BRB No. 98-1590

CARL PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAICOS CORPORATION	)	DATE ISSUED: 9/8/99
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Order for Fees and Costs of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Robert J. Burke, Jr. (Metz & Associates P.S.), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Order for Fees and Costs (97-LHC-2472) of Administrative Law Judge Henry B. Lasky 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 pile buck, suffered near-fatal injuries on February 18, 1994, when the cables and gear attached to a crane broke and fell onto his head, neck, and shoulders. The impact of the cables and gear drove claimant first into the deck of the barge he was working on and then into the water. Claimant was rescued from the water by a co-worker, and then taken by helicopter to the hospital. Employer voluntarily paid claimant temporary total disability benefits from February 19, 1994, to August 21, 1994. Claimant cannot return to his usual work but has been working since August 22, 1994, as a superintendent of General Construction Company (General Construction), a company that has no relationship to employer.

The administrative law judge awarded claimant permanent total disability benefits from August 22, 1994, to the present and continuing. The administrative law judge found that claimant's current work at General Construction is sheltered employment, that claimant is working there only through extraordinary effort, and that employer did not establish the availability of suitable alternate employment through the sales positions it identified in its labor market survey. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and held employer entitled to a credit pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), for claimant's recovery under the Jones Act.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $30,787.50, representing 81.75 hours of attorney work at $250 per hour and 86.25 hours of paralegal work at $120 per hour, and expenses in the amount of $6,863.36. In a Supplemental Order for Fees and Costs, the administrative law judge awarded claimant's counsel a fee of $18,300, representing 74 hours of attorney work at $225 per hour, 16.75 hours of paralegal work at $100 per hour, and expenses in the amount of $4,970.44.

On appeal, employer challenges the administrative law judge's award of total disability benefits. In its supplemental appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds in support of the administrative law judge's award of disability benefits as well as his award of an attorney's fee.

An award of total disability compensation for a period when a claimant is

working is the exception rather than the rule. *See, e.g., Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Such an award is permitted, however, where claimant's post-injury employment is due solely to the beneficence of the employer and therefore is sheltered work. *See, e.g., CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991), or where the claimant works only through extraordinary effort and in spite of excruciating pain, *see, e.g., Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). The administrative law judge found both exceptions present in the instant case. Employer initially contends that the administrative law judge erred in finding that claimant's current employment at General Construction is sheltered. Sheltered employment has been described as a job for which the employee is paid even if he cannot do the work or a job which is unnecessary to employer's operations and created to place claimant on the payroll. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Sheltered employment does not exist where, for example, the employee is in a job which is necessary, he is capable of performing it, he is protected by a collective bargaining agreement, and he would have to be replaced if he left. *See Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412, 416 (1981).

The administrative law judge found that claimant's position as a superintendent for General Construction was sheltered employment based on the testimony of claimant and his current supervisor, Mr. Hinkle, which the administrative law judge found credible.[1] Decision and Order at 5-6. Applying the relevant factors, the administrative law judge concluded that claimant is being paid for work even

[1]Claimant testified he returned to work on August 22, 1994, against the advice of both of his physicians. Tr. at 213. Claimant testified that his current job was specifically tailored to fall within his capabilities. Tr. at 215. Although claimant wanted to quit his job because he felt that he could not properly perform it, Messrs. Hinkle and Morford, the vice-president of General Construction, would not let him do so. Tr. at 216-217. Instead, they provided him daily with a flexible schedule to accommodate his working capacity. Tr. at 216-217. Claimant considers Mr. Hinkle a close personal friend and thinks that Mr. Hinkle and his co-workers carry him on the job. Tr. at 123, 220. Claimant believes that General Construction is bending over backwards to accommodate his problems. Tr. at 217.

Mr. Hinkle testified that he has known claimant for approximately 14 years. Tr. at 97-98. He personally designed the job for claimant to fit within claimant's physical capabilities yet stated that claimant is incapable of performing the majority of the work assigned to him, that his stamina has decreased and he must often rest during his shifts, and that he is significantly aided in his work by other co-workers. Tr. at 103, 105-106, 113.

though he cannot perform many of the required duties, that claimant would not be replaced by a new worker if he were to leave, that claimant is not protected by a collective bargaining agreement, that no other superintendent performs claimant's job, and that the value of claimant's work is marginal such that it would be unreasonable and unprofitable for General Construction to retain employees like claimant on a regular basis. Decision and Order at 6. As the administrative law judge acted within his discretion in crediting the testimony of claimant and Mr. Hinkle that claimant's current employment is sheltered and available only due to Mr. Hinkle's beneficence, we affirm the administrative law judge's finding as it is rational and supported by substantial evidence.[2] *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *Kimmel*, 14 BRBS at 416; Decision and Order at 5-6.

Employer next contends that the administrative law judge erred in finding that claimant was performing his current job at General Construction only through extraordinary effort. The administrative law judge found that claimant was performing his current employment only through extraordinary effort based on claimant's aggregate symptoms which, claimant testified, include constant neck pain, extreme, intermittent arm pain, occasional dizziness and imbalance, fatigue, and difficulty concentrating. Decision and Order Awarding Benefits at 7. The administrative law judge noted that each symptom by itself would be insufficient to establish that claimant is performing his work only through extraordinary effort, and that the existence of some pain in conjunction with reduced duties is insufficient to establish extraordinary effort. Decision and Order at 7, *citing Jordan*, 19 BRBS at 82. He concluded, however, that based on the testimony of claimant and his wife regarding claimant's extreme fatigue as a result of working beyond his capacity, claimant is performing his current job only through extraordinary effort. As this finding is rational and supported by substantial evidence, we affirm it. *See generally*

[2]The administrative law judge discussed evidence to the contrary, including Mr. Hinkle's testimony that claimant's work is profitable to the company to some degree, that he is an asset to the company, that he tries to do a good job, that he is useful because of his knowledge, and that claimant performs work that has to be done. Tr. at 112-114. Additionally, claimant testified that he was given a raise. Tr. at 232. However, in view of the circumstances of claimant's employment, the administrative law judge found that the only reasonable conclusion was that claimant would not be employed if not for the beneficence of Mr. Hinkle and General Construction. As it is within the administrative law judge's authority to weigh conflicting evidence, we may not disturb his conclusions which are supported by substantial evidence. 33 U.S.C. §921(b)(3).

Shoemaker v. Schiavone & Sons, Inc., 11 BRBS 33 (1979).

Employer next contends that the administrative law judge erred in his findings regarding the availability of suitable alternate employment. Once, as here, claimant succeeds in establishing that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

The administrative law judge found that employer did not establish the availability of suitable alternate employment through its labor market survey, which identified positions involving sales of construction equipment. The administrative law judge addressed the opinion of employer's vocational expert, Mr. Shafer, that these sales positions were suitable for claimant and available, but found that claimant did not have the minimum qualifications or the essential qualities for such a position. Decision and Order at 8. With respect to the minimum qualifications of the sales positions, the administrative law judge found that claimant lacked necessary familiarity with the construction equipment he was to sell or with the companies with which he was to do business.[3] *Id.*. Additionally, claimant lacked previous sales

[3]Although claimant is familiar with one company, Pro Rentals, identified in the labor market survey, he is not familiar with the equipment they rent. Emp. Ex. 2 at 34; Tr. at 226, 228-229. Pro Rentals rents skill saws, jackhammers, and forklifts, but not pile driving equipment. Tr. at 228-229. The administrative law judge found that claimant is familiar with pile driving equipment such as cranes, derrick barges, piling accessories, leads, gates, and pile hammers, Tr. at 226, whereas the prospective employers identified in the labor market survey rented or sold office equipment,

experience which two of the prospective employers preferred or found helpful. *Id.*; Emp. Ex. 2 at 21, 26.

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custom designed homes or buildings, trucks, and construction or building equipment. Emp. Ex. 2 at 15, 18, 21, 23, 26, 29, 32, 34.

With respect to the essential qualities for the sales positions, the administrative law judge found that claimant does not possess an enthusiastic attitude and the ability to talk easily and persuasively to other people, as required by the positions identified.[4] *Id.* at 7-9. This finding is supported by the testimony of claimant, his wife, and former co-worker, Mr. Wheatley, to that effect and is rational given claimant's work history in manual labor. Tr. at 65-67, 83-85, 219, 229. Additionally, it was not irrational for the administrative law judge to find that claimant's physical symptoms and resultant loss of concentration are incompatible with any sales positions even though the positions fit within claimant's physical restrictions, as the physical ability to perform a job is not the exclusive determinant of the suitability of alternate employment. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1999); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). As the administrative law judge's findings that claimant does not possess the minimum qualifications or the essential qualities of the sales positions identified in employer's labor market survey are rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. *See Ledet*, 163 F.3d at 901, 32 BRBS at 212 (CRT); *Caudill*, 25 BRBS at 92.

Based on our affirmance of the administrative law judge's findings that claimant's employment at General Construction is sheltered employment, that claimant performs this job only through extraordinary effort, and that employer did not establish the availability of other suitable alternate employment, we affirm the administrative law judge's award of permanent total disability benefits from August 22, 1994, to the present and continuing.

We next address employer's appeal of the administrative law judge's award of an attorney's fee. Employer initially challenges the administrative law judge's award of 5.75 hours for travel time from San Francisco to the hearing in Seattle, as well as hotel expenses of $398.82 and airfare of $382 incurred as a result of the travel. Employer objects to the award of travel time and expenses based on the holdings of *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982), and *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979), that such are unreasonable where a claimant retains an attorney outside his locale even though there are competent attorneys available locally.

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[4]Of the eight prospective employers identified on the labor market survey, all of them required their applicants to be able to talk easily and persuasively to other people, and three required an enthusiastic attitude. Emp. Ex. 2 at 15, 18, 21, 23, 26, 29, 32, 34.

The administrative law judge considered employer's objection to the travel time and expenses, but rationally found employer liable for these fees and costs, based on the facts of this case. Supplemental Order for Fees and Costs at 2. The administrative law judge noted that claimant first chose the services of a local attorney, but that this attorney then associated with counsel outside claimant's locale since the case implicated issues of concurrent claims under the Jones Act and the Longshore Act. As the administrative law judge's conclusion is reasonable based on these specific circumstances, and as the administrative law judge found that the travel time as well as reduced hotel and airfare expenses were reasonable and necessary, we affirm the administrative law judge's fee award in this regard.[5]

[5]The administrative law judge found that claimant's counsel's airline ticket in the amount of $382 was neither unreasonable nor excessive but disallowed the travel agent fees in the amount of $30. Supplemental Order for Fees and Costs at 3. The administrative law judge reduced claimant's counsel's requested hotel expenses to $398.82 after finding the requested amount of $1,040.94 excessive and unreasonable.

We reject employer's objection to the hourly rates of $225 and $100 for claimant's counsel and paralegal, respectively, and affirm them as reasonable and within the administrative law judge's discretion.[6] *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998)(decision on reconsideration *en banc*).

We also reject employer's challenge to the administrative law judge's award of specific items to claimant's counsel's paralegal, Mr. Holbrook, since employer has not shown that the administrative law judge abused his discretion in awarding these items. Thus, we affirm the administrative law judge's award of an attorney's fee.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Although the administrative law judge noted that an hourly rate of $175 is appropriate for the average attorney in these matters, the administrative law judge found that claimant's counsel is not an average attorney. Moreover, the administrative law judge rationally considered the qualifications of the paralegal, Mr. Holbrook, who has more than 20 years of longshore experience, in awarding him an hourly rate of $100. 20 C.F.R. §702.132.