BRB Nos. 91-0316
and 91-0316A

OTIS F. DUFFEY, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order - Awarding Attorney Fees of Theodor P. von Brand, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Cathleen Reilly-Brew and Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order, and employer appeals the Supplemental Decision and Order - Awarding Attorney Fees,[1] (86-LHC-1890) of Administrative Law Judge Theodor P. von Brand rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an

[1]By Order dated March 9, 1992, the Board consolidated for decision claimant's appeal and employer's cross-appeal of the administrative law judge's Decision and Order, and employer's appeal of the administrative law judge's Supplemental Decision and Order -Awarding Attorney Fees.

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, a cleaner, was injured during the course of his employment with employer on March 24, 1983, when he slipped and fell while washing down a submarine tank. Since his injury claimant has undergone extensive medical treatment and two surgical procedures and has attempted to return to work for this employer on several occasions. In July 1987, claimant was discharged by employer for a violation of a company rule. Subsequent to his discharge, claimant has worked at several non-maritime jobs.

In his decision, the administrative law judge, after initially determining that claimant had not been discharged by employer in violation of Section 49 of the Act, 33 U.S.C. §948a, denied claimant's request for temporary total disability compensation from April 13, 1987, to August 1, 1988. Next, the administrative law judge found that claimant was entitled to permanent partial disability compensation in the amount of $50.15 per week as a result of his loss of overtime during the period from December 1985 until April 13, 1987, and $100.93 per week based upon his loss of wage-earning capacity in the open market from April 13, 1987, and continuing. Lastly, the administrative law judge determined that employer is not entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant contends that the administrative law judge erred in finding that claimant's continued employment at employer's shipyard from December 10, 1985, to April 13, 1987, constituted suitable alternate employment for purposes of determining his post-injury wage-earning capacity and that his loss of wage-earning capacity during this period should be the same as that which he sustained subsequent to April 13, 1987. Employer, in its cross-appeal, asserts that the administrative law judge erred in finding that claimant sustained an increased loss of wage-earning capacity following his discharge in July 1987.

We first address claimant's contention that the administrative law judge erred in finding that claimant's continued employment at employer's facility from December 10, 1985, to April 1987, constituted suitable alternate employment for purposes of determining claimant's post-injury wage-earning capacity. Specifically, claimant avers that the clean-up job which he performed at employer's facility from September through December 1986, was make-shift, sheltered employment created by employer and thus cannot constitute suitable alternate employment for purposes of determining his post-injury wage-earning capacity. Claimant asserts that the administrative law judge should have used his earnings on the open market, as he did for the period after April 1987, to establish claimant's wage-earning capacity during this period.

In order to establish a *prima facie* case of total disability, claimant need only establish that he cannot perform his usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Once claimant has established a *prima facie* case of total disability, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light-duty job in its facility; such

a position may constitute evidence of suitable alternate employment if the job is within claimant's medical restrictions and the tasks performed are necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Once suitable alternate employment is demonstrated, the administrative law judge must determine claimant's wage-earning capacity in that position, evaluating relevant factors to determine whether claimant's earnings in that job represent his wage-earning capacity under Section 8(c)(21) and (h), 33 U.S.C. §908(c)(21), (h). *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, ___ BRBS ___, BRB No. 92-2308 (Feb. 15, 1996).

In the instant case, the administrative law judge addressed the relevant evidence and found claimant's earnings in the job at employer's facility established claimant's wage-earning capacity during the period of employment. Since employer conceded that claimant sustained a loss in overtime from his pre-injury job, the administrative law judge awarded permanent partial disability benefits based on this loss. Specifically, with regard to claimant's arguments in this appeal, the administrative law judge rejected claimant's contention that the job provided by employer was sheltered, make-shift work. The administrative law judge found that claimant's cleaning job was necessary based on the testimony of Mr. Rodrigues, claimant's general foreman, that the mission of the X-35 cleaning services department to which claimant was assigned was to perform the final clean-up on ships and that claimant's cleaning up of debris both on the ship's main deck and on the pier constituted a necessary function. *See* Tr. at 165-167, 170, 176-177. Mr. Rodrigues' testimony was supported by the testimony of Mr. Bell, one of claimant's supervisors, who noted that it continued to be necessary to assign workers to perform the job that claimant carried out of picking up trash and debris. *Id.* at 154. In this regard, claimant conceded that there were certain areas of the pier that he was assigned to clean-up that could have occupied him for years. *Id*. at 96. Thus, the record reflects that the cleaning position to which claimant was assigned upon his return to work was a necessary and essential part of employer's operation and that the collection of debris from the work area continues to be performed by employer's workers.

Next, the administrative law judge found the cleaning position was within claimant's physical capabilities, despite claimant's subjective complaints of pain, based on the job description given by Mr. Rodrigues and Mr. Bell, and Dr. Foer's and Dr. Muizelaar's approval of claimant's job duties as being within his physical restrictions. EX 20. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's findings regarding claimant's work in the cleaning position are rational and supported by the record. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's conclusion that claimant's position as a cleaner for employer was both necessary and within his physical restrictions, and his consequent use of that position to calculate claimant's post-injury wage-earning capacity.

In its cross-appeal, employer challenges the administrative law judge's determination that claimant lost his post-injury light-duty employment position due to his work-injury and that, accordingly, claimant is entitled to permanent partial disability compensation following his discharge based upon his loss in wage-earning capacity in the open market. Specifically, employer asserts that, because claimant lost his post-injury job as a result of his violation of a company rule, he is entitled only to permanent partial disability compensation based upon his earnings in that position for the period subsequent to his discharge. We agree.

The Board has held that an employer has established suitable alternate employment where claimant successfully performs light-duty work at employer's facility, but is discharged for breaching company rules and not for reasons related to his disability. *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. 1993); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980)(Miller, J. dissenting), *vac. and remanded mem. on other grounds*, 642 F.2d 445 (3d Cir. 1981), *decision after remand* 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). In the instant case, claimant returned to restricted work in December 1985 and worked sporadically although his physicians continued to return him to work duty with restrictions. *See* EXs 12, 16. Subsequent to April 13, 1987, claimant failed to report to work despite the fact that no physician had authorized his absence. On July 8, 1987, claimant was discharged by employer for violation of its five-day rule which requires that an employee, absent for more than five consecutive days from work, call in and have medical documentation to support the absence. EX 10; Tr. at 206-208. On these facts, the administrative law judge held that claimant's discharge occurred because of his work-related disability. Thus, as claimant's light-duty position was unavailable to him after April 13, 1987, the administrative law judge awarded claimant partial disability compensation commencing that date based upon his earnings in the open market.

Based upon the facts presented, we agree with employer that the administrative law judge erred in awarding claimant permanent partial disability compensation based upon claimant's earnings in the open market subsequent to his discharge. As we held *supra*, based upon claimant's post-injury cleaning job with employer, employer succeeded in establishing the availability of suitable alternate employment which determined claimant's post-injury wage-earning capacity. If claimant could no longer perform this job due to the effects of the work-related injury, then that job would no longer be suitable and could not establish claimant's wage-earning capacity, justifying the administrative law judge's decision to rely upon evidence regarding the open market. Contrary to the administrative law judge's conclusion, however, while claimant's violation of employer's "five-day call-in" rule may not have occurred but for his work-injury, his discharge occurred solely because he violated that rule and not because of the work-injury itself.[2] Thus, inasmuch as claimant's post-July 8, 1987, loss of wage-earning capacity was not due to any disability resulting from his work-related incident, but rather was due to claimant's violation of a company rule, any

[2]Claimant's testimony indicates that he was aware of this policy and that he had no problems complying with it in the past. *See* Tr. at 61, 113, 120-121.

additional loss in his wage-earning capacity after that date is not compensable under the Act. *See Brooks*, 26 BRBS at 6; *Harrod*, 12 BRBS at 10. Moreover, since claimant was discharged for a reason unrelated to his disability, employer did not have a continuing responsibility to identify new suitable alternate employment. *See Brooks*, 26 BRBS at 6. We therefore reverse the administrative law judge's determination that employer bore a renewed burden of establishing suitable alternate employment subsequent to claimant's discharge, and we vacate his award of permanent partial disability compensation to claimant based upon claimant's earnings on the open market subsequent to April 13, 1987.

Employer concedes that claimant is entitled to a continuing permanent partial disability award of $50.15 per week, based upon claimant's loss of overtime in the job employer provided. An award of permanent partial disability may be based on a loss of overtime wages. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 111 (1989); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *see also Peele*, 20 BRBS at 133. In the instant case, the administrative law judge's award of permanent partial disability compensation during the period of claimant's post-injury employment at a weekly rate of $50.15 was based upon a loss of overtime wages sustained by claimant as a result of his work-injury. As this loss of earning capacity would have continued despite claimant's discharge, and is not disputed by employer, we modify the administrative law judge's decision to reflect claimant's entitlement, based upon his loss of overtime, to weekly permanent partial disability compensation in the amount of $50.15 commencing April 13, 1987.

Lastly, in a supplemental appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge; specifically, employer contends that claimant's counsel is not entitled to a fee payable by employer. Subsequent to the issuance of his Decision and Order, the administrative law judge issued a Supplemental Decision and Order in which he awarded claimant's counsel a fee of $10,975, payable by employer.

An attorney's fee can be assessed against employer only under Section 28, 33 U.S.C. §928, of the Act. Under Section 28(a), 33 U.S.C. §928(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director and claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*; 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). As employer in the instant case was paying benefits to claimant at the time the case was referred to the Office of Administrative Law Judges, Section 28(b) rather than Section 28(a) is applicable herein.

Before the administrative law judge, claimant asserted that his discharge by employer was in violation of Section 49 of the Act, that he was entitled to temporary total disability compensation

from April 13, 1987, until August 1, 1988, and that he was entitled to permanent partial disability compensation based on his loss of wage-earning capacity in the open market thereafter. The administrative law judge denied claimant's claim under Section 49, as well as his claim for temporary total disability compensation, and awarded claimant permanent partial disability compensation for the loss of overtime from December 10, 1985, until April 13, 1987, and permanent partial disability based on a loss of wage-earning capacity in the open market thereafter. Pursuant to our decision, the administrative law judge's award of permanent partial disability subsequent to April 13, 1987, has been vacated, and the administrative law judge's award modified to reflect claimant's entitlement to ongoing compensation based on his loss of overtime.

With regard to employer's voluntary payments, it is uncontroverted that prior to the case's being referred to the Office of Administrative Law Judges, employer paid benefits to claimant based on a loss of overtime of $75 per week. Thereafter, employer, both before the administrative law judge and on appeal, did not contest claimant's entitlement to compensation based on the loss of overtime; in fact, we note that the administrative law judge relied on employer's figures to compute the amount of compensation due claimant as a result of his lost overtime since claimant offered no evidence on the issue. Accordingly, as claimant's counsel did not gain any benefits which had not already been proffered by employer, Section 28(b) is inapplicable to the instant case. We therefore reverse the administrative law judge's assessment of an attorney's fee against employer, *see generally Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984), and we remand the case to the administrative law judge to determine whether claimant should be held liable for his counsel's fee pursuant to 33 U.S.C. §928(c). *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), *rev'g Loiselle v. Portland Stevedoring Co.*, 2 BRBS 214 (1975). We note that the regulations provide that the amount of benefits awarded may be taken into account in awarding the fee, and that the financial circumstances of claimant shall be taken into account when the fee is assessed against claimant. *See* 20 C.F.R. §702.132(a).

Accordingly, the administrative law judge's award of permanent partial disability compensation subsequent to April 13, 1987, based upon claimant's loss of wage-earning capacity on the open market earnings is vacated, and the decision modified to reflect claimant's entitlement to ongoing weekly benefits in the amount of $50.15 from that date. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order-Awarding Attorney Fees assessing claimant's counsel's fee against employer is reversed, and the case remanded for consideration of an attorney's fee payable by claimant.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge