BRB Nos. 96-0877
and 96-0877A

JAMES BARBERA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICE, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order, Supplemental Decision and Order, and Second Supplemental Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

William M. Broderick and Richard P. Stanton, Jr., New York, New York, for claimant.

Keith L. Flicker and John F. Karpousis (Flicker, Garelick & Associates), New York, New York, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order, Supplemental Decision and Order, and Second Supplemental Decision and Order (94-LHC-2154) of Administrative Law Judge Edith Barnett 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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).

On April 16, 1991, claimant, a maintenance manager for employer, injured his back after falling three feet while he was climbing a container stacked on top of another container in order to perform a damage estimate. In her Decision and Order, the administrative law judge initially found that claimant met the status as well as the situs tests for coverage under Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a). The administrative law judge denied claimant compensation, however, after finding that claimant's present salary fairly and reasonably reflects his wage-earning capacity under Section 8(h) of the Act, 33 U.S.C. §908(h), and that claimant suffered no loss in wage-earning capacity by virtue of his injury. The administrative law judge also denied claimant a *de minimis* award because although claimant has a serious back condition, his condition is stable as are his prospects for continued employment. Consequently, the administrative law judge ordered employer to pay claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, and found claimant "entitled" to temporary total disability under Section 8(b) of the Act, 33 U.S.C. §908(b), from April 29, 1991, through August 31, 1991. No compensation was awarded for this period, however, as claimant had received his full salary from employer.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $69,247.50, representing services at $300 per hour for Mr. Broderick and $250 per hour for his associate, Mr. Stanton, and $3,750.39 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied.

In her Supplemental Decision and Order, the administrative law judge denied claimant's request for reconsideration of her denial of a *de minimis* award. The administrative law judge also rejected most of employer's objections to the attorney's fee request with the exception of two entries for travel to obtain medical films and records on February 10, 1995, and February 17, 1995. With respect to these two travel entries, the administrative law judge ordered claimant's counsel to file an amended fee petition adequately explaining the necessity of this travel or deleting the time attributable to this travel, as these services are generally considered to be clerical duties properly included in overhead.

Claimant's counsel subsequently submitted an amended fee petition which deleted the claim for 3.5 hours for both travel entries on February 10, 1995, and February 17, 1995. In her Second Supplemental Decision and Order, the administrative law judge ordered employer to pay claimant's counsel the sum of $71,247.89 in fees and costs for the successful representation of claimant and an additional $1,060 in fees and costs for defending the fee application.

On appeal, claimant challenges the administrative law judge's denial of an award. Claimant contends that the administrative law judge erred in finding that his present salary fairly and reasonably reflects his wage-earning capacity and in denying him a *de minimis* award. In its cross-appeal and supplemental appeal, employer appeals the administrative law judge's award of an attorney's fee.[1] In this regard, employer contends that the administrative law judge erred in not applying the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

We first address claimant's challenge to the administrative law judge's finding that claimant's present salary fairly and reasonably reflects his 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. *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); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996). In determining whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Guthrie*, 30 BRBS at 48; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).

In determining that claimant suffered no loss in wage-earning capacity as claimant's present salary fairly and reasonably reflects his wage-earning capacity, the administrative law judge considered claimant's skills, experience, and relative youth, in addition to his physical condition and availability of post-injury employment. Decision and Order at 9-13. The administrative law judge, in considering the availability of post-injury employment, concluded that claimant's periods of unemployment after August 1991 were related to the vicissitudes of the job market rather than to claimant's inability to work. Decision and Order at 11; Tr. at 69, 72-74, 112. The administrative law judge also concluded that claimant's position as a maintenance manager with Southern Intermodal Logistics (Intermodal) in Savannah, Georgia, at a salary of approximately $300 per week in November and December 1991 was stop-gap employment pending claimant's higher paid position as a maintenance manager with China Ocean Shipping Company (COSCO) which he obtained in Charleston, South Carolina, in April 1992. Decision and Order at 12. With regard to claimant's present position as a maintenance manager with COSCO, the administrative law judge noted that claimant has held this position since 1992, has received appropriate increases in pay since that time, and is able to do this job without physical difficulty. Decision and Order at 5, 13. As of 1994, the administrative law judge further noted that claimant earned almost $100 more per week in his new position as a maintenance manager for COSCO than did his replacement with employer.[2] Decision

[1]We accept employer's Petition for Review and Brief filed on August 20, 1996, as part of the record although it was filed out of time. 20 C.F.R. §802.217.

[2]In 1994, claimant earned an average weekly wage with COSCO of $961.54 while claimant's replacements with employer, Mr. Reardon and Mr. Bronson, earned an average weekly wage of

and Order at 12; Emp. Ex. E; Cl. Ex. 12. The administrative law judge further found that claimant was not precluded from seeking employment as a maintenance manager with higher paying larger companies[3], and rejected as speculative claimant's argument that his loss in wage-earning capacity should be measured by the higher pay he would be receiving as a maintenance manager for the larger companies because it was based solely on the testimony of Mr. Brady, employer's assistant general manager, that a person in claimant's position might expect to move up in his career to a larger company such as Maher or Universal. Decision and Order at 12; Tr. at 196-197.

Contrary to claimant's contention, the administrative law judge additionally took into account claimant's physical condition when she gave greater weight to Dr. Cuomo's opinion which recognized the need for possible future surgery. Decision and Order at 10-11; Cl. Ex. 6. However, the administrative law judge found that claimant's employment at COSCO was stable and likely to continue as claimant is able to do the job without physical difficulty. Consequently, we affirm the administrative law judge's finding, as supported by substantial evidence, that claimant's current earnings as a maintenance manager with COSCO fairly and reasonably reflect his wage-earning capacity, and therefore, that claimant has not suffered a loss in wage-earning capacity. *See Guthrie*, 30 BRBS at 48.

We next address claimant's challenge to the administrative law judge's denial of a *de minimis* award. *De minimis* awards are appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), but has established that there is a *significant* possibility of future economic harm as a result of the injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT)(9th Cir. 1996), *pet. for cert. granted*, 117 S.Ct. 504 (1996); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989); *Fleetwood*, 776 F.2d at 1225, 18 BRBS at 12 (CRT); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 398.1 (5th Cir. 1981). After concluding that claimant suffered no loss in wage-earning capacity, the administrative law judge found no basis for awarding a *de minimis* award as claimant's medical condition and prospects for continued employment are stable, and as claimant received appropriate increases in pay since he began his employment at COSCO almost four years ago. As the administrative law judge's determination that claimant did not establish a significant possibility of future economic harm is supported by substantial evidence, we affirm the denial of a *de minimis* award. *See Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

$852.74 and $771.15, respectively. Emp. Ex. E; Cl. Ex. 12; Tr. at 142-143, 158-159, 176-177.

[3]In 1994, the maintenance manager employed by Maher Terminals earned an average weekly wage of $1,127.04 while the maintenance manager employed by Universal Maritime earned an average weekly wage of $1,183.85.

Turning to employer's cross-appeal and supplemental appeal of the administrative law judge's award of an attorney's fee, we agree with employer that the administrative law judge erred in not applying the holding set forth in *Hensley*, 461 U.S. at 424. In *Hensley*, the United States Supreme Court held that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case. Although the administrative law judge cited to *Hensley* in her Supplemental Decision and Order, the administrative law judge did not apply its holding in awarding an attorney's fee in excess of $71,000.[4] We therefore must vacate the administrative law judge's award of an attorney's fee and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must adjust the attorney's fee awarded after taking into account the limited results obtained in this case, specifically that only medical benefits, but no disability benefits, were awarded. Although the most useful starting point for determining a reasonable attorney's fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate, the inquiry does not end there, as this may result in an unreasonable fee given the results obtained. *See Hensley*, 461 U.S. at 424; *see also Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Accordingly, the administrative law judge's Decision and Order and that part of the Supplemental Decision and Order which denied claimant compensation are affirmed. The administrative law judge's Supplemental Decision and Order and Second Supplemental Decision and Order awarding an attorney's fee are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[4]The administrative law judge merely stated with regard to *Hensley* that, "This case is an example of why the Supreme Court has admonished counsel not to turn motions for fee awards under fee shifting statutes into a 'second major litigation.'" [Citations omitted]. Supplemental Decision and Order at 2.