BRB Nos. 05-0703
and 06-0796

ROBERT W. MYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SGS COMMERCIAL TESTING & ENGINEERING COMPANY	)	DATE ISSUED: 06/29/2007
	)	
and	)	
	)	
CNA ISNURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order, the Decision and Order on Modification, and the Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Kevin A. Marks and Jessie Schott Haynes (Galloway, Johnson, Tompkins, Burr & Smith), 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, the Decision and Order on Modification, and the Supplemental Decision and Order Awarding Attorney's Fee (2004-LHC-1368) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial

evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer for ten weeks as a field inspector/barge surveyor. His duties included taking temperature readings and collecting samples from barges at various locations along the Mississippi River. Claimant testified that he sustained an injury on September 18, 2002, at the Exxon-Mobil facility in Baton Rouge, when he slipped as he walked to the edge of the bow and caught himself on the bowline. He complained of pain in his neck and shoulder area, his upper and lower back, and his right knee. Claimant was examined by his family physician, Dr. Leckie, at a pre-scheduled appointment the next day. Claimant was referred to an orthopedist, Dr. Haimson, by Dr. Leckie. Dr. Haimson treated claimant's complaints of pain with medication and physical therapy. At employer's request, claimant was examined by Dr. Po, who opined that claimant could return to light-duty work with restrictions. Dr. Haimson agreed with this assessment. Claimant attempted to return to work on May 1, 2003, and was told he would be returning to his former duties. However, claimant was terminated on May 1, 2003, and was notified that his compensation and medical benefits would be suspended. In July 2004, claimant began working intermittently on a part-time basis as a driver delivering parts. Claimant filed a claim for benefits under the Act.

In his initial decision, the administrative law judge found that claimant's description of the accident to three physicians and to employer was consistent and that the physicians reported that claimant suffered injuries as a result of the accident. Therefore, the administrative law judge found that claimant established invocation of the presumption that he suffered a work-related injury, pursuant to Section 20(a), 33 U.S.C. §920(a). The administrative law judge also found that there are no medical opinions of record stating that claimant was not injured in a work accident, but, as employer raised questions concerning claimant's credibility, he stated he would weigh the evidence as a whole. The administrative law judge found that employer's only contrary evidence is the testimony of Mr. Touissant, a co-worker, who did not see the accident occur. Therefore, the administrative law judge concluded that as claimant gave consistent descriptions of what happened and had credible complaints of pain, and as three doctors stated claimant's complaints are related to the incident, the evidence establishes that the injuries to claimant's neck, lower back, and left arm and shoulder are work-related.[1]

The administrative law judge found that claimant's restrictions against repetitive bending and no outstretched use of the left arm conflict with claimant's former job duties, and thus that claimant established he cannot return to his former employment. The

[1] The administrative law judge found, however, that claimant did not sustain a work-related injury to his knee. This finding is not challenged on appeal.

administrative law judge found that as Dr. Fleet did not release claimant for light-duty work until December 29, 2004, that is the date of maximum medical improvement. In considering whether employer established the availability of suitable alternate employment, the administrative law judge found that a barge surveyor position offered by employer in May 2003 was not suitable because it did not meet claimant's restrictions.[2] The administrative law judge rejected nine of the positions identified in a labor market survey dated November 3, 2004, because the specific physical requirements of the positions were not identified. He also rejected the other four specific positions as they were outside claimant's restrictions. However, the administrative law judge found that claimant was capable of performing the duties of his post-injury position as a delivery driver and concluded that claimant has a residual earning capacity of $60 per week as of July 1, 2004. Nonetheless, as claimant did not reach maximum medical improvement until December 29, 2004, the administrative law judge awarded claimant temporary total disability from September 18, 2002 to December 28, 2004, and ongoing permanent partial disability benefits as of December 29, 2001.

The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), to determine claimant's average weekly wage at the time of the injury. He found that claimant's earnings with employer at the time of injury best represent his earning capacity and he calculated claimant's average weekly wage by dividing his earnings, $5,888.25, by the number of weeks claimant worked for employer, 10, for an average weekly wage of $588.83. The administrative law judge also found that employer is responsible for all reasonable and necessary medical expenses arising out of the work-related injuries to claimant's neck, left shoulder, back and left arm/hand.

Employer appealed this decision to the Board, BRB No. 05-0703, but before the Board addressed the appeal, employer filed a motion to remand for the administrative law judge to address its motion for modification. On modification, employer averred that the administrative law judge made a mistake in fact as to the circumstances of claimant's alleged accident and as to his current condition. In support of its motion, employer submitted the sworn statement and deposition of claimant's ex-wife. Employer also argued that claimant is not entitled to further compensation or medical benefits pursuant

[2] The administrative law judge alternatively found that, even if the job were suitable, it was not available to claimant as AIMCOR, the company in charge of loading operations at the Exxon-Mobil facility which contracted for employer's services, refused to grant claimant access to the Exxon-Mobil dock. The administrative law judge rejected employer's contention that claimant's subsequent termination by employer was due to claimant's own misconduct, relying on the testimony of employer's representative, Mr. Sanford, that employer had no positions other than that at Exxon-Mobil which claimant could perform with his restrictions. Decision and Order at 51-52.

to Section 31(a) of the Act, 33 U.S.C. §931(a), as he fraudulently misrepresented the facts in an effort to obtain disability benefits.

In his Decision and Order on Modification, the administrative law judge found that the newly submitted evidence, including the statements by claimant's ex-wife, did not establish a mistake in fact warranting a modification of the original decision. The administrative law judge also found that claimant did not knowingly and willfully omit his post-injury earnings from Westaff. Rather, the administrative law judge credited claimant's testimony that he had inadvertently forgotten the three weeks of work he performed for that company. Thus, that administrative law judge found that Section 31(a) is not implicated.

Subsequently, claimant's counsel filed an attorney's fee petition with the administrative law judge, requesting a fee in the amount of $16,490, representing 82.45 hours of legal services at the hourly rate of $200, and $1,467.03 in litigation expenses. In his Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge considered employer's objections to the hourly rate and determined that under the facts of this specific case, $200 per hour is reasonable given counsel's experience, the necessary work performed, and the benefits obtained on claimant's behalf. As employer made no other objections, the administrative law judge awarded the fee requested.

Employer appeals these decisions, BRB No. 06-0796, and requested reinstatement of its appeal of the original Decision and Order, BRB No. 05-0703, which was granted by Board Order dated September 14, 2006. On appeal, employer contends that the administrative law judge erred in finding that claimant suffered a work-related injury and that claimant is not capable of returning to his former job. Employer contends that, in the alternative, it established the availability of suitable alternate employment. Employer also contends that the administrative law judge erred in his calculation of claimant's average weekly wage and in finding it responsible for claimant's medical treatment as there was no work-related injury. In addition, employer contends that the administrative law judge erred in denying its motion for modification as the evidence submitted should have cast doubt on claimant's testimony in its entirety and is cause for reversal. Employer also contends that the administrative law judge erred in finding that Section 31(a) is not applicable. Lastly, in contesting the fee award, employer contends that the administrative law judge erred in finding that an hourly rate of $200 was reasonable in this case. Claimant responds, urging affirmance of the administrative law judge's Decision and Order, Decision and Order on Modification, and Supplemental Decision and Order Awarding Attorney's Fee.

CAUSATION

Employer contends that the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption that claimant suffers from a work-related injury. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In this case, the administrative law judge accepted claimant's testimony regarding the occurrence of an accident at work on September 18, 2002. The administrative law judge found that claimant gave the same consistent description of the accident to his supervisor, to Dr. Leckie, who he saw the next day, and to the other physicians of record. In spite of the lack of objective medical evidence, Drs. Fleet and Po opined that claimant's reported injuries were consistent with the mechanics of the described accident. Drs. Haimson and Po diagnosed claimant with a shoulder strain due to his complaints of left shoulder pain. Drs. Haimson, Po, and Fleet noted that claimant experienced lower back pain. Drs. Po and Fleet noted complaints of neck pain, which Dr. Po diagnosed as cervical disc disease. Drs. Haimson and Po opined that claimant's work injury would have aggravated claimant's pre-existing disc degeneration. Moreover, the administrative law judge fully addressed the contrary evidence of record.[3] Decision and Order at 43-44. He rejected the testimony of claimant's co-worker, Mr. Toussiant, that claimant injured only his shoulder by walking into something, as he was not present when the incident occurred. The administrative law judge rejected employer's contention that claimant's "version of the events" defies logic, as Dr. Fleet opined that claimant's complaints and symptoms were consistent with the mechanics of the described accident. The administrative law judge also found it persuasive that three physicians diagnosed injuries to claimant's left shoulder and arm, neck and back, despite the lack of "objective" evidence. Decision and Order at 45.

[3] The administrative law judge did so after, assuming *arguendo,* that employer rebutted the Section 20(a) presumption. *See* Decision and Order at 43-44. Employer bears a burden of production on rebuttal, and the administrative law judge found that employer did not produce any medical evidence that claimant's injuries are not due to the work accident, a finding employer does not contest. Moreover, all evidence relevant to claimant's *prima facie* case should be weighed at the initial step of the causation analysis. As the administrative law judge ultimately weighed all this evidence, any error in assuming that employer rebutted the Section 20(a) presumption is harmless.

The administrative law judge is entitled to weigh the evidence of record, and the Board must respect his rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the administrative law judge thoroughly reviewed the evidence of record and acted within his discretion in crediting claimant's description of the work-related accident, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm the administrative law judge's finding that claimant suffered a work-related injury to his left shoulder and arm, neck and back on September 18, 2002.[4]

EXTENT OF DISABILITY

Employer contends the administrative law judge erred in finding that claimant is currently disabled. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Delay v. Jones Washington Stevedoring Co*., 31 BRBS 197 (1998).

On April 14, 2003, claimant was released by Dr. Haimson to modified light work to exclude heavy lifting. He instructed claimant to avoid outstretched or overhead use of his arm, and to avoid climbing ladders, repetitive bending and stooping. Dr. Po, who examined claimant at the request of employer, recommended that claimant decrease his use of the left upper extremity, not work above the shoulder level, and not use hand controls on the left side. In addition, he restricted claimant from pushing and pulling and from lifting greater than 20 pounds. Cl. Ex. 18. Claimant began treatment with Dr. Fleet, a board-certified neurologist, on February 24, 2004. On December 29, 2004, Dr. Fleet released claimant for part-time work limited to four hours a day, five days a week. Dr. Fleet opined that claimant could frequently carry up to 20 pounds, and occasionally carry up to 50 pounds. He also recommended that claimant not engage in climbing or balancing activities, and could occasionally bend/twist, stoop, kneel, crouch, crawl, and reach. He reported that claimant's left hand is restricted from activities requiring simple grasping and fine manipulation. Cl. Ex. 34. The administrative law judge accorded

[4] In order to be entitled to medical benefits, a claimant must establish he sustained a work-related injury, an issue to which the Section 20(a) presumption applies. *See Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). As we affirm the administrative law judge's finding that claimant sustained work-related injuries to his left shoulder and arm, neck and back, we reject employer's contention that the administrative law judge erred in awarding medical benefits in this case. 33 U.S.C. §907(a).

greater weight to the restrictions imposed by Dr. Fleet, as he was claimant's most recent treating physician. We affirm this finding as it is rational and a proper exercise of the administrative law judge's discretion. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The administrative law judge then reviewed the "Job Functions Capabilities Form," which described the duties of a field inspector/barge surveyor. He found that the position's requirements of frequent bending and reaching did not comply with claimant's restrictions. Therefore, the administrative law judge concluded that claimant established he was unable to return to his former position. We affirm the administrative law judge's finding that claimant has an impairment that precludes him from performing his usual work, as it is rational and supported by substantial evidence. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Where, as here, claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs in the geographic area where claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing, and which he could realistically secure if he diligently tried. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

In addressing suitable alternate employment, the administrative law judge found that a field inspector/barge surveyor job offered by employer on April 25, 2003, was not suitable for claimant because it was not within his credited restrictions. Consistent with his evaluation of this job in addressing claimant's ability to return to his usual work, the administrative law judge found that the position exceeded claimant's restrictions against bending and reaching. This finding is affirmed, as it is supported by the credited medical evidence.[5]

[5]As we affirm the administrative law judge's finding that the job was thus not suitable for claimant, we need not address the administrative law judge's alternate findings that the job was not actually available to claimant since AIMCOR refused to allow him entry to the Exxon-Mobil docks and that claimant was not discharged from his position with employer due to his own malfeasance. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). However, we note that the administrative law judge's finding that claimant was not terminated from his position for malfeasance was based on the testimony of employer's representative, Mr. Sanford,

The administrative law judge next reviewed the positions identified in the labor market survey performed by Dr. Stokes. Emp. Ex. 19. On appeal, employer states no more than that the administrative law judge should have credited Dr. Stokes's opinion that claimant retains a wage-earning capacity of $241 to $420 per week. Emp. Br. at 27. Dr. Stokes identified a representative sample of the types of jobs claimant is capable of performing including order clerk, dispatcher, surveillance system monitor, courier/messenger, parts salesperson, self-service station attendant, cashier, counter attendant, and hotel clerk. We affirm the administrative law judge's finding that employer did not establish suitable alternate employment with these positions, as he rationally found that employer did not establish the jobs' requirements or their actual availability. *Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT). Moreover, employer does not specifically challenge the administrative law judge's rejection of four specific available positions identified by Dr. Stokes. The administrative law judge compared the requirements of the jobs identified with claimant's physical restrictions and rationally found that they are not suitable. Decision and Order at 54-57. We affirm this finding as it is supported by substantial evidence. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

Employer contends the administrative law judge erred in awarding claimant total disability benefits after claimant obtained employment. The administrative law judge found that claimant's self-procured position as a part-time delivery parts driver constitutes suitable alternate employment and establishes claimant's post-injury earning capacity as $60 per week. However, the administrative law judge found that as Dr. Fleet did not release claimant for work until December 2004, claimant is entitled to temporary total disability benefits until that date despite his part-time employment commencing July 1, 2004. As the administrative law judge correctly found, a claimant may be found entitled to total disability benefits while working only if he works with extraordinary effort and in spite of excruciating pain, or is provided a position through employer's beneficence. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). In this case, the administrative law judge found that claimant was not working his post-injury job in excruciating pain and the evidence does not indicate that the job was available only through the beneficence of the employer. Although Dr. Fleet did not release claimant for work with restrictions until December 2004, we cannot affirm the administrative law judge's finding that claimant is entitled to total disability during the period he successfully performed the

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who stated that, after claimant was denied access to the Exxon-Mobil facility by AIMCOR, he was terminated by employer because there were no other jobs he could perform given his condition. H. Tr. at 205.

duties of his post-injury part-time job. Therefore, we modify the administrative law judge's award to reflect claimant's entitlement to a period of temporary partial disability benefits from the beginning of July 2004 to December, 29, 2004, rather than temporary total disability benefits, based on the post-injury wage-earning capacity of $60 per week found by the administrative law judge. *See generally Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

AVERAGE WEEKLY WAGE

Employer contends that the administrative law judge erred in his application of Section 10(c) in determining claimant's average weekly wage. 33 U.S.C. §910(c). Employer avers that all of claimant's earnings in the year prior to his injury should have been accounted for in an average weekly wage calculation. The purpose of Section 10(c) is to reflect a claimant's annual earning capacity at the time of injury, *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991), and the administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See, e.g., Louisiana Ins. Guaranty Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The administrative law judge relied on the Board's decision in *Miranda v. Excavation Constr. Inc.*, 13 BRBS 882 (1981), to find that claimant's earning capacity is best reflected by his earnings with employer prior to the injury. In *Miranda*, the Board held that a calculation based on the claimant's higher wages in the employment in which he was injured, rather than including his wages at other unrelated jobs in the same year, would best adequately reflect claimant's earning potential at the time of his injury. *Miranda*, 13 BRBS at 886; *see also Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). The administrative law judge also stated that claimant's prior earnings with Valley Builders, combined with his wages from employer do not equal a year's worth of wages. Therefore, the administrative law judge rejected employer's contention that he should divide the combined wages by 52 in favor of utilizing claimant's earnings from employer divided by the 10 weeks he worked for employer. The administrative law judge's decision to rely on claimant's earnings from employer is rational, *id.*, and his calculation of claimant's average weekly wage under Section 10(c) by dividing claimant's earnings by the number of weeks he worked is consistent with law. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Thus, we affirm the administrative law judge's finding that claimant established an average weekly wage of $588.83, as it is supported by substantial evidence.

MODIFICATION

In its appeal of the Decision and Order on Modification, employer contends that the administrative law judge erred in finding that the evidence is insufficient to establish a mistake in fact. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997). The fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc*., 390 U.S. 459 (1968).

In support of its motion for modification, employer submitted the sworn statement and deposition testimony of Ashlyn Smith, claimant's ex-wife. Ms. Smith offered testimony regarding claimant's physical condition following his work-related accident and stated that claimant exaggerated his symptoms and capabilities. The administrative law judge accorded no weight to the testimony of Ms. Smith as he found that many of the assertions in her first statement were recanted in her later deposition. Decision and Order on Modification at 12-13. The administrative law judge also noted that Ms. Smith did not testify before him and that her demeanor could not be assessed. In addition, the administrative law judge reviewed claimant's testimony on modification and did not accept claimant's assertion that he suffered from memory loss as a result of a work-related head injury as his explanation for his inability to fully recall the events at the time of the accident and thereafter. *Id.* at 13-14. However, the administrative law judge found that at best, the credibility of claimant and Ms. Smith is in equipoise and thus employer did not carry its burden to establish that the previous decision was based on a mistake in fact.

In adjudicating a claim, it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw his own inferences and conclusions from the evidence. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403. Moreover, the administrative law judge is free to disregard parts of some witnesses's testimony while crediting other parts of their testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, the administrative law judge's decision to reject the testimony of Ms. Smith, and to partially credit claimant's testimony, is neither inherently incredible nor patently unreasonable. *Cordero,* 580 F.2d at 1333, 8 BRBS at 747. Consequently, we affirm the administrative law judge's finding that employer did not establish a mistake in fact in the original

decision and thus affirm the award of benefits. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000).

SECTION 31

Employer contends the administrative law judge erred in finding that claimant did not intentionally make false statements in support of his claim, and thus that the administrative law judge erred in finding that Section 31(a) of the Act is not implicated. Section 31(a)(1) of the Act states:

> Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this chapter shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. §931(a)(1). Complaints under subsection (a)(1) are to be investigated by the appropriate United States attorney for the district where the injury occurred. 33 U.S.C. §931(a)(2); *Valdez v. Crosby & Overton,* 34 BRBS 69, *aff'd on recon.,* 34 BRBS 185 (2000).

The bases for employer's contention regarding false statements were claimant's alleged lack of credibility overall and specifically his failure to report earnings from three weeks of employment with Westaff in May and June 2003. *See also* 33 U.S.C. §908(j). The administrative law judge found that claimant's omission of these earnings was not intentional, and that, therefore Section 31(a) is not applicable. The administrative law judge credited claimant's testimony that he did not recall this work until he was shown his payroll records.

The Board is not empowered to re-weigh the evidence, and credibility assessments are left to the discretion of the administrative law judge. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In his decisions, the administrative law judge thoroughly discussed employer's contentions regarding claimant's credibility generally and specifically with regard to the omission of earnings. Employer has not established that the administrative law judge's assessment of claimant's credibility is "inherently incredible or patently unreasonable," *Cordero,* 580 F.2d at 1333, 8 BRBS at 747, but only that it disagrees with that assessment. This argument is not a basis for overturning the administrative law judge's decision. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 34 BRBS 187(CRT) (5th Cir. 1999); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). Therefore, as it is rational and supported by substantial evidence, we affirm the

administrative law judge's finding that claimant did not engage in "knowingly and willingly" false conduct.

ATTORNEY'S FEE

Employer contends the administrative law judge erred in awarding claimant's attorney a fee based on the hourly rate of $200. 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

We reject employer's contention. The administrative law judge did not abuse his discretion in awarding an hourly rate of $200 based on such factors as the prevailing hourly rate in the community, counsel's expertise, and the results obtained. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); 20 C.F.R. §702.132. Therefore, the fee award is affirmed. *See generally O'Kelley v. Dep't of the Army*, 34 BRBS 39 (2000).

Accordingly, the Decision and Order of the administrative law judge is modified to reflect an award for temporary total disability benefits from September 18, 2002, to June 30, 2004, and for temporary partial disability benefits from July 1, 2004 until December 29, 2004. The administrative law judge's Decision and Order, Decision and Order on Modification and Supplemental Decision and Order Awarding Attorney's Fee are affirmed in all other respects.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge