BRB No. 03-0476

PAULETTE POPE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAM INDUSTRIES, INCORPORATED	)	DATE ISSUED: April 2, 2004
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, the Order Denying Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Michael J. McElhaney, Jr. (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Order Denying Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (2001-LHC-2522) of Administrative Law Judge Lee J. Romero, Jr., 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 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).

Claimant was working as a pipefitter on October 4, 1999, when she caught the toe of her boot on the edge of a pallet and started to fall. She caught the skidpad with her right arm bearing her whole weight and pulled herself upright. Claimant felt pain in her neck, right hand and arm, and sought treatment with Dr. Doster, the company doctor, who subsequently referred her to a specialist, Dr. Winters. Dr. Winters diagnosed cervical and shoulder strains, and limited claimant to light duty work. Claimant performed such work in employer's tool room until December 17, 1999, when she was terminated by employer when trash bags were discovered in her purse as she was exiting employer's facility. Claimant has not returned to work since her termination and sought benefits under the Act.

In his decision, the administrative law judge found that following the injury on October 3, 1999, claimant was unable to return to her former employment as a pipefitter and that she reached maximum medical improvement on June 10, 2000. However, the administrative law judge found that employer established suitable alternate employment based on the light duty position claimant held following her injury. Therefore, the administrative law judge found that claimant is entitled to temporary partial disability benefits from October 5, 1999 through December 17, 1999, the date she was terminated for misfeasance. In addition, the administrative law judge found that as claimant was terminated from the light-duty job due to her own misconduct, she is not entitled to benefits for any future loss of wage-earning capacity, and thus denied her further compensation benefits. The administrative law judge based claimant's benefits on her pre-injury average weekly wage of $537.53, and a post-injury wage-earning capacity of $460, representing claimant's loss of overtime. The administrative law judge also found that claimant is entitled to her choice of physician, Dr. Detamore, a neurologist in her new home state, 33 U.S.C. §907, travel expenses for medical treatment, a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), and interest. The administrative law judge denied claimant's motion for reconsideration. In a Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge awarded claimant's counsel a fee of $5,512.50, representing 31.50 hours of legal services at the hourly rate of $175.

On appeal, claimant contends that the administrative law judge erred in finding that she is not entitled to permanent total disability benefits following her discharge from the light-duty position at employer's facility. Alternatively, claimant contends that she is entitled to continuing partial disability benefits. Claimant also contends that the administrative law judge erred in reducing the amount of the attorney's fee award. Employer responds, urging affirmance of the administrative law judge's decision.

In his decision, the administrative law judge found that claimant returned to work with employer following her work-related injury on October 4, 1999, with restrictions against climbing, lifting with her right arm, and performing overhead work, and thus, that

she could not perform the duties of her former occupation. Where it is uncontroverted that claimant is unable to return to her usual employment duties, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Employer may meet its burden by tailoring a job within its own facility to meet claimant's specific restrictions so long as the work is necessary to its operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). The administrative law judge found that employer established suitable alternate employment by providing claimant a position in the tool room which she was able to perform. The administrative law judge also found that claimant was unable to work the 20 hours a week of overtime that she did prior to the work-related injury, and thus that she had a loss of wage-earning capacity of $77.53 per week (average weekly wage of $537.53 – post-injury wage-earning capacity of $460).[1] Thus, the administrative law judge awarded claimant temporary partial disability benefits of $51.69 per week from October 5, 1999 to December 17, 1999. 33 U.S.C. §908(e), (h).

However, the administrative law judge found that as claimant was terminated from her light-duty job due to her own misconduct, employer is not liable for any loss in wage-earning capacity after the date of termination, December 17, 1999. Claimant contends on appeal that the administrative law judge erred in finding that she was terminated because of her own misconduct, but does not identify any specific errors in the administrative law judge's weighing of the conflicting testimonial evidence on this issue. Decision and Order at 24-25. As the administrative law judge thoroughly reviewed all the relevant evidence and is entitled to make credibility determinations, which may not be disturbed unless they are inherently incredible or patently unreasonable, we affirm the administrative law judge's finding that claimant was terminated due to her own misfeasance. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert denied*, 440 U.S. 911 (1979); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is well established that where claimant loses a suitable job in employer's facility due to her own misconduct, employer need not establish the availability of other suitable alternate employment and claimant is not entitled to total disability benefits. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *cf. Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999)(employer bears burden of establishing new suitable alternate

[1] Employer does not challenge this finding on appeal.

employment if it causes a suitable position at its facility to become unavailable due to factors other than claimant's misfeasance). Therefore, the conclusion that claimant is not entitled to total disability benefits after her termination is also affirmed.

However, we cannot affirm the denial of all compensation if claimant suffered a loss in wage-earning capacity in the suitable job employer provided. Claimant is entitled to the continuation of any partial disability benefits to which she was entitled prior to her termination. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). In the instant case, the administrative law judge found that employer established the availability of suitable alternate employment by providing a light-duty position in its tool room, but concluded that claimant suffered a loss in wage-earning capacity as she was unable to perform overtime in the light-duty position. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). As claimant's termination does not affect this established loss, we vacate the administrative law judge's finding that claimant's ongoing loss in wage-earning capacity is not attributable to her work-related injury in any part, and we hold that claimant's termination did not sever employer's liability for continuing partial disability benefits based on the loss in earning capacity existing at the time of termination. *See Mangaliman* 30 BRBS at 43. Therefore, as the evidence establishes that claimant suffered a loss in wage-earning capacity of $77.53 per week in the suitable job provided by employer as a result of her work-related cervical and shoulder injuries, she is entitled to temporary partial disability benefits of $51.69 from the date of injury until the date of maximum medical improvement, June 10, 2000, and to permanent partial disability benefits thereafter.[2] 33 U.S.C. §908(c)(21), (e), (h).

Claimant also contends on appeal that the administrative law judge erred in reducing the attorney's fee award. Although claimant did not file a separate appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee, this issue was raised in claimant's Petition for Review and brief of the decision on the merits. As the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees was issued on April 17, 2003, and filed on that date or thereafter, claimant's appeal of the fee award in his Petition for Review and brief dated May 17,

[2] Claimant also contends that the administrative law judge erred in finding that she has reached maximum medical improvement, but does not discuss any relevant law or evidence supporting this contention. The Board has stated previously that adequate briefing must include a "discussion of the relevant law and evidence." *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). Mere assignment of error is not sufficient to invoke Board review. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *Carnegie v. C&P Telephone Co.*, 19 BRBS 57 (1986). Thus, as this contention was not adequately briefed, it will not be considered by the Board.

2003, and mailed May 19, 2003, is a timely appeal of the administrative law judge's supplemental decision. *See generally* 20 C.F.R. §§802.205(a), 802.221.

An attorney=s fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. '928, and the applicable regulation, 20 C.F.R. '702.132, which provide that the award of any attorney=s fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass=n*, 22 BRBS 434 (1989). However, if a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *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).

In the present case, the administrative law judge found that claimant's counsel had successfully established claimant's entitlement to temporary partial disability payments, a Section 14(e) penalty, interest, and all reasonable and necessary medical expenses arising from claimant's work-related injury. However, the administrative law judge found that as employer established that claimant was dismissed for a reason unrelated to her disability, and thus that she was not entitled to continuing benefits under the Act, claimant was not successful on a core issue. Therefore, the administrative law judge reduced the number of hours spent by counsel by 50 percent to account for claimant's limited success. Inasmuch as we modify the administrative law judge's decision to award claimant continuing partial disability benefits, we also must vacate the administrative law judge's reduced fee award. We remand the case for further consideration of the fee award pursuant to *Hensley*. *See generally Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

Accordingly, the Decision and Order of the administrative law judge is modified to reflect claimant's entitlement to temporary partial disability benefits from October 5, 1999 to June 10, 2000, and to permanent partial disability benefits from June 11, 2000, and continuing, subject to employer's credit for benefits paid. 33 U.S.C. §§908(c)(21), (e), 914(j). The administrative law judge's decision is affirmed in all other respects. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge