BRB Nos. 04-0679, 04-0761
and 04-0761A

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| JEFFREY T. ROOTS | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| COLUMBIA GRAIN | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LIBERTY NORTHWEST | ) | DATE ISSUED:May 25, 2005 |
| | ) | |
| Employer/Carrier- | ) | |
| Petitioners | ) | |
| Cross-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' | ) | |
| COMPENSATION PROGRAMS, UNITED | ) | |
| STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order Granting Disability Benefits, the Decision and Order on Motion for Modification, and the Order Awarding Attorney Fees of Jennifer Gee, Administrative Law Judge, United States Department of Labor, and the Compensation Order Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Jennifer A. Weston (Johnson, Nyburg & Anderson), Portland, Oregon, for employer/carrier.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Disability Benefits, the Decision and Order on Motion for Modification, and the Order Awarding Attorney Fees of Administrative Law Judge Jennifer Gee (2003-LHC-0581), and the Compensation Order Approval of Attorney Fee of District Director Karen P. Staats (Case No. 14-136401), and claimant appeals the administrative law judge's Order Awarding Attorney Fees 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On August 23, 2001, claimant injured his lower back lifting a 120-pound slide gate during the course of his employment for employer. Claimant was diagnosed with a lumbar sprain and it was recommended that he avoid heavy lifting for a week. On August 29, 2001, claimant was released for modified duty by Dr. Pribnow. Claimant reported to work the following day, where he declined a job employer offered as a secondary master console operator because he believed the job was not physically suitable. Claimant returned to Dr. Pribnow on September 5, 2001; Dr. Pribnow noted that claimant was unable to work due to his injury. On September 19, 2001, Dr. Pribnow opined that claimant may be able to perform very light work for up to four hours a day. On October 4, 2001, Dr. Pribnow again released claimant for modified work, and, in response to employer's request, he specifically approved five positions at employer's facility as within claimant's work restrictions. On February 25, 2002, Dr. Pribnow opined that claimant was medically stationary and has permanent lifting restrictions. Claimant returned to work on February 27, 2002. Claimant sought benefits under the Act for temporary total disability from the date of injury to February 26, 2002, and for permanent partial disability after his return to work, based on a loss of wage-earning capacity. Employer sought relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In her decision, the administrative law judge found that claimant was unable to work from August 24 to August 28, 2001. The administrative law judge next found that the position employer offered on August 29, 2001, was not suitable. The administrative law judge determined that claimant was unable to work at all from September 5 to September 18, 2001, and that employer did not offer any employment from September 19 to October 3, 2001. She also found that although Dr. Pribnow approved positions at employer's facility as of October 4, 2001, these positions were never offered to claimant. Thus, the administrative law judge awarded claimant compensation for temporary total disability from August 24, 2001, to February 25, 2002. Thereafter, the administrative law judge awarded claimant continuing compensation for permanent partial disability based on a weekly loss of wage-earning capacity of $282.81. The administrative law judge calculated claimant's average weekly wage as $1,438.44 under Section 10(a), 33 U.S.C. §910(a), and claimant's inflation-adjusted wage-earning capacity as $1,155.63. Employer's claim for Section 8(f) relief was denied.

In her decision on reconsideration, the administrative law judge rejected employer's contention that claimant's average weekly wage should be calculated under Section 10(c), 33 U.S.C. §910(c), or alternatively, that claimant should be classified as a five-day per week worker for purposes of calculating average weekly wage under Section 10(a). The administrative law judge also rejected employer's contention that claimant is not entitled to compensation for temporary total and permanent partial disability.

Claimant's counsel filed an attorney's fee petition with the administrative law judge, requesting a fee of $22,675 and $1,406.05 in costs.[1] Employer filed objections to the fee petition. In her Order Awarding Attorney Fees, the administrative law judge discussed employer's objections to the fee petition, reduced the requested hourly rate to $225, and rejected the remainder of employer's objections. The administrative law judge awarded claimant's counsel a fee of $21,137.50 and costs of $1,406.05.

Claimant's counsel also filed an attorney's fee petition for work performed before the district director, requesting a fee of $3,912.50 and costs of $40.[2] Employer filed objections to the fee request. In her Compensation Order Approval of Attorney Fee, the

[1] The fee request was for 88.5 hours of attorney time at $250 per hour, and 5.5 hours of legal assistant time at $100 per hour. Claimant's counsel subsequently requested an additional $750 for three hours related to employer's motion for reconsideration, and for time expended attempting to settle his fee request.

[2] The fee request was for 14.25 hours of attorney time at $250 per hour, and 3.5 hours of legal assistant time at $100 per hour. Claimant's counsel subsequently requested an additional $375 for time expended responding to employer's objections.

district director discussed employer's objections to the fee petition, reduced the requested hourly rate to $225, reduced one-half hour requested for responding to employer's objections, and rejected employer's other objections. The district director awarded claimant's counsel a fee totaling $3,781.25.

Employer appeals the administrative law judge's award of temporary total and permanent partial disability benefits, her average weekly wage determination, and the denial of Section 8(f) relief. Employer also appeals the fee awards of the administrative law judge and the district director. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's compensation award and average weekly wage determination. Claimant appeals the administrative law judge's reduction of counsel's requested hourly rate. Employer responds, urging affirmance of this finding.

We reject employer's contention that the administrative law judge erred by awarding claimant compensation for temporary total disability from August 24 to October 3, 2001. The administrative law judge acted within her discretion in crediting claimant's testimony that he was in extreme pain from his commute to work on August 29, 2001, and that he was physically unable to work as a secondary master control operator, a position employer offered him that day. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we affirm the award of compensation for temporary total disability from August 29 to September 4, 2001. The administrative law judge next credited Dr. Pribnow's contemporaneous medical records and the absence of suitable alternate employment within Dr. Pribnow's September 19, 2001, restrictions to award claimant compensation for temporary total disability from September 5 to October 3, 2001. Decision and Order at 8; Decision and Order on Motion for Modification at 3; *see* CX 7 at 20-26. Thus, the award of total disability compensation for this period is supported by substantial evidence and is affirmed. As a result, we reject employer's contention that claimant is not entitled to compensation before August 29, 2004, as we have affirmed the administrative law judge's award of temporary total disability benefits from August 29 to October 3, 2001, which is a period of disability exceeding 14 days from the date of claimant's work injury. *See* 33 U.S.C. §906(a). The award of temporary total disability from August 24 through October 3, 2001, is affirmed.

We next address the administrative law judge's finding that employer did not establish the availability of suitable alternate employment from October 4, 2001, to February 25, 2002. Employer contends the evidence shows that claimant would have been able to obtain suitable work at its facility if claimant had attempted to return to work on October 4, 2001, after Dr. Pribnow released him for light-duty work. Once, as here, a claimant establishes that he cannot return to his usual work, the burden shifts to his

employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must show the availability of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

In her decision, the administrative law judge addressed the five specific positions at employer's facility which Dr. Pribnow approved on October 3, 2001, as within claimant's work restrictions. The administrative law judge found, however, that employer never actually offered to claimant any of the positions approved by Dr. Pribnow and three vocational consultants as physically suitable.[3] The administrative law judge found that employer contacted claimant only on August 29, 2001, to inform him that light-duty work was available; however, the administrative law judge found, and we have affirmed, that claimant was unable at that time to perform the position employer offered. The administrative law judge found that employer made no subsequent efforts to inform claimant of suitable employment. The administrative law judge therefore concluded that claimant is entitled to compensation for temporary total disability from October 4, 2001, to February 25, 2002, as employer did not establish the availability of suitable alternate employment. In her decision on reconsideration, the administrative law judge rejected employer's contention that its job offer on August 29, 2001, met its burden of proof, and that claimant did not diligently seek suitable work. Decision and Order on Motion for Modification at 3-4.

We affirm the administrative law judge's finding that employer failed to establish suitable alternate employment for the period in question. Employer may establish suitable alternate employment by offering claimant a job in its facility within the claimant's work restrictions. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Although employer identified specific jobs, consistent with *Bumble Bee*, the administrative law judge found that employer never offered claimant any of the specific positions approved by Dr. Pribnow on October 3, 2001, Decision and Order at 10-11, and employer does not dispute this finding. Moreover, the record evidence does not establish

[3] The administrative law judge explicitly declined to address the suitability of these positions. Decision and Order at 10 n.6.

that claimant was informed by Dr. Pribnow or employer of the availability of any specific positions at employer's facility. *See* EX 58 at 197-198.

Employer correctly states that it need not inform claimant of specific job opportunities available on the open market. *See, e.g., Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Where employer seeks to meet its burden with a job at its facility, however, the case precedent states that employer may establish suitable alternate employment by "offering" claimant, or by "making available," a suitable position. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79, 84(CRT) (7th Cir. 2000); *Hord*, 193 F.3d at 800, 31 BRBS at 171(CRT); *Darby*, 99 F.3d at 688, 30 BRBS at 94(CRT); *Stratton*, 35 BRBS at 6-7. As the administrative law judge's finding that employer did not offer a position to claimant after he was released to modified work on October 3, 2001, is rational and supported by substantial evidence, we affirm the administrative law judge's award of compensation for temporary total disability from October 4, 2001, to February 25, 2002.

Employer next contends the administrative law judge misinterpreted *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), and therefore erred in computing claimant's average weekly wage under Section 10(a) of the Act. Specifically, employer argues that *Matulic* is distinguishable from the case herein, as the use of Section 10(a) results in benefits based on an increase of approximately $10,000 over claimant's actual earnings for the year 2000, and that Section 10(c), therefore should be used to compute claimant's average weekly wage.[4]

Section 10(a) of the Act, 33 U.S.C. §910(a), states:

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[4] Employer's argument is based on claimant's earnings of approximately $65,000 in calendar year 2000. The administrative law judge rationally rejected this figure because it does not reflect earnings in the 52 weeks prior to claimant's August 2001 injury. Decision and Order at 14. The administrative law judge found that in the 52 weeks prior to the injury claimant earned a total of $73,054, which divided by 52 weeks equals an average weekly wage of $1,404.88. Pursuant to *Matulic* and application of Section 10(a), the administrative law judge divided claimant's earnings by 293, which represents the number of days he actually worked, 282, plus 11 days claimant received holiday pay. The quotient of $249.33 represents claimant's average daily wage. The administrative law judge determined that claimant is a six-day per week worker. *See* discussion, *infra*. Thus, the administrative law judge multiplied by 300 claimant's average daily wage, which corresponds to an annual wage of $74,799. Finally, the annual wage is divided by 52 to derive under Section 10(a) claimant's average weekly wage of $1,438.44. Decision and Order at 14.

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

In *Matulic*, the administrative law judge found that the claimant actually earned $43,370.81 in the year preceding his injury and that use of Section 10(a) would result in calculated earnings of $52,941.20; thus, he concluded that Section 10(a) could not be used because it would overestimate the claimant's annual earnings. On appeal, the United States Court of Appeals for the Ninth Circuit held that under the statutory framework, Section 10(a) must be used when the claimant works seventy-five percent of the available workdays in a year. *Matulic*, 154 F.3d at 1057, 32 BRBS at 150-151(CRT). The Ninth Circuit held that any "overpayment" due to the application of Section 10(a) is not unreasonable or unfair but is built into the statutory system.[5] *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT). Thus, because Matulic worked 82 percent of the available work days for a five-day worker and because the nature of his employment was stable and continuous, the court held that the administrative law judge should have applied Section 10(a). *Id.*, 154 F.3d at 1058, 32 BRBS at 152(CRT). The Ninth Circuit recently reaffirmed its holding in *Matulic*. *Stevedoring Services of America v. Price*, 382 F.3d 1878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1724 (2005). As this case arises within the jurisdiction of the Ninth Circuit, and as employer has not demonstrated that this case is distinguishable from *Matulic*, we reject employer's contention that the administrative law judge erred by applying Section 10(a) because it resulted in claimant's receiving compensation based on a higher average weekly wage than claimant actually earned.

Employer next contends the administrative law judge erred by finding that claimant is six-day per week worker. The administrative law judge found that in the 52 weeks prior to the injury claimant worked 282 days and was paid for 11 holidays he did not actually work. Decision and Order at 14; Decision and Order on Order for Modification at 2; CX 3 at 3-11. The administrative law judge therefore determined that claimant was a six-day per week worker. Applying Section 10(a), she found that claimant's average weekly wage is $1,438.44. *See* n.4, *supra;* Decision and Order at 14; Decision and Order on Order for Modification at 2. Employer contends that dividing by

[5] Thus, Section 10(c), which applies, *inter alia*, if Section 10(a) cannot be reasonably and fairly applied, is not applicable merely because a Section 10(a) calculation exceeds claimant's actual earnings.

52 weeks the 282 days claimant actually worked during the year preceding his injury, results in claimant's working an average of 5.4 days per week. Employer argues that the administrative law judge should have rounded down this average to find that claimant is a five-day per week worker.

In her decision, the administrative law judge added to the 282 days claimant actually worked the 11 days claimant received holiday pay and did not work, and divided this sum of 293 by 52, which results in claimant's working on average 5.6 days per week. The administrative law judge rounded up this average to find that claimant was a six-day per week worker during the year preceding his injury. Decision and Order at 14; Decision and Order on Motion for Modification at 2. We hold that, for purposes of determining whether claimant was a six-day per week worker during the year preceding his injury, the administrative law judge acted within her discretion to count as days claimant actually worked the 11 days claimant received holiday pay and to round up the resulting figure. *See Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Thus, we hold that the administrative law judge properly characterized claimant as a six-day per week worker for purposes of determining claimant's average weekly wage.[6] Accordingly, we affirm the administrative law judge's finding that claimant's average weekly wage was $1,438.44 during the year preceding his injury.

Employer next challenges that administrative law judge's finding that claimant sustained a loss of wage-earning capacity of $282.81 per week due to his injury.[7]

[6] This corresponds to claimant's working 94 percent of the 300-day work year for a six-day per week worker, and thus claimant worked "substantially the whole of the year" prior to his injury. *See* 33 U.S.C. §910(a); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

[7] Employer argues that the administrative law judge erred by applying the Section 20(a) presumption, 33 U.S.C. §920(a), and the "true doubt" rule to find that claimant has a permanent partial disability due, in part, to the August 23, 2001, work injury. Employer correctly asserts that the Section 20(a) presumption does not apply to the issue of the nature and extent of claimant's disability. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934 34 BRBS 79(CRT) (7th Cir. 2000). Moreover, the "true doubt" rule was invalidated by the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). However, employer does not dispute the administrative law judge's findings regarding the physical extent of claimant's work-related disability. Accordingly, any error in the administrative law judge's discussion of the Section 20(a) presumption and the "true doubt rule" is harmless.

Employer argues that the administrative law judge erred by crediting claimant's actual post-injury wages to determine his post-injury wage-earning capacity. Employer contends it submitted substantial evidence that, after claimant returned to longshore work, there were ample employment opportunities for claimant within his work restrictions and that claimant should not have sustained any wage loss. Specifically, employer submitted evidence that a worker with claimant's seniority and work restrictions could obtain daily longshore work. Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), 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. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. It is well established that the party contending that the employee's actual post-injury earnings are not representative of his residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity.[8] *See, e.g., Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom., J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

In her decision on reconsideration, the administrative law judge rejected employer's contention that claimant's actual post-injury earnings do not best reflect claimant's wage-earning capacity. Decision and Order on Motion for Modification at 4. The administrative law judge credited claimant's testimony that, after his return to work, his endurance level decreased, he has difficulty lifting even within Dr. Pribnow's restrictions, and that, because of these conditions, he no longer works overtime. Tr. at 127-129. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). In this case, we hold that the administrative law judge acted within her discretion in crediting claimant's testimony as evidence that claimant's actual wages best represent his post-injury wage-earning capacity, and in rejecting employer's evidence of the wages earned by other disabled longshoreman with claimant's seniority. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *see also Louisiana Ins. Guar. Ass'n v. Bunol*,

[8] On appeal, employer asserts that claimant's post-injury earnings of $70,183.63 exceed his pre-injury earnings of $65,337.70. Emp. Brief at 23; Emp. Reply Brief at 10. Employer's assertion regarding claimant's pre-injury earnings rests on claimant's earnings during the 2000 calendar year, *see* EX 59, and the administrative law judge rationally rejected this figure in favor of using claimant's earnings in the 52 weeks prior to claimant's injury as is required under Section 10. *See* note 4, *supra.*

211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). We, therefore, affirm the administrative law judge's reliance on claimant's actual post-injury earnings as it is supported by substantial evidence.

Employer next argues that the administrative law judge erred in finding that claimant has a loss of wage-earning capacity. Employer contends that if *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT), is applicable to determine claimant's average weekly wage, then it should also apply to wage-earning capacity, and therefore claimant's post-injury wages are higher than his average weekly wage. We reject this contention, as it does not comport with the specific requirements of the Act. Section 8(h) provides that claimant's post-injury wage-earning capacity is to be based on his actual post-injury earnings, where, as here, they reasonably and fairly represent claimant's earning capacity. 33 U.S.C. §908(h). Section 8(c)(21) states that claimant's loss in wage-earning capacity is to be calculated as 66 2/3 percent of the difference between claimant's average weekly wage and post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). The fact that Section 10(a) permits claimant's average weekly wage to be calculated on a theoretical basis does not establish that post-injury wage-earning capacity may also be calculated in this manner given the statute's reference to a claimant's "actual [post-injury] earnings." *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). Accordingly, we affirm the administrative law judge's finding that claimant's actual post-injury earnings are $1,342.20 per week.

Employer contends that the administrative law judge erred in her method of discounting claimant's post-injury average weekly wage to account for inflation. In calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid at the time of injury in order to neutralize the effects of inflation. *See Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Johnston*, 280 F.3d 1272, 36 BRBS 7(CRT); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). In her decision, the administrative law judge credited claimant's wage records from the Pacific Maritime Association (PMA) to find that at the time of claimant's injury his basic hourly pay rate was $24.25, and that the basic pay rate after claimant returned to work was $27.75, or an increase of 13.9 percent. The administrative law judge, therefore, reduced claimant's post-injury average weekly wage by 13.9 percent to account for inflation, which yielded an adjusted post-injury wage-earning capacity of $1,155.63.

We agree with employer that the PMA records show that the administrative law judge erred in finding that the basic pay rate in August 2001 was $24.25. While the records establish that the basic pay rate in February 2001 was $24.25, this rate was increased to $27.25 in March 2001, and was in effect at the date of claimant's injury in

August 2001. CX 3 at 8, 11. After claimant returned to work in February 2002, the administrative law judge correctly found that the basic pay rate was $27.75, but this pay rate was increased in October 2002 to $28.25. EX 59 at 212, 216. Accordingly, we vacate the administrative law judge's calculation of claimant's post-injury wage-earning capacity, and we remand for the administrative law judge to readjust for inflation claimant's post-injury wage-earning capacity, if necessary, and thus determine the extent of claimant's loss of wage-earning capacity. *See Johnston*, 280 F.3d 1272, 36 BRBS 7(CRT).

Employer next challenges that administrative law judge's denial of Section 8(f) relief. The administrative law judge found that none of the three elements necessary for Section 8(f) relief is satisfied in this case. Decision and Order at 16-17. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, that his current permanent partial disability is not due solely to the subsequent work injury, and that the current disability "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991).

In this case, the administrative law judge found that employer failed to establish that claimant had a manifest pre-existing permanent partial disability which contributed to his current permanent partial disability. We affirm the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief as it is supported by substantial evidence. The administrative law judge found that none of claimant's prior injuries affected his wage-earning capacity or would motivate a cautious employer to dismiss him. *See generally Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986). Specifically, the administrative law judge found that claimant underwent surgery approximately 15 years ago for carpal tunnel syndrome, which corrected the condition. Claimant also sustained a foot injury in 1980 and a back strain in 1985, which never bothered him again. Decision and Order at 16. Claimant testified that these injuries had resolved. Tr. at 193; EX 58 at 162. Based on this evidence, the administrative law judge rationally determined that claimant's carpal tunnel syndrome, foot injury, and back strain are not pre-existing permanent partial disabilities for purposes of obtaining Section 8(f) relief. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

The administrative law judge also found that claimant's pre-existing degenerative disc disease is not a pre-existing permanent partial disability under Section 8(f) because the condition was asymptomatic. Decision and Order at 12, 16. However, an asymptomatic condition may constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990). We hold harmless any error the administrative law judge may have made in finding that claimant's asymptomatic degenerative disc disease is not a pre-existing permanent partial disability. The administrative law judge also found that employer did not have actual or constructive knowledge of this condition prior to claimant's sustaining his work injury. She found that the evidence establishes that claimant's degenerative disc disease was first discovered by diagnostic testing conducted after claimant's August 23, 2001, work injury. EX 67 at 343-344. A post-hoc diagnosis of a pre-existing condition is insufficient to meet the manifest requirement for Section 8(f) relief. *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that claimant's degenerative disc disease was not manifest to employer. *See Caudill v. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 25 BRBS 92 (1991), *aff'd mem. sub nom., Sea Tac Alaska Shipbuilding v. Director*, OWCP, 8 F.3d 29 (9th Cir. 1993). Because the administrative law judge's determination that employer did not establish a manifest, pre-existing permanent partial disability is supported by substantial evidence, we affirm the administrative law judge's denial of Section 8(f) relief.[9]

Employer's only contention on appeal regarding the fee awards of the administrative law judge and district director is that they should be stayed pending the outcome of its appeal concerning the extent of claimant's disability. It is well established that a fee award is not "final" for purposes of payment until all appeals are exhausted. *See generally Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). In view of the Board's remanding this case for reconsideration of the extent of claimant's loss of wage-earning capacity, the administrative law judge and the district director should consider whether their fee awards are reasonable in view of any decrease in the award of benefits. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In his appeal, claimant challenges the attorney's fee awarded by the administrative law judge. Claimant argues that the administrative law judge erred by awarding a fee based on an hourly rate of $225, contending that the appropriate hourly rate for Portland,

[9] Accordingly, we need not address the administrative law judge's finding that the contribution element is not satisfied. *See* Decision and Order at 16-17.

Oregon, is $250. The administrative law judge addressed employer's objection to the requested hourly rate of $250, and she found the rate excessive considering the nature of the claim, the complexity of the case, the experience of claimant's counsel, and the hourly rates he had been previously awarded. Order Awarding Attorney Fees at 3. On this basis, the administrative law judge found a rate of $225 reasonable. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995)*; Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). We affirm the hourly rate of $225 awarded as the administrative law judge adequately addressed the relevant factors. Claimant has not shown that the administrative law judge abused her discretion in reducing the hourly rated based on the

regulatory criteria.[10] *See generally Barbera v. Director, OWCP,* 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Accordingly, the administrative law judge's permanent partial disability award is vacated, and the case is remanded for the administrative law judge to recalculate claimant's adjusted post-injury wage-earning capacity and any loss in wage-earning capacity. In all other respects, the administrative law judge's decisions are affirmed. The administrative law judge and the district director should reconsider the amount of their attorney's fee awards if claimant obtains a lower award on remand. In all other respects, the fee awards are affirmed.

SO ORDERED.

[10] Claimant's counsel submitted with his fee petition a decision by the Board in which he was awarded a fee based on an hourly rate of $250, and a decision by the Oregon Court of Appeals, in which he was awarded a fee based on an hourly rate of $237.50. The amount of a fee awarded in another case is not binding precedent in this case. *See Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994).

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge