BRB No. 96-0820

KENNETH RAAPPANA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: _____
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fee of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson and Atchison), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fee (94-LHC-3339) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are

rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a longshoremen, slipped and injured his shoulders during the course of his employment for employer on February 2, 1993. Employer voluntarily paid claimant temporary total disability benefits from February 10, 1993, to March 8, 1994. 33 U.S.C. §908(b). Thereafter, claimant filed two claims under the Act. Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a), due to the combination of his work-related shoulder injury and pre-existing impairments of both knees. Secondly, claimant sought medical benefits and additional compensation for temporary total disability due to carpel tunnel syndrome.

In his Decision and Order, the administrative law judge found employer liable for the treatment of claimant's carpel tunnel syndrome, and thereafter awarded claimant temporary total disability compensation from March 9, 1994, to July 11, 1994, when claimant's condition reached maximum medical improvement. The administrative law judge next denied the claim for permanent total disability benefits. Specifically, the administrative law judge found that claimant's shoulder injury caused a permanent impairment that prevents him from working in some, but not all, of the longshore occupations available to him at his home port. In this regard, the administrative law judge found that there are fourteen longshore occupations within claimant's shoulder-related work restrictions. The administrative law judge rejected claimant's contention that his left and right knee conditions contribute to his overall disability. The administrative law judge found that employer therefore had established the availability of suitable alternate employment. The administrative law judge next reviewed the employment records of the Pacific Maritime Association (PMA) and determined, based upon those records, that claimant did not sustain a loss of wage-earning capacity due to his shoulder impairment. Accordingly, the administrative law judge concluded that claimant was not entitled to compensation for his permanent shoulder disability. *See* 33 U.S.C. §908(c)(21). Claimant moved for reconsideration, which was summarily denied by the administrative law judge in an Order Denying Motion for Reconsideration.

Claimant's counsel subsequently filed a fee petition requesting an attorney's fee of $19,385, plus $1,283.37 in expenses. Employer filed objections to the fee. In a Supplemental Decision and Order, the administrative law judge, agreeing with the objections raised by employer, awarded claimant's counsel a fee of $4,000, plus $320 in expenses.

On appeal, claimant challenges the administrative law judge's findings that

employer established the availability of suitable alternate employment and that claimant did not sustain a post-injury loss of wage-earning capacity. Claimant also challenges the administrative law judge's attorney's fee award. Employer responds, urging affirmance.

Disability

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 & Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See 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). Employer must establish realistic, not theoretical, job opportunities; for the job opportunities to be considered realistic, employer must establish their precise nature, terms and availability. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985).

We reject claimant's initial contention that the administrative law judge placed the burden of proof on claimant to establish permanent total disability. Claimant cites to a single finding by the administrative law judge that claimant presented no evidence that he is unable to perform any longshore work, *see* Decision and Order at 7, which does not establish the alleged error. Rather, the administrative law judge found that claimant's pre-existing left and right knee impairments do not prevent claimant from returning to longshore employment based on: 1) the physically demanding longshore jobs and the number of hours per year claimant worked prior to his February 2, 1993, shoulder injury; 2) claimant's testimony regarding his knee condition; 3) the lack of evidence of knee treatment after February 1993; 4) the lack

of supporting medical or vocational evidence; and 5) claimant's lack of credibility. Next, the administrative law judge credited the testimony of Dr. Smith, *see* Tr. at 236-242, and Dr. Harper, *see* RX 137 at 500-501, and Mr. Kleinstuber, *see* Tr. at 268-269, employers' vocational consultant, who opined that, with his shoulder condition, claimant was capable of physically performing less arduous jobs on the waterfront. Based upon these opinions, the administrative law judge determined that there were fourteen longshore job categories within claimant's shoulder-related work restrictions that claimant could realistically obtain, and that employer thus established the availability of suitable alternate employment.[1]

It is well-established that fact-finding functions reside with the administrative law judge, who is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Based upon the record before us, the administrative law judge's finding that claimant is capable of performing jobs within the fourteen identified longshore categories is supported by substantial evidence and is consistent with law. We therefore affirm the administrative law judge's determination that employer met its burden of establishing the availability of suitable alternate employment based upon the vocational evidence and medical opinions of record. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 777 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Wage-Earning Capacity

Claimant bears the burden of proof in establishing any loss of wage-earning capacity due to his February 2, 1993, work accident. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *West v. Port of Portland,* 21 BRBS 87 (1988), *modifying on recon.* 20 BRBS 162 (1988). In this case, claimant challenges the administrative law judge's determination that he did not sustain a

[1]The administrative law judge specifically found that claimant could perform the following longshore jobs: slingman, buttonpusher, hatchtender/signalman, lift truck operator, payload operator, tractor-semidock, utility lift driver, heavy lift truck operator, bargeman foreman, barge lift driver, wagoner log loader, container toploader/port packer, dockside clerk, and hopperman.

post-injury loss of wage-earning capacity; in support of this allegation of error, claimant avers that employer failed to produce substantial evidence regarding the number of work hours available to claimant within his physical restrictions. We disagree.

In addressing the issue of claimant's post-injury wage-earning capacity, the administrative law judge credited evidence that claimant, as a class A longshoreman, is entitled to priority in job assignments over class B longshoremen and casual laborers. Next, the administrative law judge credited the PMA records establishing the number of first shifts that were actually available to class B longshoremen and casual laborers from January 1993 to June 1995 in the fourteen specific longshore job categories which he found constituted suitable alternate employment. The administrative law judge next determined that these available shifts total 3,651.2 hours per year, while claimant worked 2,600 hours in 1992. Moreover, he found that these shifts were realistically available to claimant due to his senior status as a class A longshoreman. The administrative law judge therefore concluded that claimant did not sustain a loss of wage-earning capacity based on the greater number of hours available to claimant within his physical restrictions than he actually worked in 1992, the year preceding his shoulder injury on February 2, 1993. Because the administrative law judge's finding that claimant sustained no loss of wage-earning capacity as a result of his February 2, 1993, work accident is supported by substantial evidence, we affirm that finding, *see Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir. 1971)*(per curiam); Sears v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 235 (1987), and his consequent denial of additional disability benefits beyond July 11, 1994.

Attorney's Fee

Lastly, claimant challenges the fee awarded by the administrative law judge. Claimant's counsel requested a fee of $19,385, plus $1,283.37 in expenses. The administrative law judge, in considering claimant's fee request, stated that claimant only succeeded on his carpel tunnel claim, which he found was "virtually uncontested," while claimant's second claim, in which he sought permanent total disability due to the shoulder injury and pre-existing impairment of both knees, was unsuccessful. The administrative law judge further found that nearly all of counsel's efforts were expended towards establishing the second claim. Accordingly, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and the absence of any legal or factual relationship between the two claims, the administrative law judge reduced the requested fee to $4,000.

We affirm the $4,000 attorney's fee awarded by the administrative law judge in

view of the decision of the Supreme Court in *Hensley*. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fee under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. *See Bullock v. Ingalls Shipbuilding, Inc.,* 27 BRBS 90 (1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27

BRBS 24 (1993).

In the present case, the administrative law judge found, in reducing the fee pursuant to *Hensley*, that claimant was not successful in all of his claims; specifically, the administrative law judge noted that claimant, although successful in obtaining from employer a limited period of compensation and medical benefits for his carpel tunnel claim, was unsuccessful in establishing the claim alleging permanent total disability, and that nearly all of counsel's efforts were expended on this claim as the carpel tunnel claim was "virtually uncontested." Thus, the administrative law judge considered, consistent with *Hensley,* claimant's failure to succeed on unrelated claims. Accordingly, because the administrative law judge's consideration of counsel's fee petition and the resulting fee award are in accordance with applicable law, we affirm the administrative law judge's consequent award of an attorney's fee totaling $4,000 in this case.[2]

[2]Employer also contends that the administrative law judge failed to consider all the factors enumerated in 20 C.F.R. §702.132 in awarding the fee. Pursuant to the administrative law judge's unchallenged findings that the carpel tunnel claim was "virtually uncontested" and that there is no legal or factual relationship between the carpel tunnel claim and the claim for permanent total disability, we hold that the administrative law judge did not abuse his discretion by awarding a fee of $4,000 for services expended on this claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge