BRB Nos. 98-874
and 98-874A

DARRYL LE DUCE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order, the Reconsideration and Modification of Order, the Denial of Request for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fee of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postal (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for Ceres Corporation.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City,

New Jersey, for I.T.O. Corporation of Baltimore, Incorporated.

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

PER CURIAM:

Employer Ceres Corporation (Ceres or employer) appeals, and claimant cross-appeals, the Decision and Order, the Reconsideration and Modification of Order, the Denial of Request for Reconsideration, and employer appeals the Supplemental Decision and Order Awarding Attorney Fee (96-LHC-1795, 96-LHC-1796) of Administrative Law Judge John C. Holmes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an 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 was employed by Ceres when he was injured on April 10, 1995, while driving a fifth wheel and towing a chassis on which 40-foot containers were being loaded. The crane dropped containers on the chassis from about five feet above the chassis, and claimant was jostled around inside the cabin of the truck. Although claimant was authorized to seek medical treatment, he declined to do so. Eleven days later, on April 21, 1995, claimant slipped while jumping from the catwalk of a fifth wheel which he was operating. As he slipped, he grabbed onto a safety rail with his right hand but his momentum carried him over the side of the truck and onto the ground four feet below. At that point, his right arm hyper-extended and he felt his neck "snap." Again claimant was authorized to seek medical attention but declined.

Claimant spent seven hours the next day unloading cars from a ship, which he testified was light, easy work involving minimal physical strain. He did not work on Sunday, April 24, but returned to work on Monday, April 25, this time working for I.T.O. Corporation of Baltimore (ITO). His only work that day consisted of unlashing a bulldozer and driving it down a ramp from the ship to the asphalt pier. He testified that as he drove the bulldozer off the ship, the pain in his neck and arm inflamed. He informed the ITO representative that he had been previously injured at Ceres, and was given permission to report to the Ceres office, where he was authorized to seek medical treatment. Claimant went to Holabird Industrial Clinic, where he was diagnosed with a neck strain and prescribed pain pills and muscle

relaxers. Claimant began treatment with Dr. York on April 28, 1995, and a subsequent MRI revealed a broad based bulging disk in the middle of his neck which pushed through the sac that protects the spinal cord. Claimant has not returned to work, and he sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge rejected Ceres' contention that there was a subsequent injury on April 25, 1995, with ITO, and he thus found Ceres is the responsible employer. The administrative law judge also found that claimant cannot return to his duties as a heavy equipment driver, but that employer established the availability of suitable alternate employment. In addition, the administrative law judge found that claimant did not exercise reasonable diligence in attempting to secure alternate employment, and thus found claimant entitled to permanent partial disability benefits, based on the difference between claimant's average weekly wage of $1006.77, and his post-injury wage-earning capacity of $400 per week. The administrative law judge rejected employer's contention that claimant's benefits should be suspended due to his failure to undergo reasonable medical care pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), and he awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[1]

In a Supplemental Decision and Order Awarding Attorney Fee, the administrative law judge found that the rate of $200 per hour in the Baltimore area is not excessive for an experienced longshore attorney who won a substantial award of benefits for his client. He reduced a number of the items requested and disallowed some of the costs. Thus, he awarded claimant an attorney's fee of $15,750, plus $6,026.75 in costs.

[1]On reconsideration, the administrative law judge reaffirmed his responsible employer determination; subtracted claimant's tax refund of $751 from his average weekly wage calculations and concluded that claimant's average weekly wage is $922.33; reaffirmed his finding that claimant did not unreasonably refuse medical treatment; and found that claimant did not reach maximum medical improvement until May 9, 1996, and thus concluded that employer cannot establish suitable alternate employment before this date. The administrative law judge summarily rejected employer's second motion for reconsideration.

On appeal, Ceres contends that the administrative law judge erred in finding that a new injury did not occur on April 25, 1995, and thus in failing to find that ITO is the responsible employer. In addition, Ceres contends that the administrative law judge erred in finding that claimant's benefits should not be suspended pursuant to Section 7(d)(4), and that the administrative law judge erred in determining the date of maximum medical improvement, and thus the onset of permanent partial disability benefits. ITO responds, urging affirmance of the administrative law judge's finding that claimant did not suffer a new injury or aggravation of his condition on April 25, 1995, while in its employ.[2] In a supplemental appeal, Ceres contends that the administrative law judge erred in awarding such a large attorney's fee, alleging that the hourly rate should have been limited and the administrative law judge should have disallowed all time and costs on issues on which claimant lost. In addition, Ceres contends that the administrative law judge erred in refusing to require receipts for the claimed costs, and in denying employer's request for a hearing on the attorney's fee issue. Claimant responds, urging affirmance of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees.

Claimant contends on cross-appeal that the administrative law judge erred in finding that employer established suitable alternate employment, and in determining that he failed to exercise due diligence in attempting to secure alternate employment. In addition, claimant contends that the administrative law judge erred in determining his average weekly wage and post-injury wage-earning capacity. Ceres responds, urging affirmance of the administrative law judge's findings on these issues.

RESPONSIBLE EMPLOYER

Initially, Ceres contends that the administrative law judge erred in finding that the evidence does not demonstrate that a new injury occurred while claimant was employed with ITO on April 25, 1995. The employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of the injury. If, however, the subsequent injury aggravated or accelerated claimant's condition resulting in disability, the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *McKnight v. Carolina Shipping Co.*,

[2]ITO also raises a contention in its response brief that no claim was filed against ITO in the instant case, and the absence of any informal or formal claims process violates ITO's due process rights. However, ITO received written notice of the claim prior to the hearing by Order of the administrative law judge dated September 26, 1996, and was given the opportunity post-hearing to submit evidence challenging the claim. Thus, we reject ITO's contention that its due process rights were abridged. *See generally Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989).

32 BRBS 165 (1998), *aff'd on recon.*, 32 BRBS 251 (1998); *Buchanan v. International Transportation Services*, 31 BRBS 81 (1997).

The administrative law judge in the instant case found that claimant's work on April 25, 1995, did not aggravate or accelerate claimant's condition, and, thus, concluded that Ceres is the responsible employer. The administrative law judge noted claimant's testimony that he did not experience any irregular or jolting movements while operating the bulldozer, but that it was a "regular ride." H. Tr. at 129. The administrative law judge also credited Dr. Hunt's conclusion that there could not have been a new injury as there was no traumatic event that could have triggered an injury. *See* Ceres Ex. 2; ITO Ex. 1. In addition, the administrative law judge found that Dr. York agreed with Dr. Hunt's conclusion regarding the events that transpired on April 25, 1995. Cl. Ex. 4. Thus, the administrative law judge concluded that claimant did not suffer a new injury on April 25, 1995, and that the symptoms which claimant experienced while driving the bulldozer were the same symptoms he experienced since the injuries on April 10 and 21, 1995.

Contrary to Ceres' contention, the administrative law judge noted that the bulldozer ride was "regular," not "smooth." Decision and Order at 7. Moreover, the administrative law judge did not err in accepting only a portion of Dr. Hunt's testimony as it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment, and Ceres has raised no reversible error. *See Perini Corp. v.* Heyde, 306 F.Supp. 1321 (D.R.I. 1969); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). However, Ceres is correct that the administrative law judge did not discuss Dr. Weiner's opinion, or Dr. York's opinion that there was aggravation from the bulldozer ride. Dr. Weiner opined that it is medically reasonable to conclude that all three events were significant in precipitating symptoms in claimant's pre-existing degenerative spinal disease. Ceres Ex. 55. In addition, while Dr. York testified in a deposition on March 5, 1997, that what happened on April 25th was not enough to cause a permanent aggravation of the condition claimant was in after April 21st, *see* ITO Ex. 2; Ceres Ex. 75 at 21, he also stated that the work on April 25th exacerbated claimant's symptoms, Ceres Ex. 56 at 55.

As there is evidence of record, which, if credited, could establish that claimant's work at ITO aggravated claimant's condition, we vacate the administrative law judge's finding that Cere is the responsible employer, and we remand the case to the administrative law judge to weigh all relevant evidence in determining the responsible employer.[3] *See Buchanan*, 31

[3]Ceres also states that the administrative law judge did not discuss Dr. Hunt's opinion that claimant's injuries had resolved and he could return to longshore work. However, this contention is not briefed and thus will not be addressed in this decision. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

BRBS at 84-85; *see also Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

SECTION 7(d)(4)

Ceres also contends on appeal that the administrative law judge erred in refusing to suspend claimant's benefits as a result of his refusal to undergo surgery and his failure to cooperate with his physical therapist. Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of all further compensation to an employee during any period in which he unreasonably refuses to submit to medical or surgical treatment, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4). Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo medical treatment is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting).

In the instant case, the administrative law judge found that even if he were to conclude that an ordinary and reasonable person in claimant's circumstances would have undergone disk surgery, he would be unable to conclude that claimant's reasons were unjustified, *i.e.*, claimant testified that he had heard that surgery could make his condition worse and that he was frightened by the prospect of any surgery. Thus, contrary to Ceres' contention, the administrative law judge properly considered claimant's subjective reasons for avoiding the surgery and found that his refusal was not unjustified. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's refusal to undergo surgery is not cause for the administrative law judge to suspend payment of compensation. *See Malone v. International Terminal Operating Co., Inc.*, 29 BRBS 109 (1995).

However, Ceres also contends that the administrative law judge erred in finding that claimant's lack of cooperation in the physical therapy programs was not sufficient to warrant the suspension of benefits under Section 7(d)(4). On reconsideration, the administrative law judge found that while claimant could have shown a greater willingness in fully cooperating with physical therapy, the conduct was not so unreasonable as to warrant a suspension of benefits. Moreover, he concluded, it cannot be said that claimant refused medical treatment as he participated in physical therapy for more than three months.

The evidence indicates that both Drs. Weiner and York opined that claimant's condition would improve given a work-hardening or physical therapy program. Claimant was sent to two different physical therapy programs, and the record contains multiple reports from physical therapists regarding claimant's non-cooperation, including symptom magnification, failure to perform tasks or to stay the allotted time, and open hostility to the

therapists. The administrative law judge based his decision regarding claimant's cooperation in part on the fact that he showed up every day, but did not address this other evidence, including evidence that while claimant checked in at the therapists' office during this period, he did not participate in the program.[4] Therefore, as there is conflicting evidence which the administrative law judge did not address in determining whether claimant adequately participated in the physical therapy program, or whether it was reasonable for claimant to be required to undergo physical therapy, we vacate his finding that claimant did not unreasonably refuse to submit to medical treatment and remand for further findings on this issue. *See Dodd*, 22 BRBS at 249-250.

DISABILITY ISSUES

Ceres also contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on May 9, 1996, based on the parties' "stipulation" allegedly agreed to at page 24 in the Hearing Transcript. This cite is to claimant's counsel's opening argument and thus does not support a finding that there was an agreement. Rather than agreeing, moreover, Ceres contends that claimant reached maximum medical improvement on December 20, 1995, based on Dr. York's opinion. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *McKnight*, 32 BRBS at 170.

The evidence shows that while Dr. York did opine on December 20, 1995 that "if [claimant] does not have surgery, he probably has reached maximum medical improvement and could further deteriorate by not having the surgery," Emp. Ex. 29, he testified in a deposition dated September 18, 1996, that claimant reached maximum medical improvement by May 9, 1996, Emp. Exs. 56 at 28, 18. As the administrative law judge did not address this conflict in Dr. York's opinion and erroneously concluded that the parties had stipulated to the date of maximum medical improvement, the administrative law judge is instructed on remand to address the issue of maximum medical improvement and fully explain his finding. *See Dodd*, 22 BRBS at 248.

Ceres also contends that the administrative law judge erred in commencing partial

[4]In support of the administrative law judge's conclusion, the evidence does contain Dr. York's opinion that claimant's movement was self-limited as a result of pain and not incalcitrance.

disability benefits on May 9, 1996, as it showed jobs available as of January 1, 1996. The administrative law judge noted that the labor market survey submitted by Ceres was dated September 27, 1996, and thus ordered the commencement of permanent partial disability benefits at that time.

The record includes a labor market survey prepared by Mark E. Dennis that proposes fifteen jobs as suitable alternate employment. Mr. Dennis states that these types of positions have been readily available since December of 1995 and continuing. The position descriptions in the labor market survey also indicate the date of availability. Mr. Dennis noted that he verified that the positions identified were within Dr. York's work restrictions as described in his December 20, 1995 letter, and these restrictions did not change after that date. Emp. Ex. 57.

Contrary to Ceres' contention, and the administrative law judge's finding, the date that total disability becomes partial is not related to the date of maximum medical improvement. Once claimant shows an inability to return to usual employment, the burden shifts to employer to demonstrate the existence of suitable alternate employment. The same standard applies whether the claim is for permanent or temporary disability, *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989), as the date of maximum medical improvement has no direct relevance to the question of whether a disability is total or partial; the nature and extent of a disability require separate analysis. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). Indeed, the Act specifically provides for benefits for a temporary partial disability. 33 U.S.C. §908(e).

In the instant case, the administrative law judge did not address Mr. Dennis's opinion that the positions identified have been available since December 1995 or the availability dates indicated in the labor market survey, as he erroneously found suitable alternate employment cannot be established before maximum medical improvement. Thus, the administrative law judge is instructed on remand to reconsider the date that employer established the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Claimant contends on cross-appeal that the administrative law judge erred in finding that employer established the availability of suitable alternate employment based on Mr. Dennis's labor market survey. Where, as here, a claimant establishes that he is incapable of returning to his usual employment, the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of other jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS

10 (CRT) (4th Cir. 1988). The United States Court of Appeals for the Fourth Circuit has held that an employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant to determine if they would in fact consider hiring the candidate for a position, as this would substantially increase the employer's burden without commensurate benefits. *Moore*, 126 F.3d at 264, 31 BRBS at 125 (CRT); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984).

Mr. Dennis located fifteen jobs in claimant's geographic area. He testified that he contacted these employers and referenced claimant's work experience and restrictions. He identified each of these employers and provided the nature and terms of each opportunity. The administrative law judge found each of these jobs is sedentary and meets the work restrictions proposed by Dr. York. Thus, based on the testimony of Mr. Dennis, the administrative law judge concluded that Ceres demonstrated the availability of suitable alternate employment.

Initially, we reject claimant's contention that Mr. Dennis erroneously presumes claimant can read blueprints, as none of the jobs identified requires this skill. Moreover, Mr. Dennis testified that claimant would be trained to assemble machinery. Mr. Dennis spoke to the employers identified regarding an employee with claimant's previous work experience and work restrictions, and they stated that such an individual would be considered a qualified candidate for the positions. Moreover, he used Dr. York's specific work restrictions rather than the general classification of the positions as either "sedentary" or "light" to determine the suitability given claimant's physical abilities. Claimant does not explain his contention that he had additional restrictions which Mr. Dennis did not consider, nor contend how they would affect the finding of alternate employment. Moreover, contrary to claimant's contention, it is not relevant that the expert did not contact claimant's treating physicians for approval of the positions identified, as Mr. Dennis was aware of claimant's restrictions. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). The labor market survey prepared by Mr. Dennis includes the job title, the employer, the date of availability, the description of the position, the wages and the physical requirements . Given the specificity of the labor market survey, we hold that Ceres has exceeded the minimum requirements set forth in *Moore*, and we affirm the administrative law judge's finding that Ceres established suitable alternate employment as it is supported by substantial evidence.[5]

[5]Although Mr. Dennis did not specifically notify the employers about claimant's intellectual abilities, he was not required to do so; moreover, he was aware of claimant's deficient scores in spelling and arithmetic as he referenced them in his labor market survey.

Once employer meets this burden of demonstrating that suitable jobs are available, claimant may retain eligibility for total disability benefits if he demonstrates that he was unable to secure employment although he diligently tired. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1987). Claimant contends that the administrative law judge erred in determining that he failed to exercise reasonable diligence in attempting to secure suitable alternate employment. If the employee establishes reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and establishes his willingness to work, but is unable to obtain a job identified by employer, he may prevail in his claim for total disability. *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).

Claimant testified that he sought employment with six different employers that he had heard were hiring, but found that they were not accepting applications.[6] H. Tr. at 97-99. He also submitted applications for two of the positions identified in Ceres' labor market survey, which he received the week before the hearing. The administrative law judge based his decision that claimant had not exercised reasonable diligence in attempting to secure suitable alternate employment on the fact that five of the seven employers contacted by claimant had no openings when he applied, and he only submitted an application for, but had no serious discussions about, employment with the remaining two employers.

Contrary to claimant's contention, the duty to exercise reasonable diligence is not necessarily linked to the labor market survey, as employer has no duty to inform claimant of identified positions. *Hogan*, 23 BRBS at 292. Rather, claimant must establish that he diligently tried to obtain employment similar to the jobs Ceres demonstrated were reasonably available in claimant's community. *Palombo*, 937 F.2d at 74, 25 BRBS at 6 (CRT). However, claimant is not required to establish that he was in fact successful in obtaining suitable alternate employment in order to prove reasonable diligence. Therefore, we vacate the administrative law judge's finding that claimant did not exercise reasonable diligence in attempting to secure suitable alternate employment as it is based on an invalid reason. As there is evidence that claimant did attempt to independently find a job, although the employers he contacted were not hiring, and claimant did not have time to follow-up on the applications he submitted for the two positions identified on the labor market

[6]Claimant contacted Sears; Montgomery Wards; Nevermar; NCR, a check processing company; Microtech, a sporting goods store; and American Alarm Service.

survey, the administrative law judge is instructed on remand to make specific findings regarding the nature and sufficiency of claimant's alleged efforts. *Palombo*, 937 F.2d at 75, 25 BRBS at 9 (CRT); *see also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991).

WAGE-EARNING CAPACITY

Claimant also contends that the administrative law judge erred in determining his post-injury wage-earning capacity as Mr. Dennis stated both that claimant could earn anywhere from $6 to $10 per hour, and that claimant would be able to earn $8 per hour. Claimant also notes that in addition to the two statements by Mr. Dennis, Mr. Smolkin, another vocational counselor, estimated that claimant could earn only between $6 and $8 per hour. If claimant has no actual earnings, the administrative law judge may fix a reasonable wage-earning capacity based on factors or circumstances such as the degree of physical impairment, his usual employment, and the possible future effect of the disability. 33 U.S.C. §908(h). Where claimant seeks total disability and employer establishes suitable alternate employment, the earnings established for the alternate employment may establish claimant's earning capacity. *See generally Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT) (5th Cir. 1998).

In the present case, the administrative law judge considered claimant's arguments and noted that Mr. Dennis believed that claimant should be able to earn toward the higher end of the hourly estimate because of his long and consistent work history. Thus, he concluded, given claimant's established work history and the testimony by one of Ceres' managers that claimant was an "excellent employee," that $10 per hour is an appropriate wage. As the administrative law judge considered claimant's contentions, and claimant has raised no reversible error, we affirm the administrative law judge's finding that claimant has the post-injury wage-earning capacity of $400 per week. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

AVERAGE WEEKLY WAGE

We also reject claimant's contention that the administrative law judge erred in determining his average weekly wage. Under Section 10, 33 U.S.C. §910, computation of average annual earnings must be made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. To calculate average weekly wage under Section 10(a), claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine average daily wage. 33 U.S.C. §910(a); *Moore*, 126 F.3d at 265, 31 BRBS at 125 (CRT). If the administrative law judge does not have this information, he must use Section 10(c) to determine average weekly

wage. *Lobus v. I.T.O. Corporation of Baltimore, Inc.*, 24 BRBS 137 (1990). The administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979).

The evidence of claimant's pre-injury wages consists of claimant's 1994 and 1995 federal income tax returns. There is no evidence of claimant's wages for the 52 weeks immediately preceding the injury or the number of days claimant actually worked during this period. Thus, the administrative law judge properly found that he did not have enough information to apply Section 10(a), and thus calculated claimant's average weekly wage pursuant to Section 10(c). *Lobus*, 24 BRBS at 140. He found that claimant's tax return for 1994 indicated that he earned $52,352, while his return in 1995 indicated that he had earned $27,799 prior to his injury on April 25, 1995. The administrative law judge noted that claimant's projected 1995 salary, based on this earning rate, well exceeds that of his 1994 earnings.[7] Moreover, the administrative law judge concluded that the 1994 reported income was a more accurate reflection of claimant's average annual salary as it represents a full year of employment, and thus factors in the irregularities of longshore work. Thus, the administrative law judge concluded that claimant has an average weekly wage of $992.33. *See* Reconsideration and Modification of Order. As claimant has raised no reversible error on appeal, we affirm the administrative law judge's calculation of claimant's average weekly wage as supported by substantial evidence. *See Fox*, 31 BRBS at 124 (1997).

ATTORNEY'S FEE

In a supplemental appeal, Ceres contends that the administrative law judge erred in his award of an attorney's fee. Initially, we reject Ceres' contention that the attorney's fee application lacked the required specificity. Although the application does not state which of the two attorneys in the office performed the work, the work is detailed with such specificity that the administrative law judge would be able to address any duplication of service. Moreover, the application notes that the work was performed by one of two licensed attorneys, either Michael Eisenstein or Myles Eisenstein, and that the same hourly rate was requested for both attorneys. In addition, we reject employer's contention that the administrative law judge erred in awarding claimant's counsel a fee in the amount of $200 per hour because the administrative law judge specifically considered the applicable rate in

[7]The administrative law judge extrapolated that claimant was on pace to earn $90,346.88 for the year 1995.

the geographic locality involved, the experience of the attorneys, and the complexity of the case. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting).

Ceres also contends that the administrative law judge should have disallowed all time and costs on issues on which claimant was unsuccessful. The administrative law judge specifically addressed employer's contention that claimant's counsel is not entitled to fees for work on the issues of average weekly wage and extent of disability, as claimant did not prevail on these issues. He rejected this contention as claimant's counsel established entitlement to permanent partial disability and, contrary to Ceres' contention, Ceres had contested claimant's entitlement to any disability benefits. *See, e.g.*, H. Tr. at 35. The administrative law judge further considered employer's objections to the number of hours spent on trial preparation and found the specified time charges are excessive and that 78.75 hours is a reasonable estimate of time need to complete the work for this case.

In addition, contrary to Ceres' contention, the administrative law judge's decision not to hold a formal hearing on the issue of a fee application is not a violation of due process when the fee request is to the judicial or administrative body before whom the work was performed. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998). Due process requires only that the fee request be served on employer and that employer be given a reasonable time to respond. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds). As it is not alleged that employer was not given a reasonable time to respond, we reject Ceres' contention that the administrative law judge erred in denying a hearing in the instant case.[8]

[8]Ceres also contends that the administrative law judge erred in failing to require proof of costs, but does not specifically identify instances of questionable entries. The administrative law judge addressed Ceres' objections regarding costs in his Supplemental Decision and Order, disallowed the request for photography and reduced the amount requested for a deposition of Dr. York. As Ceres has raised no reversible error, we reject this contention. *See generally Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

Inasmuch as the administrative law judge specifically addressed employer's contentions, and as employer has not met its burden of establishing that the administrative law judge abused his discretion in awarding a fee of $15,750 in light of the issues raised and claimant's success therein, we affirm the administrative law judge's fee award. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Accordingly, the administrative law judge's findings that Ceres is the responsible employer, that claimant did not unreasonably refuse to submit to physical therapy, that claimant reached maximum medical improvement on May 9, 1996, that this date is the onset date for partial disability benefits, and that claimant did not exercise reasonable diligence in attempting to secure alternate employment are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's decisions are affirmed in all other respects. In addition, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge