BRB No. 01-0382

MARTEY D. ROBERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE PORT TERMINALS, INCORPORATED	)	DATE ISSUED: Dec. 26, 2001
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Order Awarding Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger, LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Order Awarding Attorney's Fee (99-LHC-2852) of Administrative Law Judge Jeffrey Tureck 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 if they are rational, supported by substantial evidence, and in accordance with law. *OKeeffe 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).

Claimant, a forklift operator, injured his back on September 9, 1996, in a work-related

accident. Employer voluntarily paid temporary total disability benefits from September 11, 1996 through May 13, 1998, and temporary partial disability benefits from May 13, 1998 through August 5, 1998. At issue at the hearing was claimant's entitlement to compensation for temporary total disability through September 1, 1999, when claimant testified he began working for his father-in-law, and for permanent partial disability after September 1, 1999.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on August 19, 1997, based on the opinion of his treating physician, Dr. Gold. The administrative law judge further found that claimant established a *prima facie* case of total disability because he presented unrebutted testimony that he was unable to perform the usual duties of his pre-injury job. Relying on employer's labor market surveys of May and July 1998, prepared by employer's vocational expert, Ms. McCain, the administrative law judge found that employer established suitable alternate employment. Specifically, the administrative law judge found that although employer presented insufficient evidence to establish that the job of auto mechanic constitutes suitable alternate employment, Ms. McCain identified numerous suitable jobs which claimant could perform and were realistically available to him. Based on the salary ranges of the suitable jobs, the administrative law judge determined that claimant's post-injury wage-earning capacity is $6.75 per hour, or $270 for a 40 hour week, beginning on May 13, 1998. The administrative law judge therefore awarded claimant compensation for permanent partial disability beginning on May 13, 1998. 33 U.S.C. §908(c)(21), (h).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $11,725, representing 67 hours at $175 per hour. Employer filed objections challenging the number of hours billed as excessive. In his Supplemental Order Awarding Attorney's Fee, the administrative law judge awarded claimant's counsel $10,762.50, representing a reduction of five and one-half hours from the requested total.

On appeal of the administrative law judge's decision, employer contends that the administrative law judge erred in finding that employer did not establish that the position of brake mechanic constituted suitable alternate employment and therefore erred in finding that claimant had any loss of wage-earning capacity. Alternatively, employer argues that the administrative law judge erred by not including in his calculation of claimant's wage-earning capacity the positions of general laborer which pays $7 per hour and laborer which pays $8.38 per hour. Claimant responds, urging affirmance. On appeal of the administrative law judge's fee award, employer contends that the
administrative law judge erred in not further reducing the number of hours requested in the fee petition.

Once, as here, the claimant establishes his inability to return to his usual work, it is employer's burden to establish the availability of realistic jobs, 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 for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991). We reject employer's contention that the administrative law judge erred in finding that the brake

mechanic position is not realistically available to claimant. The administrative law judge found that claimant is physically capable of performing an automobile mechanic's duties, and that his knowledge of stock car mechanics is transferrable to passengers vehicles. Nonetheless, as claimant had no actual employment experience as a brake mechanic, the administrative law judge rationally concluded that this position, which requires five years' experience, is not realistically available to claimant. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 780(CRT) (5th Cir. 1991). Thus, the administrative law judge did not err in excluding from the determination of claimant's post-injury wage-earning capacity the $14 to $16 per hour position of brake mechanic.

Employer next contends that the administrative law judge erred in finding that claimant has an hourly post-injury wage-earning capacity of $6.75. Employer contends that claimant has a wage-earning capacity of $8.38 per hour, based on the suitable laborer job paying the highest wage of those jobs identified in employer's May 1998 labor market survey. Employer identified 35 suitable positions in its May 1998 labor market survey. The hourly wages of these positions ranged from $5.15 to $8.38. Emp. Ex. 7. The administrative law judge properly noted, however, that only four of the 35 jobs paid $6.75 per hour or more. In an addendum survey from July 1998, employer identified four additional jobs paying from $5.50 to $8.00 per hour, but the administrative law judge rationally found that claimant would not be employable at the $8.00 wage due to his inexperience in the field of automobile detailing. Based on the fact that the vast majority of identified positions paid less than $6.75 per hour, we reject employer's contention that the administrative law judge was required to base claimant's wage-earning capacity on the one position with the highest wage. Contrary to employer's contention, the administrative law judge did not exclude the higher paying jobs in making his determination, but rationally concluded, based on the range of salaries presented, that claimant could earn $6.75 per hour, which is at the higher end of the range. *See Avondale Industries Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *see also Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). As the administrative law judge's finding is rational and supported by substantial evidence, it is affirmed. Thus, we affirm the administrative law judge's award of permanent partial disability benefits. 33 U.S.C. §908(c)(21), (h).

Finally, employer challenges the attorney's fee awarded to claimant's counsel. Specifically, employer contends that the administrative law judge erred in not further reducing the attorney's fee awarded based on employer's objections to the "excessive" nature of the fee requested and alleged insufficient explanation provided by counsel for various entries.

Initially, we reject employer's contention that it is not liable for a fee, as we have affirmed the administrative law judge's award of permanent partial disability benefits. In the instant case, the administrative law judge reduced the number of hours sought by five and one-half in response to employer's objections. Employer contends on appeal that further reductions are warranted based on the reasoning used by the administrative law judge in reducing certain entries. We decline to further reduce or disallow the hours addressed by the administrative law judge, who fully considered employer's objections. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in limiting his reductions to five and

one-half hours. *See Pozos v. Army & Air Force Exchange Services*, 31 BRBS 173 (1997); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge