BRB No. 90-1503

JOSEPH R. WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U. S. LINES, INCORPORATED	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Eugene Brooks (Middleton and Anderson, P.C.), Savannah, Georgia, for claimant.

Jordon D. Morrow (Barrow, Sims, Morrow & Lee, P.C.), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Order awarding an attorney's fee of Administrative Law Judge Eric Feirtag (89-LHC-2941) on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may only be set aside if shown to be arbitrary,

capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, worked as a shop mechanic for employer from 1983 until 1985, when he developed pain and numbness in his hands. While working for employer as a shop mechanic, claimant used pneumatic tools 95 percent of the time. He had performed similar work for most of his working life. Claimant's problems with his hands began in 1979, and in June 1980, Dr. Timms reported that claimant was suffering from carpal tunnel syndrome in both hands. On June 28, 1980, Dr. Timms performed bilateral carpal tunnel surgery on claimant's hands. Following this surgery, claimant was off work for about three months. In 1985, after claimant described his working conditions to Dr. Timms, Dr. Timms advised claimant to reduce his work using pneumatic tools in order to avoid the stress it was producing in his hands. Claimant then reported his hand condition to his foreman and manager and was reassigned to a different position, which involved no use of pneumatic tools or change in salary. Claimant's duties in this position involved inspecting containers and sweeping out trailers, work that caused no pain in his hands. In November 1986, however, claimant was laid off by employer when employer went bankrupt. At that time, claimant was still having problems with his hands, and was referred by Dr. Timms to Dr. Cannon, a neurosurgeon. Dr. Cannon performed carpal tunnel surgery on claimant's hands in March 1988. On March 15, 1988, claimant filed a claim[1] under the Act seeking temporary total disability compensation from January 5, 1988 through August 10, 1988, and permanent partial disability compensation from November 21, 1986 through January 4, 1988, and from August 11, 1988 and continuing.

The administrative law judge found that causation was established, that the claim was timely filed, and that employer met its burden of establishing suitable alternate employment prior to its bankruptcy based on the light duty job it provided to claimant. The administrative law judge determined, however, that because this job became unavailable to claimant due to employer's bankruptcy, employer was required to establish another suitable alternate employment opportunity and that such evidence was presented as of the date of the hearing. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from November 21, 1986 until September 26, 1989, and permanent partial disability under the schedule for a seven-and-one-half percent loss of use of his right hand and a two-and-one-half percent loss of use of his left hand thereafter.

[1]Although this claim is referred to as an "amended claim", we note that it was the only claim submitted into evidence.

Employer appeals, contending: (1) that the claim is barred by the applicable statute of limitations; (2) that claimant was not temporarily totally disabled between November 20, 1986 and September 26, 1989; and (3) that the award of an attorney's fee is excessive. Claimant responds that the administrative law judge erred in finding that employer established the availability of suitable alternate employment at the time of the hearing and urges that the administrative law judge's fee award be affirmed.[2]

Section 13(a) of the Act, 33 U.S.C. §913(a), provides that in the case of a traumatic injury, the right to compensation for disability shall be barred unless the claim is filed within one year from the time claimant became aware or in the exercise of reasonable diligence should have been aware of the relationship between the injury and his employment. Section 20(b), 33 U.S.C. §920(b), provides a presumption that the claim has been timely filed. *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem*, 729 F.2d 1441 (2d Cir. 1983). As part of its burden to rebut Section 20(b), employer must preliminarily establish that it complied with the requirements of Section 30(a), which provides that employer must submit a report within ten days of the date of any injury which causes the loss of one or more shifts of work. 33 U.S.C. §930(a) (1988). Section 30(f) provides that where an employer has notice of an employee's injury and fails to file a report as required by Section 30(a), the Section 13(a) time limitation period does not begin to run against the claim until the report is filed. 33 U.S.C. §930(f); *see also Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 69 (1990).

In the present case, the administrative law judge found that although no evidence was presented showing that claimant filed his claim within one year after he became aware of his November 1985 work injury, claimant's amended claim filed March 15, 1988, was not time-barred. In so concluding, the administrative law judge reasoned that because claimant had provided employer with actual notice of his alleged November 1985[3] injury at the time it occurred and as no

[2]On May 29, 1991, claimant filed a motion for modification of the administrative law judge's Decision and Order with the Board, arguing that he had been unable to find alternate employment. The Board issued an order on December 3, 1991, declining to dismiss employer's appeal and stating that the issue of suitable alternate employment would be addressed in its final decision. On June 23, 1992, claimant requested that the Board reconsider its December 3, 1991 order denying claimant's motion for modification based on new information not available at the time of the hearing, including an award of permanent total disability benefits by the Social Security Administration and claimant's continued inability to obtain employment despite diligent effort. Claimant's motion for reconsideration is denied as it is untimely. 20 C.F.R. §802.407. Moreover, if claimant wishes to have new evidence considered, he must file a motion for modification with the administrative law judge pursuant to Section 22, 33 U.S.C. §922, as the Board is not empowered to conduct a *de novo* review. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

[3]Although claimant asserted that October 1985 was the date of injury in his claim, the administrative law judge's error in this regard is harmless in light of our disposition of this case. *See* discussion, *infra*.

evidence existed demonstrating that employer had filed a Section 30(a) report of injury, the Section 13(a) statute of limitations remained tolled pursuant to Section 30(f) until claimant filed his claim.

On appeal, employer contends that the administrative law judge erred in finding that the March 15, 1988 claim was timely. Employer avers that it was not required to file a First Report of Injury under Section 30(a) until after claimant was terminated due to employer's dissolution as claimant did not sustain a time loss injury until that time and that claimant had the burden of filing his claim within one year of his November 1985 date of injury. Claimant responds that the administrative law judge properly determined that the Section 13(a) filing period was tolled pursuant to Section 30(f). Claimant argues that employer had a statutory duty to file its Section 30(a) report as of November 1985 when claimant reported his injury to his foreman because Section 30(a) requires that this report be filed within ten days of any injury which causes the loss of one or more shifts of work or from the date that employer has knowledge of a disease or infection.

We agree with employer that it was not required to file a Section 30(a) report until claimant's injury caused him to lose time from work. The statute as amended in 1984 explicitly requires a report only where claimant loses one or more shifts of work due to his work-related injury. *See Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting on other grounds); 33 U.S.C. §930(a)(1988). Nonetheless, we reject employer's assertion that claimant was required to file his claim within one year of his 1985 injury. In the present case, the administrative law judge's finding that claimant had the requisite awareness to commence the Section 13(a) time limitation as of November 1985, is not consistent with applicable law. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction the present case arises, has recently held that the Section 13(a) statute of limitations does not begin to run until claimant is aware of the full character, extent, and impact of the harm done to him. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). The fact that claimant suffers an accident and is aware that he is injured is not determinative; rather, claimant must be aware that he has sustained a compensable injury resulting in a loss in wage-earning capacity. *Brown*, 893 F.2d at 296, 23 BRBS at 24 (CRT). Although claimant in this case was aware that he sustained a work-related injury in late 1985, he was not aware that he had suffered an injury which would impair his earning power until he was laid off in November 1986, at the earliest. Up until that time, claimant continued to work for employer with no loss of wages. Moreover, as Dr. Cannon performed carpal tunnel surgery on claimant's hands in March 1988, claimant may not have been aware of the full nature and extent of his injury until that time. As the administrative law judge decided this case without benefit of the decisions in *Brown* and *Nelson*, this case is remanded for reconsideration of the timeliness of the claim under Sections 13(a) and 30(a), consistent with the Section 20(b) presumption.

Employer next argues that claimant's light duty work for employer prior to its dissolution established the availability of suitable alternate employment and precluded the administrative law judge's award of temporary total disability compensation in this case. Employer contends that it met its burden of establishing the availability of suitable alternate employment[4] by providing claimant

[4]To establish a *prima facie* case of total disability, claimant must show that he cannot return to his

with a suitable light duty job within its facility and that claimant's inability to continue to perform this job was due solely to employer's dissolution, rather than to reasons related to claimant's physical condition. On the facts of this case, however, we affirm the administrative law judge.

The Board has recognized that employer can establish the availability of suitable alternate employment by providing claimant with a job in its facility which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In order for such a job to constitute suitable alternate employment, the job must be actually available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 24 (1988). Where, as here, employer withdraws claimant's opportunity to perform the light duty work, suitable alternate employment in its facility is no longer available. *Mendez*, 21 BRBS at 25. Employer's reliance on *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *vac. and remanded mem.*, 642 F.2d 445 (3d Cir 1981), *decision following remand*, 19 BRBS 171 (1986), and *Harrod v. Newport News Shipbuilding & Dry Dock Co*., 12 BRBS 10 (1980), in support of its argument that the light duty job performed in its facility was sufficient to establish suitable alternate employment is misplaced. The claimants in *Walker* and *Harrod* performed light duty work successfully for a period of time but were then discharged due to their own misconduct. *See also Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992). In the present case, claimant was not at fault in causing the loss of the light duty job. Because the light duty position provided by employer in this case became unavailable due to employer's bankruptcy and not because of any malfeasance on claimant's part, we hold that the administrative law judge properly determined that this job could not meet employer's burden after it ceased to exist in November 1986. Thus employer was required to establish other suitable alternate employment opportunities to avoid liability for total disability compensation. *See Mendez, supra*.[5]

In the alternative, employer argues that the administrative law judge erred in determining

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regular or usual employment due to his work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *appeal pending*, No. 91-70648 (9th Cir. Oct. 24, 1991).

[5]The present case is also distinguishable from *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *appeal pending*, No. 91-70648 (9th Cir. October 24, 1991) and *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting). In *Edwards* and *Armfield*, the Board recognized that claimant's satisfactory performance of a post-injury job for another employer could meet employer's burden of establishing suitable alternate employment even if the job ceased to exist. Under such circumstances, unlike those in the present case, claimant has demonstrated the ability to compete on the open market. Moreover, whereas in *Edwards* and *Armfield*, the claimants had reached maximum medical improvement prior to obtaining the alternate job, claimant in the present case was still temporarily disabled at the time he worked for employer prior to undergoing surgery.

that claimant remained temporarily totally disabled up until the time of the hearing. After claimant was laid off by employer, he underwent surgery for his hand condition in March 1988. The administrative law judge found him temporarily totally disabled until he reached maximum medical improvement from this surgery in September 1989. Although employer recognizes that Dr. Cannon did not find that claimant reached maximum medical improvement until September 1989, employer asserts that because Dr. Cannon testified that the majority of claimant's recovery occurred within two months of the March 1988 surgery, the administrative law judge should have terminated the award of temporary disability benefits at that time. In addition, employer argues that because the job alternatives it presented at the September 1989 hearing were available to claimant during the entire time of his asserted disability and claimant was capable of performing them at all times with the possible exception of a short period after the March 1988 surgery, the administrative law judge improperly determined that claimant remained totally disabled up until the time of the hearing.

We reject employer's contentions. A showing of available alternate employment may not be applied retroactively to the date an injured employee reaches maximum medical improvement; an employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *See Rinaldi v. General Dynamics Corp*, 25 BRBS 128, 131 (1991). In this case, employer presented no evidence of suitable alternate employment available after the surgery prior to the September 1989 hearing. The administrative law judge, moreover, rationally found that maximum medical improvement was not achieved until September 1989 based on Dr. Cannon's September 5, 1989 assessment. The administrative law judge's determination that claimant remained temporarily totally disabled through the date of the hearing is therefore consistent with the applicable law and supported by substantial evidence. Accordingly, if the administrative law judge finds that the claim was timely filed on remand, claimant is entitled to temporary total disability compensation during this period.

The next issue to be addressed is claimant's assertion that the administrative law judge erred in finding that employer established the availability of suitable alternate employment as of the time of the September 26, 1989 hearing. In finding suitable alternate employment established, the administrative law judge found that claimant can, and has, worked as a welder, and that such work was not contraindicated by the medical opinions. He also credited the testimony of C. S. Blue, who manages an organization that provides employees to various enterprises in the Savannah area, that there was a shortage of welders and noted that both C. S. Blue and J. S. Waddington, a rehabilitation consultant, testified that the starting wages for welders are eight dollars and up.

Claimant asserts that the administrative law judge erred in finding that employer established the availability of suitable alternate employment because he was not informed of the alternate job opportunities until the time of the hearing. We disagree. Employer need not communicate alternate available job opportunities to claimant in order to meet its burden. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Claimant's assertion that Mr. Waddington's testimony can not properly support a finding of suitable alternate employment because he did not contact the prospective employers directly to determine whether they would hire someone with claimant's physical limitations similarly must fail. The Act does not require the vocational expert to contact the

prospective employers directly; the expert need only be aware of claimant's age, education, work experience, and physical restrictions to provide a valid opinion as to the availability of suitable alternate employment. *See Tann v. Newport News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Hogan*, 23 BRBS at 292. We note, however, that the administrative law judge's findings as to claimant's work capabilities in his Decision and Order are not internally consistent. In the Decision and Order at 9, the administrative law judge determined that claimant can and has performed work as a welder and that such work is not contraindicated, noting that Dr. Cannon had only restricted claimant's use of pneumatic tools. Earlier in the Decision and Order, however, the administrative law judge reported Dr. Cannon as saying that claimant cannot perform work requiring constant pressure against the hand or medial portion of wrist. Decision and Order at 5. Claimant also testified that both Drs. Timms and Cannon restricted him from heavy industrial work. Decision and Order at 4. In addition, while the administrative law judge considered Ms. Blue's deposition testimony that welding work was generally available in the Savannah area in finding suitable alternate employment established, he did not discuss her testimony that she was uncertain whether the positions she identified were compatible with claimant's limitations and that she did not know if welding jobs would be available to someone with claimant's limitations. Deposition at 15. In order that the administrative law judge may more fully address this evidence, we vacate his finding of suitable alternate employment and remand the case for him to resolve the conflict in the medical evidence and to reconsider whether suitable alternate employment has been established consistent with this determination.

The final issue to be considered is employer's appeal of the administrative law judge's fee award. Claimant filed a fee petition for work performed before the administrative law judge, requesting $6,848.15 representing 46.25 hours of services at $125 per hour plus $1,066.90 in expenses. In a Supplemental Order dated June 12, 1990, the administrative law judge awarded claimant's counsel the full $6,848.15 requested. On appeal, employer contends that the award of an attorney's fee is excessive in that claimant's petition does not adequately support an hourly rate of $125. Employer submits that this hourly rate is above the customary rate in the Savannah, Georgia area and that a more reasonable rate would be $90 an hour, the same rate as claimant's attorney charged for services before the district director. In addition, employer challenges the administrative law judge's award of the $1,066 in litigation expenses requested, arguing that claimant's counsel did not itemize or otherwise provide documentation to support this request.

As employer's unsupported assertions are insufficient to establish that the administrative law judge abused his discretion in awarding a fee based on a $125 hourly rate, we affirm the administrative law judge's hourly rate determination. *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds). Employer correctly contends, however, that claimant's counsel failed to provide any supporting documentation or itemization of his request for $1,066.90 in litigation expenses.[6] Accordingly, we vacate that portion of the fee award for the

[6]Although claimant's counsel attempts to rectify the situation by providing itemization in its brief on appeal, the Board cannot determine the adequacy of the fee expense determination based on this

expenses of litigation and remand to allow claimant's counsel to amend the fee petition to reflect an itemization of these expenses and to allow the administrative law judge to reconsider this portion of the fee based on claimant's itemization. *See generally Carter v. General Elevator Co.*, 14 BRBS 90 (1981).

Accordingly, the administrative law judge's findings that the claim was timely filed and that suitable alternate employment was established as of the time of the hearing are vacated, and the case is remanded for reconsideration of these issues consistent with this opinion. The administrative law judge's determination that claimant was temporarily totally

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itemization which was not part of the fee petition below.

disabled from November 21, 1986 until September 26, 1989 is affirmed. The hourly rate chosen as the basis for the fee award is also affirmed. The portion of the fee award relating to the expenses of litigation is vacated, and the case is remanded to allow claimant to amend the fee petition to reflect an itemization of these expenses and to allow the administrative law judge to reconsider the compensability of these expenses based on this itemization.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge