BRB Nos. 99-0845
and 99-0845A

JOSE JESUS GARCIA	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
TRAVELERS PROPERTY CARRIER	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Modification and Decision and Order on Reconsideration of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Preston Easley, San Pedro, California, for claimant.

Daniel Valenzuela (Gonzalez, Samuelsen, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Modification and Decision and Order on Reconsideration (84-LCH-396) of Administrative Law Judge Henry B. Lasky rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. To briefly recapitulate the relevant facts in this case, claimant was working as a welder, prohibited from performing heavy work due to a previous work-related injury, when he reinjured his back on March 18, 1981, while pulling welding cables. He continued working until March 23, 1981, when he again felt discomfort, and was diagnosed as having sustained an acute lumbosacral sprain with pre-existing spondylolisthesis.[1] Claimant thereafter filed a claim for benefits.

[1]Claimant sustained an earlier injury to his back in a work-related accident on July 12, 1978, for which he was awarded permanent partial disability benefits. At that time, his underlying spondylolisthesis was diagnosed.

The administrative law judge concluded that claimant was not entitled to total disability benefits based on his findings that employer established the availability of suitable alternate employment and that claimant sustained no loss in his wage-earning capacity.[2] The Board ultimately reversed the administrative law judge's determination that employer met its burden of establishing the availability of suitable alternate employment, and thus, modified the administrative law judge's Decision and Order on Remand to reflect claimant's entitlement to permanent total disability benefits based on an average weekly wage of $326.55, commencing on September 24, 1981, the date of maximum medical improvement, consistent with the factual findings made by the administrative law judge in his initial Decision and Order in this case. *Garcia v. Todd Shipyards Corp.*, BRB No. 90-0291 (Mar. 28, 1996)(unpublished). Upon reconsideration, the Board modified its decision to provide for a remand to the administrative law judge for consideration of employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f), *Garcia v. Todd Shipyards Corp.*, BRB No. 90-0291 (Sept. 27, 1996)(Order on Reconsideration)(unpublished), which prompted the issuance of a Second Decision and Order on Remand by the administrative law judge, wherein Section 8(f) relief was granted to employer.

Employer thereafter moved for modification of the existing permanent total disability award on the basis of an alleged change in claimant's economic condition, as evidenced by claimant's earnings through self-employment between 1985-1989, various welding jobs he performed between 1990-1995, and several suitable alternate employment positions identified in 1997 and 1998. In his Decision and Order Awarding Modification, the administrative law judge determined that employer's economic evidence is sufficient to establish the requisite change in condition for modification of the award of permanent total disability benefits. Based on claimant's actual earnings, the administrative law judge modified the prior award to reflect that claimant is entitled to permanent partial disability for the years 1985 through 1989, and that he is not entitled to any disability benefits for the years 1990 through 1995. In addition, based on employer's evidence of suitable alternate employment, the administrative law judge modified the prior award to reflect that claimant is entitled to permanent partial disability benefits commencing on March 13, 1997, to the present and continuing. The administrative law judge found that claimant remained entitled to his permanent total disability award between January 1, 1996, and March 13, 1997. He also found employer obligated to pay a Section 14(f) penalty, 33 U.S.C. §914(f), on the compensation award ordered by the Board in its March 28, 1996, disposition, and that

[2]A thorough discussion of the initial decisions rendered by the administrative law judge and the Board, *i.e.*, *Garcia v. Todd Shipyards Corp.*, BRB No. 84-2404 (July 31, 1989)(unpublished), as well as a discussion of the administrative law judge's decision on remand, is contained in the Board's decision in *Garcia v. Todd Shipyards Corp.*, BRB No. 90-0291 (Mar. 28, 1996)(unpublished).

claimant's counsel is entitled to a limited award of attorney's fees and costs in connection with the work he performed in his successful prosecution of the Section 14(f) issue. In his Decision and Order on Reconsideration, the administrative law judge denied employer's request to terminate the on-going award of benefits but vacated his finding that claimant is entitled to a Section 14(f) penalty, and any attorney's fees resulting therefrom, since this issue was not first presented to the district director pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a).

On appeal, employer challenges the administrative law judge's findings that claimant is entitled to any disability benefits after 1995. Claimant responds, urging affirmance, and in his cross-appeal, challenges the ALJ's denial of a Section 14(f) penalty, medical benefits associated with treatment rendered by Dr. Latteri, and attorney's fees.

Employer asserts that the administrative law judge erred in finding claimant entitled to permanent total disability benefits from January 1, 1996, to March 13, 1997, and permanent partial disability benefits thereafter, as claimant's position as a rig welder between 1990-1995 satisfied employer's burden of establishing suitable alternate employment and conclusively established claimant's wage-earning capacity at $360 per week, which exceeds his pre-injury average weekly wage of $326.55. Specifically, employer argues that since suitable alternate employment was established, and claimant's work in that capacity ceased solely because of a lay-off, and not because of any physical impairment associated with his work-related injury, it was erroneous for the administrative law judge to require an additional showing of suitable alternate employment by employer as of January 1, 1996.

Section 22 provides that upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the factfinder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of an award or denial of benefits. 33 U.S.C. §922. Section 22 allows for modification of an award where there is a change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*,776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). Once the party seeking modification, employer in this case, meets its burden of demonstrating a change in claimant's physical or economic condition or a mistake in a determination of fact, the standards for determining the extent of disability are the same as in the initial proceeding. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Once, as here, claimant succeeds in establishing that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth

Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 94 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). The Ninth Circuit has explicitly held that short-lived employment is insufficient to meet employer's burden, as it does not establish that alternate work was realistically and regularly available to claimant in the open market. *Edwards*, 999 F.2d at 1374, 27 BRBS at 81 (CRT).

In the instant case, the administrative law judge found that claimant's various intermittent positions as a rig welder between 1990-1995, satisfied employer's burdens to establish a change in condition, and to show the availability of suitable alternate employment for that period of time.[3] As claimant's earnings in these jobs exceeded his pre-injury average weekly wage, the administrative law judge found that claimant was not entitled to any benefits between 1990-1995. In considering claimant's condition from January 1, 1996, and beyond, the administrative law judge found that claimant remains physically capable of performing light duty welding jobs and rig welding. However, he noted that the mere fact that claimant is capable of performing such employment does not relieve employer of its obligation to prove the availability of suitable alternate employment, particularly, where as in the instant case, claimant's last rig welding job ended because he was laid-off. The administrative law judge thus found that while claimant's years of intermittent employment as a rig welder established a post-injury wage-earning capacity during the period of employment from 1990 through 1995, this work cannot be used to support a finding that such intermittent employment was realistically and regularly available to claimant subsequent to his being laid off in 1995. In addition, he acknowledged that claimant probably worked in some pain or with increased symptoms during this employment, although his pain did not rise to the level of the "extraordinary effort" required to entitle him to total disability benefits

[3]The administrative law judge found that claimant worked in welding jobs at various oil refineries requiring lighter work than pre-injury. These jobs were intermittent and claimant was subject to layoffs during this period. Between jobs, claimant received unemployment compensation. Decision and Order at 3.

while working. *See Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978).

Under these circumstances, as claimant's welding work was intermittent with periodic layoffs and unemployment during this time, the administrative law judge rationally concluded that claimant's jobs from 1990-1995 cannot support a finding that such employment continued to be realistically and regularly available to claimant after his final layoff. As the administrative law judge found employer presented no evidence that light-duty welding jobs were available and regular in 1996 and thereafter and did not present any additional evidence regarding the availability of suitable alternate employment until March 13, 1997, the administrative law judge rationally concluded that claimant is entitled to permanent total disability benefits from January 1, 1996, to March 13, 1997, and permanent partial disability benefits thereafter.[4] Inasmuch as the administrative law judge's findings on this issue are rational and supported by substantial evidence, they are affirmed.[5] *Edwards*, 999 F.2d at 1374, 27 BRBS at 81 (CRT); *Stevens*, 909 F.2d at 1260, 23 BRBS at 94 (CRT); *see generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797 (4th Cir. 1999).

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[4]Employer's evidence as to the availability of suitable alternate employment consisted of its labor market survey conducted in March 1997, and updated in May and September of 1998. With regard to this evidence, the administrative law judge determined that claimant could perform work in positions identified as a parking lot attendant and/or an assembly production worker and therefore concluded that employer established suitable alternate employment, and thus, a change in economic condition, as of March 13, 1997, the date at which said positions were identified as available. The administrative law judge then determined that claimant's average weekly wage for this suitable alternate employment was $190 per week based upon a forty-hour work week at the prevailing rate of $4.75 per hour. As a result, he concluded that claimant is entitled to permanent partial disability benefits from March 13, 1997, and thus modified the award of permanent total disability in accordance with that finding.

[5]We reject claimant's contention that employer's showing of suitable alternate employment as of March 13, 1997, is legally invalid since it identifies employment opportunities which were available and thus could have been presented at the time of the first trial in 1984. The administrative law judge explicitly addressed this issue and found that based on claimant's unwillingness to work at the pay rate of a security guard, and given that the Board's remand order was limited to consideration of two welder positions, it was reasonable for employer's original labor market survey to include only welding positions. As such, the administrative law judge rationally concluded that employer is not now intending to use a back door for retrying or litigating an issue that could have been raised in the initial proceeding.

In his cross-appeal, claimant argues that he is entitled to Section 14(f) penalties payable by both employer and the Special Fund for compensation not paid in a timely manner. Claimant asserts that the parties stipulated that the issue of penalties would be submitted directly to the administrative law judge and that employer should be bound by said stipulation. As such, claimant asserts that his failure to raise this issue before the district director should be excused, and therefore, the administrative law judge's denial of Section 14(f) penalties should be reversed.

In the instant case, the administrative law judge ultimately found that, as a matter of law, claimant was required to initially raise the Section 14(f) penalty against employer before the district director, and that as claimant did not take such appropriate action, he vacated the prior award of Section 14(f) penalties against employer. In so finding, the administrative law judge properly rejected claimant's contention that the parties entered into an oral stipulation regarding the issue of Section 14(f) penalties as there was nothing in writing to memorialize said stipulation and there was no further agreement reached on this issue at the time of the hearing. As properly noted by the administrative law judge, the issue of Section 14(f) penalties must first be raised before the district director. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Von Lindenberg v. I.T.O. Corp. of Baltimore*, 19 BRBS 233 (1987). Thus, inasmuch as claimant did not raise this specific issue before the district director, the administrative law judge's finding that claimant is not entitled to Section 14(f) penalties against employer in this case is affirmed.

Claimant next argues that the administrative law judge erred by denying reimbursement of medical expenses associated with a re-examination performed by Dr. Latteri on August 5, 1998. Specifically, claimant asserts that the administrative law judge failed to consider relevant evidence on this issue, which establishes that claimant requested authorization for treatment by Dr. Latteri from employer in 1984, as a result of Dr. Brooks' refusal to provide treatment. Claimant also asserts that he is entitled to reimbursement of $100 that he paid out of pocket for prescription medications prescribed by his family physician, Dr. Pacana.

Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish

that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

In his decision, the administrative law judge found that employer is not liable for the medical bill of Dr. Latteri or the medication prescribed by Dr. Pacana since the record conclusively established that Dr. Brooks was claimant's treating physician since the onset of his injury in 1981, and there is neither evidence that claimant requested a change of treating physician or that employer denied claimant's treatment. The administrative law judge's finding regarding the prescription drugs is correct as there is no evidence to indicate that claimant requested prior authorization for Dr. Pacana's treatment. However, contrary to the administrative law judge's finding, the record contains evidence indicating that claimant sought employer's authorization prior to obtaining treatment by Dr. Latteri. Attached to claimant's letter addressed to employer's counsel dated August 14, 1998, requesting an evaluation and treatment from Dr. Latteri, is a copy of a February 23, 1984, letter also to employer's counsel, wherein claimant requested authorization for treatment by Dr. Latteri based on Dr. Brooks' refusal to treat him. Claimant's Exhibit 11. Based on this evidence, the administrative law judge's denial of reimbursement for treatment provided by Dr. Latteri must be vacated and the case remanded for further consideration of this issue. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). On remand, the administrative law judge must consider whether claimant sought authorization for the treatment provided by Dr. Latteri, and if so, whether employer refused said treatment.

Lastly, claimant argues that he is entitled to attorney's fees since, contrary to the administrative law judge's finding, he did prevail at trial. Specifically, claimant asserts that he successfully defended employer's assertion that he had no work-related wage loss and was awarded ongoing permanent partial disability benefits that extend beyond the date of the hearing. Attorney's fees can be assessed against an employer when employer has controverted some aspect of the claim and claimant successfully obtains an award of disability or medical benefits. *Mobley v. Bethelehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd* 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990). The Board has held that an attorney's fee is appropriate for work performed in a successful defense against an employer's appeal. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

It is clear that employer's actions in seeking modification in this case prompted claimant to seek additional legal representation to defend his entitlement to benefits. Thus, claimant's entitlement to an attorney's fee award centers upon a determination as to whether there was a successful prosecution or perhaps more appropriately a successful defense of employer's attack on his entitlement to disability benefits.

With regard to claimant's period of self-employment, between 1985-1990, and the

period where claimant worked as a rig welder, between 1990-1995, claimant was unsuccessful in defending his continued entitlement to the previously awarded benefits and thus, is not entitled to an attorney's fee for any work performed on these issues. In addition, the administrative law judge's findings that claimant is not entitled to reimbursement for medications prescribed by Dr. Pacana or to a Section 14(f) penalty payable by employer similarly precludes an award of an attorney's fee for work performed on these issues.

Claimant however is entitled to an attorney's fee for work related to the defense of employer's assertion that he is no longer entitled to benefits after 1995. Employer argued that based on claimant's past work as a rig welder, and on positions identified in its Labor Market Survey, claimant no longer had any loss in wage-earning capacity and therefore was not entitled to any benefits. Strictly considering what the administrative law judge found on modification, claimant met with limited success in defending against employer's petition for modification in that, contrary to employer's position, he remained entitled to a period of permanent total disability benefits, followed by a period of continuing permanent partial disability benefits, although claimant had ongoing permanent total disability benefits before that. In addition, contrary to the administrative law judge's finding, claimant may be entitled to reimbursement of the medical expenses associated with Dr. Latteri's examination. Thus, the administrative law judge's denial of an attorney's fee must be vacated. On remand, the administrative law judge must consider claimant's entitlement to an attorney's fee based on his successful defense of employer's attack on his entitlement to compensation after 1995, and, if applicable, claimant's success in obtaining reimbursement for Dr. Latteri's examination.

Accordingly, the administrative law judge's findings that claimant is not entitled to medical benefits associated with Dr. Latteri's examination, and that claimant's counsel is not entitled to an attorney's fee award are vacated and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Awarding Modification and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge