BRB Nos. 95-1593
and 95-1593A

EUGENE W. COSSEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order, Order, and Supplemental Decision and Order Awarding Attorney Fees of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown, Houston, Texas, for claimant.

Tobi A. Tabor (Royston, Rayzor, Vickery & Williams, L.L.P), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and Order, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (92-LHC-2617) of Administrative Law Judge E. Earl Thomas 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, employed as a truck driver, sustained an injury to his lower back on October 30, 1987, when his truck cab was accidently picked up by a crane with the container/chassis and then dropped. After conservative treatment proved unsuccessful, claimant underwent an anterior lumbar fusion at the L4-5 level on August 7, 1990. Claimant's recovery proceeded satisfactorily to the extent that the surgeon, Dr. Kozak, recommended that claimant return to a "limited type of work" by January 6, 1992 with an 8 hour day, 30 pound lifting restriction. Dr. Kozak further opined that claimant reached maximum medical improvement on January 6, 1992.

Claimant returned to his pre-injury work as a truck driver on January 9, 1992, and was working regularly at the time of the formal hearing. From November 1, 1987 through January 19, 1992, employer voluntarily paid claimant temporary disability benefits.[1] Shortly after his return to work, a dispute arose regarding claimant's entitlement to disability benefits from January 19, 1992. Prior to a formal hearing, the parties, in January 1993, reached an agreement whereby employer paid claimant two lump sum amounts on January 11, 1993, both based on a stipulated weekly compensation rate of $205.99. As a result of this agreement, claimant received $10,446.60 for past due compensation from January 20, 1992 to January 11, 1993, and $10,711.48 as an advance on compensation for the period from January 12, 1993 through January 13, 1994. Employer additionally paid attorney's fees and expenses for all work done through January 11, 1993, at both the district director and administrative law judge levels.

The parties further agreed that employer would not review claimant's earnings until January 1994, and at that time, depending upon whether his previous year's earnings demonstrated a loss of wage-earning capacity, claimant's compensation benefits would be terminated, or resumed with appropriate adjustment. Employer subsequently determined that claimant's average weekly wage in 1993 was significantly higher than it was pre-injury, and thus notified claimant of its intent to end payment of benefits after the year's advance.[2]

Claimant disputed the termination of employer's payment of compensation, asserting that he is entitled to continuing permanent partial disability benefits despite the fact that his post-injury earnings are higher than his pre-injury average weekly wage. Claimant specifically argued that his actual wages are not a true indication of his post-injury wage-earning capacity because he is only working due to extraordinary effort with considerable pain and suffering in order to meet a financial hardship which occurred largely as a result of his injury. In his Decision and Order, the administrative law judge determined that claimant's current actual earnings, which exceed his pre-injury earnings, fairly and reasonably represent his wage-earning capacity and, thus, concluded that claimant has no loss of wage-earning capacity as a result of his work-related injury. Accordingly,

---

[1]The parties stipulated that claimant received temporary total disability benefits from November 1, 1987 to November 2, 1988, and September 3, 1990 to January 19, 1992, and temporary partial disability benefits from November 3, 1988 to September 2, 1990.

[2]Employer paid an additional sum of $2,677.87 in compensation benefits through April 14, 1994, in compliance with a provision of the 1993 agreement, whereby claimant was to be given three months' notice of employer's decision to terminate or resume payments of compensation benefits.

continuing benefits were denied. The administrative law judge further found that employer was not entitled to any reimbursement of the $13,389.35 paid to claimant as advanced compensation. Lastly, the administrative law judge found that inasmuch as claimant achieved partial success in the pursuit of his claim, in that he is not required to repay employer for its advance of compensation, his attorney is entitled to an attorney's fee payable by employer. Both parties subsequently filed motions for reconsideration, which were denied.

Claimant's counsel next submitted a petition for an attorney's fee for work performed before the administrative law judge, requesting a fee of $11,243.75, representing 64.25 hours at $175 per hour. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, after consideration of employer's objections, awarded a fee of $6,425 for 64.25 hours at $100 per hour.

Claimant appeals and employer cross-appeals the administrative law judge's Decision and Order. Additionally, in its cross-appeal, employer alleged errors in the administrative law judge's Order denying reconsideration dated April 26, 1992. Employer also appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, which the Board, by Order dated November 6, 1995, consolidated with the previously pending appeals in this case.[3] On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. In its appeals, employer challenges the administrative law judge's award of attorney's fees.

Claimant initially avers that the administrative law judge erred in finding he does not have a loss in wage-earning capacity under Section 8(h). Claimant also contends that the administrative law judge applied an improper standard by relying on *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), to deny claimant's claim for loss of wage-earning capacity after January 12, 1993.

Section 8(h) of the Act mandates a two-part analysis: First, if the employee is working post-injury, do his actual wages fairly and reasonably represent his wage-earning capacity? Second, if his actual wages are determined not to be representative, a wage-earning capacity must be established. A claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically capable of it, and whether the claimant has the seniority to stay on the job. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). If it is found that the claimant's current employment meets the aforementioned standards, the claimant may not be

[3]Inasmuch as employer's appeal of the administrative law judge's fee award, BRB No. 95-1593S, was received by the Board on October 2, 1995, and is consolidated with BRB Nos. 95-1593 and 95-1593A, the Board has determined that the one year period of review provided by Public Law No. 104-134 commenced on that date.

economically disabled even though he may continue to suffer some physical impairment as a result of his injury. *Penrod Drilling*, 905 F.2d at 84, 23 BRBS at 108 (CRT).

In examining claimant's post-injury employment to discern whether his actual wages fairly and reasonably represent his post-injury wage-earning capacity, the administrative law judge properly considered claimant's work duties, the number of hours he worked pre- and post-injury, his seniority status, and the effects of inflation on his post-injury wages. *See* Decision and Order at 7-8. Based on these factors, the administrative law judge rationally concluded that since claimant is working more hours and making more money than he did prior to his accident, even after accounting for the increase in wages due to inflation, he has not suffered any loss from an economic standpoint as a result of his injury. *Burkhardt*, 23 BRBS at 273.

The administrative law judge next considered whether claimant's situation falls within the parameters of the *Lewis* case, under which claimant may be found totally disabled despite his post-injury employment, where it can be shown that he continued his employment in spite of excruciating pain and through extraordinary effort.[4] *Lewis*, 572 F.2d 447, 7 BRBS 838 (CRT). Relying on the facts that claimant's treating physician, Dr. Kozak, returned claimant to work with some restrictions and that even with those restrictions claimant managed to work more hours upon his return to work than he had prior to his injury, the administrative law judge rationally determined that claimant is not working despite excruciating pain. *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, inasmuch as the administrative law judge's findings are supported by the medical reports of Dr. Kozak and claimant's employment records, we reject claimant's alternative assertion that the record establishes claimant has met his burden under *Lewis*. Therefore, as the administrative law judge's analysis regarding claimant's post-injury wage-earning capacity comports with Section 8(h) of the Act and relevant case law, *Burkhardt*, 23 BRBS at 273, and the administrative law judge has provided a factual basis which is supported by the record, his determinations that claimant's actual wages fairly and reasonably represent his post-injury wage-earning capacity and, thus, that claimant has not proven a decreased wage-earning capacity as a result of his accident, are affirmed. Additionally, since the administrative law judge found that claimant's actual wages fairly and reasonably represent his wage-earning capacity, he was not required to consider the second-part of the Section 8(h) analysis.

Claimant lastly avers that the administrative law judge erred by failing to take into consideration "the effect of disability as it may naturally extend into the future." 33 U.S.C. §908(h).

[4]Claimant argues that the standard set out in *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), is applicable only in cases where claimants seek permanent total disability benefits. Claimant, therefore, maintains that the *Lewis* standard is too stringent to be applied by the administrative law judge in the instant case since claimant seeks benefits for a permanent partial rather than permanent total disability. Inasmuch as claimant's physical condition is taken into account in determining whether his actual wages fairly and reasonably represent his post-injury wage-earning capacity, claimant's contentions regarding the applicability of *Lewis* are rejected.

In particular, claimant asserts that the administrative law judge should have issued a *de minimis* award to claimant in order to preserve his right to compensation in light of any uncertainty as to the amount of future economic harm.

All of the United States Courts of Appeals which have addressed this issue, including the Fifth Circuit which has appellate jurisdiction in this case, have upheld the validity of such awards where claimant has a permanent physical impairment without a present loss of earning capacity, but has established a significant possibility of future economic harm due to the injury. *See Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT)(9th Cir. 1996); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyards Corp*, 640 F.2d 760, 13 BRBS 237 (5th Cir. 1981). In the instant case, the administrative law judge found that claimant has significantly increased the amount of work he has performed in each year following his return to work, that claimant is successfully performing his pre-injury job as a truck driver, and that said employment is regular and continuous. Additionally, the administrative law judge determined that there is nothing in the medical evidence that suggests that claimant is suffering from unbearable pain either at home or at work, or that claimant's work activities cause considerably more pain than his non-work routine. We therefore hold as a matter of law that claimant has not established a "significant" possibility of future economic harm, and thus is not entitled to a *de minimis* award of benefits in the instant case. *See Burkhardt*, 23 BRBS at 273; *Adams v. Washington Metropolitan Area Transit Authority*, 21 BRBS 226 (1988).

In its cross-appeal, employer asserts that the administrative law judge erroneously awarded claimant's counsel an attorney's fee payable by employer. Employer maintains that its request for a credit against any future compensation under Section 14(j), 33 U.S.C. §914(j), was automatically rendered moot by the administrative law judge's denial of compensation benefits. Employer therefore argues that since there was no successful prosecution of the claim, no attorney's fee can be awarded pursuant to Section 28.

Employer's contention has merit. In the instant case, employer repeatedly sought a credit for the portion of compensation it overpaid claimant as an advance on future compensation. Contrary to the administrative law judge's finding that employer sought repayment, the record establishes that employer specifically argued that if claimant was found by the administrative law judge to be entitled to compensation benefits in the future, employer would be entitled to *a credit against such future compensation benefits* up to the total amount of the overpayment pursuant to Section 14(j). Consequently, employer sought no more than it was entitled to obtain under the Act, notably an offset for its prior overpayment of compensation against future compensation. *See* 33 U.S.C. §914(j); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992). Inasmuch as claimant's attorney was not successful in obtaining any additional compensation for claimant and employer never sought a direct reimbursement of its overpayment from claimant, there has been no successful prosecution in this case as claimant gained no additional benefits. *See* 33 U.S.C. §928; *West v. Port of Portland*, 20 BRBS 162, *aff'd on recon.*, 21 BRBS 87 (1988). Consequently, we

reverse the administrative law judge's award of an attorney's fee payable by employer in this case.

Accordingly, the administrative law judge's award of attorney fees is reversed, and his Order dated April 26, 1995, denying employer's motion for reconsideration and his Supplemental Decision and Order Awarding Attorney Fees are vacated. In all other regards, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge