BRB Nos. 98-882,
98-882A and 98-882B

JOHN C. GALLAGHER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
Petitioner	)	
	)	
v.	)	
	)	
JAMES J. FLANAGAN STEVEDORES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
Respondents	)	DECISION and ORDER

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

Phil Watkins (Law Offices of Phil Watkins, P.C.), Corpus Christi, Texas, for claimant.

Charles F. Herd, Jr. (Rice Fowler), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals and claimant cross-appeals the Decision and Order awarding benefits, employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney Fees, and claimant appeals the Supplemental Decision and Order Denying Additional Attorney's Fees (97-LHC-1601) 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 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 contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant has worked on the waterfront since 1973. He sustained injuries to his left foot, back and neck, when he fell off a ladder at work on January 20, 1995, and sought treatment in a hospital emergency room. He consulted with Dr. Snook and several other orthopedic surgeons. He developed problems with his left ankle, and then back problems resulting from an altered gait. On July 3, 1993, Dr. Swann performed surgery on claimant to repair a ruptured Achilles tendon. Dr. Wilk, another orthopedic surgeon, prescribed a brace. On February 14, 1997, claimant's ankle "rolled over" at work, and he fell.

In his Decision and Order, the administrative law judge found that claimant has a 17.5 percent permanent partial disability to his left foot. The administrative law judge awarded claimant temporary total disability benefits for various periods, and continuing from February 15, 1997, as well as temporary partial disability benefits for two periods of time. He additionally awarded claimant a Section 14(e) penalty, medical expenses, and interest. 33 U.S.C. §§907, 914(e).

Claimant's counsel subsequently filed a fee petition with the administrative law judge, requesting $48,374.75, plus $9,864.35 in costs. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded claimant's counsel a fee of $28,784.25, plus $6,772.40 in costs.

Employer appeals and claimant cross-appeals the administrative law judge's Decision and Order. In its appeal, employer challenges the administrative law judge's award of temporary partial disability benefits, as well as the administrative law judge's inclusion of container royalty payments and the use of a 48-week divisor in determining claimant's average weekly wage. On cross-appeal, claimant contends that the administrative law judge erred in including only one, instead of both, royalty payments which he received during the

52-week period prior to his injury.

Claimant and employer also have appealed the administrative law judge's fee award. In its appeal, employer challenges claimant's counsel's right to an award altogether, and objects to other specific aspects of the fee award. In his cross-appeal, claimant challenges the administrative law judge's reduction of the requested expenses.

Claimant also appeals the administrative law judge's Supplemental Decision and Order Denying Additional Attorney's Fees denying claimant's counsel's request for an attorney's fee for the time spent defending his original fee application on the ground that it was not timely filed.

Temporary Partial Disability

Initially, employer contends that the administrative law judge's finding that claimant is entitled to temporary partial disability benefits during certain periods does not comport with the requirements of the Administrative Procedure Act (APA). Failure by the administrative law judge to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion violates the APA, 5 U.S.C. §557(c)(3)(A). *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Employer in this case is merely challenging the administrative law judge's weighing of the evidence. The administrative law judge discussed all the relevant evidence, and his analysis complies with the APA. As employer has failed to demonstrate any reversible error, we reject its argument.

We affirm, as supported by substantial evidence, the administrative law judge's finding that claimant sustained a loss of wage-earning capacity during the two disputed periods. An award of temporary partial disability under Section 8(e) of the Act, 33 U.S.C. §908(e), is based on the difference between claimant's pre-injury average weekly wage and claimant's wage-earning capacity thereafter, *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992), similar to an award under Section 8(c)(21), 33 U.S.C. §908(c)(21). Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). The party contending that actual earnings are not representative of wage-earning capacity loss has the burden of establishing an alternative reasonable wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

The administrative law judge found, based on claimant's credited testimony, that claimant worked as much as he could between February 21, 1995 and June 26, 1995, and

August 27, 1996 to February 14, 1997, the two periods in question, and that his reduced earnings during these two periods were representative of his wage-earning capacity. While claimant was performing some of the same work after the injury that he performed prior to it, the administrative law judge rationally credited claimant's testimony that he could not perform some tasks at all, while he could only work at others for a shorter period of time than he could prior to the injury. Employer's argument that claimant performed some of his former jobs on several consecutive days, during which he worked long hours, does not invalidate a finding that overall he could not perform the work he did prior to his injury. Moreover, employer's argument that claimant could perform the lighter jobs which were the ones someone with his seniority would perform anyway is not dispositive, as claimant's usual employment prior to his injury included jobs which he could not perform after the injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge's decision is also supported by the medical evidence. The administrative law judge concluded that either Dr. Snook misdiagnosed claimant's condition, or that claimant's condition greatly worsened with his effort to work, between February 20, 1995, and June 27, 1995, as Dr. Swann, on June 27, 1995 (the day following the period for which claimant claims partial disability), stated he did not believe claimant could function as a longshoreman and immediately scheduled him for surgery. In addition, the administrative law judge noted that claimant was not fully released for work by Dr. Snook on February 20, 1995, as he gave claimant a brace, from which claimant was to wean himself. As to the second period for which the administrative law judge awarded temporary partial disability, August 27, 1996 to February 14, 1997, the administrative law judge noted that Dr. Swann acknowledged claimant's complaints of pain. On September 5, 1996, Dr. Swann, at a loss as to what more to do, sought the opinion of another physician. Two months later, Dr. Wilk imposed restrictions on claimant's activities, advising him not to accept jobs requiring him to be on his feet for long periods. He also equipped claimant with a brace. Accordingly, on the basis of the record before us, the administrative law judge's award of temporary partial disability benefits for the two disputed periods is affirmed. *See generally Container Stevedoring Co.*, 935 F.2d at 1544, 24 BRBS at 213 (CRT).

Average Weekly Wage

The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), based on claimant's earnings in the 52 weeks immediately preceding the injury, January 20, 1994 to January 19, 1995. He divided claimant's earnings of $44,606.07, which included vacation pay and an $8,136.85 royalty payment, by the 48 weeks he actually worked, arriving at an average weekly wage of $929.29.

Initially, we reject employer's argument that the administrative law judge erred in including a container royalty payment in calculating claimant's average weekly wage. Such payments are clearly "wages" within the meaning of the Act because they are payments for "services rendered by an employee . . . under the contract of hiring in force at the time of the injury." 33 U.S.C. §902(13). As the container royalty payments were made pursuant to a collective bargaining agreement between Western Gulf Maritime Association and the ILA, *see* Tr. at 143, they are to be included in the average weekly wage calculation. *See Trice v. Va. Int'l Terminals, Inc.*, 30 BRBS 165 (1996)*; Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *see also Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1997), *aff'd in pert. part,* 155 F.3d 311 (4th Cir. 1998).

Claimant, on cross-appeal, argues that while the administrative law judge correctly included the $8,135.85 royalty payment, he should also have included a $5,599.38 royalty payment claimant received in 1994 in calculating his average weekly wage, because claimant paid taxes on the entire amount in 1994, and the payment was indicative of his increasing wage-earning capacity resulting from his seniority. We disagree. The record reflects that claimant was entitled to the excluded container royalty payment in 1993. Tr. at 82, 143. Although claimant received the payment in 1994, and paid taxes on it that year, the payment had no relation to the hours claimant worked in the 52 weeks preceding the injury. It was therefore proper for the administrative law judge to exclude this payment from claimant's average weekly wage. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997). It would be unfair for claimant to profit from the fortuitousness of the receipt of royalties past due, Tr. at 143-144, as this would, in fact, distort his true pre-injury wage-earning capacity. *See generally Wright*, 155 F.3d at 311, 32 BRBS at 199 (CRT).

We also reject employer's argument that in calculating claimant's average weekly wage the administrative law judge erred by failing to divide claimant's gross annual wages by 52 rather than by the 48 weeks claimant actually worked. Section 10(c) provides a method for determining average annual earnings. The administrative law judge should thus arrive at a figure approximating an entire year of work. This figure is then divided by 52. *See* 33 U.S.C. §910(d)(1). Under Section 10(c), the administrative law judge has broad discretion to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). As claimant did not work during approximately four weeks in 1994 due to a different injury, and received temporary total disability compensation during this period, Cl. Exs. 5, 8, it was not unreasonable for the administrative law judge to divide his gross pay by the 48 weeks claimant actually worked. *See Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). The division of claimant's earnings by 52 based on 48 weeks of earnings would distort the determination of claimant's

earning capacity at the time of the injury. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); *see generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Accordingly, as the administrative law judge's determination of claimant's average weekly wage is supported by substantial evidence, we affirm that finding.

Attorney's Fees and Costs

We now consider the appeals of the administrative law judge's fee award. Subsequent to the issuance of the administrative law judge's Decision and Order in this case, claimant's counsel filed his Application for Attorney's Fees, requesting a fee of $48,374.75, representing 127.72 hours of services at a rate of $175 per hour for Lead Attorney Watkins, 32.75 hours at $175 per hour for Attorney Dilley, 103.71 hours at $100 per hour for legal assistant Smith, and 1.27 hours at $45 per hour for legal secretary Jennifer Smith, plus expenses of $9,864.35. Employer filed objections and "Supplemental Objections." In a Supplemental Decision and Order Awarding Attorney Fees the administrative law judge considered employer's objections, and awarded claimant's counsel a fee of $28,784.25, plus $6,772.40 in expenses.

We initially reject employer's contention that the prerequisites for its fee liability pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), have not been met. Contrary to employer's contention, the record supports claimant's assertion that the parties stipulated that an informal conference was held in this case on December 6, 1996. Jt. Ex. 1A, Stip. # 7.

We also reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee because there was no successful prosecution of the claim. The administrative law judge found that claimant was successful in the prosecution of his claim, noting that employer was found liable for compensation for two periods not previously paid based upon a higher average weekly wage, and for a Section 14(e) penalty. The administrative law judge also found that the parties did not stipulate to the issues of claimant's entitlement to medical benefits, the percentage of disability to the left foot, the date of maximum medical improvement, and the work-relatedness of the back injury until the morning of the trial, which meant that claimant's counsel had to prepare to try these issues. Decision and Order at 3; Form LS-18, Pre-Hearing Statement. As claimant's counsel notes, claimant received over $55,000 in back compensation benefits, continuing temporary total disability compensation, $10,000 in past due medical benefits, and a substantial increase in his compensation rate. As claimant's counsel successfully prosecuted his claim, the administrative law judge's finding that claimant is entitled to a fee assessed against employer is affirmed. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *see generally Wilkerson v. Ingalls Shipbuilding, Inc.*,

125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997).

In the alternative, employer has targeted 278 entries in counsel's fee petition which it deems unnecessary, duplicative and clerical and therefore not recoverable, and asserts that the administrative law judge erred in finding "a mere 29 entries" unnecessary, excessive or duplicative. While time spent on traditional clerical duties is not compensable and should be included in the attorney's overhead, *see Staffile v. Int'l Terminal Operating Co.*, 12 BRBS 895 (1980), work performed by law clerks and paralegals which is usually performed by attorneys is compensable and separately billable. *See Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986). While the administrative law judge did not make specific findings regarding employer's "clerical" objection, a review of the contested items reveals that the services involved, such as writing letters and reviewing the file, are not traditional clerical or secreterial services. *See Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994)(decision on recon.).

Addressing employer's contention that many items were unnecessary, the administrative law judge stated, "I am unwilling to find that the tasks were not in some way reasonable and necessary to the preparation of this claim for trial because Employer has offered no proof in support of its objection. . . Besides, Employer/Carrier's counsel's zealous defense of this claim was so thorough that I can well imagine Claimant's counsel found it necessary to prepare on many fronts." Supplemental Decision and Order Awarding Attorney Fees at 3. With regard to employer's argument that services were duplicative, the administrative law judge specifically reduced certain hours as excessive or duplicative, and disallowed all time requested for the services of Ms. Smith as office overhead. Supplemental Decision and Order at 3.

The absurdity of employer's allegation that a line by line analysis of the fee petition is necessary speaks for itself. It would take the administrative law judge and the Board an unreasonable amount of time to perform a line-by-line analysis of the 278 allegedly objectionable entries. While not addressing each objection separately, the administrative law judge addressed each of employer's objection "categories." The administrative law judge reduced the total of 265.45 hours requested to 227.57, explaining his reasons, and employer does not provide valid reasons for a further reductions in hours.[1] Because employer has

[1]Specifically, employer contends that the administrative law judge erred by failing to address employer and claimant's dispute about recovery of fees before the district director, employer's opposition to charges for unrelated work, excessive correspondence and conferences, and various other matters. As to employer's minimum billing argument, the administrative law judge reduced 16 billing entries of .25 to .125 hours, and 13 .50 entries to .25.

failed to show an abuse of discretion by the administrative law judge in awarding a fee for the remaining services requested, having considered employer's objections, we reject employer's item-specific contentions and decline to reduce further the administrative law judge's award. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next challenges the $150 hourly rate awarded to Mr. Watkins and Mr. Dilley, as being excessive in view of the attorneys' inexperience with longshore cases, and the help from a legal assistant (Mr. Smith), contending that the hourly rate should be reduced to $125. Employer also maintains that the hourly rate for Mr. Smith, the legal assistant, should be reduced, as the standard hourly paralegal rate in the area is $58, and the hourly rate for a senior legal assistant with considerable experience is no more than $60-$65. The administrative law judge reduced the hourly rate for the attorneys to $150 per hour, and Mr. Smith's hourly rate to $75. We reject employer's contentions, as it has not shown that the administrative law judge abused his discretion in this regard. *See Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT)(10th Cir. 1997); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

We also reject employer's allegation that claimant's counsel's fee application is fraudulent. Employer contends that Attorney Watkins's answers during his deposition contradict various entries on the fee application. While Mr. Watkins conceded that he did not prepare various documents which contain his initials on the fee application, the administrative law judge, noting that although Mr. Watkins did not recall every document generated underlying the entries, stated he was satisfied that Mr. Watkins's overall testimony supports that he himself either initiated or approved the work performed by his employees/agents.[2]

[2]The record reflects that the administrative law judge allowed employer to undertake what claimant's counsel characterizes as an exhaustive three and one-half month "witch hunt" into claimant's counsel's fee application (including deposing counsel and delivering a subpoena to the building manager demanding the immediate production of claimant's counsel's office lease), during which claimant's counsel sufficiently explained his office's billing and timekeeping procedures.

We also affirm the administrative law judge's allowance of a fee to claimant's counsel for preparation of his fee petition. The administrative law judge, citing *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996), awarded the amount claimant's counsel requested, noting "the extraordinary effort Claimant's counsel was put to in this instance." We reject employer's argument that that Board only allowed such an award in Ninth Circuit, based on *Anderson,* as the Board has allowed an award for preparing a fee petition in cases arising in other circuits. *See, e.g., Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998).

Claimant also requested expenses of $9,864.35. *See* 33 U.S.C. §928(d). The administrative law judge awarded $6,772.40, specifically disallowing the cost of postage, copying, long distance telephone calls, fax charges, Greyhound Lines Shipping, travel expenses, and Federal Express charges. On cross-appeal, claimant alleges that the administrative law judge either made a mathematical error, or erred in eliminating all travel expenses claimed. Claimant asserts that disallowed expenses add up to $1,399.16, and that amount subtracted from the amount requested yields $8,456.19, instead of the $6,772.40 awarded.

Claimant's contention on this issue has merit. In light of the discrepancy in the award of expenses, we vacate the administrative law judge's award of costs and remand the instant case for reconsideration of this issue. On remand, the administrative law judge should specify which expenses he was disallowing, ascertaining that the amount disallowed added to the expenses awarded add up to the amount claimant's counsel requested.

Additional Attorney's Fees

Claimant filed a Supplemental Request for Additional Attorney's Fees on September 21, 1998, seeking an additional $4,440.25 for time spent defending his original application for attorney's fees. The administrative law judge denied the additional fees on the ground that the application was untimely. Claimant's counsel argues that he could not file a supplemental application for fees so long as employer continued to file objections and motions, noting that on October 7, 1998, some 16 days after claimant's counsel filed his supplemental application for fees, employer's counsel filed another motion for additional discovery, and that, in any case, the application cannot be untimely because the administrative law judge did not establish a time frame for the filing of a supplemental fee request.

We hold that on the facts of this case the administrative law judge's finding that this petition was untimely is rational. The Act and regulations do not specify a time period for filing a fee petition. 33 U.S.C. §928; 20 C.F.R. §702.132; *see Harmon v. Sea-Land Service,*

Inc., 31 BRBS 45 (1997). However, on June 23, 1998, the administrative law judge issued a briefing schedule for the attorney's fee issues, allowing employer until July 10, 1998, to object to claimant's fee request, and claimant until July 24, 1998, to respond to employer's objections. Since a lengthy series of motions by the parties and rulings by the administrative law judge relating to this issue took place after claimant's March 17, 1998, application for an attorney's fee, culminating in claimant's counsel deposition on June 2, 1998, the July 24, 1998 cutoff date to these proceedings by the weary administrative law judge is rational. Claimant's Supplemental Request for Additional Attorney's Fees reflects that entries related to defending his first fee request comprise the period from March 31, 1998, through July 24, 1998, with only three entries after that date relating to the review of the administrative law judge's decision and order awarding fees and application for a fee for preparing the supplemental request.[3] Thus, claimant's counsel had ample opportunity to file a supplemental request prior to the administrative law judge's September 3, 1998, fee award.

Motion

Employer has filed an "Emergency Motion to Produce Or Preserve Evidence" with the Board. Employer alleges that the administrative law judge failed to directly rule on its letter Motion to produce and that an "emergency" exists as to claimant's counsel's billing and timekeeping records which may be discarded or destroyed. We deny employer's motion, as the record contains ample evidence that the administrative law judge addressed and responded to employer's repeated and repetitious motions to produce. On April 21, 1998, the administrative law judge issued an "Order Denying Employer's Motion to Produce." From the totality of the record it is clear that the administrative law judge considered employer's four-hour, 148-page deposition of claimant's counsel, at which he had to produce documents and answer questions relating to his office's billing procedures, as adequately responsive to employer's discovery requests. In an Order issued on October 19, 1998, the administrative law judge specifically denied employer's letter Motion of June 26, 1998, stating that while he no longer had the file he thought that his "numerous Orders and letters putting an end to

[3]The administrative law judge in his decision awarding attorney's fees issued on September 3, 1998, implied that he considered any potential request for additional fees already late at that point, stating: "In fact had Claimant's counsel timely sought a fee for the taking of his deposition, I would have entertained such a motion." This is an additional reason why claimant's September 21, 1998 request for additional fees is untimely.

Employer's . . . counsel's zealous discovery pursuits concerning Claimant's counsel's fee application applied as well to . . . [the] letter/motion of June 26, 1998." Employer's representation to Board that an "emergency" exists as to the very same billing and timekeeping records, when it is covering the same territory, is unsupported by the record.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. The administrative law judge's award of expenses is vacated , and the case is remanded for further consideration consistent with this opinion. In all other respects, the Supplemental Decision and Order Awarding Attorney Fees is affirmed. The Supplemental Decision and Order Denying Additional Attorney's Fees is also affirmed. Employer's Emergency Motion is denied.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge