BRB Nos. 04-0396, 04-0396A,
05-0348, and 05-0348

KEVIN HILL	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
GULF COAST FABRICATIONS	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	DATE ISSUED: 01/10/2006
	)	
c/o	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Decision and Order on Section 22 Modification, and Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, LTD), Gulfport, Mississippi, for claimant
Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

Jennifer R. Marion (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order, Decision and Order on Section 22 Modification, and Supplemental Decision and Order Awarding Attorney's Fee (2002-LHC-02722) 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 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).

Claimant injured his right knee on June 16, 1998, during the course of his employment for employer as an electrician. Claimant returned to work on August 3, 1998, but he stopped working in January 1999 due to right knee pain. On February 2, 1999, Dr. Flores removed the bursa from claimant's knee. Claimant unsuccessfully attempted to return to work in August 1999. He was referred to a work-hardening program where he alleged he injured his back on August 17, 1999. He has not since retuned to work. Claimant fell at his church on April 28, 2001, which he attributed to his right knee buckling. Claimant underwent operations to his right hip and left foot for injuries caused by this fall. The parties stipulated that employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from July 17, 1998, to July 21, 2001. Employer also provided medical benefits for claimant's knee injury until it went bankrupt and the Mississippi Insurance Guaranty Association assumed coverage of the claim.

In his decision, the administrative law judge accepted the parties' stipulation that claimant has a compensable right knee injury. The administrative law judge found that claimant's back injury while undergoing work hardening for the knee injury is also compensable. The administrative law judge found, however, that this injury was only temporarily disabling until June 15, 2000, and that claimant has no continuing disability or work restrictions related to this injury. The administrative law judge found that claimant failed to establish that his April 2001 right hip and left ankle/foot injuries are related to the June 1998 work injury. The administrative law judge credited the opinion of Dr. Graham to find that claimant's right knee injury reached maximum medical improvement on December 12, 1999. The administrative law judge credited the June 2003 opinion of Dr. Flores to find that claimant is unable to return to his usual

employment as an electrician. Because employer presented no evidence of suitable alternate employment, the administrative law judge found claimant entitled to compensation for temporary total disability from June 17, 1998, to December 11, 1999, and for continuing permanent total disability, 33 U.S.C. §908(a), thereafter. The administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), finding that employer failed to establish that claimant had a serious and lasting pre-existing permanent partial disability or that claimant's prior back injury contributed to his current disability from the work-related knee injury.

Employer appealed and claimant cross-appealed this decision. BRB Nos. 04-0396/A. While the appeals were pending, both parties filed motions for modification. 33 U.S.C. §922. By Orders issued March 11, 2004, and March 30, 2004, the Board dismissed the appeals and remanded the case for modification proceedings. The administrative law judge held a hearing on the parties' motions for modification. In his decision on modification, the administrative law judge found that employer is not entitled to modification inasmuch as employer could have presented evidence of suitable alternate employment at the initial hearing and thus did not establish a change in claimant's economic condition. Alternatively, the administrative law judge rejected employer's evidence of suitable alternate employment. In addressing claimant's petition for modification, the administrative law judge found that claimant failed to show a mistake of fact in his determination that claimant's hip and left ankle/foot injuries from the April 2001 fall at church are not related to the initial work injury. However, the administrative law judge found that claimant established he has a psychological injury related to his work injuries. The administrative law judge also found claimant entitled to medical treatment for his work-related lower back injury. Finally, the administrative law judge found claimant failed to establish that a diagnostic arthroscopy of his right knee is a reasonable and necessary medical expense.

Employer appealed and claimant cross-appealed this decision. BRB Nos. 05-0348/A. In addition, by Order issued February 9, 2005, the Board reinstated the parties' appeals of the administrative law judge's Decision and Order, BRB Nos. 04-0396/A, and consolidated these appeals with the parties' appeals of the administrative law judge's decision on modification. Subsequent to issuance of the administrative law judge's Decision and Order on Modification, claimant's counsel submitted a petition requesting a fee of $16,555.75, representing 66.625 hours at $200 per hour, plus costs of $3,230.75. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge awarded claimant's counsel a fee of $8,538.40, representing 28.69 hours at $185 per hour, plus costs of $3,230.75. Both parties appeal this decision. By Order issued May 4, 2005, the Board consolidated the parties' appeals of the administrative law judge's supplemental fee award with BRB Nos. 05-0348 and 05-0348A.

CAUSATION

We first address claimant's challenge to the administrative law judge's finding that claimant failed to establish that his fall at church on April 28, 2001, was due to his right knee buckling as a result of the June 16, 1998, right knee injury at work. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed that could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his injury is causally related to his employment. The burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1999). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id*.; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

If there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by showing that the claimant's disabling condition is caused by the subsequent event, provided the employer also proves that the subsequent event was not caused by claimant's work injury. *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997); *see also Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Where the subsequent injury is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the intervening cause. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *see also Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed. Appx. 126 (5th Cir. 2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Claimant testified that he fell at church due to instability in his right knee as a result of the work injury. The administrative law judge found claimant entitled to the Section 20(a) presumption assuming, *arguendo*, that claimant's testimony is credible. The administrative law judge discussed the relevant evidence and found that employer rebutted the presumption with evidence detracting from claimant's testimony concerning the cause of his fall.[1] The administrative law judge concluded that, in the absence of

[1] Claimant does not contest the finding of rebuttal.

medical or other evidence that claimant's April 2001 injuries resulted from the knee's buckling or giving way, claimant's testimony to this effect is not credible. Consequently, the administrative law judge concluded that claimant failed to establish, based on the record as a whole, that his right hip and left ankle/foot injuries are related to the June 1998 right knee injury.

Claimant argues on appeal that the administrative law judge erred by failing to credit his testimony and medical evidence linking the injuries from the April 2001 fall at church to his work-related right knee condition. Specifically, claimant relies on the January 2, 2002, report by Dr Jackson, CX 13 at 1, on Dr. Flores's checking the "yes" line on a form written by claimant's counsel stating claimant's April 2001 injuries are related to the June 1998 right knee injury. CX 9 at 1, and on his being prescribed a knee brace by his physical therapist, Jay Pullman. CX 12 at 51.

In his decision, the administrative law judge credited Dr. Flores's deposition testimony. Dr Flores testified he has no record of claimant's knee buckling during the course of treating claimant from September 1998 to March 2001. EX 9 at 40. Moreover, the administrative law judge found that claimant last complained of knee pain to Dr. Flores on May 4, 1999, which is 22 months before the April 2001 injury. *Id*. at 16, 19, 40-41; *see* CX 9 at 1-56. The administrative law judge further credited Dr. Flores's deposition testimony, in which he conceded that his linking the April 2001 injury to claimant's right knee buckling is speculative. CX 9 at 42-45. With regard to the knee brace, the administrative law judge credited the physical therapist's January 6, 2000, report that claimant had minimal complaints of knee problems, CX 12 at 51, and his April 20, 2003, letter stating that claimant had satisfactory rehabilitation of his quadriceps by May 2000. There are no notes of claimant reporting his right leg buckling. *Id*. at 1-2.

The administrative law judge also credited the testimony and report of Chris Powell, the emergency medical technician who arrived at the church in response to the reported fall, the records from Hancock Medical Center, where claimant was taken by Mr. Powell, and the records of Dr. Flores, who treated claimant at the medical center. Decision and Order at 40. This evidence records injuries to claimant after he fell from a ladder and does not mention claimant's knee buckling as a cause of this accident. Tr. I at 126-129; EXs 9; 15 at 37-40; 24. Claimant testified that he fell down steps. Tr. I at 41-42.

The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge was not required to credit claimant's testimony concerning the fall at church, as he noted the lack of eyewitnesses and, in addition, rationally relied on evidence that claimant fell down a ladder and not down steps as he alleged. The administrative law judge also acted within his discretion in crediting Dr. Flores's

deposition testimony and Mr. Pullman's letters to support his conclusion that claimant did not establish that his April 2001 fall is related to his June 1998 work injury. *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). Finally, Dr. Jackson's report merely records claimant's statement of how the injury occurred. Accordingly, we affirm the administrative law judge's finding in his initial decision that claimant's injuries from his April 2001 fall are not related to his work injury as it is supported by substantial evidence.

Employer appeals the administrative law judge's finding that claimant's August 17, 1999, back injury while undergoing work hardening is related to the June 1998 work injury. Employer argues the administrative law judge erred by crediting claimant's unsubstantiated claims of a back injury in view of the administrative law judge's discrediting claimant's testimony concerning his alleged right knee buckling. Employer also notes that, on the day of the alleged back injury, Mr. Pullman observed that claimant exhibited signs of malingering, and that claimant moved with no pain posturing, grimacing or limping after reporting severe back pain. EX 17 at 9-10. Employer thus contends that claimant did not establish the "working conditions" element of his *prima facie* case. An injury that occurs as a result of treatment for a work-related condition also is work-related. *See Mattera v. M/V Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

In his decision, the administrative law judge credited claimant's testimony that he felt a pop in his back while lifting crates during a work-hardening session. Tr. at 39-40. Based on this evidence, the administrative law judge found claimant entitled to the Section 20(a) presumption. The administrative law judge noted Dr. Jackson's June 15, 2000, examination observation of mild restrictive motion in claimant's mid-back and his diagnosis of a torn muscle or ligament. CX 13 at 8. The administrative law judge further credited Dr. Graham's conclusion in his December 22, 1999, report that claimant's back injury was consistent a ligament tear or soft tissue injury and that it comported with claimant's description of the injury. CXs 14 at 3-4; 17 at 16. Given these findings, claimant's testimony is sufficient to invoke the presumption notwithstanding the administrative law judge's discrediting of testimony concerning the injury at church and the observations by Mr. Pullman on the day of the back injury. *See Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). Moreover, the record contains no medical opinion contravening claimant's description of his back injury.[2] As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's May 1999 back injury is a consequence of his June 1998 work-related knee injury. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

[2] Employer does not challenge the administrative law judge's finding that it did not rebut the Section 20(a) presumption linking claimant's back condition to the work injury.

DISABILITY

We next address employer's contention that the administrative law judge erred by awarding claimant compensation for total disability. The administrative law judge found that claimant is unable to return to his usual employment as an electrician due to his right knee injury and, as employer presented no evidence of suitable alternate employment, claimant is entitled to compensation for total disability from the date of injury. The administrative law judge credited the opinion of Dr. Flores that claimant has permanent work restrictions from his knee injury and resulting surgery of no heavy lifting, crawling, and ladder climbing. EX 9 at 50-53; ex. 3. Dr. Flores also assigned a four percent impairment rating. EX 9 at ex. 3. The administrative law judge found support for Dr. Flores's restrictions from a functional capacity evaluation (FCE) conducted on May 13, 1999, which stated that claimant is unable to return to his usual work. CX 9 at 46; EX 16 at 5-8.

On appeal, employer argues that the administrative law judge erred by crediting Dr. Flores's opinion since claimant's condition does not warrant a rating under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and Dr. Flores relied on statements made by claimant who is not a credible witness. Employer also contends Dr. Flores's opinion is not credible since he last examined claimant in 2001. We reject employer's contentions. The absence of ratable impairment under the AMA *Guides* is not dispositive of the extent of claimant's knee disability and, consequently, whether claimant is able to return to his usual employment. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Moreover, there is no evidence that Dr. Flores relied on claimant's self-assessment of his knee condition. Dr. Flores testified that he retired on December 15, 2002, and that he last examined claimant in April 2001. EX 9 at 4-6. He stated that he reviewed his medical records to determine claimant's work restrictions on June 17, 2003. *Id*. at 52-53. The administrative law judge rationally credited the work restrictions of claimant's treating physician. Moreover, these work restrictions are also reflected in the May 1999 FCE. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is unable to return to his usual employment. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004); *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp.*, 300 F.2d 741. As employer presented no evidence of suitable alternate employment, we also affirm the administrative law judge's award of compensation for total disability from the date of injury. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

SECTION 8(f)

We next address employer's appeal of the administrative law judge's denial of Section 8(f) relief. The Director, Office of Worker's Compensation Programs, responds,

urging affirmance of the administrative law judge's findings in this regard. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908, 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). A pre-existing permanent partial disability must be a serious and lasting physical problem, such that a cautious employer would be motivated to discharge the employee because of an increased risk of compensation liability. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Callnan v. Morale, Welfare & Recreation, Department of the Navy*, 37 BRBS 246 (1998). Employer contends that it established that claimant had a pre-existing permanent partial disability based on a previous back condition, which employer contends contributes to claimant's permanent total disability. The record shows that claimant had a prior back injury for which he underwent a lumbar laminectomy and discectomy in October 1985, and a lysis of the adhesions at L4-5 in October 1986. EX 7.

We affirm the administrative law judge's denial of Section 8(f) relief as the administrative law judge rationally found that claimant's previous back injury is not a pre-existing permanent partial disability for purposes of Section 8(f). The administrative law judge found there is no evidence of back impairment or permanent restrictions after claimant returned to work in 1987. *See* CX 16; EX 7. The administrative law judge also found that claimant worked in heavy jobs until his right knee injury in June 1998. Decision and Order at 50; *see* EX 22 at 8-12. Moreover, there is no evidence that claimant experienced any back problems prior to seeking treatment for his work-related back injury in August 1999. The administrative law judge therefore found there is no evidence that a cautious employer would not hire claimant due to his back condition, *see C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), and he concluded that employer did not establish a pre-existing permanent partial disability. The mere existence of prior injuries is insufficient to establish the existence of a serious lasting physical impairment. *Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Moreover, the administrative law judge properly credited the absence of any evidence that claimant had physical restrictions after his last back surgery in October 1986, and claimant's successful return to work in February 1987 without re-injuring his back until August 1999. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986). Accordingly, we affirm the administrative law judge's conclusion that claimant

did not suffer from a pre-existing permanent partial disability due to his previous back injury. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Thus, we affirm the denial of Section 8(f) relief.[3]

DECISION ON MODIFICATION

Causation

We have affirmed the administrative law judge's finding in his initial decision that the injuries claimant sustained from a fall at church in April 2001 are not related to claimant's June 1998 work injury. *See supra* p. 6. On modification, the administrative law judge found that claimant presented new evidence supporting his assertion of more recent right knee buckling, but that claimant presented no medical evidence linking this condition to the work injury. The administrative law judge therefore denied claimant's motion for modification based on a mistake in fact. Decision and Order on Modification at 34.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *see Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

On appeal, claimant challenges the administrative law judge's finding that the fall at church is not related to his right knee's buckling. Claimant specifically cites to the testimony of Andrea Coote, a friend of claimant's wife. Tr. II at 42-43. She testified at the modification hearing that she had witnessed claimant's knee buckling within the last three to four months. *Id*. at 44-45. The administrative law judge found that this testimony, as well as that of claimant and the records of Dr. Winters, may show recent knee buckling but this evidence is not sufficient to show that claimant's knee buckled in April 2001 when he fell and sustained his injuries. The administrative law judge also found that claimant's subjective history of the injury that he reported to various doctors is inconsistent with the history recorded at the time of the fall. Decision and Order on Modification at 35.

We affirm the administrative law judge's finding that claimant did not establish a mistake in fact regarding the cause of his injuries resulting from the fall at church. The administrative law judge rationally found that claimant's more recent evidence of knee buckling does not establish that claimant's knee buckled in April 2001 in view of the contemporaneous records which fail to mention his knee buckling. As the administrative law judge's crediting of the contemporaneous medical histories that did not report right

[3] The Director also argues, and the administrative law judge stated, that employer failed to establish the contribution of claimant's pre-existing back condition. As there is no pre-existing permanent partial disability, we need not address the issue of contribution.

knee buckling is rational, the administrative law judge's rejection of claimant's new evidence in his decision on modification and his conclusion that claimant failed to establish that his April 2001 fall at church is related to his June 1998 work-related knee injury are affirmed as they are supported by substantial evidence. *See generally Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Employer appeals the administrative law judge's finding on modification that claimant sustained a work-related psychological injury. Employer argues that any psychological condition is related to claimant's pre-existing lower back condition and the non work-related hip and left ankle/foot conditions.

The administrative law judge found that Drs. Koch and Maggio both stated that claimant has a depressive disorder associated with psychological factors, his general medical condition, and back pain. Decision and Order on Modification at 38. The administrative law judge found this evidence sufficient to entitle claimant to the Section 20(a) presumption that claimant's psychological condition is work-related. Specifically, the administrative law judge found that the medical reports support a connection, at least in part, between claimant's psychological condition and his work-related injuries and the pain from these injuries. *Id*. at 36. The administrative law judge found that employer established rebuttal of the presumption based on Dr. Maggio's opinion. In weighing the evidence as a whole, the administrative law judge noted that he had found in his first decision that claimant sustained a work-related low back injury. The administrative law judge credited the fact that claimant was prescribed Lortab, a narcotic, for lower back pain. Claimant's Exhibit on Modification (CXM) 13 at 1-4. The administrative law judge therefore found compensable any psychological side effects from claimant's taking 200 Lortabs per month for back pain. The administrative law judge further credited the reports of Drs. Koch and Maggio indicating that claimant suffers from a pain disorder related, in part, to his lower back injury, and possibly to the knee injury. The administrative law judge therefore concluded that the medical evidence establishes a causal connection between claimant's mental disorder and his work-related injuries. Consequently, the administrative law judge found that claimant's psychological condition is work-related. Decision and Order on Modification at 38-39.

A psychological impairment which is work-related is compensable under the Act. *See, e.g., American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1967); *Manship v. Norfolk & Western Railway Company*, 30 BRBS 175 (1996); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). In addition, it is sufficient if the condition is due only in part to a work-related injury. *See Director, OWCP v. Vessel Repair*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). For the reasons that follow, we vacate the administrative law judge's determination that claimant established a work-related psychological injury, and we remand the case for further findings.

The administrative law judge's finding on modification concerning a lower back injury and its contribution to claimant's psychological condition is inconsistent with the

findings in his initial decision that claimant sustained an injury in the mid-back area during work hardening. In his initial decision, the administrative law judge specifically credited Dr. Jackson's June 15, 2000, report that claimant sustained a torn muscle or ligament in the mid-back area when he was injured lifting crates while participating in a work-hardening program. Decision and Order at 37; CX 13 at 8. Dr. Jackson prescribed trigger point injections for this condition. Dr. Graham also diagnosed a mid-back ligament tear.[4] CX 14 at 3-4. On modification, the administrative law judge merely restated his finding that claimant sustained a compensable back injury, but referred to it as a low back injury. Decision and Order on Modification at 32-33. In his analysis of the cause of claimant's psychological condition, the administrative law judge repeatedly refers to it having been caused, in part, by claimant's work-related lower back injury. *Id.* at 37, 39, 43. Inasmuch as there are no findings by the administrative law judge supporting a conclusion that claimant sustained a work-related lower back injury, we vacate the administrative law judge's finding that claimant established a work-related psychological injury.[5] On remand, the administrative law judge must address the type of back injury claimant sustained in May 1999 and its relation to claimant's psychological condition.[6]

[4] Inconsistent with the diagnoses by Drs. Jackson and Graham of a mid-back injury, in his initial decision, the administrative law judge found that the trigger point injections to claimant's mid and upper back to alleviate pain were not related to claimant's August 1999 back injury. Decision and Order at 45-46. Claimant challenges this finding. On remand, the administrative law judge must address claimant's contention that Dr. Jackson's trigger point injections for mid-back pain were a reasonable and necessary for the injury sustained during the work-hardening program. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

[5] The administrative law judge's finding that claimant's psychological injury is due in part to claimant's work-related knee injury does not render harmless his conclusion concerning claimant's back condition. The administrative law judge qualified the relationship between claimant's psychological condition and the knee injury by stating, "claimant suffers from a pain disorder related at least to his lower back injury, and *possibly* to his work-related knee injury as well." Decision and Order on Modification at 39 (emphasis added). *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

[6] Thus, we also vacate the administrative law judge's finding on modification that claimant is entitled to medical treatment for his work-related lower back injury. *See* Decision and Order on Modification at 43. The administrative law judge must first address whether claimant sustained a work-related lower back injury.

Disability

Claimant also appeals the administrative law judge's finding that his psychological condition was only temporarily disabling and does not prevent his returning to his usual work as an electrician. We address this contention as the administrative law judge may find on remand that claimant established a work-related psychological injury. Claimant bears the burden of establishing the nature and extent of his disability. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1980).

In his decision, the administrative law judge discussed the opinion of Dr. Maggio that claimant is not disabled by his temporary psychological condition, and the opinion of Dr. Koch that claimant is permanent totally disabled due, in part, to neuropsychological deficits. Decision and Order on Modification at 41. The administrative law judge found that neither Dr. Koch, Dr. Maggio, nor the Gulf Coast Mental Health Center provided any work restrictions related to claimant's psychological condition. The administrative law judge found the record "balanced at best concerning the nature and extent of claimant's psychological disability." *Id*. The administrative law judge concluded that claimant thus failed to establish a permanently disabling mental condition that prevents his returning to his usual work. Decision and Order on Modification at 41-42.

Claimant contends that, contrary to the administrative law judge's finding, Dr. Koch provided permanent work restrictions. However, the administrative law judge properly found that Dr. Koch did not provide any specific restrictions related solely to claimant's psychological condition. Dr. Koch opined that claimant is permanently totally disabled due to multiple factors, including cognitive limitations, low IQ, functional illiteracy, orthopedic limitations, chronic pain, and moderate neuropsychological impairments. CX 11 at 3. The administrative law judge compared this assessment to Dr. Maggio's opinion that claimant has a temporary and non-disabling psychological condition, and found that claimant failed to establish he has a permanent psychological disability. Decision and Order on Modification at 41. As the administrative law judge acted within his discretion in weighing the medical evidence, we affirm the administrative law judge's finding that claimant failed to establish he was prevented from performing his usual employment by his temporary psychological condition. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

Denial of Employer's Motion for Modification

We next address employer's contention that the administrative law judge erred in denying its petition for modification based on a change in claimant's condition.[7] It is

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[7] Employer filed a motion for modification with the administrative law judge specifically alleging a change of condition and attaching a labor market survey. Accordingly, we will not address employer's contention that it also established a mistake

well established that the party requesting modification due to a change in conditions has the burden of showing the change in conditions. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994). However, the Board also has held that employer cannot offer evidence of suitable alternate employment for the first time in a modification proceeding if employer fails to assert a basis for finding a changed physical or economic condition. *Feld v. General Dynamics Corp.*, 34 BRBS 131 (2000); *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998).

In this case, the administrative law judge found that employer is not entitled to modification based on its evidence of suitable alternate employment because employer did not present evidence of suitable alternate employment at the initial hearing, citing *Lombardi* and *Feld*. Employer argued below, and renews its contention on appeal, that such evidence only became available after the May 21, 2003, hearing inasmuch as Dr. Flores's work restrictions were not part of the record until his post-hearing deposition was taken on June 30, 2003. The administrative law judge found there was other evidence of record that claimant could not return to his usual employment due to his knee and back injuries admitted prior to the conclusion of the hearing from which employer could have attempted to identify suitable alternate employment. Decision and Order on Modification at 29. The administrative law judge also found that employer had the opportunity post-hearing to request that the record be held open for evidence of suitable alternate employment in light of Dr. Flores's work restrictions, but failed to do so. *Id*. at 30.

Having considered the arguments raised by employer on appeal and the applicable legal standards, we conclude that the administrative law judge erred by denying employer's motion for the reasons he provided. Initially, we note that there was little evidence admitted at the initial hearing that claimant could not return to his usual work as an electrician. In his decision on modification, the administrative law judge noted that Dr. Penden, on the day of claimant's right knee injury, released him to light-duty work. CX 15. Subsequently, Dr. Graham opined on January 13 and August 20, 2000, that claimant had no restrictions or impairment due to his knee condition. EX 11 at 3-4. The administrative law judge also noted Dr. Graham's and Dr. Jackson's restrictions due to claimant's back injury. Dr. Graham opined that claimant had restrictions when he examined him in December 1999, but that these restrictions were limited to four months, and that claimant had no permanent back restrictions. CX 17 at 18-20. Dr. Jackson opined on June 15, 2000, that claimant is limited to light or light-sedentary work

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of fact, as this contention is raised for the first time on appeal. *See generally Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

involving no bending, stooping or lifting over 30 pounds. CX 13 at 8. However, Dr. Jackson's subsequent reports do not address these restrictions.[8]

In his initial decision, the administrative law judge credited the work restrictions Dr. Flores imposed in his post-hearing deposition, *see* EX 9 at 50-53; ex. 3, to find that claimant is unable to return to his usual employment. Although the record did not close until several days after the submission Dr. Flores's post-hearing deposition, *see* EX 9 at 50-53; ex. 3, and the administrative law judge correctly found that employer had an opportunity to request that the record be held open for evidence of suitable alternate employment in light of Dr. Flores's work restrictions, *see Patterson v. Omniplex World Services,* 36 BRBS 149 (2003); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992), we hold that employer was not required to do so in order to preserve its right to seek modification. Decisions regarding the scope of Section 22 issued subsequent to *Lombardi* and *Feld* have emphasized the broad scope of modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *see also Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The modification process is flexible, easily invoked, and intended to secure accuracy and justice under the Act. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002), *citing Banks*, 390 U.S. at 464. A party need not establish that the evidence on which it bases its modification request was unavailable at the initial hearing, *Jensen*, 346 F.3d at 277, 37 BRBS at 101(CRT), and modification is not foreclosed merely because a party chose one path of litigating the case initially. *See Old Ben Coal Co.*, 292 F.3d at 550-554, 36 BRBS at 42-46(CRT) (administrative law judge may weigh many factors in determining whether justice under the Act will be served by reopening). In light of this law, and the circumstances of this case in which the evidence concerning claimant's disability was not available to employer until shortly before the close of the record, [9] we construe the scope of Section 22 as sufficiently broad to allow employer to present evidence of suitable alternate employment for the first time on modification to establish a change of conditions. *See Jensen*, 346 F.3d 273, 37 BRBS 99(CRT). We, therefore, vacate the administrative law judge's denial of employer's motion for modification.

[8] Nonetheless, the administrative law judge found in his initial decision that Dr. Jackson opined that claimant's back condition was only temporarily disabling. Decision and Order at 45-46.

[9] This case thus is distinguishable from *Lombardi*, 32 BRBS 83 and *Feld*, 34 BRBS 131, in that the evidence relied on by the administrative law judge to establish claimant's disability was developed post-hearing. Modification is not foreclosed to employer merely because it did not seek to further hold the record open for it to develop evidence in response. In light of more recent case law, *see Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), *Lombardi* and *Feld* are hereby limited to their facts.

Once, as here, claimant established that he is unable to return to his usual employment as an electrician, the burden shifts to employer to establish the availability of suitable alternate employment. Employer can meet its burden by demonstrating the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See 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).

In this case, the administrative law judge addressed the merits of employer's evidence of suitable alternate employment assuming, *arguendo*, that employer could be entitled to modification. The administrative law judge found that all of claimant's physical and mental limitations must be considered in addressing the sufficiency of employer's evidence. The administrative law judge found that claimant has work restrictions due to his right knee injury, right hip and left ankle/foot injuries, and psychological condition. The administrative law judge also found that claimant credibly testified concerning the symptoms and side effects of his medications. The administrative law judge found that employer's and claimant's vocational consultants agreed that claimant is unemployable when all these work restrictions are considered. *See* CXM 14; EXM 5. Accordingly, the administrative law judge concluded that employer did not establish the availability of suitable alternate employment. Decision and Order on Modification at 31.

We hold that the administrative law judge erred in rejecting employer's evidence of suitable alternate employment. The administrative law judge must not consider the effects of any intervening condition to determine claimant's ability to work, as only disability attributable to the work injury, or factors related to conditions pre-dating the injury, is relevant. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). In this case, the administrative law judge erred by including disability attributable to claimant's non work-related fall in April 2000 in assessing claimant's physical restrictions. Accordingly, the administrative law judge's rejection of employer's evidence of suitable alternate employment is vacated. On remand, the administrative law judge must determine the restrictions attributable to his work injuries and any pre-existing conditions, and then

compare those restrictions to the jobs identified in employer's labor market survey.[10] *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT). Moreover, in view of his findings on remand concerning claimant's psychological condition, the administrative law judge must address employer's contention that claimant's reliance on pain medication and his psychological and lower back conditions are intervening injuries that should not be considered by the administrative law judge in determining claimant's ability to perform the jobs identified in employer's labor market survey. If employer establishes suitable alternate employment, claimant is at most partially disabled and the administrative law judge must make appropriate findings in this regard.[11] *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Medical Benefits

Claimant challenges the administrative law judge's denial of medical treatment. Specifically, the administrative law judge denied claimant's request for a diagnostic arthroscopy of his right knee. The administrative law judge credited Dr. Noblin's statements that nothing can be done for the knee, and that the purpose of the proposed arthroscopy is to convince claimant that there is no significant injury. Decision and Order on Modification at 43; *see* CXM 12 at 9-10. The administrative law judge found that Dr. Noblin's recommendation does not establish the necessity of the proposed treatment.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30

[10] We will not address employer's contention that claimant did not diligently seek suitable alternate employment, as the administrative law judge made no findings in this regard.

[11]The administrative law judge concluded that claimant established a temporary psychological condition, which must be considered in assessing claimant's vocational capability. Decision and Order on Modification at 42. This finding is not challenged on appeal. However, the administrative law judge did not state the specific limitations from claimant's psychological condition on his ability to work. Should the administrative law judge find on remand that claimant has a work-related psychological injury, he must make findings of fact on the extent of claimant's temporary psychological condition. *See generally Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988).

BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In April 2004, claimant went to Dr. Winters for evaluation of his right knee. Claimant obtained an MRI of the knee in May 2004. Dr. Winters opined from the MRI results that claimant should have an arthroscopy, but he referred claimant to Dr. Noblin for evaluation. CXM 12 at 8. Dr. Noblin found no knee instability. Dr. Noblin opined that the MRI "fails to reveal any significant abnormalities except for a possible small lateral meniscal tear." *Id*. at 10. He recommended that claimant continue to work on strengthening the knee, take anti-inflammatory medication, and wear a brace. He stated that claimant "cannot have anything done, but I think a diagnostic arthroscopy may be in order for him to access the inside and let him understand and realize there is nothing significant in his knee." *Id*. Inasmuch as Dr. Noblin's treatment recommendations support the administrative law judge's finding that claimant did not establish that a diagnostic arthroscopy of his right knee is medically necessary, we affirm the denial of this claim. *See Arnold*, 35 BRBS 9; *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

ATTORNEY'S FEE

After he issued his initial Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $12,905.20. Following his Decision and Order on Modification, the administrative law judge awarded claimant's counsel an additional attorney's fee of $8,538.40. Both parties appeal this latter award. 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).

Employer's sole contention on appeal regarding the fee award is that it should be stayed pending the outcome of its appeal. It is well established that the administrative law judge may issue a fee award during the pendency of an appeal, but a fee award is not "final" for purposes of payment until all appeals are exhausted. *See generally Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982).

Claimant appeals the administrative law judge's decrease in the hourly rate to $185 from the requested $200, a 50 percent reduction in the total number of hours awarded, and the disallowance of specific entries that the administrative law judge characterized as clerical services. Claimant first argues that the administrative law judge erred in reducing the requested hourly rate from $200 to $185. The administrative law judge agreed with employer that $200 per hour is excessive and found $185 per hour is reasonable based on counsel's experience, the quality of the work performed, and the difficulty of the issues involved. As claimant has not established that the administrative law judge abused his discretion or acted unreasonably in reducing the requested hourly rate from $200, we affirm the administrative law judge's award of an hourly rate of $185.

See generally Story v. Navy Exch. Serv. Ctr., 33 BRBS 111 (1999); 20 C.F.R. §702.132; Supplemental Decision and Order at 3-4.

Claimant next contends that the administrative law judge erred by applying *Hensley v. Eckerhart*, 461 U.S. 421 (1983), to reduce by 50 percent the total number of hours awarded. In *Hensley*, the Supreme Court held that a fee award, under a fee-shifting scheme, should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The administrative law judge has considerable discretion in setting the amount of the attorney's fee where claimant's success is only partial. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

In accordance with *Hensley*, the administrative law judge reduced the total number of hours awarded by 50 percent inasmuch as claimant only achieved partial success on modification. Specifically, the administrative law judge determined that claimant was successful in defending against employer's motion for modification, and in establishing a compensable psychological injury, but that claimant was unsuccessful in establishing that his hip, ankle, and foot injuries are a consequence of the initial work injury, claimant was denied medical benefits for a diagnostic arthroscopy, and claimant did not show that his psychological injury caused any total or permanent disability, nor was he awarded additional compensation due to this injury. Supplemental Decision and Order at 7. The administrative law judge concluded, after consideration of the factors contained in 20 C.F.R. §702.132(a), and the particular facts and issues of this case, that claimant is entitled to a fee for one-half of the hours requested.

Claimant's contention that the administrative law judge erred in reducing claimant's fee award, pursuant to *Hensley*, is rejected. The Board has previously affirmed across-the-board reductions where the administrative law judge determined that claimant achieved limited success. Thus, the administrative law judge's decision to reduce the number of hours requested by 50 percent is affirmed. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(50 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999)(90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits). However, in light of our remanding this case for reconsideration, the administrative law judge should consider whether the fee awarded is reasonable in view of any increase or decrease in the award of benefits on remand. *See generally Hensley*, 461 U.S. 424; *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

Finally, claimant challenges time disallowed for activity the administrative law judge characterized as clerical. Specifically, the administrative law judge disallowed seven entries requesting a quarter hour for time expended on routine cover letters and for filing claimant's response to employer's motion for modification.[12] Supplemental Decision and Order at 10. The administrative law judge also disallowed five entries totaling 1.5 hours expended composing routine letters requesting medical records with an attached release form. *Id*. at 13. The administrative law judge disallowed 12 entries totaling three hours for issuing checks. *Id*. at 12-13. The administrative law judge disallowed a quarter hour expended sending a letter and a check to claimant's vocational consultant, Kelly Hutchins. *Id*. at 13. The administrative law judge found that without further clarification from claimant's counsel, who did not respond to employer's objections, these entries on their face describe purely clerical tasks. *Id*. at 10, 12-13.

Time spent on traditional clerical duties by an attorney is not compensable, *Staffile v. International Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), and clerical services are part of an attorney's overhead. In this case, the administrative law judge rationally found that claimant did not establish that the contested attorney time was for non-clerical activity. Accordingly, as claimant has not raised any error in this regard, we affirm the administrative law judge's attorney's fee award.[13]

Benefits Review Board Fee

Claimant's counsel has filed a fee petition with the Board in which he requests a fee of $1,250, representing 6.25 hours at $200 per hour, for work in BRB Nos. 04-0396/A. Employer objects to the hourly rate, to the amount of the fee request, and to various itemized entries. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal of the administrative law judge's initial decision, *see Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992), but is not entitled to a fee payable by employer for work performed on his unsuccessful cross-appeal. *See generally Hensley*, 461 U.S. 424. We disallow 4.75 hours as relating to claimant's unsuccessful cross-appeal.[14] We reject employer's contention concerning the hourly rate, as it is an appropriate rate in the geographic area where the claim arose. 20 C.F.R. §802.203(d)(4). In addition, counsel's fee petition conforms to the minimum billing increments rule of the Fifth Circuit. *See generally Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). We find the remaining services reasonably commensurate with the necessary work performed in defense of employer's appeal. Therefore, we award claimant's

[12] The administrative law judge found that claimant's counsel had already requested 1.5 hours for the response.

[13] In addition, contrary to claimant's contention, the administrative law judge did not reduce any itemized entries based on counsel's billing increments.

[14] These services were performed on February 3, 17, 23-27, 2004. In addition, we disallow one of the February 10 entries.

counsel on attorney's fee of $300 for work in BRB No. 04-0396, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Decision and Order on Modification is vacated insofar as the administrative law judge found that claimant's sustained a work-related psychological injury and he denied employer's petition for modification. The case is remanded for reconsideration of the work-relatedness of claimant's psychological condition and of employer's evidence of suitable alternate employment. In all other respects, the administrative law judge's Decision and Order on Modification is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed. However, the administrative law judge may reconsider the fee award in light of any increase or decrease in the award of benefits on remand. Claimant's counsel is awarded an attorney's fee of $300 payable by employer for work in BRB No. 04-0396.

SO ORDERED.

_____
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