BRB No. 03-0265

GARY RIDDLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMCO INTERNATIONAL, INCORPORATED	)	DATE ISSUED: Dec. 19, 2003
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Decision and Order Awarding Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price & McElroy), Orange, Texas, for claimant.

W. Gregory Merritt (Silbert & Garon, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Decision and Order Awarding Attorney's Fees (2002-LHC-0068) of Administrative Law Judge Clement J. Kennington 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).

Claimant, a service specialist, injured his neck during the course of his employment on March 9, 1996. Following a cervical fusion, claimant returned to work for employer in a light duty capacity on October 8, 1996. Employer's facility closed on May 26, 2001, and claimant has not worked since that time. In his Decision and Order, the administrative law judge found that employer did not establish the availability and suitability of higher paying jobs within the company. The administrative law judge also found that employer did not establish suitable alternate employment on the open market. Accordingly, he found claimant was temporarily totally disabled from March 23 to October 7, 1996, temporarily partially disabled from October 8, 1996, until April 28, 1997, permanently partially disabled from April 29, 1997 through May 25, 2001, and permanently totally disabled thereafter.

Subsequent to the issuance of the administrative law judge's decision awarding benefits, claimant's counsel sought an attorney's fee of $40,414.40, representing 56.5 hours of services for Attorney Barton at $250 per hour and 88.5 hours of services for Attorney McElroy at $225 per hour, plus expenses of $6,376.90. The administrative law judge awarded a fee of $33,373.98, representing 8 hours at $125 per hour and 47.75 hours at $200 per hour for Attorney McElroy, 4 hours at $125 per hour and 79.75 hours at $200 per hour for Attorney Barton, plus expenses of $6,373.98.

Employer appeals, arguing that the administrative law judge erred in finding claimant was totally disabled as of the date of the closing of employer's facility. Employer specifically contends that the administrative law judge erred in finding it did not establish the availability of suitable alternate employment both at employer's facility and on the open market. Employer also appeals the fee award. Claimant responds, urging affirmance of the administrative law judge's decisions.

Employer contends that the administrative law judge erred in finding claimant totally disabled as of May 26, 2001, the date claimant was terminated due to employer's closing the facility in which claimant was suitably employed. In finding that claimant is entitled to total disability compensation as of this date, the administrative law judge concluded that the positions proffered by employer in its other facilities were either beyond claimant's physical restrictions or were never actually available to claimant, and that the positions identified on the open labor market were beyond claimant's vocational skills or outside claimant's geographic region. Accordingly, he found employer failed to establish the availability of suitable alternate employment after its facility closed and awarded claimant compensation for total disability.

It is undisputed that claimant is incapable of performing his pre-injury job duties. Thus, the burden shifts to employer to prove that claimant is not totally disabled by presenting evidence of the realistic availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 689, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Although an employer can establish the availability of suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Larsen v. Golten Marine Co*., 19 BRBS 54 (1986), when that position is subsequently made unavailable to claimant through no fault of his own and he remains unable to perform his pre-injury work, employer must establish the availability of other suitable alternate employment in order to avoid liability for total disability. *Norfolk Shipbuilding & Dry Dock v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Vasquez v. Continental Maritime of San Francisco, Inc*., 23 BRBS 128 (1990).

We address first employer's contention that the administrative law judge erred in finding that the other positions it offered claimant within its facilities do not constitute suitable alternate employment. Employer allegedly offered claimant the positions of tool supervisor, EX 1, service supervisor, EX 2, Health, Safety and Environment (HSE) coordinator, CX 3, and functional test inspector in Houston, Texas, EX 4. The administrative law judge addressed these positions and found them insufficient to meet employer's burden. The administrative law judge, accepting claimant's testimony that an assistant would not always be available to him, found that the position of tool supervisor was beyond claimant's physical restrictions as imposed by Dr. Franklin. Decision and Order at 22. The administrative law judge also concluded that although the positions of HSE coordinator and service supervisor positions were discussed with claimant, neither position was actually offered to him and therefore could not meet employer's burden. *Id*. Finally, the administrative law judge concluded that the position in Houston did not constitute suitable alternate employment both because it exceeded claimant's physical restrictions and because it was not available in the community in which claimant resided. *Id.* at 23.

It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to weigh and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). In the instant case, the administrative law judge thoroughly reviewed the positions within employer's own facility and found none sufficient to meet employer's burden. Employer argues that it was irrational for the administrative law judge to rely upon claimant's testimony that the position of tool supervisor was physically beyond his capabilities after finding that claimant was not a credible witness. The administrative law judge, however, also relied upon the restrictions placed upon claimant by his treating

physician. Although Dr. Franklin modified claimant's restriction to allow him to attempt to lift weights up to 40 pounds, CX 3 at 25-26, the administrative law judge found that Dr. Franklin's approval of the tool supervisor position was based upon a mischaracterization of the job's requirements which exceeded those of claimant's light duty work consisting of mostly answering the telephone. As noted by the administrative law judge, Dr. Franklin's approval of the position was based upon his belief that claimant would spend 80 percent of his time taking telephone calls and dispatching tools, CX 3; he was not informed that claimant would be routinely required to use tools in excess of his lifting restrictions to tear down equipment. Thus, in reaching his conclusion, the administrative law judge properly compared claimant's physical restrictions with the requirements of the position identified by employer and rationally found that it was beyond his capabilities. *See Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Fox v. West State Inc.*, 31 BRBS 118 (1997). The administrative law judge, therefore, rationally found that the position of tool supervisor was not suitable for claimant.

In addressing the positions of HSE coordinator and/or service supervisor, the administrative law judge concluded that although these positions had been discussed with claimant, they never were actually offered to him. The administrative law judge noted that the only evidence supporting employer's allegations of an offer were two post hoc notes vaguely referencing a discussion of these positions; the administrative law judge found the failure of employer to issue a written offer particularly significant in light of its written offer of the Houston position. Decision and Order at 23. Moreover, the administrative law judge found indicative of employer's never offering claimant the position the fact that claimant performed the job duties of service supervisor for three months without having been promoted to the position. *Id.* at 23. Accordingly, the administrative law judge properly found that these positions did not constitute suitable alternate employment. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

Similarly, the administrative law judge found the position of functional test inspector offered claimant in Houston also did not constitute suitable alternate employment despite employer's offer to pay claimant's expenses to relocate. As noted by the administrative law judge, the position in Houston was over two hundred miles from claimant's current residence in Lafayette, Louisiana. Decision and Order at 23. It is well-established that the burden is on employer to prove the existence of a suitable job presently available to claimant *in the community in which he lives*. *See Turner*, 661 F.2d 1031, 14 BRBS 156; *see also Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 111, 28 BRBS 96(CRT) (4th Cir. 1994); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 22 (1997); *Patterson*, 36 BRBS 149. There is no requirement that a claimant relocate in order to relieve employer of paying disability compensation. Accordingly, we

affirm the administrative law judge's finding that the Houston position did not constitute suitable alternate employment.

Employer also presented a labor market survey, prepared on July 2, 2002, identifying alternate employment on the open market. EX 10. Employer alleges that four of the identified positions are sufficient to meet its burden: a parts store operator and three dispatcher positions. The administrative law judge found none sufficient to meet employer's burden. First, he rationally found that the parts store operator was located over sixty-five miles from claimant's residence and rejected it for the same reason he found the Houston position unsuitable, namely, that it was not located within claimant's geographical area. *Holder,* 35 BRBS 22. Second, he rationally rejected the positions of dispatcher because he determined that claimant was not vocationally qualified to obtain these positions. The dispatcher positions required basic keyboarding and/or computer skills which claimant lacks. EX 10. The administrative law judge found that claimant's concession that he had some typing skills while in high school, HT at 57, did not equate with the ability to perform computer skills. Both Mr. Stampley, employer's vocational consultant, and Mr. Kramberg, claimant's consultant, agreed that claimant needed computer keyboard training in order to qualify for the dispatcher positions.[1] See HT at 184-185, 270-272. Based upon the consultants' concessions that claimant would be more likely to obtain such employment following a three month training course, the administrative law judge properly concluded the dispatcher positions did not meet employer's burden of demonstrating the availability of jobs which claimant could reasonably secure based upon his education and/or work experience. *Ceres Marine Terminals v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). As the administrative law judge's finding that employer did not establish suitable alternate employment either in its own facility or on the open market is rational, supported by substantial evidence, and in accord with law, it is affirmed.[2] Therefore, we affirm the award of total disability

[1] Mr. Kramberg also testified that he did not believe that claimant could retain these positions because of his need to lie down at least three times per day due to pain. HT at 289.

[2] Following this conclusion, the administrative law judge stated "[i]n the alternative, Employer established suitable alternative employment as a dispatcher as of July 2, 2002, and Claimant failed to rebut Employer's showing through a diligent job search." Decision and Order at 27. This conclusory statement is irrational in light of the administrative law judge's other findings which we have affirmed. Moreover, contrary to employer's contention, claimant need not engage in a diligent job search until employer establishes suitable alternate employment. *Rogers's Terminal*, 784 F.2d 689, 18 BRBS 79(CRT).

benefits after claimant was laid off due to the closing of employer's facility. *Hord*, 193 F.3d 836, 33 BRBS 170(CRT).

Employer also appeals the administrative law judge's award of an attorney's fee. Subsequent to the administrative law judge's issuance of his decision awarding benefits, claimant's attorney sought a fee of $40, 414.40, representing $34,037.50 in legal services and expenses.[3] The administrative law judge awarded a fee of $33,373.98, representing $27,000 in legal services and $6,373.98 in expenses.[4] Employer appeals, contending that the administrative law judge erred in awarding fees to both attorneys, including travel time, in not further reducing the hours requested, in not further reducing the hourly rates, and in approving a consultant's fee for claimant's vocational expert of $4,087.13.[5] Employer contends that the administrative law judge improperly awarded an attorney's fee for more than one attorney in this case. Employer asserts that it is claimant's burden to establish the necessity of and thus entitlement to the hours requested. As the administrative law judge noted, there is nothing objectionable to several attorneys participating in the litigation of a single claim. In considering the fee petition, the administrative law judge took specific notice of employer's concerns regarding the necessity for more than one attorney. The administrative law judge addressed employer's objections, analyzing specific time requests charged for travel, the hearing, and windup services; the administrative law judge reduced hours he found to be duplicative. As the administrative law judge fully addressed employer's concerns regarding the duplication of services, we reject employer's assertion that the administrative law judge erred in awarding a fee to more than one attorney in this case. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Parks v. Newport News Shipbuilding & Dry Dock Co*., 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

The administrative law judge also addressed employer's objections to specific entries in the fee petition. He reduced the hours requested by both attorneys by .75 hours each to account for their failure to bill in one-eighth hour increments and reduced Mr. McElroy's hours by four to eliminate what he considered duplicative windup services. Inasmuch as the administrative law judge considered employer's specific objections and

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[3] Claimant was represented by two attorneys from the same law firm who itemized their legal services as following: Mr. Barton requested 56.5 hours at $250 per hour; Mr. McElroy requested 88.5 hours at $225 per hour.

[4] The award was itemized as following: Mr. Barton received $10,000, representing 8 hours of legal services at $125 per hour and 47.5 hours at $200 per hour; Mr. McElroy received $16,450, representing 4 hours at $125 per hour and 79.75 hours at $200 per hour. Fee Award at 9.

[5] On appeal, employer contends that a more reasonable hourly rate would be $150 to $175 per hour and that the fee for the vocational expert should be reduced to $1,000; it further requests that the hours approved be reduced by 20.75.

employer has not demonstrated that the administrative law judge's finding on this matter is arbitrary, capricious or an abuse of discretion, its contentions regarding further reductions are rejected.

Employer also objected to the administrative law judge's award of the hourly rates. After considering employer's contentions, the customary rates awarded in the geographic area, the complexity of the case, and the results obtained, the administrative law judge reduced the hourly rates requested by counsel to $200 per hour for legal services and to $125 per hour for travel time. As the administrative law judge considered both what was reasonable and appropriate in the geographic area as well as the factors contained in the regulation at 20 C.F.R. §702.132, we affirm the hourly rates awarded as employer has not shown that the administrative law judge abused his discretion in this regard. *See Moore v. Universal Maritime Corp*., 33 BRBS 54 (1999); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Additionally, employer objects to the travel costs awarded by the administrative law judge to counsel. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that the costs, fees, and mileage for necessary witnesses also can be assessed against employer when an attorney's fee is awarded against employer, but only if they are reasonable and necessary. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Employer argues that it should not be liable for travel costs because competent counsel was available in the local area in which claimant resides. Counsel requested reimbursement for travel time for two round trips from Orange, Texas to Lafayette, Louisiana, to attend depositions and the formal hearing. Costs involved in travel time are compensable if they are found to be reasonable, necessary and in excess of that normally considered to be part of the overhead. *See Brinkley v. Department of the Army/NAF*, 35 BRBS 60 (2001); *see also Griffin v. Virginia Int'l Terminals, Inc*., 29 BRBS 135 (1995). The administrative law judge found that claimant's living in Louisiana and seeking an attorney in Texas was not unreasonable given the relative geographical closeness, 108 miles, of the two areas. Moreover, the administrative law judge specifically addressed and rejected employer's objections in determining that counsel's travel time was reasonable, necessary and in excess of normal office overhead. *O'Kelley*, 34 BRBS 39. Employer has failed to establish that the administrative law judge's finding in this regard is unreasonable; accordingly, it is affirmed. *See generally Ferguson*, 27 BRBS 16; *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981).

Finally, employer contends that the amount awarded as expenses for Mr. Kramberg, claimant's vocational expert, should be reduced. The administrative law judge considered employer's contention and found the amount requested is supported under the facts of this case. The administrative law judge found the requested cost high but neither unreasonable nor excessive. As Mr. Kramberg's services were determined to be essential to claimant's case, the administrative law judge awarded the entire cost. Thus, the administrative law judge adequately addressed employer's objections and employer's assertions on appeal are insufficient to meet its burden of proving that the

administrative law judge abused his discretion in determining that the cost of Mr. Kramberg's services was reasonable. Thus, we affirm the award of this cost. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002). As the administrative law judge committed no reversible error, his attorney's fee award is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge