BRB No. 99-0861

BORIS LA ROSA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROWLEY AMERICAN TRANSPORT, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Mark N. Hirsch (Templer & Hirsch), Miami, Florida, for claimant.

James W. McCready (Seipp, Flick & Kissane), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-1831) of Administrative Law Judge Richard E. Huddleston 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 if they 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 lower back on April 29, 1996, during the course of his

employment for employer as a driver. An MRI and CT scan showed a herniated disc at L3-4 and L4-5 and bulging and desiccation at L5-S1. Claimant's treating physician, Dr. Pagan, performed a discectomy at L3-4 and L4-5 on February 11, 1997. On September 3, 1997, Dr. Pagan noted depression. Employer referred claimant to Dr. Jarrett for a psychological evaluation on September 30, 1997. Dr. Jarrett diagnosed a non-disabling adjustment disorder. At the formal hearing, Dr. Pagan opined that claimant's back reached maximum medical improvement on March 26, 1997, and that he has an eleven percent whole body impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. He restricted claimant from lifting more than 25 pounds and to occasional bending. Furthermore, he opined that claimant needs a ten minute per hour rest period to stretch.

In his Decision and Order, the administrative law judge found that Dr. Pagan's testimony that claimant is unable to return to his former employment with employer was uncontradicted. He next addressed employer's evidence of suitable alternate employment. Specifically, employer introduced labor market surveys conducted on November 10, 1997, February 29, 1998, April 3, 1998, and September 8 and 11, 1998. The administrative law judge found that the former two surveys established the availability of suitable alternate employment, but that the latter two surveys did not. The administrative law judge next found that claimant diligently but unsuccessfully sought work from October 15, 1997, to December 23, 1997, and from July 15, 1998, to the formal hearing on October 19 and 22, 1998. The administrative law judge thus awarded claimant benefits for temporary total disability, 33 U.S.C. §908(b), from the date of injury until the date of maximum medical improvement on March 25, 1997, and for permanent total disability, 33 U.S.C. §908(a), from March 26, 1997, until the conclusion of claimant's first job search on December 23, 1997. Claimant was awarded benefits for permanent partial disability, 33 U.S.C. §908(c)(21), based on employer's November 10, 1997, labor market survey, which the administrative law judge found established a residual wage-earning capacity of $260, from December 24, 1997, to February 19, 1998.[1] Claimant was awarded benefits for permanent partial disability, based on employer's February 29, 1998, labor market survey, which the administrative law judge found established a residual wage-earning capacity of $240, from February 20, 1998, to April 2, 1998. Finally, claimant was awarded continuing benefits for permanent total disability from the date of the rejected April 3, 1998, labor market survey.

[1]However, claimant was awarded benefits for permanent total disability from January 26, 1998, to February 2, 1998, as Dr. Pagan restricted claimant from working due to an aggravation of his back condition during this period.

All of these disability benefits for claimant's April 1996 work injury were based on the administrative law judge's finding of an average weekly wage of $513.41, which he derived pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), by dividing by 52 claimant's total earnings in 1994. The administrative law judge found that these earnings included $1,267.50, representing a meal allowance, which claimant received as part of the total of $20,320, which he was paid in 1994 by EP Production Services, a non-longshore employer for whom claimant worked as a driver. Claimant received $2,450 in 1994 from employer for his work as a casual longshoreman. Claimant's earnings in the 52 weeks prior to the work injury on April 29, 1996, were disregarded by the administrative law judge based on claimant's testimony, which the administrative law judge found uncontradicted, that claimant worked fewer hours than normal during this period.

On appeal, employer challenges the administrative law judge's continuing award of benefits for permanent total disability from April 3, 1998. Employer also challenges the administrative law judge's reliance on claimant's 1994 annual earnings to derive claimant's average weekly wage and his inclusion of the $1,267.50 claimant received as a meal allowance.[2] Claimant responds, urging affirmance.

Employer first alleges error in the administrative law judge's award of benefits for permanent total disability for the period between April 3 to July 14, 1998, which is the day before claimant stated he commenced his second job search on July 15, 1998. Employer argues that, consistent with the administrative law judge's finding that claimant was entitled to benefits for permanent total disability during his first job search and to permanent partial disability benefits thereafter, claimant is not entitled to the resumption of benefits for permanent total disability until the commencement of his second alleged job search on July 15, 1998. We agree that the administrative law judge's basis for awarding claimant permanent total disability benefits during this period cannot be affirmed.

It is axiomatic that benefits for permanent partial disability based on a loss of wage-earning capacity continue until either employer or claimant establish an alternate wage-earning capacity. *See generally Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30

[2]On January 7, and April 10, 2000, employer filed a supplemental case authority with the Board regarding the average weekly wage issues in this case. We hereby accept employer's supplemental pleadings as filed before the Board. *See* 20 C.F.R. §802.215.

BRBS 1 (CRT)(1995). In the instant case, the administrative law judge awarded claimant benefits for permanent partial disability based on his finding that employer's February 29, 1998, labor market survey established the availability of suitable alternate employment, which the administrative law judge found established claimant's residual wage-earning capacity at $240 per week. There is no precedent in law or logic for the administrative law judge's termination of this award on April 3, 1998, based on his finding that employer's subsequent April 3, 1998, labor market survey did not establish the availability of suitable alternate employment. The February 29, 1998, survey is relatively near in time to the April 3, 1998, survey, and the administrative law judge's finding that claimant's wage-earning capacity is $240 per week based on the jobs in the February survey was in no way invalidated by the administrative law judge's finding regarding the subsequent survey. Accordingly, the administrative law judge's award of benefits for permanent total disability from April 3, 1998, to July 14, 1998, is vacated. The award is modified to provide for an award of benefits for permanent partial disability based on the administrative law judge's crediting of the February 29, 1998, labor market survey, which he found established a wage-earning capacity of $240 per week.

Employer next contends the administrative law judge erred in finding that claimant diligently sought employment from July 15, 1998, to the date of the formal hearing in October 1998, such that he is entitled to permanent total disability benefits, notwithstanding employer's showing of suitable alternate employment. Specifically, employer contends that the administrative law judge denied it due process of law when he denied its motion to depose post-hearing the employers allegedly contacted by claimant. Moreover, employer argues that the administrative law judge failed to address employer's challenge to claimant's credibility as to whether he even conducted a search. Finally, assuming, *arguendo*, that claimant engaged in a job search commencing on July 15, 1998, employer asserts that this search was not diligent.

Where, as here, it is uncontested that claimant is unable to return to his usual employment as a driver, claimant has established a *prima facie* case of total disability and the burden shifts to employer to demonstrate 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 or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain entitlement to total disability compensation, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *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).

We initially address employer's contention that the administrative law judge denied it due process. Employer deposed claimant on July 14, 1998. Claimant testified at the hearing in October 1998 that he conducted a job search commencing on July 15, 1998. Tr. at 292-299. Employer objected to this testimony, asserting it should not be allowed unless employer was given an opportunity to verify or rebut it; the administrative law judge denied employer's objection on the basis that claimant was not obliged under the terms of a discovery order to contemporaneously keep employer abreast of his job search. Tr. at 293-295. At the conclusion of the hearing, employer moved to depose the prospective employers allegedly contacted by claimant after July 14, 1998. Tr. at 362. The administrative law judge granted employer two weeks to submit affidavits from these employers. Tr. at 363. Employer timely submitted 11 affidavits. EX 22.

In his Decision and Order, the administrative law judge found that employer's evidence was insufficient to invalidate claimant's testimony concerning his job search. He found that employer failed to produce any evidence of the likelihood of a prospective employer's remembering claimant, and he noted that employer produced affidavits from only 11 of the almost 50 employers claimant testified he contacted after July 14, 1998. Decision and Order at 32. On appeal, employer specifically asserts prejudice from the administrative law judge's denial of its motion to depose and the administrative law judge's granting it only two weeks to submit affidavits, since the administrative law judge's rationale for discrediting the affidavits would not have arisen if it was allowed more than two weeks to depose the alleged prospective employers.

Employer's argument is rejected. An administrative law judge has broad discretion to direct discovery; a discovery ruling will constitute reversible error only if it is so prejudicial as to result in a denial of due process. *Martiniano* v. *Golten Marine Co.*, 23 BRBS 363 (1990). Employer did not object at the hearing to the two week deadline or the administrative law judge's denial of its motion to depose. Tr. at 363. Moreover, employer did not ask for an extension post-hearing to submit additional affidavits. Accordingly, employer cannot now argue it was denied due process by procedures to which it did not raise objections below. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Furthermore, employer does not offer any proof or argument on appeal that it was unable to establish through an affidavit that the prospective employers would have remembered claimant's applying for a job. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Accordingly, we hold that the administrative law judge's ruling allowing employer a two-week period post-hearing to submit relevant affidavits did not deny it due process of law.

Employer next asserts the administrative law judge erred by not addressing the contention in its post-hearing brief which challenged claimant's testimony that he conducted a job search. *See* Employer's Brief at 39-41. We disagree. In his Decision and Order, the

administrative law judge implicitly found claimant's testimony that he conducted a job search commencing on July 15, 1998, to be credible on the basis that employer failed to produce substantial evidence impeaching claimant's testimony, *i.e.*, employer submitted affidavits from only 11 of approximately 50 prospective employers and failed to establish that the employers who denied claimant's ever having applied for a job would have remembered claimant if he had applied. Decision and Order at 32. In adjudicating a claim, it is well-established that 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, we hold that the administrative law judge's finding that claimant conducted a job search from July 15, 1998, to the start of the formal hearing in October 1998 is affirmed as it is rational and supported by substantial evidence.

Employer also asserts that there is no "competent" evidence that claimant's job search was diligent. Employer contends that claimant sought jobs outside his restrictions, or from employers who were not hiring, or who required that claimant have a dependable car, which claimant testified he did not own. Moreover, employer asserts that claimant sought these jobs over the telephone rather than by a visit in person, and he emphasized to prospective employers his work restrictions rather than his capabilities. Finally, employer imputes a lack of diligence to the fact that claimant did not start his job search until the day after his July 14, 1998, deposition. We agree with employer that the administrative law judge's finding that claimant diligently sought suitable alternate employment from July 15 to the October 1998 hearing cannot be affirmed as he did not render adequate findings of fact and conclusions of law with respect to this issue.

Specifically, while the administrative law judge credited claimant's testimony that he contacted approximately 50 prospective employers after July 14, 1998, Decision and Order at 32, he further noted that during claimant's first search from October 15, to December 23, 1997, "most" of the positions sought had requirements exceeding claimant's restrictions, Decision and Order at 31-32. While claimant is not required to attempt to secure the exact jobs identified by employer in its labor market survey, his job search should be within the compass of jobs shown to be suitable and available. *Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT). Furthermore, claimant testified that during his search commencing on July 14, 1998, he sought jobs as a courier and dispatcher. Tr. at 292. With respect to these prospective employers, claimant testified that he was most often not hired because the job required heavy lifting (beyond his 25 pound restriction) or a dependable car, which he did not own. Tr. at 289, 328-329, 344. Moreover, the administrative law judge rejected employer's April 3, 1998, labor market survey on the basis that it identified courier jobs for which claimant did not have reliable transportation.

We vacate the administrative law judge's finding that claimant is entitled to total disability benefits commencing with his second job search on July 15, 1998, and we remand this case for further findings. The administrative law judge is required to make specific

findings regarding the nature and sufficiency of the job search undertaken by claimant in order to establish whether the job search was, in fact, diligent. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *Livingston v. Jacksonville Shipyards, Inc*., 32 BRBS 123 (1998). In this case, the administrative law judge's finding that claimant diligently sought work is based only on the number of alleged contacts with prospective employers. On remand, therefore, the administrative law judge must address employer's contentions regarding the nature and sufficiency of claimant's job search, and render specific findings of fact on this issue.

We next address employer's contentions regarding claimant's average weekly wage. Employer asserts that, under Section 10(c), the administrative law judge should have approximated claimant's average weekly wage at the date of injury by averaging claimant's annual yearly wages from 1990 to 1996 and dividing the average by 52. The administrative law judge first stated that only claimant's earnings from 1994 to 1996 were considered in order to minimize potential unaccounted for changes in circumstances and to more fairly calculate claimant's average annual wage. He then excluded from consideration all wages earned in 1995 and 1996 based on claimant's "uncontradicted" testimony that he worked fewer hours for employer than normal in that time frame. The administrative law judge therefore divided by 52 claimant's total earnings in 1994 of $26,697.44, which corresponds to an average weekly wage of $513.41.

Section 10(c) is the appropriate section for calculating claimant's average weekly wage when claimant's employment is discontinuous or intermittent, as in the instant case. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 276, 32 BRBS 91 (CRT)(5th Cir. 1998). Section 10(c) states that earnings from other employment are to be included in a calculation under this subsection. 33 U.S.C. §910(c); *Lobus v. I.T.O. of Baltimore, Inc.*, 24 BRBS 137 (1990). Claimant testified that he worked for employer since 1988 as a non-union casual employee. EX 11 at 72-74. During the year prior to his injury, claimant testified that he worked 32 hours a week plus overtime. Tr. at 83. Employer's payroll records covering 44 of the 52 weeks prior to the April 29, 1996, injury, indicate that claimant averaged approximately 24 hours a week plus overtime.[3]

[3]Claimant worked five days a week twice, four days a week for ten of the 44 weeks, three days a week in 15 weeks, two days a week in 11 weeks, one day a week in four weeks, and there are two weeks in which claimant did not work for employer at all. *See* EX 1.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). The Board will therefore affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). In the instant case, despite claimant's "uncontradicted" testimony that he worked fewer hours than normal for employer in the year prior to the work injury, his earnings history does not support the conclusion that this year should be excluded. In fact, claimant's earnings in the 52 weeks prior to injury are similar to those in earlier years. Claimant's earnings from 1990 to April 29,1996, were: 1990 - $22,904; 1991- $20,265; 1992 - $19,040, representing $12,730 from employer and $6,310 from EP Production Services (EP), a non-longshore employer; 1993 - $21,817, representing $15,472 from employer and $6,345 from EP; 1994 - $26,697, representing $2,450 from employer, $20,320 from EP, and $3,927 from Cast & Crew Production, another non-longshore employer; 1995 - $15,548 from employer; 1996 (through the April 29, 1996 date of injury) - $7,184 from employer.[4] In the 52 weeks preceding claimant's injury on April 29, 1996, claimant earned a total of $20,594 from employer. *See* EX 1; CX 1; EX 10 at 647, 653-654.[5] Claimant's actual earnings are in contradiction to his testimony that he worked fewer hours than normal for employer during the year prior to the injury, as they establish that claimant never earned more from employer than he did in 1995 and during the year prior to his April 29, 1996, injury.[6] Since this

[4]Wages are rounded to the nearest whole dollar. In 1995, claimant also received $1,962 in unemployment compensation payments. CX 1.

[5]Employer's payroll records indicate that it paid claimant approximately $16,547 from March 13 to December 28, 1995, or $700 more than stated on claimant's 1995 W-2 from employer.

[6]In response to employer's assertion that claimant made $20,447 for the 52 week period before his injury, claimant replied, "that's the least year (*sic*), the least I made since I have been working at Crowley." EX 11 at 84.

evidence undermines the administrative law judge's reliance on claimant's "uncontradicted" testimony that he worked fewer hours than normal for employer during the year prior to the injury, this is the sole basis for the administrative law judge's decision to eliminate claimant's wages in 1995 and 1996 in determining claimant's average weekly wage, and these wages are closer in time to the date of injury than the credited 1994 wages, we vacate the administrative law judge's average weekly wage finding, and remand the case for further consideration of this issue. *See Hall*, 139 F.3d at 276, 32 BRBS at 92 (CRT).

We further hold that, on remand, the administrative law judge may not rely solely on claimant's 1994 wages to determine claimant's average weekly wage at the time of his April 29, 1996, as this finding is not supported by the record. Specifically, claimant's wages in 1994 represent his highest yearly wages of record; however, he earned less from employer that year than any other year from 1990 to 1995. Most of claimant's 1994 wages were paid by EP, where claimant worked as a driver for movie stars on location. EX 11 at 76-82. He performed the same function in 1994 for Cast and Crew. *Id.* Thus, not only were $24,247 of claimant's 1994 earnings of $26,697 from non-longshore employers, but claimant further testified that he earned "$20 odd" dollars an hour with these employers. EX 11 at 77. Claimant earned $14.99 per hour during the year prior to his injury in his longshore employment. *See* EX 1.[7] We hold that the administrative law judge erred in concluding that claimant's 1994 wages best represent his wage-earning capacity at the date of his April 29, 1996, injury as claimant earned significantly more in 1994 than he did during the year prior to his injury or any other year since 1990, and most of these 1994 earnings are from non-longshore employers who paid a significantly higher hourly wage and who did not rehire claimant during the 16 months before the date of his work injury. Thus, claimant's 1994 wages, as a matter of law, do not represent a reasonable estimate of claimant's wage-earning capacity at the date of his injury. *See New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51 (CRT)(5th Cir. 1997). Accordingly, on remand the administrative law judge may calculate claimant's annual earning capacity based on claimant's actual earnings during the 52 weeks prior to his injury, or, as employer argues on appeal, by taking the average of claimant's annual earnings from 1990 to 1996 and dividing this average by 52. Alternatively, he could rationally factor in as many or as few years from the date of injury backwards, so long as all the years within the period of years credited prior to the date of injury are included. *See Empire United Stevedores*, 936 F.2d at 819, 25 BRBS at 26 (CRT).

[7]In its reply brief, employer states that claimant received a raise to $15.18 on March 25, 1996. Reply Brief at 3.

Employer lastly contends that, pursuant to *H.B. Zachry Co. v. Quinones*, 206 F.3d 474 (5th Cir. 2000), *rev'g* 32 BRBS 6 (1998), the administrative law judge erred by including in claimant's average weekly wage a meal allowance of $1,267.50 listed in claimant's 1994 W-2 from EP. The administrative law judge included this sum in claimant's average weekly wage, as the amount is readily calculable, and is not excluded as a fringe benefits pursuant to the Board's decision in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 25 (1990), *aff'd in part and rev'd in part on other grounds sub nom. Cretan v. Director, OWCP*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). In its recent decision in *Quinones*, the Fifth Circuit held that the value of meals and lodging provided to a claimant by his employer does not constitute "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13),[8] where it is not subject to tax withholding under Section 119 of Title C of the Internal Revenue Code. The court held that Section 2(13) is "clear on its face. It provides that 'wages' equals monetary compensation plus taxable advantages." *Quinones*, 206 F.3d at 479; *see also McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir.1998); *Wausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997); *contra Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 n.10, 33 BRBS 15, 20-21 n.10(CRT) (4th Cir. 1998); *Story*, 33 BRBS at 111.

The present case arises within the jurisdiction of the United States Courts of Appeals for the Eleventh Circuit, and this court has yet to address the interpretation of Section 2(13) of the Act as it concerns *per diem* or the value of meals and lodging. We conclude it is not necessary to address this issue in this case, as the meal allowance at issue was included in claimant's income tax withholding, and therefore is properly included in average weekly wage under any interpretation. On claimant's 1994 W-2 form, the meal allowance in question is listed under the heading "Included in the above earnings are the following amounts." CX 1. The "above earnings" are the amounts paid to claimant for his work for EP, and these earnings were subject to tax withholding. Thus, should the administrative law judge again use claimant's 1994 earnings in the average

[8]Section 2(13) of the Act states:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

weekly wage calculation, we affirm the administrative law judge's inclusion of the meal allowance.

Accordingly, the administrative law judge's award of permanent total disability benefits from April 3, 1999 through July 14, 1998, is modified to reflect claimant's entitlement to permanent partial disability benefits based on a wage-earning capacity of $240 per week. The award of continuing permanent total disability benefits from July 15, 1998, is vacated, and the case is remanded for the administrative law judge to make further findings

regarding the nature and sufficiency of claimant's job search during this period. The administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge