judge's determinations that claimant reached maximum medical improvement on January 19, 1995, that employer established suitable alternate employment by virtue of its light-duty position at the same wages claimant earned prior to his injury, and that claimant's average weekly wage was \$307.50. *Id.* at 24-27. The Board, however, vacated the administrative law judge's award of temporary total disability benefits for the period between August 10, 1994, and September 7, 1994, as it was inconsistent with his findings that claimant was capable of performing the light-duty work assigned at that time, that this work was within claimant's physical limitations, and that this position was not sheltered employment. Moreover, the Board observed that the administrative law judge made no determination that claimant performed this light-duty job only with extraordinary effort and in spite of excruciating pain. On remand, the administrative law judge was instructed to consider whether claimant is entitled to an award of temporary partial disability benefits for this period. *Id.* at 26-27. The Board further held that the administrative law judge did not abuse his discretion in excluding post-hearing evidence from the record, but vacated his denial of reimbursement for the treatment provided by Dr. Vogel and instructed the administrative law judge to reconsider this issue. *Id.* at 27-29. Lastly, the Board modified the administrative law judge's award of an attorney's fee to reflect that the requested hours for work performed before the administrative law judge totaled 347.58, and instructed him, on remand, to consider whether the attorney's fee award should be increased in view of this change. *Id.* at 29-31.

On remand, the administrative law judge held a new hearing. At the hearing, claimant testified regarding his work at the platform or tank battery in the Bayou Penchant Oilfield, stating for the first time that he performed work on barges utilized by the employer at the job site, in addition to working on the platform itself. In his decision on remand, the administrative law judge rejected claimant's testimony that he performed work on barges. The administrative law judge then found that claimant traveled by boat only when going to and from the oil platform. Based on this finding, he concluded claimant was transiently and fortuitously on navigable waters when he was injured. Thus, the administrative law judge determined that claimant was not covered under the Act. The administrative law judge further determined that claimant did not satisfy the status element under Section 2(3) of the Act, and therefore, was not a covered maritime employee. Assuming, *arguendo*, that claimant's injury was covered under the Act, the administrative law judge determined that claimant did not work in excruciating pain, and therefore was entitled only to an award of temporary partial disability compensation for the period from August 10, 1994 to September 7, 1994. Lastly, the administrative law judge found that claimant is not entitled to reimbursement for the treatment rendered by Dr. Vogel.

On appeal, claimant challenges the administrative law judge's Decision and Order on Remand. Specifically, claimant contends that the administrative law judge erred in finding that he was transiently and fortuitously on navigable water at the time of his injury, and consequently, that he did not establish coverage under the Act pursuant to *Perini* and *Bienvenu*. Alternatively, claimant asserts that the administrative law judge erred in finding that the status element for coverage under Section 2(3) was not satisfied. Claimant further asserts that the administrative law judge committed error in finding that he is entitled only to temporary partial disability compensation, and that he is not entitled to reimbursement for the treatment rendered by Dr. Vogel. Employer responds, urging affirmance.

Coverage

Claimant argues that he is covered under the Act on the basis that he was, by virtue of his employment, transported by boat for 18 of the 34 days (53 percent) he worked pre-injury and since he performed more than eight percent of his total work from barges located on navigable water. Claimant first maintains that the Fifth Circuit, in *Bienvenu*, did not intend to exclude from coverage a worker, like himself, who was routinely transported to a worksite over water and was injured during such transport. Additionally, claimant avers that the administrative law judge improperly discredited his uncontradicted testimony regarding his work on three barges. Claimant argues that a review of the actual work conducted at the tank battery, based on the record as a whole, establishes that claimant routinely performed work on the barges.

Before the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, a claimant had to establish that his injury occurred "upon the navigable waters of the United States (including any dry dock)...." See 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable water who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he is a maritime

³By Order dated January 19, 2001, the Board dismissed claimant's appeal and remanded the case to the district director for reconstruction of the record. After receiving the record, claimant's appeal was reinstated as of March 18, 2002.

employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991).

In *Bienvenu*, 164 F.3d 901, 32 BRBS 217(CRT), the United States Court of Appeals for the Fifth Circuit held that a worker injured upon navigable waters is engaged in maritime employment and meets the status test if his presence on the water at the time was neither “transient nor fortuitous.” The court declined to set “the exact amount of work performance on navigable waters sufficient to trigger [Longshore Act] coverage,” instead electing to leave “that task to the case-by-case development for which the common law is so well suited.” *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223(CRT). The court, however, provided “some guiding thoughts on the matter,” stating that “the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat,” and that “the routine activity of assisting in tying the vessel to the dock and loading or unloading one’s tools and personal gear onto the vessel do not count as meaningful job responsibilities.” *Id.* The court held claimant in *Bienvenu* covered because he spent 8.3 percent of his time working on production equipment aboard a vessel. As this time was sufficient to confer coverage, the court did not consider whether the time claimant spent aboard the vessel being shuttled to various platforms should be included in determining whether claimant spent sufficient work time on navigable waters. *Id.*, at n. 6.

In addressing the present case initially following issuance of *Bienvenu* the Board remanded the case for further consideration, as it was not clear from the record at that time how often claimant was required to travel by boat over navigable waters in the course of his employment and how much work he performed on water. Accordingly, the Board remanded the case in light of *Bienvenu* for consideration of whether claimant was “transiently and fortuitously” over navigable water at the time of his injury, taking into consideration how often claimant was required to go aboard a vessel to work or travel by boat in order to perform his employment duties. In his decision on remand, the administrative law judge discussed claimant’s testimony at the original and supplemental hearings regarding his job duties with employer. The administrative law judge observed that, at the initial hearing, claimant testified that prior to his injury, his job with employer consisted of cleaning up employer’s yard and barges, working in the mechanic shop, and performing other general duties. October 20, 1997, Transcript (Tr.) at 214-246. He confirmed this work in his

⁴This language is derived from the decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 324 n. 34, 15 BRBS 62, 81 n. 34(CRT) (1983), wherein the court, noted it expressed no opinion on whether coverage extends to a worker “injured while transiently or fortuitously on actual navigable water.”

testimony at the supplemental hearing. October 12, 1999, Transcript (Tr. SH) at 186-189. On the day of claimant's work accident, he was assigned to assist in the threading of pipe on an inshore platform in the Bayou Penchant Oilfield, which was located approximately 35 to 40 minutes away by boat from employer's shoreside facility and accessible only by boat through a series of bayous, canals, and the Intercoastal Waterway. Tr. at 257-263. At the supplemental hearing, claimant testified regarding his work at the Bayou Penchant platform, which occurred on July 18-22, 25-29, and August 1-3, 8-10, 1994. Claimant stated that in addition to working on the platform, he and his fellow crewmembers were required to work on three barges (sludge, crane or spud, and tank) at differing times. Claimant's Exhibit (CX) A at 122-124, 191-196. Claimant stated that he worked three barges at the job-site, although he could not recall what he did on the sludge barge, Tr. SH at 83-86, 105-110, 124-126, 130, and that he spent about two to three days going back and forth between the platform, tank and crane barges, although he could not estimate the amount of time he spent on the tank barge. Tr. SH at 133-135, 140, 141. On cross-examination, claimant admitted that most of his work was performed on the fixed platform replacing creosote boards and in pipe threading. Tr. SH at 194-200, 212-214, 227.

In evaluating this evidence, the administrative law judge declined to credit claimant's testimony regarding his work on the barges as claimant failed to previously mention this work despite multiple prior depositions and extensive court appearances, and as no other employees substantiated his testimony, Decision and Order on Remand at 4. The administrative law judge also found that while claimant estimated he spent 50 percent of his time on the barges, he was unable to explain how he arrived at this estimate and admitted that he could not recall the exact nature of the work he allegedly did on the sludge barge. *Id.* Consequently, the administrative law judge declined to credit claimant's testimony regarding working on the barges and determined that claimant's work in the Bayou Penchant was limited to the tank battery or fixed platform. As the administrative law judge provided a rational explanation for discrediting claimant's testimony regarding his alleged performance of work on barges, and it is within his authority as factfinder to do so,

⁵The administrative law judge also examined the details surrounding the only other job wherein claimant was required to travel by boat, which involved assisting in a turbine installation at a Tenneco Gas platform off Cocodrie, Louisiana. The administrative law judge found that the job lasted about four days, that claimant made two trips to and from the platform staying overnight on the platform on one occasion, and that at no time did this job involve any work on vessels or barges.

⁶Claimant is correct in asserting that *Bienvenu* changed the standard previously enunciated by the court, since all that was required prior to the *Bienvenu* holding was that claimant be injured on navigable waters, see *Randall v. Chevron, U.S.A.*, 13 F.3d 888 (5th Cir.), *cert. denied*, 513 U.S. 994 (1994), a test claimant

this finding is affirmed. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). As the evidence credited by the administrative law judge establishes that claimant's actual work at oil facilities was performed on the platform, we are left with the question reserved in *Bienvenu*, *i.e.*, whether claimant's time on navigable water going to and from a platform is included in determining whether he was "transiently and fortuitously" on navigable water when injured.

The record establishes that claimant herein traveled by boat 53 percent, or 18 out of 34 days, of his workdays. Tr. SH at 69-82. The administrative law judge determined that claimant's position in traveling by boat to and from the Bayou Penchant and Tenneco Gas platforms was solely as a passenger since he performed no significant work on the water. The administrative law judge rejected a finding of coverage based on this time, concluding that claimant did not perform "significant work on water and thus was only fortuitously or transiently on navigable waters when he was injured." Decision and Order on Remand at 5. In this regard, the administrative law judge found that the instant case is analogous to the decision in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), as claimant was essentially a land-based worker who took a boat, or "water taxi," to work. The administrative law judge noted that "there is no precedent to establish coverage merely by riding to and from the jobsite once a day." Decision and Order on Remand at 5 n. 5. Accordingly, the administrative law judge concluded that pursuant to *Bienvenu* and *Perini*, claimant's injury is not covered under the Act.

We cannot affirm the administrative law judge's finding that claimant is not covered under the Act. In *Perini*, the Supreme Court held, based on its decisions in *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941), *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), and other pre-1972 cases, that a claimant injured in the course of his employment on navigable waters was covered prior to 1972. Analyzing the 1972 Amendments, the court concluded that such a claimant remained covered post-1972. In the instant case, it is unquestioned that claimant sustained his injury during the course of his employment on navigable waters. The Court in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), reserved the question of whether a workman aboard a vessel "transiently or fortuitously" enjoyed coverage under the Act. The Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427 n. 13, 17 BRBS 78, 84 n. 13(CRT)

clearly met. Thus, claimant's failure to previously describe his specific work duties and where they occurred is not, in and of itself, a sufficient ground for discrediting his testimony regarding his alleged work on barges. Nonetheless, we affirm as the administrative law judge based his determination on other valid factors which are supported by the record.

(1985), reiterated this reservation.

The *Bienvenu* court specifically addressed the question reserved by the Supreme Court and concluded that the signals in the Supreme Court's opinions in *Perini* and *Herb's Welding* "indicate the Supreme Court would hold that a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA." *Bienvenu*, 164 F.3d at 99, 32 BRBS at 234(CRT).

Addressing *Bienvenu* in *Ezell*, the Board stated that "[w]hile *Bienvenu* rules out coverage for employees who are transiently and fortuitously on navigable water at the time of injury, it does not hold that a worker injured on navigable water during the course of his employment should be denied coverage under the Act if he is regularly required by his employment to travel by boat over navigable water, as well as where he performs some work on a vessel." *Ezell*, 33 BRBS at 22. Focusing on the language in *Perini*, i.e., that Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered by the Act before 1972, the Board observed that pre-1972 case law "provides guidance in applying *Perini* and *Bienvenu*," and discussed the two pre-1972 Supreme Court decisions addressed in *Bienvenu*, *Parker*, 314 U.S. 244 (the Court held that a janitor who was killed in an accident while accompanying a salesman during a demonstration of a motor boat was covered under the Act, reasoning that habitual performance of other duties on land did not alter the fact that at the time of the accident the employee was riding in a boat on navigable water), and *O'Rourke*, 344 U.S. 334 (the Court rejected a "duties test" in determining coverage when a worker is injured on navigable water, holding that a railroad employee who suffered an injury on a car float was covered under the Act, as the injury occurred on navigable water). *Parker* and *O'Rourke* establish that prior to 1972, claimant's coverage was not dependent upon the performance of specific duties while on navigable waters.

⁷In *Herb's Welding*, the court held that a worker injured on a fixed oil platform in state waters was not covered as he was a land-based worker, since a fixed platform is akin to an island, and he was not engaged in maritime employment under Section 2(3). The Court noted that "Gray traveled between platforms by boat and might have been covered, before or after 1972 had he been injured while in transit." *Id.*, 470 U.S. at 427 n. 13, 17 BRBS at 84 n. 13(CRT). The Court cited *Perini* as support for this proposition, but followed it with a "but see" citation to the *Perini* court's reservation of opinion with regard to those "transiently or fortuitously" on navigable waters. After stating that any coverage attributable to the Longshore Act itself was *de minimis*, the Court concluded by noting "in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.*

It is consistent with this precedent to hold that an employee who is regularly assigned by his employer during the course of his employment to travel on navigable waters is covered under *Perini*. Such an employee is not “transiently or fortuitously” on navigable waters, but is there because it is a regular part of his job assignment. The term “transient” is defined as “passing through or by a place with only a brief stay or sojourn,” and “fortuitous” means “occurring by chance.”

Applying these definitions, determinations as to whether a claimant’s presence on navigable waters is “transient” or “fortuitous” must turn on factors such as whether claimant’s presence on navigable waters is a regular part of his job assignments or a matter of chance, whether it happens frequently or is a rare occurrence, and whether it lasts for an extended period of time. In this case, claimant was required to regularly travel by boat, 45 minutes each way, to specific jobs assignments during the course of his day and as part of his overall work. These facts distinguish the present case from *Brockington*, 903 F.2d 1523, upon which the administrative law judge herein relied to deny coverage.

In *Brockington*, an Eleventh Circuit decision cited with approval in *Bienvenu*, claimant was a land-based electrician whose primary work involved wiring buildings. Claimant’s employer contracted to do electrical work at a building on an island. Rather than take a ferry to this job, claimant and a co-worker commuted to the job using the co-worker’s private motorboat. Claimant was injured on this vessel. Applying the occupational test of *Herb’s Welding*, the court held claimant was not a maritime employee. Relevant to this case, the court stated that “it cannot even be said that Brockington *regularly* traveled over water to more than two jobsites in the ten years he was employed by [the employer],” and thus, that “his only connection with the water was the fact that he happened to be traveling over it incidental to land-based employment.” *Brockington*, 903 F.2d at 1528 (emphasis added). It is clear that in *Brockington*, claimant was using water transportation to commute to his job. In contrast, claimant herein was already at work when required by his employer to travel by water to his work assignment. He was given this assignment on a regular basis, and thus his presence on the water was not merely incidental to his employment. Rather, claimant’s presence on the boat involved a significant portion of his day and was a necessary part of his overall employment. Unlike *Brockington*, claimant was not merely commuting to work.

Moreover, specific “duties” on a vessel are not required in order for a claimant to be covered under *Perini*. The heart of the *Perini* holding is that a

⁸ Merriam Webster Online Dictionary, <http://www.m-w.com/home.htm>.

⁹As we noted in our prior decision, the Eleventh Circuit did not cite *Perini* or discuss its holding. *Ezell*, 33 BRBS at 22 n.2.

claimant covered prior to 1972 did not lose that coverage after the 1972 Amendments. Prior to 1972, the Supreme Court specifically rejected a duties test. *O'Rourke*, 344 U.S. 334. It is contrary to the holding in *Perini* to now require some form of specific duties for coverage. Once employer assigned claimant to travel to a platform by water, he was performing a work assignment during the duration of his time on the boat. Consequently, we hold, based on the facts of this case, and consistent with the Supreme Court's decisions in *Perini*, *O'Rourke*, and *Parker*, that claimant's travel by boat to and from his worksites on 53 percent of his days prior to his injury is sufficient to establish that his presence on navigable waters was not transient or fortuitous. We therefore reverse the administrative law judge's conclusion to the contrary, and hold that claimant has, as a matter of law, established that he is covered under the Act.

Extent of Disability

Claimant next contends that the administrative law judge erred in finding that he did not work in excruciating pain in his post-injury light-duty position with employer from August 10, 1994, until September 7, 1994, and thus in denying temporary total disability benefits for that period of time. Claimant asserts that the evidence of record, and in particular the time cards showing that he performed yard work beyond his restrictions, in addition to the notes and

¹⁰ In light of this disposition, we need not consider the administrative law judge's finding that claimant's overall employment duties did not independently satisfy the status requirement under Section 2(3) of the Act, as that issue is moot.

¹¹ These time cards, which cover claimant's post-injury light-duty employment with employer, were not admitted into the record by the administrative law judge. Claimant maintains that the administrative law judge's refusal to admit this evidence is erroneous. Each of these time cards, written in claimant's hand, lists his name, the date and hours worked, and a general description of claimant's tasks. Specifically, one card lists "cleaning & maint.," a second lists "shop & yard maint.," and the remainder simply list "yard work." At the second hearing in this case, dated October 12, 1999, the merit of these time cards was discussed at length and the administrative law judge determined, after argument, that they did not significantly add to his earlier decision in this matter. Tr. SH at 49-55. As the administrative law judge determined, these cards, alone, do not establish that claimant was performing post-injury work for employer beyond his limitations. Accordingly, the administrative law judge's reason for excluding this evidence as not relevant to the issues at hand is rational. 20 C.F.R. §702.338. Moreover, claimant has not shown it to be arbitrary, capricious or an abuse of discretion. Consequently, the administrative law judge's refusal to admit this evidence is affirmed. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

deposition testimony of employer's physician, Dr. Walker, establish that claimant was only able to continue to work between August 10, 1994, and September 7, 1994, in excruciating pain and through extraordinary effort.

As the Board previously stated, *Ezell*, 33 BRBS at 26, the fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 216 (1989). Where claimant's pain and limitations do not rise to this level, such factors nonetheless are relevant in determining post-injury wage-earning capacity and may support an award of partial disability based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. See, e.g., *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

In his initial decision, while the administrative law judge found that claimant suffered from accident-related pain during his return to work for employer, that claimant's complaints to Dr. Walker supported this determination, and thus that claimant was temporarily totally disabled despite working during this time, he did not make any determination as to whether this post-injury work was performed with excruciating pain and only through extraordinary efforts. On remand, the administrative law judge considered but rejected claimant's testimony that he worked at all times after his injury in a level 10 pain (0 being no pain, 10 being so intense so as to produce tears), and that he wanted to and did cry all the time as a result of his work duties, since it directly conflicts with claimant's testimony that he never cried while working at employer's facility. The administrative law judge also found that there is no credible evidence to support his position that he was having difficulties in performing this work.

Additionally, the administrative law judge found that the fact that claimant worked substantial hours during this particular time period, August 11, 1994, through September 7, 1994, belies the notion that he was working in excruciating pain. The administrative law judge therefore determined that claimant did not work with

¹²On the contrary, the administrative law judge observed, in his prior decision, that claimant never voiced any complaints to Ms. Matherne or Mr. Guidry about the work he was doing or told either of them that the work went beyond his restrictions, that Ms. Matherne credibly testified that she emphasized to claimant that he should not perform any task which would further his injury, even if the particular task was within the doctor's restrictions, and that claimant never identified specific tasks in this work which allegedly went beyond his physical restrictions. Decision and Order Awarding Benefits at 23.

excruciating pain and only through extraordinary efforts. Moreover, in contrast to claimant's assertion, Dr. Walker's overall opinion does not support a finding that claimant continued to work post-injury with excruciating pain and only through extraordinary effort. In his initial decision, the administrative law judge found that Dr. Walker noted several episodes of either lack of effort or malingering by claimant with non-physiologic findings and a negative straight leg raising which ultimately led Dr. Walker to refer claimant elsewhere for treatment. Consequently, we affirm the administrative law judge's finding that claimant did not work with excruciating pain or only through extraordinary efforts and thus is not entitled to total disability benefits for the period in question, as it is rational, supported by substantial evidence and in accordance with law. *Everett*, 23 BRBS 316.

Nevertheless, in concluding that claimant was not totally disabled during this period, the administrative law judge stated that claimant was entitled to an award of temporary partial disability benefits. Decision and Order at 6. As the administrative law judge denied benefits based on the absence of coverage, he did not make any further findings necessary to an award of temporary partial disability benefits for the period between August 10, 1994, and September 7, 1994. We therefore remand this case for the administrative law judge to render the necessary findings on claimant's entitlement to temporary partial disability benefits.

Medical Benefits

Claimant argues that the administrative law judge erred in denying the medical expenses associated with Dr. Vogel's examination of claimant, particularly since the administrative law judge's finding is based on claimant's incorrect admission that Dr. Vogel was merely hired to be a "litigation expert." Specifically, claimant asserts that the administrative law judge's factual finding that Dr. Vogel was asked to treat claimant only for a state court is contrary to claimant's specific request for prior authorization from employer for medical treatment by Dr. Vogel under the Act, and is erroneously based on invasion of the attorney-client privilege. Additionally, claimant argues that the fact that employer's choice of physician, Dr. Walker, had referred claimant to a neurosurgeon, Dr. McKowen, supports his right to select his own neurosurgeon to examine him, to perform diagnostic testing, and to treat him, if necessary.

In its prior decision, the Board vacated the administrative law judge's denial of reimbursement for treatment provided by Dr. Vogel, and instructed the administrative law judge to consider whether Dr. Walker was claimant's or employer's physician, and then to reconsider whether Dr. Walker's discharge of claimant amounted to a refusal to treat claimant, whether claimant sought authorization for Dr. Vogel's treatment, and lastly, whether Dr. Vogel is a specialist and thus, whether employer is required to consent to Dr. Vogel's treatment. *Ezell*, 33 BRBS at 27-28.

Under Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to

recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. See *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). As the administrative law judge determined on remand that claimant requested authorization for treatment with Dr. Vogel and that employer refused to authorize the treatment, the only issue left for resolution is whether the treatment procured by claimant with Dr. Vogel was reasonable and necessary.

In this regard, the administrative law judge concluded that Dr. Vogel's services were neither reasonable nor necessary for the treatment of claimant's injury. First, the administrative law judge found that it was not reasonable for claimant to seek treatment with Dr. Vogel because of the considerable distance between claimant's residence in Houma, Louisiana, and Dr. Vogel's office, located in New Orleans, Louisiana, especially since other equally qualified physicians, including Dr. Kinnard, who was chosen by claimant, were in the Houma area. See *generally Schoen*, 30 BRBS at 114; *Welch v. Pennzoil Co.*, 23 BRBS 385 (1990). More importantly, the administrative law judge made a factual determination that Dr. Vogel's services were not necessary to the treatment of claimant's condition, and the record supports this conclusion. As the administrative law judge observed, claimant testified at his deposition that Dr. Vogel was not a physician of his own choosing, that he was chosen by claimant's attorney, that he just saw Dr. Vogel in connection with a tort lawsuit in state court against employer, and that he did not see Dr. Vogel with the thought in mind that Dr. Vogel was going to be his treating physician. See Tr. SH at 261-264.

In addressing claimant's testimony regarding his relationship to Dr. Vogel, the administrative law judge considered but rejected claimant's counsel's contentions that claimant's testimony in this matter was not to be trusted due to his low IQ, that employer's counsel was badgering him, and that the fact that claimant saw Dr. Vogel with regard to an unrelated state court matter cannot be considered because it falls within the realm of attorney-client privilege. Specifically, the administrative law judge concluded that the purpose behind the request for Dr. Vogel is highly relevant as to its propriety and employer's obligation to pay for such "treatment." Additionally, the administrative law judge found significant the fact that the record contained no treatment records by Dr. Vogel or any indication that claimant went to Dr. Vogel for continued treatment of his work-related condition. Specifically, the record contains only the deposition testimony of Dr. Vogel; it does not contain any record of treatment by Dr. Vogel. At his deposition, Dr. Vogel stated that he examined claimant on three occasions and that each time he recommended that claimant

¹³ Dr. Kinnard is, however, a specialist in orthopedic surgery whereas Dr. Vogel is a specialist in neurological surgery.

continue with “conservative care,” including heat, massage and rest, for his back injury. CX 18, Dep. at 16, 20, 26-27. It is not clear as to whether Dr. Vogel administered, supervised or referred claimant for any sort of “conservative care” treatment, or whether he simply concurred with Dr. McKowen’s prior recommendation that claimant undergo “conservative care” in order to improve his back condition. Perhaps even more importantly, the record establishes that claimant did, in fact, seek treatment from Dr. Kinnard subsequent to his visits with Dr. Vogel, and was counseled by Dr. Kinnard as to the use of anti-inflammatory drugs for the purpose of treating claimant’s back, thereby further indicating that claimant was not being treated by Dr. Vogel. Lastly, the administrative law judge was swayed by the fact that claimant was referred to Dr. Vogel by his attorney and not by any treating physician. Consequently, the administrative law judge concluded that while claimant has the right to request his own treating physician, he does not have the right to demand that employer pay for experts who have been chosen for the sole purpose of testifying against employer in a state court proceeding. The administrative law judge therefore denied, as unreasonable and unnecessary, the “medical treatment” allegedly administered by Dr. Vogel. As the administrative law judge’s findings are supported by substantial evidence, his denial of medical benefits related to Dr. Vogel is affirmed.

Motion for Modification

Claimant further asserts that the administrative law judge improperly denied his request for modification on the ground that there was no precedent for claimant’s request. Claimant contends that employer’s downsizing or cessation of business should be grounds enough for modification of the order since it is a clear indication that, contrary to employer’s position, the light duty job would no longer be available. The issue as to the effect, if any, that employer’s going out of business would have on a determination regarding the availability of suitable alternate employment was considered by the Board in the prior appeal of this case by employer. *Ezell*, 33 BRBS at 26 n. 9. Thus, the Board’s decision on this issue constitutes the law of the case, and we decline to reconsider it. See *Ion v. Duluth Missabe & Iron Range Ry Co.*, 32 BRBS 268 (1998); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

¹⁴ In any event, there is no evidence in the record that claimant ever sought modification in this case or that the administrative law judge issued any decision regarding an alleged request for modification.

Attorney's Fee Award

Lastly, claimant requests that the Board recalculate claimant's attorney's fee since the administrative law judge, on remand, did not address this aspect of the Board's remand instructions. As previously observed, the Board modified the administrative law judge's supplemental attorney's fee award to reflect that the number of hours requested by claimant's counsel totaled 347.58, as opposed to the 248 hours considered by the administrative law judge, and instructed him, on remand, to discern whether the attorney's fee "award should be increased in view of this change." *Ezell*, 33 BRBS at 31.

On remand, the administrative law judge did not address the Board's instructions to reconsider the attorney's fee award in light of its modification of the total number of hours to 347.58. Rather, the administrative law judge determined that claimant was not covered under the Act. As that finding is herein reversed, we must remand this case for the administrative law judge to fully consider our prior remand instructions with regard to his award of an attorney's fee. We note that although the administrative law judge's finding that claimant is not entitled to temporary total disability benefits is affirmed, claimant is still entitled to an attorney's fee as he successfully obtained an ongoing award of medical benefits for his work-related injuries. Additionally, the administrative law judge has herein been instructed to address claimant's entitlement to temporary partial disability benefits for the period between August 10, 1994, and September 7, 1994, which, if awarded, would likewise support an award of a reasonable attorney's fee in this case.

Accordingly, the administrative law judge's determination that claimant is not covered under the Act is reversed, his findings that claimant is not entitled to temporary total disability benefits and to medical benefits for Dr. Vogel's examinations are affirmed, and the case is remanded for consideration of claimant's entitlement to temporary partial disability benefits and for further consideration of his prior award of an attorney's fee consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge