BRB Nos. 03-0413
and 03-0413A

ROBERT SEDOR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:MAR 4, 2004
ARCHER DANIELS MIDLAND COMPANY	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Daniel E. Becnel, III (Law Office of Daniel E. Becnel, Jr.), LaPlace, Louisiana, for claimant.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and employer appeals the Supplemental Decision and Order Awarding Attorney Fees[1] (02-LHC-0397) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls*

[1] Employer's appeal is redesignated as BRB No. 03-0413A.

Associates, Inc., 380 U.S. 359 (1965). 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 law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a boat welder, alleged that he sustained an aggravating injury to his back on January 6, 2001, while welding patches on a barge.[2] He returned to work the following Tuesday, January 9, 2001, and was assigned light duty work in the tool room while waiting to be taken to employer's physician, Dr. Winston. As part of his examination by Dr. Winston, claimant was given a breathalyzer test and was found to be in violation of employer's substance abuse program. Claimant was immediately terminated. Subsequently, claimant obtained work with Orleans Iron Works from January 31 to October 10, 2002, which claimant alleged was too strenuous for him. At the time of the hearing, claimant was working at a convenience store for approximately six hours per day/thirty hours per week.

In his decision, the administrative law judge found that claimant's employment aggravated and rendered symptomatic claimant's pre-existing back condition.[3] The administrative law judge further found that claimant's condition remains temporary and that claimant established his *prima facie* case of total disability. However, the administrative law judge found that employer established the availability of suitable alternate employment in its tool room and that claimant's own malfeasance resulted in his loss of that job, thereby relieving employer of the burden of establishing further suitable alternate employment. Thus, he concluded that claimant suffered no loss in wage-earning capacity as a result of his work injury and is not entitled to disability compensation. In reviewing the medical evidence, the administrative law judge concluded that the services provided by Dr. Bartholomew, a neurosurgeon, were neither reasonable for nor necessary to claimant's treatment. Dr. Finney, claimant's orthopedist, recommended a back specialist, and the administrative law judge found that Dr. Bartholomew is not such a specialist. The administrative law judge also found that Dr. Bartholomew provided an opinion concerning claimant's condition which was similar to Dr. Finney's. Therefore, the administrative law judge denied reimbursement of the expenses incurred for Dr.

[2] Prior to the work injury claimant had undergone three surgeries on his back: a partial discetomy in 1986, EX 16, a lumbar laminectomy in 1993, EX 13, and a lumbar microdiscectomy in 1995, EX 12.

[3] This determination is not appealed and is hereby affirmed.

Bartholomew's treatment. Subsequently, the administrative law judge awarded claimant's counsel an attorney's fee of $10,376.62.[4]

Claimant appeals the administrative law judge's Decision and Order, arguing that the administrative law judge erred in finding that employer established suitable alternate employment by virtue of the tool room position and in denying reimbursement for the medical treatment provided by Dr. Bartholomew. Employer appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, contending he erred in awarding a fee for 37 hours for unitemized telephone calls and for four hours of services performed before the district director.

We initially address claimant's contention that the administrative law judge erred in finding that employer established suitable alternate employment by virtue of the tool room position at employer's facility. Claimant contends that his temporary placement in the tool room while waiting to be transported to employer's doctor does not fulfill employer's burden.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the 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. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Employer may meet its burden by tailoring a job within its own facility to meet claimant's specific restrictions so long as the work is necessary to its operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If claimant loses a suitable job in employer's facility due to his own misconduct, employer need not establish the availability of other suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director,*

[4]Claimant's counsel originally requested a fee of $21,303.17, representing 120.5 hours at $175 per hour. The administrative law judge reduced the hours requested by 32 (28.5 hours for work performed before the office of the district director and 3.5 hours for a telephone deposition) and found 88.5 hours at $175 per hour reasonable. The administrative law judge denied the requested costs as part of office overhead. The administrative law judge then reduced the resulting fee of $15,487.50 by 33 percent to fairly represent the degree of success claimant achieved, and he awarded a fee of $10,376.62.

OWCP, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *cf. Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999) (employer bears burden of establishing new suitable alternate employment if it causes a suitable position at its facility to become unavailable due to factors other than claimant's misfeasance). In such a case, however, claimant remains entitled to any partial disability benefits to which he was entitled prior to his termination. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In this case, if the tool room position constitutes suitable alternate employment, it suffices to establish claimant's post-injury wage-earning capacity, and employer is not required to show other alternate employment as claimant lost this job due to his own misconduct. *Brooks*, 26 BRBS 1*; Mangaliman*, 30 BRBS 39. However, the administrative law judge's findings regarding the tool room position are inadequate to establish that it constitutes suitable alternate employment. Therefore, we must remand this case for additional findings.

Initially, the evidence recited by the administrative law judge establishes only that claimant was placed in a light-duty position in the tool room while he awaited an appointment with employer's physician, Dr. Winston. The administrative law judge did not discuss whether the position would have continued to be available to claimant had he not been terminated. Employer bears the burden of establishing that suitable alternate employment is actually available during the post-injury period during which claimant is able to work. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). Second, the administrative law judge did not determine the requirements of the tool room position or discuss if the position was suitable for claimant given his physical restrictions and vocational history.[5] *See Ceres Marine Terminal v. Hinton*, 243 F.2d 222, 35 BRBS 7(CRT)(5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1998); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1988); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). Contrary to the administrative law judge's statement that

[5] Dr. Winston, who diagnosed a lumbar strain, prescribed physical therapy and limited claimant's use of his back, placing restrictions of no repetitive lifting over 20 pounds, no bending more than four times per hour, no pushing more than 40 pounds, and no squatting or kneeling. EX 8. Following a course of physical therapy, claimant was released by Dr. Winston and sought treatment from his personal choice physician, Dr. Finney, who found claimant unable to work as of his first visit, February 13, 2001. As of June 13, 2002, Dr. Finney recommended that claimant work light to medium jobs, with no lifting over 30 pounds and no bending or stooping. EX 20. Claimant testified he was forced to return to work, despite his pain, out of economic necessity. Tr. at 42.

"claimant has never argued that he was unable to perform the duties required of him in the tool room," it is employer's burden to demonstrate that the job in its facility was available to claimant had he not been terminated, and that it was suitable given claimant's medical restrictions and other factors. *See Dollins,* 949 F.2d 185, 25 BRBS 90(CRT).

Finally, the administrative law judge's brief comment that the position paid a "comparable wage" to claimant's pre-injury employment is not insufficient to establish that claimant suffered no loss in wage-earning capacity. The parties stipulated that claimant's average weekly wage was $677.42, and the administrative law judge is required to make an explicit finding regarding claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), in order to determine if claimant is entitled to partial disability benefits. 33 U.S.C. §908(e). Because the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility and that claimant does not have a loss in wage-earning capacity is not supported by substantial evidence of record, we must vacate the denial of all benefits and remand this case for further findings.

On remand, the administrative law judge must first determine if a suitable tool room position would have continued to be available to claimant had he not been terminated for cause. If it would have been, then employer need not show the availability of other suitable alternate employment. *Brooks,* 26 BRBS 1. If the tool room job was neither available nor suitable, the administrative law judge must determine whether the record contains other evidence of record sufficient to satisfy employer's burden of establishing the availability of suitable alternate employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge also must make explicit findings of fact pursuant to Section 8(h) concerning claimant's post-injury wage-earning capacity either in the tool room position or in other suitable alternate employment, in order to determine if claimant is entitled to partial disability benefits notwithstanding his termination. *Mangaliman,* 30 BRBS 39.

Claimant next contends that the administrative law judge erred in finding that employer is not liable for the medical treatment provided by Dr. Bartholomew. Claimant contends that employer refused to authorize Dr. Finney's referral to Dr. Eiserloh, and therefore, he was not required to seek employer's authorization prior to his seeing Dr. Bartholomew, who, claimant contends, provided the services Dr. Finney sought. Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employees' work-related injuries. Under Section 7(d) of the Act, 33 U.S.C. §907(d), employer is not liable for claimant's medical expenses unless claimant first seeks authorization for treatment. *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). If employer refuses claimant's request for authorization, claimant is relieved

of the obligation of seeking further authorization, and employer is liable for the medical services claimant procures if they are reasonable and necessary for the treatment of claimant's work injury. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Claimant contends that Dr. Finney, an orthopedist and his choice of physician, referred him to a back specialist in Dr. Finney's group, Dr. Eiserloh, EX 7 at 6; EX 20 at 24,[6] and that employer denied claimant permission to seek treatment from Dr. Eiserloh, an orthopedic surgeon. In the instant case, the administrative law judge did not discuss claimant's contentions about his request for treatment by Dr. Eiserloh, as referred by his treating physician, and employer's alleged refusal of his request. Employer is required to consent to a change in physicians when the claimant's initial physician is not a specialist whose services are appropriate for the care of claimant's injury. 20 C.F.R. §702.406(a); *Armfield v.* Shell *Offshore, Inc*., 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds).

If employer refused claimant's request for a referral to Dr. Eiserloh, the administrative law judge must reconsider employer's liability for the treatment rendered by Dr. Bartholomew, a neurosurgeon. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The mere fact that Dr. Bartholomew rendered a diagnosis similar to that of Dr. Finney does not render his treatment duplicative as it was the preliminary step in developing a surgical treatment plan for claimant's condition; this is the reason Dr. Finney sought a referral to Dr. Eiserloh. CX 5. Moreover, we cannot affirm the administrative law judge's rejection of Dr. Bartholomew's examination and proposed intervention on the basis that he was a neurosurgeon and not an orthopedist. Dr. Finney had already opined that claimant may need the treatment of a surgeon, and the administrative law judge thus must consider whether Dr. Bartholomew is an appropriate specialist and if his treatment was reasonable and necessary. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In this regard, we note that a neurosurgeon may be competent to perform back surgery as evidenced by the fact that at least one of claimant's prior surgeries was performed by a neurosurgeon. *See* EX 15. As the administrative law judge did not discuss the issues of referral, authorization and refusal thereof, and medical necessity under the proper standards, we vacate his finding that employer is not liable for the medical charges in question and remand the case for further findings.

[6] Dr. Finney made the referral because he no longer performs back surgery. EX 20 at 24.

We next address employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. Employer contends the administrative law judge erred in awarding 37 hours in legal fees for unitemized telephone calls and four hours for work performed before the case was referred to the Office of Administrative Law Judges (OALJ).

We first reject employer's contention that fours hours of the awarded fee were for services performed before the case was transferred to the OALJ. Our calculations reflect that claimant's attorney performed 28.5 hours of services prior to October 16, 2001, the date of transfer, the exact number of hours the administrative law judge disallowed as services performed before the office of the district director.

Employer next argues that the administrative law judge erred in approving 37 hours for time spent on unitemized telephone calls. The administrative law judge found that although claimant's fee petition was "not as thorough as many application which [he has] seen" it satisfies the requirements of the Act and regulations. Supplemental Decision at 2. We agree with employer that the administrative law judge must reconsider the compensability of the time at issue.

The regulation at 20 C.F.R. §702.132(a) provides that a fee application must contain a complete statement of the extent and character of the necessary work done, the professional status and billing rate of each person performing such work, and the hours devoted by such person to each category of work. *Hudson v. Ingalls Shipbuilding, Inc*., 28 BRBS 334 (1994). In the instant case, at the end of his fee petition, claimant's attorney lists:

Phone calls to and from defendant attorney	8.0 hours
Phone calls to and from Client and Client Meetings	25.0 hours
Phone Calls to Department of Labor	4.0 hours

This cursory list, requesting 37 hours of services which comprise 41 percent of the total hours awarded, does not conform to the requirements of 20 C.F.R. §702.132(a). The fee petition fails to specify both when the services were performed and the time spent on each call. As a result the administrative law judge cannot adequately judge whether the requested services were reasonable when they were performed. We therefore must vacate the administrative law judge's fee award based upon counsel's failure to file a fee application which conforms to Section 702.132(a). On remand, the administrative law judge should provide counsel the opportunity to amend his fee petition to conform to the regulatory criteria and employer the opportunity to file objections. *See Smith v. Aerojet General Shipyards*, 16 BRBS 49 (1983).

Accordingly, we vacate the administrative law judge's denial of disability benefits and his finding that employer is not liable for the treatment provided by Dr. Bartholomew, and we remand the case for further findings consistent with this decision. 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 is vacated insofar as it awarded counsel a fee for 37 hours of telephone calls, and the case is remanded for reconsideration of the compensability of these services upon counsel's filing of a fee petition conforming to 20 C.F.R. §702.312(a).

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge