BRB Nos. 00-0350
and 00-0814

KENNETH CRONIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Dec. 13, 2000
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees (99-

LHC-0402) of Administrative Law Judge James W. Kerr, 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. *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 injured his neck on August 4, 1992, during the course of his employment for employer as a shipfitter. Prior to his returning to work on July 29, 1997, claimant was intermittently employed by employer for a total of approximately 60 weeks in modified duties as a shipfitter that were within his assigned work restrictions due to the neck injury. Specifically, claimant was initially restricted from lifting over 25 pounds, overhead work with his left arm, and prolonged ladder climbing. Thereafter, claimant's neck condition required additional temporary and permanent work restrictions, which employer accommodated. On October 25, 1996, claimant underwent a cervical diskectomy to repair herniated discs at C5-6 and C6-7. On April 8, 1997, claimant's treating physician, Dr. Danielson, determined that claimant's neck condition had reached maximum medical improvement from the surgery, and he rated claimant's neck condition as resulting in a 14 percent impairment of the whole person. Dr. Danielson assigned the following work restrictions: no rapid neck movement; no overhead work; no prolonged neck extension or ladder climbing; no lifting more than 20 to 30 pounds occasionally; and the ability to change positions sitting, standing and walking as needed. Employer notified claimant on July 9, 1997, that it had identified work within claimant's work restrictions. Employer's understanding of claimant's restrictions, however, did not include Dr. Danielson's restriction of no lifting more than 20 to 30 pounds occasionally. On July 30, 1997, claimant re-injured his neck while lifting, with the assistance of a co-worker, a 20 feet long length of steel weighing approximately 200 pounds. Claimant again returned to work in modified duties as a shipfitter, including the lifting restriction, on August 19, 1997. Claimant was discharged by employer on April 14, 1998, for refusing a work order from his supervisor. Claimant sought benefits under the Act for permanent total disability, 33 U.S.C. §908(a), and, in the alternative, for permanent partial disability based on a loss of wage-earning capacity, 33 U.S.C. §908(c)(21), commencing from the

[1]In a Decision and Order filed November 24, 1997, Administrative Law Judge David DiNardi ordered, pursuant to the parties' stipulations, that employer pay claimant compensation for total disability from: August 6 to November 18, 1992; January 19 to March 23, 1993; May 19, 1993 to May 21, 1995; July 11 to August 14, 1995; December 6, 1995 to April 1, 1996; September 10, 1996, to July 10, 1997; and July 30 to August 18, 1997. EX 5.

date after his discharge on April 14, 1998. Employer contended that claimant was discharged for cause, and that claimant is therefore not entitled to any additional compensation under the Act.

In his Decision and Order, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his neck condition to the July 30, 1997, work injury, and that employer failed to rebut the presumption that claimant sustained a second work-related neck injury on that date. The administrative law judge found that claimant is unable to return to his usual employment as a shipfitter. He found, however, that claimant's actual job at employer's facility after his return to work on August 19, 1997, established the availability of suitable alternate employment. The administrative law judge found that claimant was justifiably terminated by employer on April 14, 1998, for violating a company rule and was not discharged for a reason related to his neck condition. Accordingly, the administrative law judge found that claimant is not entitled to total disability benefits under the Act. The administrative law judge, however, found claimant entitled to compensation for partial disability from the date of the discharge, based on a loss of wage-earning capacity. The administrative law judge reasoned that claimant's actual earnings from his modified shipfitter position with employer did not reflect his post-injury wage-earning capacity. The administrative law judge found that employer's labor market surveys establish a wage-earning capacity of $211.20 per week on the open market. Pursuant to the parties' stipulation that claimant's average weekly wage was $520.65, claimant was awarded compensation for permanent partial disability from April 15, 1998, based on a loss of wage-earning capacity of $309.45. Employer was found entitled to Special Fund relief from continuing compensation liability, pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer's motion for reconsideration of the award of benefits was denied. Employer appeals the compensation award, contending that the administrative law judge erred by finding claimant entitled to benefits. BRB No. 00-0350. Claimant responds, urging affirmance.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting a fee of $7,875, representing 52.2 hours of attorney services at $150 per hour, plus expenses totaling $726.45. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge rejected employer's objections, awarded the requested fee and reduced by $100 the allowable expenses, finding that counsel failed to sufficiently document all of the requested expenses. Accordingly, the administrative law judge awarded claimant's attorney a fee totaling $7,875, plus expenses totaling $626.45. On appeal, employer challenges the fee award. BRB No. 00-0814. Claimant responds, urging affirmance.

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[2]By Order issued June 13, 2000, the Board consolidated for purposes of decision employer's appeals in BRB Nos. 00-0350 and 00-0814.

Employer initially appeals the administrative law judge's findings that claimant sustained a second neck injury on July 30, 1997, and that, due to claimant's neck condition after this alleged injury, claimant is unable to return to his usual employment with employer. Employer contends that these findings are in error because the extent of claimant's neck impairment is solely related to claimant's August 4, 1992, work injury, for which claimant has already received compensation pursuant to Judge DiNardi's decision.

We reject employer's contentions. It is well established that, under the "aggravation rule," where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). The administrative law judge's finding that claimant's neck condition was aggravated by a work injury on July 30, 1997, is supported by substantial evidence. Specifically, the administrative law judge rationally credited claimant's testimony that he sustained a work injury on that date while lifting a heavy piece of steel, and the administrative law judge found that an MRI taken after this date revealed a previously undisclosed central disc protrusion at C4/5, for which an epidural steroid injection was prescribed. EX 19; *see Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Accordingly, we affirm the administrative law judge's finding that claimant sustained a work-related injury to his neck on July 30, 1997.

With regard to employer's contention that claimant's disability is not related to the 1997 injury, we note that claimant was working in a restricted capacity at the time of this injury, and in fact, was placed in a position that required lifting in violation of his restrictions. Following the injury on July 30, 1997, claimant was not able to return to this

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[3]Moreover, as there is no medical opinion of record that claimant's neck condition was not caused or aggravated by the July 30, 1997, work injury, we affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. *See generally Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). That claimant had a pre-existing condition does not negate a connection between the July 30, 1997 incident and claimant's neck injury, in view of the aggravation rule. *Id*. Accordingly, any error the administrative law judge may have made in not fully addressing the evidence on rebuttal is harmless. *See generally Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

[4]That employer may have been unaware of this restriction is irrelevant, as fault, or lack thereof, is not a relevant consideration in determining a claimant's entitlement to benefits under the Act. *See* 33 U.S.C. §904(b); *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998).

position. The administrative law judge therefore properly shifted the burden to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can satisfy this burden by providing at its facility a job suitable for claimant. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If claimant successfully performs a suitable alternate position, but is discharged for breaching company rules, employer is not liable for total disability benefits. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992); *Walker v. Sun Shipbuilding & Dry Dock*, 19 BRBS 171 (1986). That a claimant is discharged due to his own misfeasance, however, does not negate his entitlement to any benefits to which he otherwise is entitled. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Walker,* 19 BRBS at 171.

In the instant case, it is uncontested that claimant's actual employment as a shipfitter from August 19, 1997, to April 14, 1998, established the availability of suitable alternate employment. Claimant contended that he was discharged by employer for refusing to sweep outside of his work area, which activity claimant asserted was not within his work restrictions. The administrative law judge found that sweeping was within claimant's work restrictions and that claimant was discharged for violating the company rule of refusing to execute a work order and for reasons unrelated to his neck condition. The administrative law judge thus concluded that, as employer established the availability of suitable alternate employment at its facility, claimant is not entitled to compensation for total disability.

The administrative law judge next determined that claimant was partially disabled after his discharge by employer on April 14, 1998. Specifically, the administrative law judge found that claimant's wages from his modified duties as a shipfitter with employer were not representative of his post-injury wage-earning capacity as claimant's neck condition rendered him unable to compete for a shipfitter position on the open market. In this regard, the administrative law judge credited evidence that claimant was unable to obtain employment as a shipfitter with other employers because they did not have available work within his restrictions. Decision and Order at 21-22, 22 n.6; Tr. at 51. The administrative law judge found that labor market surveys conducted by employer after claimant's discharge establish a post-injury wage-earning capacity commencing on April 15, 1998. The administrative law judge determined that a September 1998 survey established the availability of three positions paying from $5.15 to $5.50 per hour and that a June 1999 survey established the availability of three positions paying from $5.25 to $5.50 per hour. The administrative law judge averaged the wages paid by these positions to find that claimant has a post-injury wage-earning capacity of $5.28 per hour or $211.20 per week. Claimant was awarded continuing benefits under the Act from April 15, 1998, for permanent partial disability based on the difference between claimant's average weekly wage on the date of his July 30, 1997, work injury of $520.65 and his post-injury

wage-earning capacity of $211.20.

Employer contends that the administrative law judge erred in finding claimant partially disabled, as claimant's wage-earning capacity on the open market need not be considered where, as here, employer provided claimant with a suitable job within its facility from August 19, 1997, to April 14, 1998. Alternatively, employer argues that the administrative law judge erred by finding that claimant could not obtain work on the open market as a shipfitter within his restrictions. Furthermore, employer asserts that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity by failing to include in his determination the actual wages claimant received from employer prior to his discharge.

Section 8(c)(21), (e) of the Act, 33 U.S.C. §908(c)(21), (e), provides for award for partial disability benefits based on the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which 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. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). Section 8(h) requires that the administrative law judge evaluate all relevant evidence under a range of relevant factors in determining claimant's post-injury wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). Accordingly, where claimant is terminated from suitable alternate employment for reasons unrelated to his disability, claimant may be entitled to benefits for permanent partial disability if the administrative law judge determines that claimant has a loss in wage-earning capacity notwithstanding the termination. *Mangaliman*, 30 BRBS at 39.

In *Mangaliman*, the Board rejected the employer's contention that the claimant's post-injury wage-earning capacity on the open market need not be considered where the employer provided the claimant with a suitable light-duty job from which he was terminated for reasons unrelated to his disability. The Board held that, while the suitable light-duty job would preclude an award for total disability, notwithstanding claimant's justifiable termination, *see 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. 1992), this employment does not *per se* establish claimant's post-injury wage-earning capacity; like any other suitable job held after a disabling injury, the actual earnings paid in this job should be considered by the administrative law judge in

determining whether claimant has a loss in wage-earning capacity. *Mangaliman*, 30 BRBS at 42-43; *see also Edwards v Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

In the instant case, the administrative law judge properly considered whether the wages paid by employer were representative of claimant's wage-earning capacity. The administrative law judge found that the wages earned from employer's light-duty shipfitter position did not establish claimant's post-injury wage-earning capacity. The administrative law judge reasoned that the wages employer paid claimant were higher than those he could have earned on the open market, given his physical restrictions. The administrative law judge found this borne out by claimant's applying for shipfitting work at other companies, and being informed that they had no work within his restrictions. *See* Tr. at 49-52; CX-18; Decision and Order at 21-22. In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, the administrative law judge rationally relied on the evidence of claimant's unsuccessful attempt to obtain employment as a shipfitter on the open market. Thus, the administrative law judge's finding that the wages paid by employer do not fairly and reasonably represent claimant's earning capacity is supported by substantial evidence, and is affirmed. *See generally Penrod Drilling*, 905 F.2d at 84, 23 BRBS at 108(CRT). We reject, therefore, employer's assertion that the administrative law judge erred by failing to include the actual wages paid by employer in calculating claimant's post-injury wage-earning capacity. Moreover, the administrative law judge rationally relied on the wages paid by the jobs identified in the two labor market surveys to derive claimant's post-injury wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Penrod Drilling*, 905 F.2d at 84, 23 BRBS at 108(CRT). Accordingly, we affirm the administrative law judge's continuing award of benefits for permanent partial disability from April 15, 1998.

We lastly address employer's appeal of the administrative law judge's fee award. Employer argues that, as no permanent partial disability compensation is owed, claimant's counsel is not entitled to a fee. Alternatively, employer argues that, if its appeal is partially successful, then the fee award should be vacated and the case remanded for the administrative law judge to take into account claimant's limited degree of success. Inasmuch as claimant's attorney has successfully defended on appeal the administrative

[5]Claimant's disclosure of his neck condition to the prospective employers is irrelevant for purposes of determining whether there is available work within claimant's work restrictions as a shipfitter on the open market.

law judge's award of benefits, employer's contentions are rejected. *See generally LaPlante v. General Dynamics Corp.*, 15 BRBS 83 (1982). Accordingly, we affirm the administrative law judge's attorney's fee award.

Accordingly, the Decision and Order, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge