BRB Nos. 89-2962
and 89-3966

RICHARD J. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order on the Fee Application of Julius A. Johnson, Administrative Law Judge, and the Supplemental Award of Attorney's Fee of Floyd S. Goff, District Director, United States Department of Labor.

Edward DeV. Bunn, Bailey's Crossroads, Virginia, for claimant.

Charles P. Monroe (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order on the Fee Application (87-DCW-0044) of Administrative Law Judge Julius A. Johnson, and the Supplemental Award of Attorney's Fee (No. 40-167228) of District Director Floyd S. Goff, 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *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).

Claimant, a bus driver, suffered three injuries while working for employer on September 24, 1981, June 2, 1982 and October 20, 1983. As a result of these incidents, claimant sustained physical

injury to his back, hands and neck and developed an adjustment disorder and passive-aggressive personality disorder. Employer voluntarily paid claimant temporary total disability benefits from September 25, 1981 to November 1, 1981, from June 3, 1982 to July 10, 1982, and from October 25, 1982 to October 26, 1982. Claimant sought permanent total disability compensation under the Act for his back, hands, neck, and psychological injuries.

The administrative law judge awarded claimant permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(21) for a back strain he sustained on September 1981. The administrative law judge also awarded claimant medical expenses for this condition pursuant to Section 7, 33 U.S.C. §907, but determined that the other injuries claimed by claimant were non-compensable. Claimant's motion for reconsideration of the administrative law judge's average weekly wage calculation was denied.

In appeal BRB No. 89-2962, claimant contends that the administrative law judge erred in finding his hands and wrist, neck, and psychological injuries non-compensable and in denying him permanent total disability compensation. Claimant also contends that the administrative law judge erred in calculating his average weekly wage, in making the award of medical benefits, and in awarding employer Section 8(f), 33 U.S.C. 908(f), relief. Additionally, claimant alleges bias with regard to the administrative law judge's evidentiary and discovery rulings and asserts that the administrative law judge should have recused himself from the trial because he had previously supervised claimant when he was employed at the YMCA prior to working for employer. Claimant also appeals the administrative law judge's attorney's fee award. Claimant has also filed a separate appeal of the district director's attorney's fee award. BRB No. 89-3966. Employer responds, urging affirmance.

Initially, we reject claimant's assertion that the administrative law judge was biased and should have recused himself from presiding over the case. The United States Court of Appeals for the District of Columbia Circuit, within whose jurisdiction this case arises, has held that the general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist so that a determination on the matter is made a part of the record and decision. *Pfister v. Director, OWCP*, 675 F.2d 1314, 1318, 15 BRBS 139 (CRT)(D.C. Cir. 1982); 5 U.S.C. §556(b). The petition for disqualification must present specific evidence of bias; allegations of adverse rulings, alone, will not suffice. *See Marcus v. Director, OWCP*, 546 F.2d 1044, 1050-1051, 5 BRBS 307 (D.C. Cir. 1976); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991).

In the present case, claimant moved for a mistrial at the hearing, alleging that the administrative law judge had prejudged the case based on his alleged denial of all of claimant's discovery motions, his alleged acceptance of employer's motions, and his gestures and tone of voice. Tr. 292, 294-295. Claimant did not assert bias with regard to the administrative law judge's alleged prior supervision of

him, however, until after the issuance of the adverse decision.[1] In light of claimant's failure to raise bias based on the administrative law judge's alleged prior knowledge of him until after the administrative law judge issued his adverse decision[2], we hold that claimant failed to raise this issue in a timely fashion. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197, 2-198 (6th Cir. 1986); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *Jones v. J.F. Shea Co., Inc.*, 14 BRBS 207, 209 (1981).

Claimant's assertion that the administrative law judge committed reversible error in denying him permanent total disability compensation and in finding his hand and wrist, neck, and psychological conditions non-compensable similarly must fail. Claimant maintains that he established that he is disabled due to the aforementioned conditions both in light of the Section 20(a), 33 U.S.C. §920(a), presumption and the evidence of record.

Initially, we note that the Section 20(a) presumption does not aid claimant in establishing the compensability of his hand, wrist, neck and psychological injuries in this case as the administrative law judge did not deny benefits for these injuries based on claimant's failure to establish that these conditions were work-related.[3] Rather, the administrative law judge found that claimant was not entitled to compensation for these injuries because they were not disabling. Accordingly, the relevant inquiry on appeal is whether these findings are supported by substantial evidence of record.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to the work-related injury. 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 could obtain if he diligently tried. If employer succeeds in meeting this burden, claimant is partially rather than totally disabled. *See 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).

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[1]The administrative law judge denied the request for declaration of a mistrial and recusal. Tr. 297-303.

[2]Although claimant did assert at the hearing that the administrative law judge had previously supervised him, the administrative law judge denied having known claimant prior to the trial. Tr. at 298.

[3]Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed, or a work accident occurred, which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1992); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991). The Section 20(a) presumption does not, however, contrary to claimant's assertions, aid him in establishing the extent of his disability. *See Holten v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1982).

Relying on claimant's testimony as to his severe, ongoing complaints of back pain and the opinion of Dr. Gordon, an orthopedic surgeon, that claimant can only perform light work, the administrative law judge found that claimant's June 2, 1982 back injury prevented him from performing his usual work. The administrative law judge found, however, that claimant could perform alternate work identified by Ms. Farrell with an hourly wage of $5.79 or a weekly wage of $231.60, and awarded claimant permanent partial disability compensation for his back injury accordingly. The administrative law judge denied compensation for claimant's psychological injury, however, noting that neither Dr. Schulman's nor Dr. Decker's opinion established that he had any secondary psychological condition arising from the bus accidents which is separately compensable from his other injuries. The administrative law judge also denied claimant's claim for carpal tunnel syndrome based on his determination that the abnormal EMG, interpreted by Dr. Ignacio in his October 1982 report as merely suggestive of carpal tunnel syndrome, and claimant's testimony as to his ongoing hand and wrist symptoms,[4] were insufficient evidence upon which to base a determination of a disability involving the right hand.[5] Finally, the administrative law judge determined that claimant's neck injury was not compensable as there was no evidence sufficient to support a claim of cervical disc syndrome or any other physical condition.

On appeal, claimant contends that the administrative law judge erred in finding that his psychological injury was not separately compensable, arguing that Drs. Schulman's and Decker's testimony indicating that psychological factors play an important role in his resistance to rehabilitation and the ability to place him in a job other than bus driving establish that he is totally disabled.[6] Claimant additionally contends that the administrative law judge ignored Dr. Azer's opinions from 1983 through 1987 in denying his claim for his hand and wrist injuries. Finally, claimant asserts that his hearing testimony indicating that his neck continued to bother him, the myelogram from Greater Southeast Community Hospital showing a spur at C5-C6, and the medical opinions of Drs. Gordon, Johnson, Gargour, Pavot and Azer establish that he is totally disabled due to his neck injury.[7]

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[4]Claimant testified that he suffered recurring numbness in his hands. For example, he stated that the phone drops out of his hands when he uses it for eight to ten minutes. Tr. 175-176, 191-192.

[5] The administrative law judge also noted that claimant "never" presented any symptoms of carpal tunnel syndrome to Dr. Gordon.

[6]Claimant also cites Dr. Decker's deposition testimony that claimant does not have any rehabilitation potential and is psychologically incapable of returning to work at the present time as additional support for this contention.

[7]We note, however, that only Dr. Azer's opinion actually supports a finding of disability due to a neck injury. While Dr. Gordon noted that claimant had complaints of pain as early as October 1981, which continued through November 15, 1983, as of August 15, 1985, he stated that claimant's neck symptoms had completely gone away. EX 1, p. 6; Tr. 85. In his November 15, 1983 report, which claimant references, despite noting that claimant complained of stiffness in his neck, Dr. Johnson assigned claimant a zero percent disability rating for all his injuries. EX 1, p. 5. On September 28,

After careful review of the record, we affirm the administrative law judge's award of compensation. Although claimant raises numerous contentions with regard to errors made by the administrative law judge in analyzing the evidence relevant to claimant's hand, wrist, neck, and psychological conditions, we need not specifically address these contentions. Any error which the administrative law judge may have made in analyzing the evidence relevant to these conditions is harmless because Ms. Farrell, whom the administrative law judge credited in finding suitable alternate employment established with regard to claimant's back injury, also accounted for all of claimant's other conditions in determining the availability of suitable alternate employment. Ms. Farrell testified that in conducting the vocational survey she identified claimant's physical restrictions as requiring frequent changes of position, lifting no more than 10 pounds, no overhead work, no repeated bending, no squatting, and no climbing based on Dr. Gordon's May 1, 1986 and June 19, 1986 opinions and Dr. Azer's November 6, 1985 opinion. With regard to the psychological injury, Ms. Farrell indicated that she relied on Dr. Schulman's December 19, 1986 and Dr. Decker's January 30, 1987 reports, both of which indicated that claimant was capable of light sedentary work. In March and April 1987, Ms. Farrell identified approximately seven jobs available within these restrictions,[8] which the administrative law judge found involved light, sedentary work, consistent with the restrictions identified by Drs. Azer and Gordon. The administrative law judge accordingly determined that employer had met its burden of establishing suitable alternate employment and that claimant had not shown "reasonable diligence" in attempting to secure alternate work. Inasmuch as the administrative law judge relied on Ms. Farrell's testimony in finding suitable alternate employment established and Ms. Farrell accounted for all of claimant's limitations including those relating to his hand, wrist, neck and psychological injuries in conducting her vocational survey, employer successfully rebutted the claim for total disability. Moreover, based on this evidence, any disability resulting from these injuries is included in the administrative law judge's Section 8(c)(21) award. The administrative law judge's determination that claimant is not entitled to additional compensation for these injuries is accordingly affirmed.

Claimant's assertion that Ms. Farrell's testimony cannot properly support a finding of suitable alternate employment because she was unaware of the weight restrictions imposed by Dr. Azer in his September 17, 1986 report and accordingly did not give prospective employers an accurate description of claimant's limitations is rejected. As the Act does not require a vocational expert to contact prospective employers directly, Ms. Farrell's failure to inform prospective employers of the

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1984, Dr. Gargour noted that claimant suffered from cervical pain but diagnosed a post-traumatic cervical spondylitic bar which is quiescent at the time but could give claimant problems in the future. CX 4, p.1 . On October 31, 1984, Dr. Pavot, a psychiatrist, simply diagnosed post-traumatic spondylosis at C-5, C-6. CX 6.

[8]These jobs included: a cashier position at Stewart's Car Wash, a collection agent position at American Creditors Bureau; a postal clerk and parking cashier positions at Fairfax Hospital; a customer greeter position at Croyste Toyota and Saab; a cashier position at Marlo Furniture Company; and a dispatcher position at Scott Securities.

lifting and hand and wrist restrictions imposed by Dr. Azer is not determinative. *See Hogan v. Schiavone Terminal Inc.*, 23 BRBS 290, 292 (1990). Moreover, although claimant correctly asserts that Ms. Farrell did not have possession of Dr. Azer's September 17, 1986 functional limitation form at the time the labor market survey was conducted, when presented with this evidence at the hearing, Ms. Farrell indicated that the restrictions imposed therein were essentially the same as those imposed by Dr. Gordon which she had relied upon in conducting the vocational survey. In addition, because at least one of the positions identified, the collection position with American Creditors Bureau, involved no lifting, the fact that Ms. Farrell may not have been aware of any alleged discrepancy between the lifting limitations imposed by Drs. Gordon and Azer is clearly harmless error.

We also reject claimant's assertion that the administrative law judge's finding of suitable alternate employment is invalid because he demonstrated bias toward claimant in his evidentiary and discovery rulings. Pursuant to 20 C.F.R. §702.338, the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. *Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40, 44 (1991); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989). Pursuant to Section 20 C.F.R. §702.339, however, 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, and the discovery process. *See Olsen, supra; Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983). As claimant has failed to establish that the administrative law judge's evidentiary and discovery rulings were arbitrary, capricious, or involved an abuse of discretion, claimant's contentions are rejected. *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 claimant, however, that the administrative law judge erred in calculating his average weekly wage. Because there was no evidence of claimant's earnings in the year prior to the June 1982 injury, the administrative law judge determined that Section 10(a) and (b), 33 U.S.C. §910(a), (b), did not apply. Accordingly, he calculated claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c).[9] Finding claimant's 1981 Wage and Tax Statement (W-2 Form) indicating that claimant had earnings of $24,664.23 representative of claimant's average annual earnings prior to the June 1982 injury, the administrative law judge divided that figure by 52 weeks to obtain an average weekly wage of $474.31.

Thereafter, claimant sought reconsideration, arguing that the administrative law judge should have used 38 weeks rather than 52 weeks as the divisor in calculating his average weekly wage because he missed work for approximately three months during the relevant period due to the

[9]Section 10(c) applies when neither Sections 10(a) or 10(b) can fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury as in situations where claimant has not worked substantially all of the year preceding the injury and there is no evidence of wages of similarly situated employees who have worked substantially all of the year. *See generally Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

September 24, 1981 work injury. Claimant also contended that the administrative law judge should have incorporated his future potential earnings in the average weekly wage calculation based on the hourly wage increases an individual in claimant's position would have received from 1980 through 1987. The administrative law judge denied claimant's motion for reconsideration, stating that he had determined claimant's average annual earnings from what he deemed to be the "only reliable evidence" of claimant's previous work and earnings.

On appeal, claimant asserts that only the 191 days he actually worked should have been included in the calculation of his average weekly wage.[10] In the alternative, claimant contends that because his hourly wages would have increased from $10.51 in 1980 to $14.63 in 1987 at the time of hearing but for the work injury, the administrative law judge should have calculated his average weekly wage based on the $14.63 hourly wage.[11] Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in calculating his average weekly wage. Given that the administrative law judge explicitly found that claimant had missed work for a three month period due to the September 24, 1981, work-related injury and that claimant specifically testified at the hearing that his 1981 W-2 Form represented only 38 weeks of work, his division of claimant's actual earnings in 1982 by 52 weeks does not reasonably represent claimant's pre-injury earning capacity. Under Section 10(c), the administrative law judge must calculate claimant's annual earning capacity for the year prior to injury. Although the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c), *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991), adjustments for time lost due to a prior work-related injury is proper in a Section 10(c) calculation. *See Sproull Stevedoring Services of America*, 25 BRBS 100, 107 (1992); *Taylor v. Smith and Kelly Co.*, 14 BRBS 489, 497 n.3 (1982); *Strand v. Hansen Seaway Service, Ltd*., 9 BRBS 847, *aff'd in part and rev'd in part*, 11 BRBS 732, 614 F.2d 572 (7th Cir. 1980). Because the administrative law judge specifically found that claimant lost 3 months of work due to the September 24, 1981 work injury but failed to account for this time in calculating his average weekly wage, we vacate this determination and remand for him to reconcile these findings.

Claimant's alternate argument that the administrative law judge should have calculated his average weekly wage based on the hourly wage increases he would have received but for his injury is, however, without merit. Section 10(c) specifically states that claimant's average weekly wage is to be calculated at the time of injury. 33 U.S.C. §910(c). Moreover, the Board has limited the consideration of probable future earnings to special circumstances, not applicable here, where

[10]Claimant maintains that his average weekly wage should be calculated by dividing his 1981 annual earnings of $24,664.32 by 191, multiplying the product by 260, and then dividing that figure by 52, to obtain an average weekly wage of $645.70 (($24,664.32/191) X 260)/52 = $645.70).

[11]Claimant maintains that based on a $14.63 hourly rate his annual wages would have been $42,602.56, ($14.63 x 56 x 52, any hours he usually worked), and his average weekly wage, $819.28 ($42.602.56/52).

claimant was involved in seasonal work and there was evidence of increased employment opportunities in the remaining part of the year when the injury occurred.[12] *See Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds,* 920 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991); *Klubnikin v. Crescent Wharf and Warehouse Co.*, 16 BRBS 182, 187 (1984); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Claimant next argues that the administrative law judge erred in making the award of medical benefits. Initially, the administrative law judge found that claimant was entitled to medical treatment for his back strain as the nature of the condition may require. Inconsistent with this finding and his award of permanent partial disability benefits for this injury, however, the administrative law judge also found that claimant had recovered from this injury and did not require further treatment unless he decided to undergo surgery on the advice of a medical specialist in the future. On appeal, claimant notes the inconsistencies in the administrative law judge's findings and contends that he is entitled to continuing medical expenses for this and his other work-related conditions.

Section 7(a) provides that "employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." Claimant is entitled to reasonable and necessary medical expenses for a work-related injury regardless of whether that injury is disabling. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 388 n.5 (1990). It is inconsistent for an administrative law judge to find a work-related permanent medical impairment to exist for purposes of a compensation award, and then find claimant has recovered from the injury for purposes of an award of medical expenses. We therefore vacate the administrative law judge's determination that claimant fully recovered from his back injury. Because the administrative law judge in the present case found that claimant's back, neck, wrist and psychological injuries were work-related, we modify the award to reflect that claimant is entitled to reasonable and necessary medical benefits for these conditions. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 99 (1991); *Cotton*, 23 BRBS at 388 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989).

Claimant's contention that the administrative law judge erred in awarding employer Section 8(f) relief in this case is rejected. Both the United States Court of Appeals for the D.C. Circuit and the Board have recognized that claimant lacks standing to challenge an award of Section 8(f) relief because he has no interest in the source of his compensation. *Henry v. George Hyman Construction Co.*, 749 F.2d 65, 69-70, 17 BRBS 39 (CRT) (D.C. Cir. 1984); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

[12]Further, claimant's first contention that the administrative law judge should have divided $24,664.23 by 191, multiplied the result by 260 and divided it by 52, a formula apparently derived from Section 10(a), while it makes some sense, would not be mandatory for the administrative law judge to use as the administrative law judge properly found that 10(c) is applicable.

The remaining issue to be addressed in BRB No. 89-2962 is claimant's appeal of the administrative law judge's attorney's fee award. An attorney's fee award is discretionary and may only be set aside if shown 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's counsel submitted two attorney's fee petitions for work performed before the Office of Administrative Law Judges requesting a total fee of $78,487.50 plus $859.22 in costs. In the first petition dated February 2, 1989, counsel requested $65,187.50 representing 372.50 hours of services at an hourly rate of $175 plus $826.13 in costs. In the second fee petition dated March 8, 1989, claimant's counsel requested $13,300 representing 76 hours of work at an hourly rate of $175 plus $33 in costs for services rendered from February 6, 1989 through March 8, 1989. Employer submitted objections to both attorney's fee petitions.

In a Supplemental Decision and Order on the Fee Application(s), the administrative law judge found that claimant's counsel's attorney's fee petition was on its face "patently absurd." After addressing employer's contentions and considering the factors set forth in 20

C.F.R. §702.132,[13] the administrative law judge disallowed 178.25 hours of the 372.50 hours claimed in the initial fee petition, finding specific entries vague, excessive or unnecessary. The administrative law judge also disallowed an additional 150 hours claimed in the initial fee petition for what he essentially viewed as excessive work occasioned by counsel's overzealousness and pervasive unfounded distrust. In addition, the administrative law judge disallowed $57.20 in costs requested for the transcript of the formal hearing in the first fee petition and disallowed all services claimed in the second fee petition finding that they pertained solely to the fee request and were not made to advance claimant's claim. Accordingly, the administrative law judge awarded 44.75 hours of the total hours requested and entered a fee of $4,475 based on an $100 hourly rate plus $768.93 in costs.

On appeal, claimant incorporating his response to employer's objections, contends that in making the fee award the administrative law judge erred in reducing the number of hours and the hourly rate claimed in the first fee petition. In addition, claimant avers that the administrative law judge erred in denying the costs requested for the hearing transcript, and in disallowing all services and expenses claimed in the second fee petition. Employer responds, urging affirmance.

Claimant's assertion that the administrative law judge erred in disallowing 178.25 of the 372.50

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[13]Section 702.132(a) provides, in pertinent part, that

> Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded.

20 C.F.R. §702.132(a).

hours claimed in the first fee petition is rejected. Claimant's allegation of bias with regard to the fee award need not be addressed as it was not timely raised. *Pfister*, 675 F.2d at 1318; *Raimer*, 21 BRBS at 100. Although claimant argues on appeal that the administrative law judge's explanation with regard to the reduction in these hours was not sufficiently detailed and that in some instances he merely adopted employer's objections without considering them, we disagree.[14] In the instant case, however, the administrative law judge's explanation for the fee reduction was adequate in that he specifically discussed the regulatory criteria of 20 C.F.R. §702.132 and how these criteria applied to the fee reduction. In reducing the fee, the administrative law judge specifically noted that counsel's overzealousness in his representation had overcomplicated the proceedings. In addition, the administrative law judge noted that while the amount of benefits awarded was not consistent with counsel's heroic view of his efforts, counsel had succeeded in obtaining

permanent partial disability benefits for claimant. Given the facts of this case where the amount of the fee and the number of hours claimed was extraordinary, the administrative law judge could not, as claimant suggests, reasonably be expected to perform a line item evaluation of each entry. As the administrative law judge specifically considered the regulatory criteria and provided a detailed explanation as to why he was reducing the hours claimed, we affirm this determination. *See George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992); *Welch v. Pennzoil Co.*, 23 BRBS 395, 402 (1990). *See, e.g., Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 287-288 (1990)(Lawrence, J., concurring and dissenting on other grounds).

Claimant's assertion that the administrative law judge erred in reducing the hourly rate requested from $175 to $100 also must fail. The administrative law judge may award a lesser attorney's fee than that requested if an adequate explanation for the fee reduction is provided. *See Devine, supra*. Although as claimant asserts the administrative law judge did not indicate that he relied on any documentation in reducing the hourly rate we note that he specifically addressed the quality of representation at length consistent with 20 C.F.R. §702.132 in finding an $100 hourly rate appropriate. Because the administrative law judge provided an adequate explanation for the hourly rate reduction and claimant has failed to establish that the administrative law judge abused his discretion in awarding a fee based on an $100 hourly rate, we affirm his hourly rate determination.

Claimant correctly contends, however, that the administrative law judge erred in denying him the cost of the hearing transcript as this is a "reasonable and necessary expense" recoverable under Section 28(d), 33 U.S.C. §928(d), as a matter of law. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 667 (1982); *Hicks v. Pacific Marine and Supply Co., Ltd.*, 14 BRBS 549, 567-568 (1981). Accordingly, the administrative law judge's determination that this expense was not

[14]Claimant cites the fact that the administrative law judge disallowed time for a February 2, 1987 entry pursuant to employer's objection although no such entry was made in his fee petition support for this assertion. It appears, however, that employer and the administrative law judge meant February 7, 1989, and that, in the context of this case, this can reasonably be viewed as a typographical error or an oversight.

compensable is reversed and the fee award is modified to reflect that claimant is entitled to this expense.

We also agree with claimant that the administrative law judge erred in disallowing all services claimed in the second fee petition. As some of the work itemized in this fee petition related to claimant's preparation of his motion for reconsideration regarding the applicable average weekly wage, the administrative law judge erred in determining that all of the services claimed therein related to the fee request and were not made to advance claimant's claim. We therefore vacate his denial of a fee for all services claimed in the second fee petition and remand to allow him to enter a fee for any reasonable and necessary services provided in furtherance of claimant's claim. While claimant also contends that even those entries involving work on the attorney's fee petition should not be disallowed as they represent time spent defending the fee petition, we disagree. Although time spent on appeal in successfully defending or establishing liability for a fee is generally compensable, *see Jarrell v. Newport News Shipbuilding and Dry Dock Co.*, 14 BRBS 883 (1982), the time which counsel expended in this case from February 27, 1989 to March 3, 1989 in preparation of the reply to the fee opposition is analogous to time spent in preparation of a fee petition which is not compensable. *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981). On remand, the administrative law judge may, at his discretion, give claimant the opportunity to respond to employer's March 16, 1989 objections in view of his allegation that he was not served with these papers. *Morris v. California Stevedore and Ballast Co.*, 10 BRBS 375, 378-379 (1979).

Claimant submitted an attorney's fee petition for work performed before the district director, requesting $15,618.75 representing 89.25 hours of services at $175 an hour plus $12 in costs to which employer filed objections. On March 16, 1989, claimant responded to employer's objections, indicating that he was willing to reduce the hourly rate requested at varying rates between 1981 and 1986 resulting in a total attorney's fee of $13,416.25. On March 18, 1989, claimant submitted a supplemental fee application requesting $707 representing 4 hours of work at $175 per hour plus $7 in costs for preparation of claimant's March 16, 1989 response. Employer did not object to the supplemental fee petition.

In a Supplemental Award of Attorney's Fee, the district director noted that claimant sought $14,135.25 in attorney's fees and summarily determined that based on his review of the petition, employer's objections, the quality of representation, the issues involved, and the results obtained, a fee of $1,500 was reasonable.

On appeal, claimant contends that the district director failed to provide an adequate explanation for his fee reduction and makes numerous assertions as to why various itemized entries are compensable. Employer filed a response brief and claimant filed a reply to employer's brief.

Claimant correctly asserts that where, as here, his counsel is ultimately successful in procuring compensation benefits under the Act, he is entitled to fees for services rendered to claimant at each level of the adjudication process, even if he is unsuccessful at a particular level. *See Turney v.*

Bethlehem Steel Corp., 17 BRBS 232 (1985). Because the district director in the present case, however, summarily reduced the fee without providing any explanation for the reduction, we are unable to address the numerous specific arguments made by the parties regarding the compensability of specific itemized services claimed. *See generally Devine*, 23 BRBS at 288. The fee award made by the district director is accordingly vacated, and the case is remanded to allow him to provide an adequate explanation for any reductions made consistent with 20 C.F.R. §702.132. *See generally Welch*, 23 BRBS at 402. In reconsidering the fee on remand, the district director should note that, consistent with employer's argument in its response brief, under Section 28(b) employer is not liable for fees incurred while it was paying claimant compensation based on the correct compensation rate ultimately found to be due. *See Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated and the case is remanded for reconsideration of this issue consistent with this opinion. The administrative law judge's award of medical expenses is modified to reflect that claimant is entitled to reasonable and necessary medical treatment for all of his work-related injuries. In all other respects, the administrative law judge's Decision and Order awarding benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed insofar as it relates to the number of hours allowed for services claimed in claimant's first attorney's fee petition and the applicable hourly rate. The fee award is modified, however, to reflect that claimant is entitled to $57.20 in additional costs for the hearing transcript. The administrative law judge's finding that claimant is not entitled to a fee for any services claimed in the second attorney's fee petition is vacated and the case is remanded for the administrative law judge to enter a fee for any reasonable and necessary services which were provided in furtherance of claimant's claim. The district director's Supplemental Award of Attorney's Fee, the subject of BRB No. 89-3966, is vacated and remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge