BRB Nos. 00-581
and 00-581A

RICHARD NALL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ABB VETCO GRAY, INCORPORATED	)	DATE ISSUED: March 2, 2001
	)	
and	)	
	)	
LANDMARK INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

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

Timothy S. Marcel, Boutte, Louisiana, for claimant.

Mark J. Spansel and Laurie Briggs Young (Adams & Reese, LLP), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals and claimant cross-appeals the Decision and Order, and claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (98-LHC-2063) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant alleges that he hurt his neck while moving heavy equipment at work on November 2, 1993. An MRI revealed a ruptured disc at the C6-7 level. On December 3, 1993, Dr. Cannella performed surgery to relieve nerve root compression caused by the ruptured disc. At the time of the injury, claimant worked in the oil field as a service technician, performing installation of wellhead equipment on offshore and inland barges. He was on call 24 hours a day, and was paid a base salary, plus field bonuses based upon the location of each assignment. Although claimant had other diagnosed problems with his neck and back, the administrative law judge found that only the cervical problem at C6-7 was related to the work injury, and this is the only condition at issue on appeal.

The administrative law judge awarded claimant temporary total disability benefits from the date of the injury, November 2, 1993, through April 11, 1994, the date of maximum medical improvement, and permanent total disability benefits through August 4, 1999, the date he found employer established suitable alternate employment.[1] The administrative law judge then awarded claimant continuing permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(21).

On appeal, employer argues that the administrative law judge erred in finding that claimant sustained a neck injury causally related to his employment and that it did not establish the availability of suitable alternate employment with its May 3, 1999, retroactive labor market survey. Employer next contends that it is entitled to a credit for various payments claimant received during the period when he was entitled to total disability benefits. Claimant responds, urging that the administrative law judge's findings be affirmed. On cross-appeal, claimant asserts that the administrative law judge erred in finding that employer established the existence of suitable alternate employment as of August 5, 2000, and that the administrative law judge's wage-earning capacity calculation is in error. Employer responds to the cross-appeal, urging affirmance of all the issues challenged by claimant. Claimant also appeals the administrative law judge's fee award.

Employer challenges the administrative law judge's determination that claimant hurt

[1]The administrative law judge found that claimant's problems at levels C4-5 and C5-6, as well as his back condition, are not work-related. Claimant does not appeal these findings.

his neck in a work-related accident on November 2, 1993. Specifically, employer contends that claimant was not a credible witness, as his testimony differed substantially from prior statements as to how and when his condition arose. Employer further maintains that, contrary to the administrative law judge's finding, it did not stipulate that claimant was injured on November 2, 1993. Jt. Ex. 1. We reject employer's arguments. In order to be entitled to the Section 20(a) presumption that his condition arose out of employment, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. 33 U.S.C. §920(a); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 72 (1996). The administrative law judge found that claimant sustained a harm at the C6-7 level, based on Dr. Cannella's opinion that claimant had a ruptured disc and nerve root compression at that level. The administrative law judge also considered the inconsistencies in claimant's testimony regarding his alleged accident, but nevertheless found that claimant was generally credible in establishing that working conditions existed that could have caused his cervical harm. Claimant testified, without contradiction, that he had to manually move a 400 pound plugging tool because the crane was inoperable. Inasmuch as the administrative law judge's credibility determination is rational, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm the finding that claimant established the existence of a work-related incident occurring on November 2, 1993, which could have caused his cervical problems at the C6-7 level. *See H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT)(5th Cir. 2000). Consequently, we affirm the administrative law judge's finding that claimant established a *prima facie* case, as it is supported by substantial evidence.

We also affirm the administrative law judge's finding that employer did not establish rebuttal of the presumption. Employer argues that in analyzing rebuttal, the administrative law judge required employer to "rule out" any causal connection between claimant's employment and the injury, thereby applying an erroneous standard. Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco*, 194 F.3d at 684, 33 BRBS at 187(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999) *cert. denied*, 120 S.Ct. 1239 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Conoco*, 194 F.3d at 684, 33 BRBS

at 187(CRT). The administrative law judge here stated that no physician ever opined that claimant's cervical injuries did not result from his employment, and that Dr. Cannella stated claimant's injuries were due to degeneration, but conceded that if claimant was injured on the job in the manner alleged, the accident could be a precipitating cause for a degenerative disc to become symptomatic. Decision and Order at 39; Cl. Ex. 21 at 33-34. The fact that claimant initially said that his condition was not work-related is not dispositive of whether employer introduced sufficient evidence to rebut the Section 20(a) presumption. Moreover, any error in the administrative law judge's stating that employer stipulated to the occurrence of a work-related injury on November 2, 1993 is harmless, as the administrative law judge fully discussed all relevant evidence at Section 20(a). As the administrative law judge's finding that employer has not presented substantial evidence to rebut the Section 20(a) presumption is supported by the record, as Dr. Cannella's opinion does not establish that claimant's underlying condition was not aggravated by the work incident, we affirm the administrative law judge's finding that claimant's neck condition is causally related to his employment. *Conoco,* 194 F.3d at 684, 33 BRBS at 187(CRT).

Employer argues next that the administrative law judge erred in rejecting the retroactive survey it submitted into evidence allegedly demonstrating the availability of suitable alternate employment from 1994 to 1998. Employer contends that it was ready to conduct a labor market survey in 1996; however, claimant's counsel withdrew at that time. DOL asked employer not to continue with a formal discovery efforts while claimant was unrepresented, and new counsel did not ask for formal hearing until December 1997. Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to establish the availability of suitable alternate employment by demonstrating the availability of jobs within the geographic area where claimant resides which claimant, considering his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and can reasonably be expected to secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge rejected the retroactive survey because he found that it lacked sufficient specificity from which he could determine if the jobs were suitable. He noted that the listings fail to document the physical and functional requirements and demands of the work to be performed.

We affirm this finding. In the May 3, 1999, retroactive survey employer introduced archived classified advertisements from a newspaper. Employer's reliance on classified ads alone is insufficient to meet its burden, as there is no evidence regarding the physical and

other requirements of the positions.[2] *See Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989). As the administrative law judge could properly reject the testimony of Mr. Hegwood, employer's vocational counselor, his finding that employer did not establish suitable alternate employment based on this survey is therefore supported by substantial evidence. Employer's argument regarding the various "behind the scenes" activities which it asserts, occurred during this time period and delayed its developing this evidence is rejected. Such facts do not affect the finding that employer did not meet its burden, as the administrative law judge did not reject the evidence because it was retroactive, but because it lacked specificity.

[2]Employer attempts to fit this case within precedent holding that employer can demonstrate job availability through such methods as classified ads, and then utilize standard occupational descriptions to fill out the physical requirements of the jobs. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In *Moore*, the court held that employer could rely on job descriptions in the Dictionary of Occupational Titles (DOT) to provide exertional requirements for available jobs. Employer here, however, makes no argument linking DOT or similar descriptions to the available jobs. Instead, it relies solely on the general testimony of its vocational expert that the jobs were suitable. Contrary to employer's argument, the administrative law judge was entitled to evaluate this testimony and find it insufficient. Without additional information, the administrative law judge is unable to independently assess whether the jobs met claimant's physical restrictions, as is his function as the factfinder.

Contrary to the issue raised in claimant's appeal, however, the administrative law judge's determination in this case that employer established the availability of suitable alternate employment based on the August 1999 labor market survey is supported by substantial evidence. Although claimant argues that the August 4, 1999, labor market survey does not establish the availability of suitable alternate employment because claimant cannot tolerate the commuting time required for the positions found suitable, claimant lacks the intelligence or education required to perform the industrial sales, manager trainee, or auto sales positions, and the physical requirements of the manager trainee position are beyond claimant's capabilities, these arguments are without merit. The administrative law judge found five of the seven positions identified by employer in the August 1999 survey were suitable based on Dr. Cannella's and Dr. Danielson's work restrictions. Tr. at 260; Cl. Ex. 21 at 16, 28;Cl. Ex. 22 at 34-35. The administrative law judge considered the distances involved in commuting to these positions, but found they were nonetheless suitable based on claimant's testimony that he can drive for about an hour before he needs to stretch.[3] The administrative law judge credited the opinion of Mr. Hegwood, over the opinion of Mr. Stewart, claimant's vocational witness, that claimant possessed the intelligence and skills for the positions he found suitable, Decision and Order at 49; Emp. Ex. 13 at 23-26, finding Mr. Stewart's opinion unpersuasive in light of Mr. Hegwood's testimony that he spoke with the potential employers, specifically discussing claimant's capabilities, and ascertaining whether claimant would be considered for the openings. Decision and Order at 49; Tr. at 261-262. The administrative law judge noted that the industrial sales position would offer extensive training, and that the manager trainee, auto sales representative, security officer and night manager positions require no previous experience.[4] As the administrative law judge's weighing of the vocational testimony is rational and within his discretion as the fact finder, *see Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962), and as the administrative law judge's finding is supported by substantial evidence, we affirm his conclusion that employer demonstrated suitable alternate employment based on the August 1999 survey. *See generally Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT)(7th Cir. 2000).

Claimant next argues that the administrative law judge's determination of his post-injury wage-earning capacity is erroneous, as the wages listed for two positions based on state-wide averages are speculative. The administrative law judge determined that claimant's post-injury wage-earning capacity is $13.35 per hour, or $534 per week, by averaging the

[3]The commuting time for these positions ranged from 40 minutes to one hour.

[4]Claimant also argues that the manager trainee position with Blue Ribbon is a route sales position, but the job description provided does not mention driving, only alternate standing, sitting and walking. Emp. Ex. 13 at 24.

hourly rates of the five positions which he found to be suitable. Claimant objects to the administrative law judge's basing the wages of the car salesman and hotel night manager positions on the 1998 *Wage & Survey Report of Mississippi*, a government publication. Claimant does not, however, introduce any evidence that these figures are not reliable or offer alternative figures. Moreover, Mr. Stewart, claimant's vocational expert, did not object to the source of these salaries. Tr. at 339-340. As substantial evidence supports the administrative law judge's determination of claimant's wage-earning capacity, and claimant has not shown an alternative wage-earning capacity, the administrative law judge's determination is affirmed. *See generally Grage v. J. M. Martinac Shipbuilding,* 21 BRBS 66 (1988), *aff'd on other grounds sub nom. J. M. Martinac Shipbuilding v. Director, OWCP,* 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *see also Avondale Industries, Inc. v. Pulliam,* 137 F.3d 326, 32 BRBS 65 (CRT) (5th Cir. 1998).

Employer contends that it is entitled to a credit for three sources of payments received by claimant during the time claimant was found to be totally disabled. Employer contends that to disallow it a credit will result in a double recovery to claimant. The Longshore Act contains various offset or credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§903(e), 914(j), 933(f); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*). Under Section 14(j) of the Act, employer is entitled to a credit for its advance payments of compensation against any compensation subsequently found due. *Shell Offshore, Inc. v. Director, OWCP,* 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied,* 523 U.S. 1095 (1998). "[E]mployer, however, is not entitled to a credit when it continues the employee's salary under a formal salary continuance plan unless it shows that these payments were intended to be advance payments of compensation." *Id.*, 122 F.3d at 317-318, 31 BRBS at 132 (CRT).

The administrative law judge determined that there was no record evidence that the $22,018.80 short-term disability benefits paid by employer from November 4, 1993, the date of injury, until May 3, 1994, were intended to be advance payments of compensation, and thus found that they were not paid pursuant to the Act. Employer is not entitled to a credit under Section 14(j) even where payments were made under a plan whose purpose is to compensate injured employees, unless employer intends the payments as advance compensation. *See Shell Offshore,* 122 F.3d at 317-318, 31 BRBS at 133 (CRT). In a letter dated December 27, 1999, to the administrative law judge from employer's attorney concerning reimbursements/credits, one of the items for which employer claims credit is amounts "for salary continuation payments for six months." This appears to be the $22,018.80 for which employer claims credit. As employer does not point to any evidence that this payment was intended as advance compensation, the administrative law judge's finding that employer is not entitled to a credit for it is affirmed. *Id. See also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd,* 776 F.2d 1225, 18

BRBS 12 (CRT)(4th Cir. 1985).

Employer next claimed credit for $71,176.51 in medical benefits paid by DBL Services, administrator of employer's medical plan for non-work-related conditions. The administrative law judge's finding that employer is not entitled to a credit for medical benefits paid to claimant, because medical benefits are not considered "compensation," accords with law. *See Caudill v. Sea Tac Alaska Shipbuilding,* 22 BRBS 10 (1988).

Employer next alleges that claimant received $99,967.84 pursuant to a non-work-related disability policy issued by MetLife for which MetLife should receive credit. The administrative law judge found that employer has no standing to request reimbursement for MetLife, its long-term disability carrier, as MetLife has not intervened in this case; that assuming, *arguendo*, MetLife has meritorious claim for reimbursement for money paid to claimant, reimbursement may arguably be sought from employer's Longshore liability carrier. We affirm the administrative law judge's conclusion that MetLife is not entitled to a credit against employer's liability to claimant under the Longshore Act, as payments under a non-occupational insurance plan are not "compensation" for purposes of Section 14(j) of the Act.[5] *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1137 (1981).

Claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $27,125, representing 217 hours at $125 per hour plus $5,614.89 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, addressing employer's challenges to specific items on claimant's fee petition, disallowed .41 hours in response to employer's specific objections, and then, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), reduced the remaining hours requested and expenses by 60 percent. Accordingly, he awarded claimant's counsel $13,328.02, representing 86.64 hours of services at $125 per hour, $2,218.88 in expenses, and $309.14 in travel costs. Claimant appeals the fee award, and employer responds, urging affirmance.

---

[5]Employer concedes that "the credits and reimbursements requested are not the typical credits generally encompassed in the credit doctrine." Employer's Post-Trial Memorandum at 33. Moreover, employer summarily contends that MetLife paid claimant $99,967.84, but provides no information whether this amount was paid for the same condition as the one at issue in the Longshore case. *See id.*, Attachment C. Employer does not present any legal basis which would allow it to raise this issue on behalf of MetLife or the Board to credit MetLife for payments made to claimant, other than urging a "broad" interpretation of the credit doctrine. Finally, we note that double recoveries are not absolutely prohibited under the Act. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

On appeal, claimant asserts that the administrative law judge erred in disallowing .16 hours on February 9, 1999, for "Letter to SSA for SSPO on client," and $35 in related expenses, and .25 hours on August 16, 1999, for "Tel. conf. w/Met Life re: disability benefits." We agree with claimant that as his August 17, 1999, entry shows, he relied on information obtained from this Social Security record to calculate claimant's average weekly wage for purposes of the Longshore Act proceeding, and the issue of credit for benefits paid to claimant by MetLife was an issue litigated in this case, both services were relevant to the claim here. Accordingly, the disallowance of these items is reversed.

Claimant also challenges the administrative law judge's across the board reduction of the requested fee by 60 percent based on *Hensley*. In *Hensley*, the United States Supreme Court, creating a two-prong test, held that the attorney's fee awarded in fee-shifting statutes should be commensurate with the degree of success obtained in a given case, and defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). The Court's test is:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. Where claims involve a common core of facts, or are based on related legal theories, the court stated that the focus should be on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Thus, where a plaintiff has obtained "excellent" results, the fee need not be reduced simply because the plaintiff did not prevail on every contention raised. The Court held that where plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The Court emphasized that the most critical factor is the degree of success obtained. *Hensley,* 461 U.S. at 437.

The administrative law judge, in applying *Hensley,* first found that all of claimant's claims involved a common core of facts and are based on related legal theories. Supp. Decision and Order at 3-4. In applying the second prong of *Hensley,* the administrative law judge concluded that as claimant was only successful in establishing

the work-relatedness of his cervical injuries at the C6-7 level, and related medical expenses, but not the work-relatedness of those injuries at the C4-5, C5-6 levels, or lower back, he was only proportionately 40 percent successful. Therefore, after making his itemized reductions, the administrative law judge reduced the remaining fee by 60 percent.

The Board has held that an administrative law judge does not necessarily abuse his discretion in making a percentage reduction in a fee request to reflect limited success. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 31 (1999). The administrative law judge properly noted that claimant was not successful on all the issues raised, but the administrative law judge did not consider claimant's success in obtaining temporary total disability and permanent total disability compensation in the amount of $200,690.43, and continuing permanent partial disability of $145 per week.[6] The Court in *Hensley* pronounced "Where a [claimant] has obtained 'excellent' results, . . . the fee award should not be reduced simply because he failed to prevail on every contention raised." *Id.* 461 U.S. at 435-436. And while *Hensley* does not equate "success" with a dollar amount, the $200,690.43 claimant obtained here must be considered more than minimal success. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998), *aff'd* 195 F.3d 790, 33 BRBS 184 (CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). Accordingly, we vacate the administrative law judge's attorney's fee award and we remand for further consideration, emphasizing that the administrative law judge is not required to increase the fee award, but must account for the full measure of claimant's success. We also vacate the administrative law judge's disallowance of 60 percent of expenses requested, based on his assessment of claimant's degree of success. Section 28(d), 33 U.S.C. §928(d), requires only an analysis of the reasonableness and necessity of costs incurred, and the compensability of the cost is not to based on the degree of success. *Ezell*, 33 BRBS at 31.

Accordingly, the administrative law judge's Decision and Order is affirmed. The portion of the Supplemental Decision and Order Awarding Attorney's Fees disallowing .45 hours for time and expenses related to obtaining information from the Social Security Administration and from MetLife is reversed, the remaining portion is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

[6]As employer correctly notes, claimant was not successful in obtaining an ongoing award of permanent total disability.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority that the administrative law judge must analyze the attorney fee award in light of the Supreme Court's teaching in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). I write separately because the majority opinion stops short in its analysis of *Hensley.* The majority correctly states the second prong of *Hensley:*

> [D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Id. at 435. The level of success, however, is measured not only by the specific issues on which claimant prevailed and the amount of money awarded, but also by the amount sought in the lawsuit. The High Court was quite explicit:

> We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

Id. at 440-41. This is relevant to the case at bar, because claimant sought not only the total disability benefits he received from the date of injury, November 2, 1993 until August 4, 1999, but also permanent total disability benefits, *i.e.,* $551.89 per week continuing indefinitely. Instead, since August 1999, claimant has received permanent partial disability benefits, *i.e.,* $145.27 per week, continuing indefinitely. This reduction is particularly significant in light of claimant's age: he was forty-five years old at the time of the hearing.

The Supreme Court explained that where, as here, claimant has achieved "limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 437. In that event, the judge "may attempt to identify specific hours that should be eliminated or it may simply reduce the

award to account for the limited success." *Id.* The Court made clear that a judge has broad discretion in making this equitable determination. *Id.*

A fee is excessive, however, only if it appears so when considered in relationship with the "results obtained." *Id.* Hence, on remand, the administrative law judge should first, analyze thoroughly the level of success achieved in this lawsuit and second, consider the hours reasonably expended in relation to claimant's measure of success, before determining to adjust the fee.

REGINA C. McGRANERY
Administrative Appeals Judge