BRB Nos. 99-0770
and 99-1252

ARTHUR DEWEERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits and Supplemental Order Awarding Attorney's Fees of Ellin M. O'Shea, Administrative Law Judge, and Compensation Order Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Littlefield, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits and Supplemental Order Awarding Attorney's Fees (98-LHC-133) of Administrative Law Judge Ellin M. O'Shea and the Compensation Order Approval of Attorney Fee Application (Case No. 14-114890) of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, an "A" registered longshoreman, injured his lower back at work on October 31, 1993. Claimant did not lose time from work until November 17, 1993. Employer voluntarily paid claimant temporary total disability benefits from November 17, 1993 to April 3, 1994, and April 29, 1994 to July 5, 1994. The administrative law judge found that claimant's average weekly wage is $1,308, calculated from his earnings in the 52 weeks prior to October 31, 1993. The administrative law judge further found that claimant suffered no loss in wage-earning capacity. She averaged claimant's post-injury earnings, discounted for contractual increases, to arrive at a post-injury wage-earning capacity of $1,325.50, which was greater than claimant's pre-injury average weekly wage. Consequently, the administrative law judge awarded claimant a nominal award of $1 per week beginning July 6, 1994, the date of maximum medical improvement and the date he returned to work with employer.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $7,631.25, representing 36.75 hours of attorney services at $200 per hour and 3.75 hours of legal assistant services at $75 per hour, plus $103.43 in expenses. In her Supplemental Order Awarding Attorney's Fees, the administrative law judge awarded counsel $2,360, reducing by two-thirds the total number of hours, and reducing the hourly rate to $185.

Claimant's counsel also filed a fee petition with the district director, requesting an attorney's fee of $2,637.50, representing 13 hours of attorney services at $200 per hour and .50 hours of legal assistant services at $75 per hour, plus $35.50 in expenses. In her Compensation Order Approval of Attorney Fee Application, the district director awarded the sum of $1,279.88, representing 6.625 hours of attorney services at $185 per hour and .25 hours of legal assistant services at $75 per hour, plus $35.50 in expenses.

On appeal, claimant challenges the administrative law judge's average weekly wage determination, her finding that claimant has no loss in wage-earning capacity, and the award of an attorney's fee. BRB No. 99-0770. Claimant also challenges the district director's award of an attorney's fee. BRB No. 99-1252.[1] Employer responds in support of the decisions of both the administrative law judge and the district director.

[1]The Board consolidated claimant's appeals of the administrative law judge's decisions, BRB No. 99-0770, and the district director's fee award, BRB No. 99-1252, in an Order dated December 14, 1999.

Claimant initially argues that the administrative law judge erred in calculating his average weekly wage based on his earnings in the 52-week period prior to October 31, 1993, instead of in the 52-week period prior to November 17, 1993, when he stopped working, citing *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). In *Johnson*, the claimant sustained a traumatic injury in 1979. Inasmuch as claimant did not become permanently disabled by this injury until 1983, however, the United States Court of Appeals for the Ninth Circuit held that claimant's average weekly wage should be calculated with reference to her wages at the time of the 1983 disability, as otherwise claimant's future loss of wage-earning capacity would not be fairly compensated. The disabling effects of the traumatic injury in *Johnson* were not evident until a few years after the date of the accident whereas in most traumatic injury cases the date of disability and the date of injury coincide. *Johnson*, 911 F.2d at 250, 24 BRBS at 6-8 (CRT).

We affirm the administrative law judge's finding that *Johnson* is not applicable in this case. In finding that claimant's average weekly wage was calculable from the earnings prior to the October 31, 1993 accident, the administrative law judge properly found *Johnson* distinguishable based on the fact that claimant became disabled two weeks, rather than years, after the accident, and thus that claimant's disability was not latent. *Fox v. West State Inc.*, 31 BRBS 118 (1997). Indeed, the United States Court of Appeals for the Ninth Circuit has subsequently distinguished its holding in *Johnson* and found it not controlling where the claimant's disability, resulting from a back injury and two previous knee injuries, was not latent since he suffered a significant loss of earning capacity immediately after the work injury. *See Port of Portland v. Director, OWCP [Ronne]*, 192 F.3d 933, 33 BRBS 143 (CRT)(9th Cir. 1999). The court in *Ronne* rejected the argument based on *Johnson* that the claimant's average weekly wage should be based on the claimant's earnings at the time of the resultant back condition and affirmed the administrative law judge's award of total disability benefits based on an average weekly wage at the time of the accident, after which the claimant could no longer return to his usual work. Thus, as her finding in the instant case accords with law, we affirm the administrative law judge's finding that claimant's average weekly wage is $1,308 based on claimant's earnings in the 52-week period prior to the October 31, 1993, accident. *Fox*, 31 BRBS at 118.

Claimant next argues that the administrative law judge erred in finding that he has no loss in wage-earning capacity. The administrative law judge calculated claimant's post-injury wage-earning capacity at $1,325.50 based on the average of claimant's post-injury earnings from 1994-1997 discounted for contractual increases. Claimant contends that the administrative law judge erred in including his 1995 earnings on the night shift at the grain elevator and his earnings resulting from an alleged increase in work opportunity in her determination that his actual post-injury earnings reflect his wage-earning capacity. He also

argues that his actual wages do not account for his inability to perform lineman jobs due to his injury. An award for partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Id.* Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); *see also Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Post-injury wages must be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's pre-injury average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long v. Director, OWCP,* 767 F.2d 1578, 17 BRBS 149(CRT)(9th Cir. 1985).

We affirm the administrative law judge's finding that claimant's actual wages reflect his wage-earning capacity and thus that claimant did not suffer a loss in wage-earning capacity. The administrative law judge rationally included claimant's 1995 earnings from night shift grain elevator work because she found that he was physically able to perform this work and his decision to work nights in 1995 had nothing to do with his injury. The administrative law judge also found it inconsistent that claimant requested that these hours not be included when he was seeking to establish a loss in earning capacity due to his alleged inability to work as a linesman. *See Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997); Decision and Order at 8-9; Tr. at 61, 82. The administrative law judge also acted within her discretion in including claimant's post-injury earnings resulting from an alleged increased work opportunity at the port despite claimant's argument that the holding in *Devillier* requires that any increase in the economy and average port hours to be factored out of claimant's post-injury wages.[2] *See generally Sproull v. Stevedoring*

[2]The administrative law judge did not consider the Pacific Maritime Association average work hours for the Port of Longview set out in Employer's Exhibits 11-16 since no explanation was offered by either party as to what they represent or establish. Likewise, the administrative law judge made no inferences regarding the comparison between the average port hours and claimant's hours since the evidence reflected nuances in the union dispatch/availability system and the choice of work of individual longshoremen. Cl. Ex. 3; Emp. Exs. 8, 11-16; Tr. at 46-49, 56, 72-77. The only conclusion the administrative law

Services of America, 25 BRBS 100 (1991), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); Decision and Order at 9, 12-14; Emp. Exs. 8, 11-16; Cl. Ex. 3; Tr. at 46-49, 56, 66-67, 72-77, 86. Finally, we affirm the administrative law judge's finding that claimant's wage-earning capacity did not decrease because of an inability to take linesman jobs due to his back injury. The administrative law judge rationally credited the opinions of Drs. McRae and Delashaw, who did not state that claimant should avoid linesman jobs due to his back injury, over the opinion of Dr. Finkas, who stated that claimant is not suited for these jobs due to his back injury.[3] *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 9-12; Cl. Exs. 3, 7-9, 11-14, 20-23; Emp. Exs. 8, 18-20; Tr. at 36-37, 49-50, 53-57, 61, 78-79, 84-87. Moreover, the administrative law judge noted that claimant's history of taking linesman jobs was sporadic before his injury, and that he made himself available on the linesman board after stating he could not perform this work.[4] As the

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judge was willing to make from the evidence was that the availability of longshore work at the Port of Longview varies with rises and falls in longshore activities at the port. Tr. at 66-67, 86. These findings are rational.

[3]The administrative law judge did not credit Dr. Finkas' opinion as he was not a medical doctor but a chiropractor, was not claimant's treating physician (Drs. McRae and Delashaw were), and did not appear to know first-hand the physical demands of linesman jobs. Cl. Exs. 20, 22, 23.

[4]The administrative law judge found claimant worked linesman jobs pre-injury when it was convenient for him to do so, did not inform Dr. Delashaw post-injury that he could not

administrative law judge's determination that claimant's actual wages fairly and reasonably represent his post-injury wage-earning capacity, and thus that claimant has suffered no loss in wage-earning capacity is rational and supported by substantial evidence, we affirm it. We also affirm the administrative law judge's nominal award as it is unchallenged on appeal. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997).

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perform these jobs, and worked as a linesman for the first three quarters of 1995. Cl. Ex. 3; Emp. Ex. 8; Tr. at 49-50, 53-57, 84, 86-87. Additionally, the administrative law judge found that claimant inconsistently testified that the bending and pulling of linesman jobs bothered him but that he was able to hunt for elk and deer and afterwards dress them. Tr. at 36-37, 61, 78-79, 84-85, 87.

Claimant lastly challenges the fee awards of both the administrative law judge and the district director. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court held that the attorney's fee awarded in fee-shifting statutes should be commensurate with the degree of success obtained in a given case. This holding applies to cases arising under the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). Claimant's appeal of the administrative law judge's fee award is a protective appeal. Because the Board has affirmed the administrative law judge's nominal award of benefits, the administrative law judge's fee award is also affirmed since the administrative law judge acted within her discretion in disallowing two-thirds of the hours claimed based on the limited success of the case in accordance with *Hensley*. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184 (CRT)(5th Cir. 1999). Similarly, the district director acted within her discretion in disallowing one-half of the hours claimed based on claimant's limited success. We thus affirm the attorney's fee awards of the administrative law judge and the district director.[5]

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits and Supplemental Order Awarding Attorney's Fees are affirmed. The district director's Compensation Order Approval of Attorney Fee Application also is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5]Due to our disposition of this case, we need not address claimant's remaining argument in his appeal of the district director's fee award.