ROBERT BUNOL	)	BRB No. 92-1573
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEORGE ENGINE COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
ROBERT BUNOL	)	BRB Nos. 95-0370, 95-0370A, and 95-0370S
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
GEORGE ENGINE COMPANY	)	
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, and the Decision and Order Granting Petition to Modify Award and the Second Supplemental Decision and Order Denying Attorney Fee of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Joseph J. Weigand, Jr. (Weigand & Weigand), Houma, Louisiana, for claimant.

Collins C. Rossi (Bailey, Rossi and Kincade), Metairie, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration (90-LHCA-3223) of Administrative Law Judge Ben H. Walley. BRB No. 92-1573. Claimant also appeals, and employer cross-appeals, the Decision and Order Granting Petition to Modify Award of Administrative Law Judge Quentin P. McColgin. BRB Nos. 95-0370/A. Lastly, claimant appeals the Second Supplemental Decision and Order Denying Attorney Fee of Judge McColgin. BRB No. 95-0370S. These decisions were 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 may be set aside only if 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, a diesel mechanic, was injured while working for employer on July 31, 1979. He testified that the injury occurred at the back dock of employer's facility in Harvey, Louisiana. 1991 HT at 27-29; LX 30 Cl. depo. at 13-14, 21. Dr. Cracco subsequently diagnosed claimant as having a non-participation of the L4-L5 intervertebral disc and lumbosacral strain. CX 4. Claimant, who thereafter worked intermittently, underwent a discectomy on April 28, 1980. LX 45 at 8, 35, 57. Dr. Cracco released claimant for light duty with restrictions, and claimant returned to work on July 14, 1980. EX 5; LX 30 at 16. Claimant testified that he performed light duty in employer's repair shop, ultimately became an instructor, and resumed full duties six months to a year later. LX 30 Cl. depo. at 12, 15-18, 22; *but see* 1991 HT at 32-33. Employer voluntarily paid compensation for various periods of time. EX 5.

In March 1988, claimant was laid off when employer went out of business. LX 30 at 8, 23. In September 1988, he was hired by his brother who owned an insurance agency. Claimant worked at the agency until it was sold in August 1990. *Id.* at 7, 23-25. Claimant's only employment subsequent to August 1990 has been at a small-engine repair company which he incorporated in June 1991. 1992 HT at 19-27.

In his Decision and Order, Judge Walley, after initially finding that claimant was covered under the Act, determined that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, which employer failed to rebut. Judge Walley then awarded

claimant temporary total disability benefits from July 31, 1979, to December 18, 1980, and permanent partial disability benefits thereafter. Specifically, Judge Walley found that although claimant returned to work with employer, he worked in substantial pain and with extraordinary effort and thus established a *prima facie* case of permanent total disability. Judge Walley also determined that employer established available suitable alternate employment based on the identified jobs of motor vehicle office trainee and shirt presser; additionally, Judge Walley found that claimant could work as an insurance agent. Judge Walley thereafter awarded claimant benefits based upon a post-injury wage-earning capacity of $240.38 per week, which he subtracted from an average weekly wage of $460.37, which resulted in a $219.99 per week loss of wage-earning capacity. Employer's motion for reconsideration was thereafter denied.

Employer appealed Judge Walley's award of benefits to the Board. BRB No. 92-1573. While this appeal was pending, employer sought modification before the administrative law judge, asserting a mistake in fact regarding claimant's average weekly wage and residual wage-earning capacity. Claimant also sought modification, asserting that the opinions of Drs. Cracco and Russo established that his condition had worsened. On June 26, 1992, the Board dismissed employer's appeal and remanded the case for modification proceedings. On modification, Judge McColgin found no change in claimant's physical condition. Judge McColgin determined, however, that claimant was entitled to have the fusion surgery recommended by both Drs. Cracco and Russo. He thus ordered employer to authorize and pay for that surgery pursuant to Section 7 of the Act, 33 U.S.C. §907, should claimant elect to undergo the procedure. Regarding employer's request for modification, Judge McColgin found that Judge Walley's decision contained mistakes in fact. Judge McColgin then modified that decision to reflect an average weekly wage of $452.13, and claimant's entitlement to temporary total disability benefits from August 1, 1979 to September 4, 1979 and April 28, 1980 to July 9, 1980, when claimant did not work. With regard to the award of permanent partial disability benefits, Judge McColgin noted claimant's post-injury work for employer until 1988, but emphatically found that claimant did not resume his former work with employer; rather, he performed modified duties, outside his restrictions, in great pain and discomfort which led to a deterioration of his condition. He thus specifically reaffirmed Judge Walley's findings that claimant worked for employer post-injury in great pain and discomfort and that this work exceeded claimant's restrictions.

Next, Judge McColgin awarded claimant permanent total disability benefits from March 2, 1988 to August 31, 1988, at which time claimant was hired by his brother's insurance agency. Judge McColgin awarded no benefits, however, for the period from July 1980 through March 1988 during which time claimant worked for employer, despite his finding that claimant worked in pain in a modified job which was outside his restrictions.

Judge McColgin further awarded permanent partial disability benefits, at varying rates of compensation, from September 1, 1988 to August 1, 1990, from August 2, 1990 to August 31, 1993, and from September 1, 1993 and continuing. Judge McColgin thereafter denied claimant's counsel's request for a fee payable by employer. Claimant now appeals,

and employer cross-appeals, Judge McColgin's decision on modification.[1]

Situs

Employer initially appeals Judge Walley's finding that claimant's injury occurred on a covered situs. In order to be covered under the Act, claimant must satisfy both the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3), and the "situs" requirement of Section 3(a) of the Act, 33 U.S.C. §903(a). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northwest Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides that:

> Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1988) (emphasis added). In *Texports Stevedore Co. v. Winchester,* 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, concluded that a determination of whether an "adjoining area" is covered by the Act should focus on the functional relationship or nexus between the "adjoining area" and maritime activity on navigable waters. *See also Motoviloff v. Director, OWCP*, 692 F.2d 87, 14 BRBS 526 (9th Cir. 1982); *Melerine v. Harbor Const. Co*., 26 BRBS 97 (1992). In this regard, it is well-established that coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Alford v. MP Industries of Florid*a, 16 BRBS 261 (1984).

---

[1]In an Order dated December 9, 1994, the Board denied employer's motion to dismiss claimant's appeal of the decision on modification, BRB No. 95-370, denied claimant's Motion for Stay of the administrative law judge's Order, and granted employer's request to reinstate BRB No. 92-1573, consolidating it with its appeal in BRB No. 92-370A. Claimant's appeal of the administrative law judge's denial of a fee, dated June 3, 1996, has been designated BRB No. 95-0370S. As these cases were consolidated, the date of the last appeal, June 3, 1996, controls in determining the one-year period of review under Public Law Nos. 104-134 and 104-208.

In the instant case, Judge Walley, after acknowledging that the accident report completed by employer indicates that claimant's injury occurred on a job site in Baton Rouge, credited claimant's testimony that the accident occurred at employer's dock on the Harvey Canal in Harvey, Louisiana, while he was unloading a tool from his truck. In crediting claimant's testimony, Judge Walley noted that employer offered no testimony to show that the accident occurred somewhere other than at employer's dock in Harvey. It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). On the basis of the record before us, the administrative law judge's decision to rely upon claimant's testimony is neither inherently incredible nor patently unreasonable. Accordingly, we affirm administrative law judge's determination that claimant's injury occurred on employer's dock in Harvey, Louisiana. As it is undisputed that employer is engaged in maritime activity, specifically the repair of boats and ships, at its facility in Harvey, *see* 1991 HT at 22-23, 25-29; *see also* LX 30 at 13-15, 21, we affirm, pursuant to *Winchester*, the administrative law judge's determination that claimant's injury occurred on a covered situs.

Causation

Employer next asserts that Judge Walley erred in finding that it failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. Where, as in the instant case, claimant establishes his *prima facie* case, claimant is entitled to a presumption that his injury or harm arose out of and in the course of his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.* Co., 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In his Decision and Order, Judge Walley found that employer failed to introduce evidence sufficient to rebut the presumed causal link between claimant's physical ailments and his work injury. This finding is supported by the record, as the opinion of Dr. Cracco, upon whom employer relies in support of its contention of error, is insufficient to rebut the presumption. Specifically, Dr. Cracco acknowledged on cross-examination that claimant may have informed him of his July 1979 work injury, and a review of Dr. Cracco's testimony indicates that the physician did not opine that claimant's back problems are unrelated to the July 31, 1979, accident. Thus, as this opinion is not sufficient to rule out the presumed causal connection between claimant's back condition and his employment, we affirm Judge Walley's determination that claimant's back condition is causally related to his employment. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

Average Weekly Wage

Employer next challenges the average weekly wage calculations rendered by both Judges Walley and McColgin. BRB Nos. 92-1573, 95-0370A. Specifically, while acknowledging that Judge McColgin modified Judge Walley's average weekly wage calculation, employer, relying on its assertions set forth in its appeal of Judge Walley's decision, contends that claimant's average weekly wage at the time of his injury was $368.86. In calculating a claimant's average weekly wage at the time of his injury, Section 10(a) of the Act is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.,* 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[2] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

In his Decision and Order, Judge Walley determined that Section 10(a) was inapplicable because insufficient evidence had been introduced to calculate claimant's average daily wage. Thereafter, utilizing Section 10(c) of the Act, Judge Walley calculated claimant's average weekly wage by averaging claimant's annual earnings in 1978 and 1979, and dividing the sum by 52; Judge Walley thus found claimant's average weekly

[2]No party contends that Section 10(b) is applicable to the instant case.

wage at the time of the injury to be $460.37. On modification, Judge McColgin vacated Judge Walley's average weekly wage determination, finding that Judge Walley had erroneously included 5 months of *post-injury* earnings in his calculation of claimant's earnings in the 24 months *preceding* his injury. In determining anew claimant's average weekly wage, Judge McColgin relied, in part, on Employer's Exhibit 12, finding that it shows that claimant earned $18,996.70 in the 42 weeks preceding the injury. Taking into account that this amount constitutes earnings for 80.8 percent of the work year, Judge McColgin found that a reasonable representation of claimant's annual earning capacity is best determined by calculating what claimant would have earned if he had worked the entire 52 weeks of the year preceding his injury. He thus calculated claimant's average annual earning capacity at $23,510.77 ($18,996.70 divided by 80.8 percent), divided this sum by 52, and determined that claimant's average weekly wage was $452.13.

We affirm Judge McColgin's average weekly wage determination. Initially, as the record fails to apportion the number of hours worked by claimant during a pay period into specific days, as is necessary for a Section 10(a) calculation, we hold that Judge McColgin committed no error in calculating claimant's average weekly wage pursuant to Section 10(c). Moreover, it is well-established that the object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Richardson*, 14 BRBS at 855. In this regard, the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). We will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981). In the instant case, Judge McColgin calculated claimant's average weekly wage by extrapolating claimant's 42 weeks of pre-injury earnings to a complete year and dividing that result by 52. *See* 33 U.S.C. §910(d). We hold that the result reached by the administrative law judge is reasonable and is supported by substantial evidence. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam*, 21 BRBS at 91. We, therefore, affirm Judge McColgin's determination of claimant's average weekly wage.

Disability

Employer next challenges the findings of Judges Walley and McColgin regarding the extent of claimant's disability. BRB Nos. 92-1573, 95-0370A. Claimant also appeals Judge McColgin's decision on modification. BRB No. 95-0370. We will initially address the parties' contentions regarding whether claimant was capable of performing his usual employment duties post-injury. Employer asserts that substantial evidence does not support the administrative law judges' findings that claimant worked post-injury for employer in substantial pain and outside his medical restrictions. Employer argues that the wages claimant earned upon his return to work, which exceeded his pre-injury average weekly wage, should be used in calculating his post-injury wage-earning capacity, resulting in a finding of no loss in wage-earning capacity. In contrast, claimant on appeal contends

that Judge McColgin erred in "vacating" Judge Walley's award of permanent partial disability benefits from 1980 to March 1988. In this regard, claimant specifically seeks reinstatement of Judge Walley's award of permanent partial disability compensation from 1980 to March 1988, since Judge McColgin on modification affirmed Judge Walley's findings that claimant worked post-injury for employer in a modified job outside his restrictions and in great pain.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards* Corp., 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the initial burden of establishing that he is unable to return to his usual work. If claimant meets this burden, employer must then establish the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 421, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied* 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a job in its facility. *See 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). A claimant who is working can be found totally disabled while working only if he is working with extraordinary effort and in spite of excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316 (1989). Where claimant's pain and limitations do not rise to this level, such factors nonetheless are relevant in determining post-injury wage-earning capacity and may support an award of permanent partial disability under Section 8(c)(21), (h), 33 U.S.C. §908(c)(21), (h), based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). The party seeking to prove that actual wages do not fairly and reasonably represent wage-earning capacity bears the burden of proof. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

In his decision, Judge Walley determined that although claimant returned to work for employer between 1980 and March 1988, his work was outside his medical restrictions and was performed by claimant in great pain and discomfort. Accordingly, Judge Walley found claimant established that he was unable to return to his former employment and thus proved a *prima facie* case of total disability. Based on the results of a labor market survey and claimant's work for his brother as an insurance agent, Judge Walley found employer established suitable alternate employment. He determined claimant's post-injury wage-earning capacity based on the insurance job as $240.38. He thus awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21) based on this figure commencing in 1980.

On modification, Judge McColgin found two mistakes of fact with regard to claimant's disability award. First was using claimant's actual earnings in "clearly sheltered employment," *i.e.,* the insurance job, as a basis for claimant's post-injury wage-earning

capacity. Second, he found that the permanent partial disability award contained a mistake in that it failed to take into account that for certain periods after maximum medical improvement, claimant earned more in actual wages than his average weekly wage. After discussing his conclusion that the insurance job was sheltered employment and thus did not represent claimant's post-injury wage-earning capacity, the administrative law judge addressed the contention that claimant's earnings with employer represented his wage-earning capacity. Initially, after review of the evidence, he "emphatically found" that claimant did not resume his former employment when he returned to work. Decision and Order at 11. Rather, Judge McColgin concluded that when he initially returned to work as a mechanic, claimant worked in a modified position best described as "moderate duty." *Id.* He specifically reaffirmed Judge Walley's findings that this work exceeded claimant's restrictions and was performed with great pain and discomfort. He then addressed claimant's supervisory work for employer and found that those earnings did not fairly and reasonably represent his wage-earning capacity. Thus, neither job at employer's facility represented claimant's wage-earning capacity under Section 8(c)(21) and (h), and Judge McColgin turned to determining claimant's residual wage-earning capacity based on other evidence, eventually crediting labor market survey evidence of suitable available jobs as establishing claimant's residual wage-earning capacity.[3] Despite his findings, however, he awarded permanent partial disability benefits only for periods after 1988, without further discussion of the period of time prior to 1988 when Judge Walley awarded permanent partial disability.

On appeal, employer asserts that the job at its facility established claimant's wage-earning capacity at higher wages than pre-injury and thus claimant is not entitled to benefits. Claimant asserts that since Judge McColgin reaffirmed Judge Walley's finding that this job was outside his restrictions and performed only in great pain, he is entitled to reinstatement of his permanent partial disability award. We agree with claimant and will reinstate the award for the period following claimant's period of temporary total disability through March 1, 1988.

Both judges found that claimant worked in this job in great pain and that it was outside his restrictions. These facts support the conclusion that earnings in the job at employer's facility did not reasonably represent claimant's wage earning capacity, *see* 33 U.S.C. §908(h), and both judges then calculated claimant's wage-earning capacity based on evidence indicative of earning capacity on the open market. Since both judges'

[3]Despite his finding that the insurance job was sheltered employment, the administrative law judge later utilized those earnings in calculating claimant's permanent partial disability for the period claimant worked from September 1, 1988 to August 1, 1990, only, stating he was doing so to "avoid unjust enrichment." Decision and Order at 13.

calculations indicate claimant's wage-earning capacity was less than his pre-injury average weekly wage, claimant was entitled to permanent partial disability benefits under Section 8(c)(21). *See, e.g., Cook v. Seattle Stevedoring Co.,* 21 BRBS 4 (1988). Contrary to the apparent basis for Judge McColgin's denial of benefits for the period prior to 1988, the fact that claimant's actual earnings exceeded his average weekly wage is irrelevant, as the comparison under Section 8(c)(21) involves claimant's wage-earning *capacity. See, e.g., Container Stevedoring,* 935 F.2d at 544, 24 BRBS at 213 (CRT). Thus, if the findings regarding the job at employer's facility are supported by substantial evidence, claimant is entitled to permanent partial disability benefits during this period.

Judge Walley's finding that claimant returned to work for employer in great pain and discomfort, which was reaffirmed by Judge McColgin, is supported by substantial evidence in the record, specifically claimant's testimony that he continued to work in constant pain, s*ee* 1991 HT at 32, 38, 52, 60, and the testimony of Dr. Cracco, who stated that he placed post-injury restrictions on claimant's lifting, climbing, and repetitive bending in July 1980, that he intermittently lifted claimant's work restrictions to accommodate claimant's desire to earn a living, that in doing so he knew that to the extent claimant's work would exceed his restrictions it would lead to a deterioration of his back condition, and that claimant's non-supervisory work exceeded his restrictions. *See* JX 2 at 18-20. In addition, Judge McColgin reasonably concluded that claimant's actual earnings as a supervisor did not reasonably represent his wage-earning capacity, since claimant's supervisory experience was limited to one year and did not provide him with necessary employment skills. As this evidence supports the findings of Judges Walley and McColgin, we reject employer's argument that this job represented claimant's wage-earning capacity. As neither party asserts an alternate basis for determining claimant's wage-earning capacity prior to 1988, we grant the relief requested by claimant and reinstate Judge Walley's award of permanent partial disability compensation from 1980 to March 1988.

Employer additionally challenges the post-March 1988 awards of permanent partial disability compensation rendered by Judge Walley and modified by Judge McColgin. When he subsequently considered this issue, Judge McColgin noted claimant's unemployment from March 1988 to September 1988, and found that employer did not identify any job opportunities until General Rehabilitative Services, Incorporated's report dated December 27, 1988. EX 14. Accordingly, he awarded claimant permanent total disability benefits from March 2, 1988 to August 31, 1988, at which time claimant commenced employment with his brother.

Considering claimant's work for his brother from September 1988 to August 1, 1990, Judge McColgin found that claimant's wage-earning capacity during this period was $241.35, which, after utilizing the national average weekly wage to adjust back to the time of claimant's injury, he determined to be $188.25. Judge McColgin thus awarded claimant permanent partial disability compensation for this period based upon the difference between claimant's average weekly wage and his $188.25 per week post-injury wage-earning capacity. In rendering this determination, Judge McColgin rejected employer's argument that claimant could earn $23,800 per year as a State Farm Insurance Agent, as

Ms. Favolaro testified, since he determined that claimant did not acquire skills as a claims examiner and was only employed through his brother's beneficence.

Judge McColgin next noted claimant's loss of his insurance job on August 1, 1990, and Judge Walley's finding that he could physically perform and reasonably compete for the motor vehicle trainee and shirt presser positions identified in the labor market survey dated December 27, 1988. *See* EX 14. He thus found that employer established the availability of suitable alternate employment as of December 28, 1988, which paid a weekly salary of $150.42 at the time of the injury. Next, Judge McColgin determined that employer subsequently established a higher post-injury wage-earning capacity based on Ms. Favolaro's September 1993 identification of a repair technician position with Black and Decker which would have paid $160.80 per week at the time of claimant's injury. He thus awarded permanent partial disability from August 2, 1990 through August 31, 1993 based on an average weekly wage of $452.13 and a residual wage-earning capacity of $150.42, and permanent partial disability compensation from September 1, 1993 and continuing, based on a residual wage-earning capacity of $160.80.

In its appeal of Judge McColgin's findings, BRB No. 95-0370A, employer asserts that Judge McColgin erred in not considering claimant's post-injury wages with employer, that claimant's earnings with his brother's insurance agency did not represent his true wage-earning capacity during that period of his post-injury employment since Ms. Favolaro's vocational report demonstrates a wage-earning capacity in excess of $23,000 as an insurance agent, and that Judge McColgin did not consider additional employment opportunities available for claimant at Conmaco, Hunt Engine Company, and Avondale Shipyards.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the specific geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See Turner,* 661 F.2d at 1031, 14 BRBS at 156; *see also P & M Crane,* 930 F.2d at 424, 24 BRBS at 116 (CRT). If employer establishes suitable alternate employment, claimant is only partially disabled, and in a case not covered by the schedule, his award is based on the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury. *See Walker v. Washington Metropolitan Area Transit Authority,* 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986) *cert. denied*, 479 U.S. 1094 (1986) ; *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In this case, both judges found that employer established the availability of suitable alternate employment. The dispute for the period after 1988 concerns whether claimant's post-injury work for employer establishes that he was not disabled, a contention we have

rejected, and Judge McColgin's determination of claimant's wage-earning capacity. In this regard, we affirm Judge McColgin's use of claimant's wages while working for his brother in calculating claimant's post-injury wage-earning capacity between September 1, 1988, and August 1, 1990. In calculating this figure, Judge McColgin rationally rejected Ms. Favolaro's opinion that claimant could work as an insurance agent, as the record supports Judge McColgin's findings that claimant did not acquire skills as a claims examiner while working for his brother, *see* LX 27 at 10, 14, and never again secured white-collar employment. Moreover, we hold that Judge McColgin's subsequent finding that employer established the availability of suitable alternate employment, at progressively higher wages, based upon the testimony of Ms. Favolaro, is supported by substantial evidence, is rational, and is in accordance with applicable law. See *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Hughes*, 289 F.2d at 403. As the testimony of record provides substantial evidence supportive of Judge McColgin's findings, we affirm the administrative law judge's findings regarding claimant's post-injury wage-earning capacity. Judge McColgin's awards of continuing permanent partial disability compensation to claimant beginning September 1, 1988, are therefore affirmed.

Fee Award

Lastly, claimant appeals Judge McColgin's Second Supplemental Decision and Order Denying Attorney Fee filed May 13, 1996,[4] BRB No. 95-0370S, contending that counsel is entitled to a fee for services performed in connection with claimant's request for modification. In the instant case, counsel filed a petition for attorney's fees before the administrative law judge requesting a fee of $12,820.54, representing 116.4 hours work at the hourly rate of $100, plus $1,180.54 in expenses. Judge McColgin determined that employer was not liable for counsel's fee. Specifically, Judge McColgin found that claimant's request for modification had been denied, while employer's petition had been granted in part, that counsel was not successful in securing additional compensation or other benefits for claimant, and that Sections 28(a) and (b), 33 U.S.C. §928(a), (b), were inapplicable to the case at bar. Thus, Judge McColgin denied claimant's counsel a fee payable by employer.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy

[4]We grant claimant's Motion to Permit the filing of his Petition for Review and Brief in response to the Board's November 2, 1996 Order to Show Cause.

arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.,* 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we note that Section 28(b) is the applicable subsection based upon the facts of this case. Specifically, when employer filed its petition for modification, a controversy developed over additional compensation due claimant, since employer was challenging claimant's entitlement to his award of continuing permanent partial disability benefits. Claimant, thereafter, was forced to utilize the services of an attorney in order to defend against employer's petition and ensure that his compensation was not reduced; as a result of counsel's services, claimant obtained permanent partial disability compensation subsequent to September 1, 1988, at a higher rate than that awarded by Judge Walley, as well as an award of medical benefits. Thus, counsel's services resulted in claimant's retaining "greater" compensation than that sought by employer in its petition for modification.

In denying an award, Judge McColgin relied on an overall reduction in claimant's award resulting from his not awarding benefits from 1980 to 1988. Inasmuch as we have reinstated the award, this basis for denial no longer applies. Judge McColgin's denial of an attorney's fee payable by employer is thus reversed, and the case is remanded for consideration of claimant's counsel's fee request pursuant to Section 28(b) and Section 702.132 of the regulations, 20 C.F.R. §702.132.

Accordingly, Administrative Law Judge Walley's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration are affirmed. BRB No. 92-1573. The Decision and Order Granting Petition to Modify Award of Administrative Law Judge McColgin is modified to reinstate Judge Walley's award of permanent partial disability benefits for the period 1980 through March 1988; in all other respects, that decision is affirmed. BRB Nos. 95-0370/A. Judge McColgin's Second Supplemental Decision and Order Denying Attorney Fee is reversed, and the case is remanded to the administrative law judge to consider counsel's fee request consistent with this opinion. BRB No. 95-0370S.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge