BRB No. 96-1742

EARL WHITE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING & TERMINAL COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Edith Barnett, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), N. Charleston, South Carolina, for claimant.

Mark K. Eckels and Benford L. Samuels, Jr. (Boyd & Jenerette, P.A.), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (95-LHC-1213) 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained injuries to his head and neck as a result of having been hit by a lashing rod while working for employer on January 7, 1992. Claimant was initially treated by Dr. Worthington who diagnosed a closed head injury with concussion and a fracture of the T1 spinous process (*i.e*., a broken neck) and ultimately performed an anterior cervical discectomy at C5-6 with fusion to his back bone on December 8, 1992. Claimant also received treatment for his injuries from Drs. Warmouth and Brilliant who each concluded that claimant reached maximum medical improvement, set out a number of permanent physical restrictions on claimant's activities, and concluded that claimant was totally disabled from performing any longshore work.

In his Decision and Order, the administrative law judge initially determined that claimant's back injury was work-related but that claimant's left knee injury was not a consequence of his January 7, 1992, accident. The administrative law judge next found that the evidence establishes that claimant is unable to return to his usual employment and that employer has not met its burden to show the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability benefits pursuant to Section 8(a), 33 U.S.C. §908(a), of the Act. The administrative law judge also awarded claimant continuing medical benefits from October 3, 1994, under Section 7, 33 U.S.C. §907.

Claimant's counsel thereafter submitted a fee petition to the administrative law judge requesting an attorney's fee of $13,384.75. Employer filed objections to the fee. In her Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, after consideration of employer's objections, awarded the requested fee in its entirety.

On appeal, employer challenges the administrative law judge's finding that employer has not met its burden of establishing the availability of suitable alternate employment, as well as her award of an attorney's fee. Claimant responds urging affirmance.

Employer argues that contrary to the administrative law judge's determination, it has met its burden of demonstrating the availability of suitable alternate employment by the testimony of its vocational counselor Ms. McCain. Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of 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,

and which he could realistically secure.[1] *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992).

Contrary to employer's assertion, Dr. Warmouth provided explicit and independent medical reasons for rejecting each of the longshore positions identified by Ms. McCain. First, Dr. Warmouth rejected the header, truck driver, flagman and hatch tender positions because each requires movement of claimant's head which Dr. Warmouth deemed to be unsafe. *See generally Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Second, Dr. Warmouth rejected the lasher and topman positions because they involve lifting objects in excess of claimant's 20 pound lifting restriction. *Id.* Consequently, we affirm the administrative law judge's rejection of the longshore positions identified as suitable alternate employment by Ms. McCain as it is supported by substantial evidence.

[1]We note that contrary to employer's contention, inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge appropriately applied the standard enunciated in *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988), for determining whether employer established suitable alternate employment.

As for the supply specialist position, the administrative law judge accorded greater weight to Dr. Warmouth's opinion of claimant's employment limitations, including his twenty pound lifting restriction, than to Dr. Brilliant's less restrictive opinion, because Dr. Warmouth was claimant's treating physician over an extended period of time.[2] *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). As Ms. McCain testified that the supply specialist position would probably not be available to someone with a twenty pound lifting restriction, Tr. at 86, we hold that the administrative law judge rationally rejected this position as evidence of suitable alternate employment. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Lastly, in discussing the security job positions, the administrative law judge initially noted that Dr. Warmouth only approved those positions without driving responsibilities and with no more than two hours of walking at one time. The administrative law judge found that the Pegasus Security Services position includes some driving. *Wilson*, 30 BRBS at 199. As employer states, the security positions with Murray Guard and Trident Security Services each involve walking, but Ms. McCain testified that these positions met Dr. Warmouth's restrictions. Any error the administrative law judge may have committed in rejecting these positions on this basis, however, is harmless as the administrative law judge further determined that it is not clear that claimant has sufficient education to meet the jobs' requirement that he have the ability to communicate with the public and to complete incident reports. The administrative law judge credited claimant's testimony that he has only a third grade education over Ms. McCain's statement that claimant has a sixth grade education; she did so in part because Ms. McCain had never met with claimant and thus did not know whether claimant could actually read or write. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Additionally, even though Ms. McCain assumed that claimant has a "very limited reading and writing ability of almost nil," Tr. at 87, the administrative law judge rejected Ms. McCain's testimony, Tr. at 104, that some employers had told her that "illiterate" people can perform the security jobs both because it is hearsay and because it is contradicted by the job descriptions themselves which require the filing of incident reports, thereby requiring the ability to read and write. As the administrative law judge's rejection of the security job positions is supported by substantial evidence, we affirm the administrative law judge's

[2]Specifically, Dr. Warmouth stated that claimant should be restricted to intermittent walking up to 4 hours a day; intermittent squatting, climbing, kneeling, and standing; no lifting over 20 pounds; no bending and/or twisting of his neck; and no pushing or pulling or work above the shoulder. Claimant's Exhibit 10. Additionally, Dr. Warmouth opined that claimant cannot operate a car, truck, crane, tractor or any other motor vehicle other than a car because of restricted neck movement. Claimant's Exhibit 10. Lastly, Dr. Warmouth stated that claimant reached maximum medical improvement for his neck and back injuries as of November 29, 1994. Claimant's Exhibit 10. Dr. Brilliant placed permanent restrictions on claimant which included limited movement of his head, no lifting over 50 pounds, no squatting or kneeling, and no walking for long periods of time, and opined that claimant reached maximum medical improvement on October 3, 1994.

finding that employer has not established the availability of suitable alternate employment.[3] *See Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996). We thus affirm the administrative law judge's award of permanent total disability benefits.

[3]In its reply brief, employer cites *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994), in support of its contention that this case must be remanded for reconsideration of the positions identified by Ms. McCain. In *Anderson*, the Board vacated the administrative law judge's determination that employer had not established the existence of suitable alternate employment on the ground that the administrative law judge did not adequately discuss his rejection of the jobs identified by employer's vocational expert. In contrast, the administrative law judge's rejection of employer's suitable alternate employment evidence in the present case is supported by her reasonable interpretation of the testimony of the vocational counselor regarding claimant's abilities and restrictions, and the position descriptions.

Employer's sole contention regarding the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is that the hourly rate of $300 awarded for work performed by claimant's counsel is excessive. In addressing the petition for an attorney's fee, the administrative law judge explicitly noted employer's objection to the hourly rate sought for counsel on the ground that $300 per hour is "clearly outside the norm of this district." Supplemental Decision and Order Awarding Attorney Fees at 1. The administrative law judge further observed, however, that employer has not produced any documentation to support its objection. The administrative law judge then went on to consider counsel's professional and academic qualifications, the potential total dollar amount of claimant's award of benefits (over one million dollars according to the administrative law judge, *see* Supplemental Decision and Order Awarding Attorney Fees at 2), as well as documentation of what other administrative law judges have previously awarded as an hourly rate for counsel, before determining that the $300 hourly rate requested by claimant's counsel is reasonable. Moreover, claimant's counsel submitted to the administrative law judge several reports on regional attorneys' fees, showing the range in South Carolina to be from $90 to $350 per hour for partners. Inasmuch as the amount of an attorney's fee as well as the hourly rate allowed is within the discretion of the body awarding the fee, 20 C.F.R. §702.132, and employer has not met its burden of showing that the $300 hourly rate awarded is unreasonable, it is affirmed. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge