BRB No. 07-0313

R. T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREENWICH TERMINALS, INCORPORTATED	)	DATE ISSUED: 10/24/2007
	)	
and	)	
	)	
AMERICAN MOTORIST/ EAGLE INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Sean E. Quinn (Sheridan & Murray), Philadelphia, Pennsylvania, for claimant.

Eugene Mattioni (Mattioni, Ltd.), Philadelphia, Pennsylvania, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Awarding Attorney Fees (2005-LHC-02617) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an

attorney's fee award is discretionary, and 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his neck, back, and right ankle and was rendered unconscious on May 19, 2003, when he was struck by a flipper during the course of his employment for employer as a doorway man. Claimant was transported to Thomas Jefferson University Hospital where he was placed in a body cast for multiple spinal fractures. Claimant was transferred to a rehabilitation hospital for approximately nine days and then discharged to his home, where he received around-the-clock care for approximately six months. Claimant initially received treatment from Dr. Vacarro. He subsequently sought treatment for his neck and back injuries in June 2004 from Dr. Lefkoe.

Employer offered claimant two positions at its facility in January 2005. Claimant refused the offer because he believed the jobs were not within his restrictions. Employer terminated its voluntary compensation payments on January 11, 2005. Claimant unsuccessfully attempted to return to work for employer as a top pick operator on April 4, 2005. Claimant sought compensation under the Act for total disability from January 11, 2005. Employer controverted the claim, contending that it established the availability of suitable alternate employment at its facility. Alternatively, employer asserted that it established suitable alternate employment in the community.

In his decision, the administrative law judge found that claimant is unable to return to his usual employment as a doorway man due to his work injury. The administrative law judge found that employer failed to show that claimant is physically able to perform the jobs employer offered at its facility as a top pick operator and yard horse operator. However, the administrative law judge found that employer established the availability of suitable light-duty jobs in the community commencing on April 10, 2005. The administrative law judge determined that claimant's work injury reached maximum medical improvement on April 28, 2004. Finally, the administrative law judge found that employer is liable for the continuing medical treatment provided by Dr. Lefkoe. Claimant was awarded compensation for temporary total disability from May 20, 2003 though April 27, 2004, permanent total disability from April 28, 2004 through April 9, 2005, and permanent partial disability from April 10, 2005, based on a residual yearly wage-earning capacity of $23,040. 33 U.S.C. §908(a), (b), (c)(21), (h).

Claimant's counsel subsequently sought an attorney's fee of $75,712.92, representing 20.9 and 3.7 hours by Thomas W. Sherida and Neil T. Murray at $350 per hour, 212.9 hours by Sean E. Quinn at $250 per hour, 27.3 hours of paralegal time at $90 per hour, plus expenses of $9,512.92. Employer filed timely objections to counsel's fee petition. In his Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel the requested attorney's fee and costs.

On appeal, employer challenges the administrative law judge's findings that the jobs employer offered at its facility were not suitable for claimant and regarding the extent of claimant's loss of wage-earning capacity. Employer also challenges the administrative law judge's attorney's fee award. Claimant responds, urging affirmance.

Where, as here, it is uncontested that claimant is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic 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. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a job in its facility, including a light-duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The administrative law judge's finding that claimant is physically unable to perform the jobs employer offered at its facility is rational and supported by substantial evidence. Specifically, the administrative law judge rationally found that Dr. Lefkoe's opinion should be given greater weight inasmuch as he has been claimant's treating physician since June 2004 and he, therefore, is in a better position to assess claimant's disability. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *see also Soubik v. Director, OWCP*, 366 F.3d 226 (3d Cir. 2004). Decision and Order at 17, 20. Dr. Lefkoe opined that the job employer offered claimant as a top pick operator is not within his work restrictions.[1] CX 25 at 18-21, 27-28, 36, 49-53, 58, 72-73, 83-84, 90-94, 98-102. The administrative law judge rejected employer's videotape demonstrating the top pick operator position, finding it inconsistent with claimant's credible description of the job duties, which he found supported by the testimony of employer's General Manager, John Burleson. *See* Tr. at 65-67, 75, 87-88, 152, 157-163; *see also* CX 26 at 99-103, 140, 152.

[1] Dr. Lefkoe restricted claimant to four hours a day of sitting, standing and walking, with frequent change of position and breaks at will. CX 25 at 27-28. He further opined that claimant could not work overhead, reach above his shoulder, twist, climb, push or pull more than 50 pounds, or lift more than 30 pounds, and he could occasionally squat and kneel. *Id.*

In finding the job unsuitable, the administrative law judge also rejected Dr. Vacarro's opinion that claimant could return to light-duty work because it was based on work restrictions set forth more than a year prior to Dr. Lefkoe's restrictions and Dr. Vacarro had not treated claimant since March 2004. CXs 4; 10; 25 at 28-30; EX 3 at 15-17. The administrative law judge found Dr. Mandel's opinion that claimant could work as a top pick operator undermined by his statement that there is an inconsistency between the job requirements and his November 2004 work restrictions, and his explanation that his restrictions may have been inaccurate. EX 2 at 81-89. Moreover, Dr. Mandel modified his initial opinion that claimant could not work as a top pick operator after viewing employer's videotape demonstrating the position, which the administrative law judge found was not credible. *Id*. at 21-22. The administrative law judge rejected employer's contention that claimant could work as a top pick operator because he is capable of driving a car and climbing stairs at home. The administrative law judge found that these capabilities alone do not establish that the top pick operator position is within all of Dr. Lefkoe's work restrictions.[2] Decision and Order at 19. The administrative law judge rejected the opinions of physical therapists Thomas Cantwell and Deborah Shore that claimant is capable of working as a top pick operator, finding that Mr. Cantwell's opinion was based on the discredited videotape and Dr. Vacarro's November 2003 work restrictions. EX 33. The administrative law judge found that Ms. Shore's report does not indicate that she relied on any medical restrictions in forming her opinion. EX 34. The administrative law judge also rejected the yard horse operator position employer offered based on the testimony of claimant and Mr. Burleson that it is more physically demanding that the top pick operator position. Tr. at 75; CX 26 at 81-82, 142-143. Moreover, the administrative law judge found the position is not within Dr. Lefkoe's work restrictions. Decision and Order at 19.

In adjudicating a claim, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may weigh the evidence and draw his own conclusions and inferences from it. *See Duhagon v.*

[2] We reject employer's argument that the administrative law judge erred by not admitting into evidence videotape surveillance and reports based on the videotape. In its Post-Hearing Brief, employer solely argued that this evidence established claimant's ability to drive a motor vehicle. Employer's Brief at 16, 22-23. Because the administrative law judge rationally found that claimant's ability to drive his car does not establish that the top pick operator position is within Dr. Lefkoe's work restrictions, any error in the administrative law judge's refusing to admit this evidence is harmless. *See generally Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.2d 259 (4th Cir. 1999)(table).

Metropolitan Stevedore Co., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The Board is not empowered to re-weigh the evidence. *Burns v Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge provided a rational basis for crediting Dr. Lefkoe's restrictions and testimony, and his reliance on claimant's testimony addressing the requirements of the top pick and yard horse operator positions, as supported by the testimony of Mr. Burleson, also is rational. Therefore, his finding that claimant is physically unable to work as a top pick or yard horse operator is supported by substantial evidence. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Accordingly, we affirm the administrative law judge's finding that employer failed to establish that the positions at its facility of top pick and yard horse operator constitute suitable alternate employment.

Employer next generally challenges the administrative law judge's finding that claimant has a post-injury wage-earning capacity of $23,040 per year. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). If they do not or if claimant does not have any actual earnings, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See* 33 U.S.C. §908(h); *see, e.g., Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT). 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, the administrative law judge credited four positions identified by employer's vocational consultant, Sonya Mocarski, to find that employer established the availability of suitable alternate employment.[3] Specifically, the administrative law judge

[3] We agree with employer's contention that it is entitled to claimant's cooperation in order to conduct a vocational evaluation. *See generally Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Inasmuch as the administrative law judge credited employer's labor market survey to find that employer established the availability of suitable alternate employment, any error in the administrative law judge is not addressing claimant's failure to cooperate

credited available jobs as an order filler, order selector, para-transit driver, and driver-messenger. EX 6 (June 22, 2005, report at 6-7). These jobs paid from $11 to $15 per hour. *Id*. The administrative law judge found, based on this evidence, that claimant could have earned an average of $12 per hour or $23,040 per year as of April 10, 2005, which he determined best represents claimant's post-injury wage-earning capacity. An average of the range of salaries identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Therefore, the administrative law judge's decision to average the wages of the credited positions identified in Ms. Mocarski's labor market survey is rational and in accordance with law. *See Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT). Accordingly, we affirm the administrative law judge's compensation award for permanent partial disability from April 10, 2005, based on an annual wage-earning capacity of $23,040.[4]

Employer also challenges the administrative law judge's attorney's fee award, asserting that the administrative law judge erred in awarding the requested hourly rate, number of hours, and costs requested in claimant's counsel's fee petition. Moreover, employer argues that the administrative law judge's order is virtually devoid of analysis or rationale. With respect to employer's specific objections below, the administrative law judge's order reads in *toto* as follows:

> Employer's position relative to exclusion of hours, is found specious and thus overruled. Claimant's argument on these objections is hereby adopted as rational and legally sustainable.

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is harmless. Moreover, contrary to employer's contention, the administrative law judge rationally found that claimant fully cooperated with Dr. Chaiken, a vocational consultant to whom claimant was referred by the Department of Labor. Decision and Order at 20, n. 20; *see* CX 31 (Oct. 31, 2005, report).

[4] Inasmuch as the administrative law judge did not find that claimant's efforts to obtain work rebutted employer's showing of suitable alternate employment, we need not address employer's contentions that claimant did not diligently seek employment. *See generally 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).

> The hourly rates claimed are found reasonable and fair given the quality of representation provided, and results obtained.

Order Awarding Attorney Fees. Given the cursory nature of the administrative law judge's order, and in particular his failure to adequately discuss the reasons for allowing both the hourly rates and the number of hours of attorney work requested over employer's objections and to address employer's objections to the requested costs, we must vacate the Order Awarding Attorney Fees and remand this case for further consideration. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). On remand, the administrative law judge is instructed to reconsider and fully discuss the attorney's fee petition and employer's objections thereto, and he must provide a discussion and adequate rationale for the attorney's fee award.

Accordingly, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Order Awarding Attorney Fees is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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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