BRB Nos. 10-0449
and 11-0117

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| CHRISTOPHER E. FIFER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| MARINE REPAIR SERVICES | ) | DATE ISSUED: 03/24/2011 |
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| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
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| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeals of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorneys' Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Michael J. Perticone (Hardwick & Harris, LLP), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorneys' Fees (2009-LHC-01197) of Administrative Law Judge Linda S. Chapman 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 Associates, Inc.*, 380 U.S. 359 (1965). The amount of an 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 worked for employer as a container/chassis repairman. On October 26, 2007, claimant was involved in a motor vehicle accident while in the scope of his employment, injuring his arm, shoulder and back. As a result of claimant's injuries, employer voluntarily paid claimant temporary total disability benefits through January 26, 2009. Claimant sought additional disability benefits under the Act for his continuing back condition.

In her decision, the administrative law judge found that the evidence supports the parties' stipulation that claimant reached maximum medical improvement on February 23, 2009. In addition, the administrative law judge found that claimant cannot return to his former employment as a container repairman. After reviewing the evidence submitted by employer to establish the availability of suitable alternate employment, the administrative law judge found that employer did not establish the suitability of any of the positions given claimant's medical restrictions. Thus, the administrative law judge concluded that employer did not establish the availability on the open market of suitable alternate employment that claimant could realistically obtain. However, the administrative law judge found that the job claimant currently performs at his family's restaurant is within his restrictions and, thus, his salary of $400 per week represents his actual post-injury wage-earning capacity. Therefore, the administrative law judge awarded claimant temporary total disability benefits from October 27, 2007 to February 22, 2009, permanent total disability benefits from February 23, 2009 to March 22, 2009, and ongoing permanent partial disability benefits from March 23, 2009. 33 U.S.C. §908(a), (b), (c)(21), (h).

Subsequently, claimant's counsel filed a fee petition for $34,770, representing 122 hours of legal services at the hourly rate of $285, plus $2,391.63 in expenses. Employer filed objections to the fee petition. In her Supplemental Decision, the administrative law judge found that counsel established a prevailing market rate of $285 in Baltimore, Maryland, and that claimant's counsel performed competently and zealously in this case. The administrative law judge addressed employer's specific objections to the number of hours requested and disallowed 17.1 hours of legal services. The administrative law judge awarded claimant's counsel a fee of $29,896.50, representing 104.9 hours of legal services at the hourly rate of $285, and expenses of $2,391.63.

On appeal, employer contends that the administrative law judge erred in rejecting the positions identified in its labor market survey as restaurant manager and assistant

manager, as they are within claimant's medical restrictions and match his prior work experience. Thus, employer contends that the evidence establishes that claimant retains a post-injury wage-earning capacity of at least $800 per week. BRB No. 10-0449. Claimant responds, urging affirmance of the administrative law judge's decision. Employer also appeals the award of an attorney's fee. BRB No. 11-0117. Claimant responds in support of the administrative law judge's fee award, to which employer has replied.

Employer contends that the administrative law judge erred in finding that the positions identified in the vocational counselor's labor market surveys do not establish the availability of suitable alternate employment. Where, as in this case, claimant establishes that he is unable to perform his usual employment duties due to his injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984).

In determining whether employer established the availability of suitable alternate employment, the administrative law judge addressed the reports and testimony of Brian Sappington, a vocational rehabilitation specialist, in terms of the restrictions placed by Dr. Franchetti in 2009. Dr. Franchetti, claimant's treating physician, stated in October 2009 that claimant is restricted against: frequent lifting and carrying of over 10 to 15 pounds; lifting and carrying over 25 pounds; lifting over 20 pounds above shoulder level; and sitting for more than 45 minutes without changing positions. Cl. Ex. 20 at 32-33. The administrative law judge also credited claimant's testimony concerning his "persistent back pain [and] sporadic radiating pain through his legs." Decision and Order at 30. In a report dated December 30, 2008, Mr. Sappington identified four positions as a restaurant manager and one as a restaurant assistant manager that were advertised in the newspaper and on the internet.[1] Emp. Ex 21. Mr. Sappington also issued a report on

[1]In his first labor market survey dated December 2, 2008, Mr. Sappington identified positions as a forklift operator, welder, courier, and security officer which he located through the newspaper and on the internet. Emp. Ex. 21. The administrative law judge rejected these positions, as Mr. Sappington did not provide a description of the duties required by these positions or the nature, terms or availability of these positions.

October 12, 2009, in which he identified six restaurant manager and assistant manager positions. Emp. Ex. 32. Mr. Sappington testified that he had identified these positions as suitable based on Dr. Franchetti's 2008 medical restrictions, claimant's work hardening discharge release, and claimant's experience at his family's restaurant. Tr. at 101, 105. In addition, Mr. Sappington testified that he had visited a number of the employers identified in his labor market surveys in order to determine the suitability of the restaurant manager positions based on Dr. Franchetti's 2009 restrictions. Tr. at 107-109. He concluded that four of the positions did not regularly require the manager to lift over 25 pounds and that, when lifting is required, the task can be delegated. *Id*.

The administrative law judge noted that Mr. Sappington visited the employers identified on the labor market survey, but found that Mr. Sappington focused his questions to the employers on the lifting requirements of each position. The administrative law judge also found that neither the labor market surveys themselves nor Mr. Sappington provided any other specific details of the duties of the manager positions, particularly whether the jobs required long-term standing or provided for rest breaks.[2] Moreover, the administrative law judge credited claimant's complaints of pain and the testimony of claimant's brother, for whom claimant works, that claimant is significantly limited in the amount of work he can perform on any given day. Decision and Order at 33. In addition, the administrative law judge noted that claimant's use of medications could potentially affect his ability to concentrate on the job. The administrative law judge therefore concluded that employer failed to establish the suitability of the identified positions, and she based claimant's post-injury wage-earning capacity on the actual wages he earns from his work in his family's restaurant.

We reject employer's contention that the administrative law judge erred in rejecting its vocational evidence. Although employer correctly notes that a vocational expert can rely on standard job descriptions to flesh out the requirements of identified jobs, *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), employer nonetheless must provide sufficient evidence for the administrative law judge to ascertain the suitability of the positions. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998). Without sufficient information regarding all duties of a potential job and its required activity level, the administrative law judge is unable to determine whether identified jobs are suitable given claimant's restrictions. *Id.* In this

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The administrative law judge also found that the security guard positions do not comport with claimant's physical restrictions. Employer does not contest on appeal the administrative law judge's findings with respect to the first labor market survey.

[2]The jobs at Wendy's and Houlihans required a lot of standing, which the administrative law judge found is outside of claimant's restrictions. Emp. Ex. 32.

case, the administrative law judge rationally found that employer failed to provide sufficient information about the identified jobs through Mr. Sappington's reports and testimony as he did not provide all of the job duties or assess the jobs' suitability in terms of all of claimant's restrictions. Moreover, Mr. Sappington did not refer to any standard job descriptions. The administrative law judge found that, in addition to his lifting restrictions, claimant requires frequent breaks and is limited in the amount of sitting and standing he can do. The administrative law judge also credited the testimony of claimant's brother that claimant is limited in the amount of work he can do on a given day. The administrative law judge rationally found that the lack of specific information regarding all the physical duties required of the positions identified by employer made it impossible for her to determine whether in fact those positions are suitable for claimant.[3] *Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT). Thus, as the administrative law judge's findings are rational, supported by substantial evidence, and are in accordance with law, we affirm the administrative law judge's determination that the positions identified by employer are insufficient to establish the availability of suitable alternate employment and that claimant has a higher wage-earning capacity. *Id.* As the administrative law judge rationally found that claimant is performing necessary work at his family's restaurant that is tailored to his physical limitations, we affirm the administrative law judge's finding that claimant is entitled to permanent partial disability benefits based on his residual wage-earning capacity of $400 per week. 33 U.S.C. §908(c)(21), (h); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

Employer also appeals the administrative law judge's fee award. Employer contends that the administrative law judge erred in her determination of the applicable hourly rate for claimant's counsel and in awarding a fee for 105 hours of services.

In an Order dated July 8, 2010, the administrative law judge stated that it is claimant's counsel's burden to establish the reasonableness of his requested hourly rate by providing evidence of the prevailing market rate in the relevant community. The administrative law judge denied employer's motion to conduct discovery into claimant's counsel's billing practices. Claimant's counsel subsequently filed a fee petition, requesting an hourly rate of $285, which he supported by reference to his credentials and with letters from other attorneys. In response, employer renewed its discovery request as to claimant's counsel and, in addition, sought discovery with respect to the attorneys who provided letters concerning their rules. Employer attached fee petitions from attorneys in

[3]Notwithstanding that Dr. Franchetti stated that claimant would not have "problems" performing the work at his family's restaurant, described as "cooking deliveries and takeout" and as "sometimes manager," Cl. Ex. 20 at 33, the administrative law judge did not err in requiring employer to provide specific information concerning each identified job.

two other Baltimore area cases in which the attorneys sought an hourly rate lower than $285. Claimant's counsel replied with additional citation to cases in which a Baltimore attorney was awarded higher rates and employer responded that counsel failed to reveal what he charges "paying clients" such that his claim to a $285 market hourly rate must fail.

The administrative law judge discussed the evidence submitted by counsel, his qualifications, and the quality of his representation in this particular case. Supp. Decision and Order at 2-3. She found that he met his burden to provide satisfactory, specific evidence of an applicable market rate in Baltimore and she awarded him the requested hourly rate of $285. The administrative law judge again denied employer's motion for discovery. The administrative law judge also addressed employer's objection to specific itemized entries and disallowed 17.10 hours of attorney services.

On appeal, employer contends the administrative law judge erred by not addressing the evidence it offered to counter claimant's evidence concerning a prevailing market rate in Baltimore. Employer also contends that the administrative law judge erred in denying its motion to depose claimant's counsel and the attorneys who provided letters concerning their hourly rates. Employer further avers that counsel's evidence is deficient in that it fails to establish what he charges "paying clients" for similar services.

We reject employer's contention that the administrative law judge erred in finding that claimant's counsel provided sufficient evidence of a market rate in Baltimore. This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. In *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009), this court stated that, "In the usual case, we have said that an attorney identifies the appropriate hourly rate by demonstrating what similarly situated lawyers would have been able to charge for the same service." *Id.*, 591 F.3d 219, 43 BRBS 70-71(CRT) (*citing Depoaoli v. Vacation Sales Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007)). The Fourth Circuit also has stated that this "market rate" should be "determined by evidence of what attorneys earn from paying clients for similar services in similar circumstances…." *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010). Nonetheless, in describing the type of evidence by which an attorney can attempt to establish a market rate, the court noted that an attorney may, *inter alia,* submit evidence of fees he has received in the past, *id.* at 290, and that the tribunal awarding the fee "can look to previous awards in the relevant marketplace as a barometer for how much to award counsel in the immediate case." *Holiday*, 591 F.3d at 228, 43 BRBS at 71(CRT) (*citing Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004)). In this case, the administrative law judge fully considered employer's contention regarding the sufficiency of the evidence offered by claimant's counsel and her finding that it is of the type deemed to be appropriate by the

Fourth Circuit is not erroneous. *See generally Maggard v. Int'l Coal Group, Knott County, L.L.C.*, __ BLR __, BRB No. 09-0271 BLA (Nov. 8, 2010)(Order). Nonetheless, we cannot affirm the administrative law judge's determination of the applicable hourly rate. The administrative law judge did not address the hourly rate evidence submitted by employer.[4] Thus, we remand the case for the administrative law judge to address this evidence and to determine a reasonable hourly rate taking into account the evidence and arguments offered by both parties.[5] *See generally H.S. [Sherman] v. Dept. of Army/NAF*, 43 BRBS 41 (2009).

We reject employer's contention that the administrative law judge erred in denying its motion to depose claimant's counsel and the attorneys who supplied letters concerning their hourly rates. The administrative law judge did not abuse her discretion in this regard, as she properly found that the issue concerns whether claimant's counsel produced sufficient evidence of a prevailing rate in the first instance. *See* discussion, *supra; see generally Carter v. General Elevator Co.*, 14 BRBS 90 (1981). Moreover, we note that the Supreme Court has admonished that, "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Employer also contends that the administrative law judge's fee award is excessive and unreasonable given the circumstances of this case. The administrative law judge reviewed each objection raised by employer and reduced some specific entries. The administrative law judge found that the remaining entries to which employer objected were not unnecessary or excessive in view of the circumstances of this case. Supp. Decision and Order at 19. As the administrative law judge fully addressed the objections and as employer has not established an abuse of his discretion in this regard, we affirm the hours awarded by the administrative law judge. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

[4] This evidence consists of fee petitions from two other Baltimore cases wherein one attorney requested an hourly rate of $200 for work performed before the district director in 2010, and another attorney requested an hourly rate of $225 for work performed before an administrative law judge in 2009.

[5] The administrative law judge also applied appropriate factors in assessing the sufficiency of claimant's counsel's evidence. *See* 20 C.F.R. §702.132; *see also Holiday*, 591 F.3d at 228, 43 BRBS at 71(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. The case is remanded for reconsideration of the applicable hourly rate to be awarded to claimant's counsel. The attorney's fee award is affirmed in all other respects.

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