BRB No. 10-0372

PATRICK OBADIARU	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITT CORPORATION	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 02/23/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Amended Decision and Order, the Supplemental Decision and Order Awarding Attorney Fee, and the Order on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Jerry R. McKenney, Billy J. Frey, Karen A. Conticello, and Wesley K. Young (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/Insurance Company of the State of Pennsylvania.

Alan G. Brackett, Patrick J. Babin, and Wilton E. Bland (Mouledoux, Bland, LeGrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer/ACE American Insurance Company.

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

PER CURIAM:

Employer/Insurance Company of the State of Pennsylvania (ICoSP) appeals the Amended Decision and Order, the Supplemental Decision and Order Awarding Attorney Fee, and the Order on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee (2008-LDA-00366, 2008-LDA-00367) of Administrative Law Judge Robert B. Rae 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who resides in the Netherlands, has been a master mechanic since 1980. Claimant began working for employer in August 2004 as a heavy mobile equipment mechanic on a base in Kuwait. In August 2005, he injured his back while lifting a heavy truck wheel. Although he ceased work and reported the injury immediately that day, Tr. at 29-33, claimant treated himself with Tylenol and returned to work a few days later, continuing in his usual job until May 2006. In May 2006, he saw a doctor on the base and then was permitted to return home for medical treatment and therapy for two months. Employer voluntarily paid disability and medical benefits. ICoSP Ex. 1; Tr. at 35-37. Claimant returned to work in Kuwait in July 2006. He was put on a "light duty" job as a tool/parts attendant which, according to claimant, also involved inspecting vehicles and working six 12-hour days per week. Tr. at 38-39.

Claimant testified that his back began bothering him after his return to work in July 2006, and it worsened over time. In August 2007, claimant requested a three-month medical leave for back treatment, but employer denied the request. Claimant stated that, although there was no new injurious incident, he believed the repetition of performing his duties caused the continuing back pain. An MRI performed in September 2007 revealed disc protrusions and degenerative discs at L3-4, L4-5 and L5-S1, and the doctor imposed restrictions. Claimant resigned from his job in October 2007 due to the continuing pain. Tr. at 40-42, 57, 62-63. He returned home to the Netherlands and has not received any benefits. Claimant stated he has attempted to find alternate work by applying for jobs he believed he could perform after treatment. Tr. at 43, 55-56, 60-61.

The administrative law judge found claimant's testimony to be credible "overall." Amended Decision and Order at 7. Based on claimant's testimony and credibility, his medical records, and claimant's job description, the administrative law judge found that claimant established the existence of working conditions that aggravated his back condition, entitling him to the Section 20(a), 33 U.S.C. §920(a), presumption. *Id.* at 18-21. He also found that employer failed to rebut the Section 20(a) presumption. Because he found that claimant's condition was aggravated at work between July 2006 and October 2007, and employer changed carriers effective July 1, 2007, the administrative law judge assigned liability to the more recent carrier, ICoSP. *Id.* at 21. The administrative law judge also found, *inter alia*, that the claim for the 2005 injury is not time-barred, the claim for medical benefits is not time-barred, claimant cannot return to his usual work or his "light-duty" work, and the jobs proffered by employer as alternate employment are unsuitable.[1] As claimant's condition has not reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits. *Id*. at 22-25. The administrative law judge also found that claimant's average weekly wage is $1,873.85, and, as his compensation rate exceeds the maximum compensation rate under Section 6 of the Act, 33 U.S.C. §906, he is entitled to that rate, $1,160.36, commencing October 13, 2007, the date claimant resigned. With regard to medical expenses, the administrative law judge found that all reasonable and verified expenses occurring before August 1, 2007, are the responsibility of employer/ACE American Insurance Co. (ACE), and from that date forward, they are the responsibility of ICoSP. *Id.* at 20 n.9, 23 n. 11, 25-29. ICoSP appeals the administrative law judge's decision awarding benefits. Claimant and ACE respond separately, urging affirmance.

Subsequent to the issuance of the administrative law judge's Amended Decision and Order, counsel for claimant filed a fee petition with the administrative law judge for work performed between January 24, 2008, and March 3, 2010. He requested a fee of $64,345. The administrative law judge awarded a total fee of $66,822.80, based on an attorney hourly rate of $425, a paralegal hourly rate of $100, and including costs. Supp. Decision and Order at 12. ICoSP filed a motion for reconsideration, arguing that the hourly rate was too high in light of a June 2010 case issued by another administrative law judge. The administrative law judge denied the motion. ICoSP appeals the fee award.

[1]Following the closing of the record and the filing of the briefs, ICoSP filed a motion to reopen the record to submit a video surveillance CD. Claimant sought to have the evidence stricken. The administrative law judge found there was not a good enough reason to reopen the record, and he stated that the video did not weigh in his decision making. However, the administrative law judge also noted that, if he were to consider the video, it would not affect his decision as it does not contradict claimant's testimony. Amended Decision and Order at 2, n.3.

ACE responds, urging affirmance of a fee payable by ICoSP as the responsible carrier. Claimant has filed a response brief, urging affirmance, to which ICoSP replies.

Injury

ICoSP first argues that the administrative law judge erred in finding there was an aggravation of claimant's prior condition and that the current condition is not the natural progression of the first injury. ICoSP asserts that the administrative law judge erred in finding claimant credible, in failing to consider all the evidence, and in failing to find that ICoSP established rebuttal of the Section 20(a) presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition is affected but also where the work causes the claimant's underlying condition to become symptomatic. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

In this case, the administrative law judge found that claimant was a credible witness. Amended Decision and Order at 7. He stated that, after the 2005 work injury, claimant returned to work in 2006 in a light-duty or modified job which he performed for a few weeks before his back started bothering him again; this job as a tool/parts attendant required claimant to receive, store and issue tools, maintain records, take inventories, requisition stock, unpack, store and inspect equipment, and perform other duties as assigned. The administrative law judge found that this job required claimant to stand, climb, bend, work in cramped areas on occasion, and lift/carry up to 75 pounds infrequently. *Id.* at 5, 15-16; Amended ACE Ex. 4. Claimant testified that, in addition to paperwork duties, he was required to climb on and through, and to crawl under, vehicles to perform his inspections. Tr. at 38-39, 53-55. Claimant testified that he had had back pain since the August 2005 injury; however, he stated it got better after therapy in 2006, and, although he had pain again shortly after returning to work, it was not enough pain to cause him to stop working. ICoSP Ex. 7 at 40-41; Tr. at 57-59. He stated that he had no specific new injury, but that the repetition of crawling and climbing made his back worse until he asked for medical leave August 2007 and then resigned in October 2007. ICoSP Ex. 7 at 33-36.

In addition to claimant's credible testimony, the administrative law judge found that the record is replete with claimant's visits to doctors complaining of back pain, as well as a September 2007 MRI revealing disc protrusions and degenerative disc disease and September 2007 doctors' notations of "severe" pain. Cl. Exs. 3, 7-8. Drs. Pustjens, Jarolem, and Schechter all opined that claimant's job duties between July 2006 and October 2007 aggravated or could have aggravated his back condition. Amended ACE Ex. 3; Cl. Exs. 9, 14; ICoSP Ex. 17 at 24, 41-46. Accordingly, the administrative law judge properly found that claimant established a harm and conditions at work after August 2007 that could have aggravated that harm. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Therefore, the administrative law judge properly invoked the Section 20(a) presumption that claimant's back was aggravated by his employment.

ICoSP contends the administrative law judge erred in finding that the Section 20(a) presumption was not rebutted. It asserts it proffered substantial evidence to rebut the presumption, including claimant's statements that his pain was due to the original injury and his questionable credibility due to his motive to fabricate a claim. The administrative law judge found that neither carrier presented evidence rebutting the presumed causal relationship. We affirm this finding.

To rebut the presumption, the employer must produce substantial evidence demonstrating that the claimant's condition was not caused or aggravated by his employment. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). There is no evidence that claimant did not perform the work he said he performed. Additionally, all three doctors of record opined that claimant's employment activity aggravated or could have aggravated claimant's condition and caused increased pain. Cl. Exs. 9, 14; Amended ACE Ex. 3; ICoSP Ex. 17 at 24, 41-46. ICoSP's attempts to discredit claimant, in order to show rebuttal, are misplaced.[2] As employer did not present substantial evidence that claimant's condition was not aggravated by his work, the administrative law judge properly found that employer did not rebut the Section 20(a) presumption and that claimant's back condition is work-related as a matter of law. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *see Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

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[2]We affirm the administrative law judge's reasonable interpretation that claimant did not threaten to deliberately injure himself or to file a false claim against employer. Amended Decision and Order at 11 n.5, 16-17; ICoSP Ex. 14-15.

Responsible Carrier

ICoSP contends the administrative law judge erred in finding it is the responsible carrier. In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer/carrier at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer/carrier on the risk at the time of the aggravation is liable for the entire disability resulting therefrom. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). It is irrelevant that the claimant's condition existed while a prior carrier was on the risk. *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984).

We reject ICoSP's argument that claimant's condition must be the natural progression of his August 2005 injury merely because claimant stated that he experienced continuous pain since the August 2005 injury. Claimant's statements do not require that the administrative law judge reach ICoSP's conclusion. Rather, as stated previously, in addition to testifying that the pain never fully went away, claimant also testified that he felt good enough after therapy to return to work in July 2006. Tr. at 58-59. However, claimant stated that, as time went on, and without further therapy, his pain got worse.[3] ICoSP Ex. 7 at 40-41. Specifically, he stated his condition deteriorated in August 2007 when he was "just doing [his] job," and that repetition made it worse.[4] ICoSP Ex. 7 at 58-59; Tr. at 63. This is supported by the medical records, as, after July 2006, claimant's next doctor's visits were in January, April, and July 2007. Cl. Ex. 3. Thereafter, in early September 2007, claimant underwent an MRI which revealed mild to moderate disc protrusion and degenerative changes and was later advised to go on bed rest due to his severe back pain. Cl. Exs. 3, 8. Moreover, Drs. Pustjens, Jarolem, and Schechter opined that claimant's job duties between July 2006 and October 2007 aggravated his back condition, resulting in disability. Amended ACE Ex. 3; Cl. Exs. 9, 14; ICoSP Ex. 17 at

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[3]Although employer/ICoSP denied claimant's August 2007 request for three months medical leave, it appears claimant underwent five sessions of physical therapy with no success in October 2007. Amended Decision and Order at 5; Cl. Ex. 4; ICoSP Ex. 7 at 80; Tr. at 39-41.

[4]Although claimant listed August 1, 2007, as the date of injury, he testified that there was no particular fall, slip, or twist which aggravated his back. ICoSP Ex. 7 at 58; Tr. at 57. Contrary to ICoSP's assertion, an accidental injury may occur gradually over time and there need not be a specific injurious event. *Gencarelle v. General Dynamics Corp.,* 22 BRBS 170, *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

24, 41-46. As the record contains substantial evidence supporting the administrative law judge's determination that claimant's disability condition is the result of an aggravation due to continued working and is not due solely to the natural progression of his original injury, we affirm that finding. *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). As claimant's aggravation continued after July 1, 2007, when ICoSP came on the risk, the administrative law judge properly held ICoSP liable for claimant's disability benefits.[5] *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT).

Extent of Disability

Usual Work

ICoSP contends the administrative law judge erred in finding claimant to be totally disabled. It argues that claimant did not establish an inability to return to his usual work as a light-duty vehicle inspector and that the administrative law judge did not compare claimant's job duties with his physical restrictions. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his usual employment due to his work-related injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The employee's regular duties at the time he was injured constitute his "usual employment." *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). As claimant was performing the "light-duty" work when he aggravated his injury, that is his "usual work." *Id.*

In this case, the administrative law judge found that claimant cannot return to either his work as a heavy mobile equipment mechanic or to his light-duty work. Amended Decision and Order at 25. The administrative law judge set forth the demands of claimant's job which involved "standing, climbing, bending, and occasionally working in cramped and awkward positions[,]" as well as "lifting and/or carrying 25 pounds on a frequent basis and up to 75 pounds infrequently." Amended Decision and Order at 16;

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[5]It is unnecessary to address whether the administrative law judge erred in finding the claim for benefits for the 2005 injury timely as claimant sought only medical benefits for that injury, and a claim for medical benefits is never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*); Amended Decision and Order at 23 n.10; Cl. Exs. 1-2; Cl. Closing Brief at 22-23. Moreover, as we have affirmed the administrative law judge's finding that claimant's condition is the result of an August 2007 aggravation, the claim for compensation filed in September 2007 for that aggravation is timely. 33 U.S.C. §913(a).

Amended ACE Ex. 4. He also set forth claimant's September 2007 restrictions of no lifting more than 10 pounds, no continuous sitting, standing or walking, no intermittent bending or squatting. Amended Decision and Order at 9; Cl. Ex. 7. As claimant is precluded from lifting over 10 pounds and his job requires potentially lifting up to 75 pounds, as well as working in awkward positions and climbing and bending, substantial evidence supports the administrative law judge's conclusion that claimant's light-duty work exceeded his restrictions. Moreover, the administrative law judge gave great weight to Dr. Schechter's opinion that claimant's condition was aggravated by his job inspecting trucks where he had to crawl and climb. Amended Decision and Order at 11; Cl. Ex. 14; ICoSP Ex. 17 at 23-24. Accordingly, the administrative law judge's determination that claimant cannot return to his usual, light-duty, work inspecting trucks is supported by substantial evidence and is affirmed. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990).

Suitable Alternate Employment

Once the claimant establishes his inability to perform his usual work, the employer bears the burden of establishing the availability of suitable alternate employment so as to establish that the claimant is partially, not totally, disabled. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Gacki v. Sea-Land Service, Inc.,* 33 BRBS 127 (1998). ICoSP argues that it established the availability of suitable alternate employment by virtue of the October 21, 2008, vocational report submitted by ACE. The counselors reported that they interviewed claimant by phone and reviewed medical and employment records. They identified five jobs they believed suitable for claimant: customer service representative for Mercedes Benz answering phone calls from United Kingdom residents, dispatcher for a transportation service company, production worker, salesperson, and mechanic. Amended ACE Ex. 2.

Claimant hired a certified vocational evaluator to rebut employer's vocational report. Mr. Sullivan reported that he interviewed claimant over the phone and in person and reviewed medical and employment records, as well as employer's vocational report. Mr. Sullivan concluded that employer's vocational report is incomplete because it does not identify where the jobs are located or provide contact information for the employers. He also felt that the jobs were unsuitable for claimant because they required computer skills he does not have, they required communication in English which is possible but difficult because claimant has a heavy Nigerian accent, and they are not sedentary, as required by Dr. Schechter. Cl. Exs. 12, 14, 16; ICoSP Ex. 17. Mr. Sullivan opined that claimant has transferrable skills and is capable of learning and performing a sedentary job, but the labor market survey provided by ACE did not identify jobs suitable for claimant. *Id.* The administrative law judge gave dispositive weight to Mr. Sullivan's

report and deposition based on his stronger credentials and greater experience. Amended Decision and Order at 13-15.

In order to establish the availability of suitable alternate employment, employer must demonstrate that there are realistic job opportunities within the geographic area where claimant lives that he could realistically secure. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). The administrative law judge's reasons for giving greater weight to Mr. Sullivan's opinion based on his stronger credentials and greater experience are rational. *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The administrative law judge found that the jobs identified are unsuitable for claimant because they fail to account for claimant's physical restrictions. Amended Decision and Order at 25. He reasonably found that, although claimant might be able to perform the individual tasks of the lighter jobs, his restrictions prevent him from performing them for a significant period of time.[6] *Id.* Moreover, as stated by Mr. Sullivan, the labor market survey does not identify the employers or contact information, does not identify where the jobs are located, and includes jobs requiring computer skills claimant does not have.[7] *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); Cl. Exs. 12, 16. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's findings that employer did not establish the availability of suitable alternate employment and that claimant, therefore, is totally disabled. *See Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). As employer did not establish the availability of suitable alternate employment, we need not address its argument that claimant failed to diligently seek alternate employment.

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[6]The administrative law judge gave little credence to the salesperson and mechanic jobs, as they were identified based on a report by Dr. Pustjens which the administrative law judge found warranted little weight because it was internally inconsistent. Amended Decision and Order at 13.

[7]Claimant was born in Nigeria, is a German citizen, and, since 1996, has lived in the Netherlands. Tr. at 28-29. Unlike the situation in *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003), where the claimant's history of working overseas expanded the relevant labor market to include both the claimant's home-town and locales around the world, the relevant market in this case is limited to where claimant lives. Prior to working in Kuwait, claimant was a mechanic in the Netherlands and did not have a history of working elsewhere. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT).

Average Weekly Wage

ICoSP argues that the administrative law judge erred in calculating claimant's average weekly wage. It asserts that he erred in including travel expenses as wages. Additionally, ICoSP argues that the three pay reports in the record do not constitute substantial evidence supporting a finding that claimant "was consistently making" $1,820 per week. The administrative law judge cited Section 10(a) of the Act, 33 U.S.C. §910(a), and stated that claimant worked substantially the whole of the year prior to August 2007. He found that pay stubs for the months of January and August 2007 corroborated claimant's testimony that he earned approximately $7,000 per month and indicated that claimant was earning approximately $1,820 per week, exclusive of annual payments.[8] The administrative law judge found that, under the contract which became effective on February 1, 2007, claimant was entitled to $17.84 per hour, with a $1,000 signing bonus and $1,800 for annual vacation travel. Adding the annual payments, which the administrative law judge found amounted to $53.85 per week ($2,800 divided by 52), the administrative law judge calculated claimant's average weekly wage to be $1,873.85 ($1,820 + $53.85). Amended Decision and Order at 16, 25-26; ICoSP Ex. 7 at 92.

Section 10(a) provides a method for calculating average weekly wage based on the worker's average daily wage and can be applied unless such application would be unreasonable or unfair or if the facts necessary for application of Section 10(a) are not available. 33 U.S.C. §910(a), (c).[9] Although claimant testified he was a six-day worker and he worked substantially the whole of the year prior to his August 2007 aggravation,

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[8]The administrative law judge found that claimant grossed $7,319.04 for four weeks in January 2007, averaging $1,829.76 per week, and $3,632.98 for two weeks in August 2007, averaging $1,816.49 per week. Amended Decision and Order at 16; Cl. Ex. 11.

[9]Section 10(a) of the Act, 33 U.S.C. §910(a), states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c).

the administrative law judge did not find, and the record does not contain the information necessary to find, the number of days claimant worked during the year preceding his aggravation. Therefore, Section 10(a) cannot be applied. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). However, where the proper Section 10(a) formula is not applied, and the administrative law judge has not made a Section 10(a) calculation, his result may be affirmable under Section 10(c). *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Patterson*, 36 BRBS 149; *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). The administrative law judge's calculation was based on the amounts from two pay stubs offered into evidence which he found indicated "that Claimant was consistently making *approximately* $1,820.00 week, exclusive of annual payments." Amended Decision and Order at 25 (emphasis added). This is a reasonable approximation of claimant's earning capacity based on the limited evidence provided. *See, e.g., Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). Therefore, we affirm the administrative law judge's finding that claimant earned approximately $1,820 per week, albeit under Section 10(c) instead of Section 10(a). *Patterson*, 36 BRBS 149; *Brown v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 110 (1989).

Next, ICoSP argues that travel expenses should not have been included as part of claimant's "wages." Section 2(13) of the Act, 33 U.S.C. §902(13), defines "wages."[10] "Fringe benefits" have generally been characterized as those benefits which cannot be "readily converted into a cash equivalent" as they are too speculative or unpredictable.

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[10]Section 2(13) of the Act provides:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155(CRT) (1983). Under claimant's most recent contract renewal, effective February 1, 2007, and lasting for one year, claimant was to earn $17.84 per hour. He would also receive a $1,000 sign-on bonus (paid in the first pay period) and $1,800 for his annual vacation travel expenses ($1,200 at 6-month mark (August) and $600 at 12-month mark (January)). Cl. Ex. 10. Contrary to ICoSP's categorization of the vacation travel as a "fringe benefit," the contract clearly enumerates the amount employer will pay and when it will pay. *Id.* Other than reaching the six- and 12-month employment marks, there was no defined requirement for receiving the vacation travel amount. Claimant received the first payment in one of his August paychecks. Claimant was not working during the twelfth month of the contract and, therefore, did not receive the $600 travel installment. The administrative law judge properly included the $1,200 installment in claimant's average weekly wage calculation because the amount employer paid was contractual, earned, and readily calculable.[11] *B&D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). However, claimant was not working at the time he would have received the $600 installment. The Board has previously held that the contingent right to a post-injury bonus is too speculative to include in a claimant's average weekly wage. *Johnson v. Newport New Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). As the second payment of travel expenses is similar to the post-injury contingent bonus excluded from the claimant's "wages" in *Johnson*, we hold that the administrative law judge erred in including the $600 in claimant's average weekly wage calculation here. Therefore, we reject ICoSP's argument that the vacation travel payments should be excluded in their entirety; however, because the second installment occurred post-injury, and claimant did not meet the contingency for receiving it, it should not have been included in the average weekly wage calculation. Only $2,200 of the annual payments should be included, and dividing that figure by 52 results in additional weekly wages of $42.31. Accordingly, we modify the administrative law judge's calculation to reflect that claimant's average weekly wage is $1,862.31. *See generally Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

Attorney's Fee

Claimant's counsel requested an attorney's fee for work performed before the administrative law judge. ICoSP objected to its liability for a fee, the hourly rate, the number of hours, the paralegal rate, and the costs. The administrative law judge

[11] We reject the argument that the administrative law judge double-counted this amount. Claimant received the first installment in August. The administrative law judge did not use the wages from that pay period in his calculations. *See* n. 8, *supra*; Amended Decision and Order at 16, 25-26.

determined that Section 28(a), 33 U.S.C. §928(a), applies to this case, as employer did not pay any benefits after its receipt of claimant's September 2007 claim and he rejected ICoSP's argument that Section 28(b), 33 U.S.C. §928(b), applies. As ICoSP is liable for benefits, he found it is also liable for counsel's fee. Supp. Decision and Order at 5-6. Relying on *The Survey of Law Firm Economics* (2009) which demonstrated that attorneys in the South Atlantic Region have a median billing rate of $340 with the top 10 percent at $475, and rejecting ICoSP's evidence of prior fee awards where the cases did not proceed to a hearing, the administrative law judge found that counsel substantiated his request for and is entitled to a fee based on an hourly rate of $425. Supp. Decision and Order at 7-10. Although counsel sought $165 per hour for paralegal time, he did not submit documentation in support of the request, so the administrative law judge determined $100 per hour is reasonable. Additionally, the administrative law judge disallowed 7.8 hours as the work was performed before the district director (6.5 hours of attorney time and 1.3 hours of paralegal time). The administrative law judge rejected the remainder of ICoSP's arguments regarding the number of hours. *Id.* at 10-11. Finally, the administrative law judge rejected ICoSP's arguments pertaining to costs and awarded the amount requested. Thus, the administrative law judge awarded a total fee of $66,822.80. *Id.* at 12. ICoSP moved for reconsideration, arguing that an analysis of hourly rates in a decision issued by another administrative law judge should be applied in this decision. The administrative law judge denied the motion. ICoSP appeals the fee award.

ICoSP contends the administrative law judge erred in awarding over $66,000 for such a "fairly simple claim." It asserts the following: 1) the award is premature as the Board has not issued its decision; 2) Section 28(b) governs the fee liability issue and it is not liable for a fee under Section 28(b); 3) $425 is an excessive hourly rate; 4) failure to hold a "prevailing rate hearing" was erroneous; 5) the administrative law judge erred in failing to consider the Florida prevailing rate set forth in *Patrick v. SEII*, 2009-LDA-00313, 0042 (June 1, 2010); 6) the administrative law judge erred in accepting claimant's past awards showing $400 per hour but disregarding past awards of $250 hour; 7) the administrative law judge erred in awarding a fee for duplicative, unnecessary, excessive and clerical tasks; 8) the administrative law judge erred in awarding a fee for time spent on the response to the motion for reconsideration because claimant "lost" on the motion; and 9) the administrative law judge erred in awarding expenses of $5,000 to "Jim Sullivan" as there was no documentation to substantiate the request. We reject ICoSP's arguments and affirm the administrative law judge's fee award.

Initially, we reject the contention that the fee award is premature. Claimant was successful before the administrative law judge, and he has defended his award before the Board. Although the fee award is unenforceable until all appeals are exhausted, the administrative law judge did not err in issuing a fee award. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). Contrary to ICoSP's arguments, Section

28(b) is not applicable in this case. Although employer/ACE voluntarily paid benefits for the first injury, claimant suffered a second injury and filed a new claim. Employer/ICoSP did not pay compensation within 30 days of receiving notice of the claim and therefore Section 28(a) applies. *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Further, contrary to ICoSP's assertion, claimant's claim was wholly successful such that the fee need not be reduced for partial success. *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993). Additionally, we reject ICoSP's contentions related to the administrative law judge's allowance of specific entries and costs. ICoSP has not shown that the entries were duplicative, unnecessary, or otherwise disallowable, and, contrary to its assertion, the tasks performed by counsel's legal assistant were readily identified and charged accordingly. Thus, ICoSP has shown no error in the administrative law judge determination that the requested services and costs were reasonable and necessary. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010).

We also reject ICoSP's contention that the administrative law judge erred in awarding a fee based on an hourly rate of $425. The administrative law judge did not err in not conducting a "prevailing rate hearing." When a fee request is submitted, the lack of a formal hearing on the matter is not a violation of due process when the fee request is to the judicial or administrative body before whom the work was performed. *Jacksonville Shipyards v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79 (5th Cir. 1978); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Further, the administrative law judge did not err in declining to rely on the fees awarded by other administrative law judges, as he has great discretion in awarding a fee for the work performed before him, and he gave rational explanations for rejecting the evidence provided by ICoSP. *See generally Stanhope v. Electric Boat Corp.,* ___ BRBS ___, BRB No. 06-0924 (Dec. 20, 2010) (Order). As ICoSP presented no hourly rate evidence other than the prior cases without a market rate analysis, and claimant submitted evidence demonstrating regional hourly billing rates as of 2009 on which the administrative law judge rationally relied, we affirm the hourly rate of $425. Therefore, we affirm the administrative law judge's fee award.

Accordingly, the administrative law judge's Amended Decision and Order is modified to reflect claimant's average weekly wage of $1,862.31. In all other respects, the Amended Decision and Order, Supplemental Decision and Order Awarding Attorney Fee, and Order on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge