BRB No. 98-1295

RANDALL REAGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED: June 25, 1999
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Awarding Attorney's Fees and Costs of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Douglass A. Swanson (Swanson, Thomas & Coon), Portland, Oregon, for claimant.

John Dudrey (Williams, Frederickson, Stark & Littlefield, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Awarding Attorney's Fees and Costs (97-LHC-2474) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *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 journeyman painter, developed a severe rash from exposure to a paint commonly known as "MC Tar" during the course of his employment with employer in its Paint Shop. Employer voluntarily provided medical benefits and paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from April 3, to May 11, 1997, and from May 13, to May 23, 1997. Upon returning to work, claimant was transferred by employer to its Marine Division, where he would not be exposed to this paint. Claimant requested a transfer back to the Paint Shop; however, employer repeatedly denied the request on the ground that there was less available work in the Paint Shop. Claimant obtained part-time employment as a painter with Huggy Bear Painting, Inc. (Huggy Bear), during periods when he was unable to obtain work from employer. Claimant sought benefits under the Act for permanent partial disability based on a loss of wage-earning capacity incurred as a result of his work-related allergy to paint. 33 U.S.C. §908(c)(21), (h). Employer contested the claim, contending that claimant's reduced wages upon transferring to the Marine Division are related to an economic decline at its facility and not to claimant's work injury.

In his Decision and Order, the administrative law judge initially found, pursuant to Section 10(c), 33 U.S.C. §910(c), that claimant's average weekly wage at the time of his injury is $842.82. He next determined that claimant's residual wage-earning capacity based on claimant's actual post-injury earnings with employer and Huggy Bear is $756.86. The administrative law judge rejected employer's contention that these actual earnings are not representative of claimant's true post-injury wage-earning capacity. He found that employer has the burden of establishing an alternate wage-earning capacity and that employer failed to show that claimant's reduced earnings after returning to work for employer in the Marine Division are solely due to an economic decline at employer's facility. Accordingly, claimant was awarded compensation under the Act of $70.94 per week commencing on May 23, 1997, when he returned to work for employer. In his Decision and Order Awarding Attorney's Fees and Costs, the administrative law judge accepted the fee agreement of the parties and awarded claimant's attorney a fee of $10,500, plus $79.57 in costs.

On appeal, employer argues that the administrative law judge erred by finding that claimant sustained an injury-related loss of wage-earning capacity. Specifically, employer contends that the administrative law judge erred by placing the burden of

proof on employer to establish that claimant's actual post-injury wages are not representative of his residual wage-earning capacity. Moreover, employer argues that the administrative law judge erred by requiring employer to establish an economic decline in the general community, rather than a decline solely at employer's facility. Employer argues that it presented substantial evidence of such a decline at its facility, and that claimant is therefore entitled only to a *de minimis* award. Employer also appeals the attorney's fee award, asserting that, should the Board vacate the administrative law judge's Decision and Order, then the fee award also should be vacated. Claimant responds, urging affirmance.[1]

It is uncontested that claimant cannot return to his usual employment in the Paint Shop and that claimant's job in the Marine Division constitutes suitable alternate employment. Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29

[1]Claimant withdrew his appeal of the initial Decision and Order, BRB No. 98-1295A, and concurrently filed a Motion to Deem Administrative Law Judge's Fee Order Final and Payable. By Board Order issued October 23, 1998, claimant's request to withdraw his appeal was granted and the Board stated that claimant's motion will be addressed in its Decision and Order.

BRBS 22 (CRT)(5th Cir. 1994); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

We initially reject employer's contention that, pursuant to *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), the administrative law judge erred by placing the burden of proof on employer to establish that claimant's actual post-injury wages are not representative of his residual wage-earning capacity. It is well-established that the party contending that the employee's actual post-injury earnings are not representative of his residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See*, *e.g.*, *Avondale Shipyards v. Guidry*, 967 F.2d 1039, 1043-1046, 26 BRBS 30, 32-35 (CRT)(5th Cir. 1992); *see also Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990). This evidentiary scheme is consistent with the plain language of Section 8(h) of the Act, and the administrative law judge properly found that it in no way conflicts with the Supreme Court's holding in *Greenwich Collieries*, which requires the proponent to bear the burden of persuasion. As employer here seeks to establish that claimant's actual post-injury wages do not represent his residual earning capacity, it properly bears the burden of persuasion on this issue. *See Guidry*, 967 F.2d at 1043-1046, 26 BRBS at 32-35 (CRT); *Grage*, 21 BRBS at 69.

We also reject employer's contention that it produced substantial evidence to establish an economic decline at its facility after claimant's return to work for the Marine Division. The administrative law judge found that employer's best evidence of an economic decline is the testimony of Bruce Clark, the Paint Shop manager, and claimant that work slowed in the fall of 1997. The administrative law judge, however, noted from a similar decline in the fall of 1996 that this decline may be partly seasonal. *See* EX 10. The administrative law judge also found that employer did not produce sufficient evidence to establish a decline in work at the Paint Shop after claimant's return to work. Employer submitted the work hours for every Paint Shop employee in the period after claimant returned to work; however, employer did not produce the pre-injury work hours for six of the eight Paint Shop employees. The administrative law judge noted this evidentiary omission, and the fact that for the two Paint Shop employees with whom a comparison of claimant's pre and post-injury hours could be drawn, claimant worked more hours than these employees prior to the work injury as well. The administrative law judge further noted claimant's willingness to work overtime and his testimony that he worked every day offered. The administrative law judge found problematic a comparison between Paint Shop man hours and those worked in the Marine Division, as the latter work is more cyclical than the former; the administrative law judge thus concluded that employer's

evidence of an economic decline was so lacking in detail that there is no basis from which he could rationally derive an alternate wage-earning capacity.

We affirm the administrative law judge's award of benefits for a weekly loss of wage-earning capacity of $70.94, as the administrative law judge's finding that employer failed to establish an alternate wage-earning capacity is rational and supported by substantial evidence. The testimony of claimant and Mr. Clark that shipyard business declined in the fall of 1997 is insufficient, by itself, to establish an alternate wage-earning capacity. Employer, moreover, did not introduce the pre and post-injury wages of all eight Paint Shop employees from which the administrative law judge could derive the extent of any economic decline in the Paint Shop. Furthermore, employer failed to produce any pre and post-injury wages from the Marine Division from which the administrative law judge could rationally derive the extent of an economic decline there. Accordingly, we affirm the administrative law judge's conclusion the employer failed to establish that claimant's actual post-injury wages are not representative of claimant's residual wage-earning capacity as injured, and we affirm the resulting award of benefits based on claimant's actual post-injury wages with employer and Huggy Bear. *See Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990).

Employer's appeal of the fee award is predicated on the Board's vacating the award and remanding for the administrative law judge to redetermine claimant's residual wage-earning capacity. Since we affirm the award of benefits, we also affirm the administrative law judge's fee award. Finally, we deny claimant's Motion to Deem Administrative Law Judge's Fee Order Final and Payable. Fee awards by an administrative law judge are not final, and therefore are not enforceable, until all appeals are exhausted. *See*, *e.g.*, *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (9th Cir. 1987).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge