BRB No. 89-1554

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<tr><td>ALEX KOSTOPOULOS

Claimant-Respondent

v.

M.P. INDUSTRIES,
INCORPORATED

and

PROPERTY & CASUALTY
INSURANCE GUARANTY
CORPORATION

Employer/Carrier-
Petitioners</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order, Order Excluding Additional Post-Hearing Evidence, and Supplemental Decision and Order Awarding Attorney Fees and Granting and Denying Reconsideration of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Lynott (Moore, Libowitz & Thomas), Baltimore, Maryland, for the claimant.

Robert P. O'Brien and R. Wayne Pierce (Niles, Barton & Wilmer), Baltimore, Maryland, for the employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Order Excluding Additional Post-Hearing Evidence, and Supplemental Decision and Order Awarding Attorney Fees and Granting and Denying Reconsideration (88-LHC-894) of Administrative Law Judge Edward J. Murty, Jr. 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. *Muscella v. Sun Shipbuilding & Dry Dock Co*, 12 BRBS 272 (1980).

On January 11, 1984, claimant injured his lower back while working for employer as a painter. In this job, claimant was required to climb high ladders and scaffolding. After undergoing two operations, claimant was released to return to light duty work by his treating neurosurgeon, Dr. Meyer, on October 23, 1985. On February 16, 1986, claimant returned to work for employer as a shoptaker. Claimant performed this work satisfactorily for more than a year and a half but was fired from this position in November 1987 for soliciting fellow employees to work for a business competitor of employer. He was subsequently hired as a painting supervisor by Manolis Painting Company (Manolis) in March 1988, where he is currently employed. Employer voluntarily paid claimant temporary total disability compensation from January 12, 1984 until October 24, 1985. Claimant subsequently filed a claim for permanent partial disability compensation under the Act pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).

Based on Dr. Meyer's deposition testimony that claimant should avoid high ladders and repetitive climbing, bending, and lifting, the administrative law judge found that claimant was unable to perform his usual work as a sandblaster and industrial painter. The administrative law judge also found that surveillance tapes submitted by employer demonstrated that claimant has substantial limitations which would prevent his return to his previous employment. The administrative law judge further determined that claimant's post-injury job with employer as a shoptaker did not represent his post-injury wage-earning capacity, indicating that he doubted that claimant would have been able to continue to perform the duties required over any considerable period of time. The administrative law judge concluded, however, that claimant's post-injury work for Manolis was suitable alternate employment and that his earnings of $200 per week fairly and reasonably represented his post-injury wage-earning capacity.[1] Because neither party had presented any basis for accounting for the effects of inflation, the administrative law judge attempted to do so by subtracting $.50 per hour per year for the three years between the work injury and the beginning of claimant's current employment. The administrative law judge accordingly concluded that claimant's post-injury wage-earning capacity was $180 per week and awarded him compensation commencing February 10, 1986 for a $443.16 loss in wage-earning capacity pursuant to Section 8(c)(21).

[1]The administrative law judge found that the sewing jobs located by employer's vocational rehabilitation counselor were not suitable because claimant was not experienced at sewing and noted that claimant would not have earned as much in those jobs as he is currently earning with Manolis.

In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $20,000, plus $2585 in expenses. In this Decision, the administrative law judge also granted employer's request to reconsider claimant's loss of wage-earning capacity, modifying the loss of wage-earning capacity to $483.16 pursuant to the parties' stipulation, in recognition of a mathematical error made in the initial Decision. The remainder of employer's reconsideration request was denied.

Employer appeals the award of benefits, arguing that the administrative law judge erred in concluding that claimant was unable to perform his usual job based on Dr. Meyer's opinion. In the alternative, employer asserts that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity based on his earnings at Manolis. Employer maintains that there is undisputed evidence of record which indicates that claimant had greater earning potential as a painter in jobs which did not involve climbing heights. Employer further contends that the administrative law judge erred in failing to conclude that claimant's post-injury wage-earning capacity was at least $279.48 based on his actual post-injury work as a shoptaker for employer, asserting that claimant successfully performed this job for nearly two years and could have continued to do so but for his own malfeasance. Employer also maintains that even if the administrative law judge properly determined that claimant's actual post-injury earnings at Manolis were representative of his post-injury wage-earning capacity, he erred in reducing his $200 in 1988 earnings to account for inflation. Inasmuch as the party seeking to establish that claimant's actual earnings are not representative of his post-injury wage-earning capacity bears the burden of proof on this issue and claimant failed to offer any relevant evidence, employer maintains that the award of benefits should have been based on claimant's 1988 wages. Finally, employer appeals the fee award made by the administrative law judge on various grounds. Claimant responds, urging affirmance.

In order to establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). If claimant succeeds in meeting this initial burden, the burden shifts to employer to establish the availability of suitable alternate employment which claimant can perform and which he could obtain if he diligently tried. If employer succeeds in meeting this burden, claimant is partially rather than totally disabled. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992).

Initially, we reject employer's assertion that the administrative law judge erred in relying on Dr. Meyer's testimony to conclude that claimant was unable to perform his usual work as a result of his injury. Employer maintains that Dr. Meyer's opinion does not provide substantial evidence to support the administrative law judge's finding because, of the many physicians who examined claimant, he was the only one who ever intimated that claimant could not return to his usual duties. The administrative law judge, as the trier-of-fact, is not bound by the opinion of any particular

medical expert, but is free to accept or reject all or any part of the evidence as he sees fit.[2] *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). In a report dated August 7, 1985, Dr. Meyer indicated that claimant should not return to his former work climbing ladders and scaffolding. Cl. Ex. 5-o. Dr. Meyer deposed that claimant should avoid strenuous bending, lifting, stooping or any type of prolonged strenuous activity. *See* Cl. Ex. 16 at 22, 25, 32, 34, 37. Dr. Meyer explained that claimant suffered from hypalgesia (*i.e.*, weakness and decreased sensation) in his right leg which made it unsafe for him to climb ladders at heights of 25 feet or greater, because of the risk of losing his balance and falling to the ground. Cl. Ex. 16 at 18, 27-28. As Dr. Meyer's testimony in conjunction with employer's surveillance evidence constitutes substantial evidence sufficient to support the administrative law judge's finding that claimant is unable to perform his usual work, and as employer has failed to raise any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, we affirm this finding. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied* , 459 U.S. 1104 (1983).

We also reject employer's assertions that the administrative law judge erred in denying its post-hearing motion to take Dr. Hunt's deposition. In a letter dated October 26, 1988, employer requested permission to submit the post-hearing deposition of Dr. Hunt, alleging that it was surprised by Dr. Meyer's post-hearing deposition indicating that claimant could no longer perform his usual work due to weakness in his right leg. In an Order dated November 7, 1988, the administrative law judge denied employer's request, stating that the parties had ample opportunity to present evidence and that employer lacked support for its allegation of surprise. Although employer argues on appeal that the administrative law judge's refusal to allow it to rebut Dr. Meyer's testimony through Dr. Hunt's post-hearing deposition violated its procedural due process rights, we disagree. Pursuant to Section 20 C.F.R. §702.339, the administrative law judge is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but has great discretion concerning the admission of evidence. *See Olsen v. Triple A Machine Shop, Inc., 25 BRBS 40, 44 (1991)*; *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983). Employer's allegation of surprise in this case is belied by the fact that Dr. Meyer had previously indicated in his August 7, 1985 report that he did not think it was a good idea for claimant to return to his usual job, which involved painting on scaffolding and ladders. Moreover, as Dr. Hunt previously testified at the hearing that he believed that claimant could perform his usual work, it was not unreasonable for the administrative law judge to conclude that further testimony from Dr. Hunt would be cumulative. On these facts, employer has failed to establish that the administrative law judge's denial of its motion

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[2]Employer's assertion that Dr. Meyer's testimony that weakness in claimant's right leg resulting from the injury changed this claim from one based on Section 8(c)(21) to one falling under Section 8(c)(2) of the schedule, 33 U.S.C. §908(c)(2), is without merit. Because the situs of claimant's initial injury was his back, an unscheduled body part, he is limited to compensation under Section 8(c)(21) even if he subsequently develops disability in a scheduled member. *See generally Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). Moreover, we note that Dr. Meyer rated claimant as having a 35 percent impairment of the whole man based on his back injury, a rating which included any leg weakness due to nerve root problems in the back.

was arbitrary, capricious, or involved an abuse of discretion. *Champion v. S & M Traylor Brothers,* 14 BRBS 251 (1981), *rev'd on other grounds,* 690 F.2d 285, 15 BRBS 33 (CRT)(D.C. Cir. 1982).

We agree with employer, however, that the administrative law judge erred in concluding that claimant's post-injury work in employer's shop did not constitute suitable alternate employment. In so concluding, the administrative law judge summarily credited one statement made by claimant's supervisor, Mr. McElwee, that the job in the shop was probably just as demanding as the one painting in the field. Mr. McElwee's testimony taken as a whole, however, demonstrates that this job was a lighter duty job which did not require that claimant paint at great heights or regularly engage in strenuous tasks such as heavy lifting, consistent with the restrictions imposed by Dr. Meyer.[3] Moreover, claimant successfully held this job for almost two years, and it is undisputed that he was fired for organizing a work party for a competing paint company among his fellow employees. Because claimant successfully worked for employer as a shopkeeper and was forced to leave this employment because of his own misconduct and not for reasons related to the work injury, the administrative law judge's finding that this work did not constitute suitable alternate employment is reversed. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.,* 26 BRBS 1 (1992). *See also Harrod v. Newport News Shipbuilding & Dry Dock*, 12 BRBS 10, 12-13(1980); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980) (Miller, J., dissenting), *vac. and remanded mem.*, 642 F.2d 445 (3rd Cir. 1981), *decision after remand*, 19 BRBS 180.

An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21),(h). Where, as here, a claimant is unable to return to his usual work but secures other alternate employment, the wages which the new job would have paid at the time of injury are compared with claimant's pre-injury wages to calculate any loss in wage-earning capacity resulting from the work injury. *See generally Sproull v. Stevedoring Services of America*, 26 BRBS 100, 108-110 (1991)(Brown, J., dissenting on other grounds). In light of our determination that claimant's post-injury job for employer constitutes suitable alternate employment, we agree with employer that the administrative law judge erred in calculating claimant's loss in wage-earning capacity based on his lower earnings at Manolis. As employer avers, claimant's loss in wage-earning capacity should have been calculated based on the difference between his pre-injury average

[3]The written description of this job which includes the following also appears to be consistent with claimant's limitations:

1. Clean up shop and surrounding grounds.
2. Help shop mechanic in cleaning auto parts.
3. Scraping and cleaning painting equipment.
4. Operating small fork-lift for loading and unloading equipment.
5. Moving equipment by fork-lift within the plant.
6. Making safety lines by splicing fittings.

Cl. Ex. 12(d).

weekly wage and the higher wages he earned as a shoptaker for employer. Accordingly, the administrative law judge's loss in wage-earning capacity determination is vacated, and the case is remanded for recalculation of claimant's permanent partial disability award consistent with this opinion.

Contrary to employer's assertions, however, the fact that claimant does not introduce any evidence which establishes the rate of pay for his post-injury job at the time of injury will not allow employer to effectively escape liability for a portion of the benefits due claimant by employing claimant's actual post-injury earnings as the basis for calculating the award. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels paid at the time of injury. *See Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). Where the actual wages paid in claimant's post-injury job at the time of the injury are unknown, the administrative law judge should apply the percentage increase in the National Average Weekly Wage to adjust claimant's post-injury wages downward.[4] *See Richardson v. General Dynamics Corp.*, 23 BRBS 327, 331 (1990).

The remaining issue to be addressed is employer's appeal of the administrative law judge's award of attorney's fees. The administrative law judge awarded claimant's counsel $20,000 in fees plus $2585 in expenses, an amount in excess of the $17,342.75 fee requested. We agree with employer that the fee award made by the administrative law judge cannot stand. Although employer asserts otherwise, the complexity of the case and the quality of the representation provided were factors properly considered by the administrative law judge in entering the fee award. *See* 20 C.F.R. §702.132. We agree with employer, however, that the administrative law judge erred in analogizing the fee award in this case to a contingency agreement in a negligence case. Contingency fees are impermissible under the Act. *See Enright v. St. Louis Ship*, 13 BRBS 573 (1981). Moreover, we agree with employer that the administrative law judge improperly considered the risk of non payment in making the fee award. Factors such as the "risk of loss" and delay in payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987). *See generally City of Burlington v. Dague*, 112 S.Ct. 2638 (1992). We also agree with employer that the 125.9 hours sought by claimant's counsel for preparation of the post-hearing brief (98 hours by a law clerk and 27.9 hours by counsel) appears to be *per se* unreasonable. As the administrative law judge made no specific findings regarding the compensability of this, or any other, specific itemized entries sufficient to justify the fee awarded in view of employer's specific objections, we vacate the fee award and remand for further consideration and explanation of the fee consistent with 20 C.F.R. §702.132.[5] *See generally Maddon v. Western*

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[4]We need not determine whether the other jobs identified by employer constitute suitable alternate employment. Because employer established the availability of suitable alternate employment at its facility and claimant left this work for reasons unrelated to his injury, employer had no continuing obligation to identify new suitable alternate employment. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 6 (1992).

[5]In light of our determination that claimant's post-injury job with employer constitutes suitable

Asbestos Co., 23 BRBS 55 (1989); *Memmer v. ITT/Sheraton Washington,* 18 BRBS 123 (1986).

Accordingly, the administrative law judge's award of permanent partial disability compensation based on claimant's post-injury work at Manolis is vacated. The finding that claimant's post-injury work for employer did not constitute suitable alternate employment is reversed, and the case is remanded for recalculation of the award based on claimant's earnings in this employment consistent with this opinion. The attorney's fee award is vacated, and the case is remanded for further consideration of the fee in accordance with this opinion. In all other respects, the Decision and Order and Supplemental Decision and Order are affirmed. The Order Excluding Additional Post-Hearing Evidence is also affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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alternate employment, claimant's recovery will be lower, a fact which the administrative law judge should consider in re-evaluating the fee on remand. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1988).