BRB Nos. 95-2244
and 95-2244A

GEORGE L. CLEMENES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICES	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits (94-LHC-2785) of Administrative Law Judge Samuel J. Smith 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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, a warehouse foreman, was injured at Lackenheath Royal Air Force Base in England on January 5, 1990, when a truck pinned him against a loading dock. Claimant had accompanied his wife, a civilian employee of the United States Air Force, on a three-year tour of duty, obtaining employment with the Army and Air Force Exchange Services (employer), for whom he had worked at Kessler Air Force Base in Mississippi. He returned to work on March 26, 1990, and was given modified duties, performing this work except for extended absences when he underwent treatment.[1] He returned to Biloxi, Mississippi on September 1, 1992, when his wife's tour ended, and, thereafter, worked as a cashier/checker at Kessler Air Force Base. Claimant filed a claim for benefits under the Act. At the time of the hearing, claimant was on leave without pay, having accompanied his wife to her latest duty station in the Azores, Portugal.

In his Decision and Order, the administrative law judge rejected employer's position that as it provided claimant with suitable employment in England, claimant was not entitled to disability benefits after his return to the United States. He found that Biloxi, Mississippi was the relevant job market under *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994), and that employer met its burden of establishing the availability of suitable alternate employment in Biloxi as of April 20, 1993. The administrative law judge also found that claimant's pre-injury average weekly wage was $265.49. The administrative law judge thus awarded claimant temporary total disability benefits for time missed from work in England; permanent total disability benefits from September 1, 1992 to April 20, 1993; and permanent partial disability benefits based on claimant's earnings as a cashier/checker from April 21, 1993, to December 20, 1994. The administrative law judge terminated benefits as of this date, finding that employer established suitable alternate employment at a higher wage. The administrative law judge also awarded an attorney's fee in the amount of $4,462.50, and $475.23 in costs.

On appeal, claimant challenges the administrative law judge's findings with regard to the availability of suitable alternate employment after December 20, 1994, average weekly wage, and the attorney's fee. Employer cross-appeals the administrative law judge's finding that Biloxi,

[1]Employer voluntarily paid claimant temporary total disability compensation for three periods of missed work in England.

Mississippi is the relevant job market, and asserts that it established the availability of suitable alternate employment in England when it offered claimant a modified job, which claimant accepted. Employer thus contends that it is not liable for any benefits after September 1, 1992, when claimant voluntarily left this modified job. The Director, Office of Workers' Compensation Programs (the Director) responds, contending that the administrative law judge correctly determined that the relevant labor market changed with claimant's relocation to the United States. The Director asserts, however, that the administrative law judge erred by failing to determine the legitimacy of claimant's 1994 relocation to the Azores.[2]

We first address employer's argument in its cross-appeal, BRB No. 95-2244A, that it established suitable alternate employment in England, which claimant left for personal reasons, and that claimant is therefore not entitled to benefits for a subsequent loss of wage-earning capacity. The administrative law judge thoroughly addressed this argument, initially finding that while claimant met his burden of proving that he was unable to return to his former job as a warehouse foreman, the job in England was suitable alternate employment. *See, e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge noted that the standard for establishing suitable alternate employment specifies that jobs be available in claimant's "local community," and he relied upon the decision of the United States Court of Appeals for the Fourth Circuit in *See*, 36 F.3d at 375, 28 BRBS at 96 (CRT), in determining that Biloxi, Mississippi was the relevant labor market for claimant. In *See*, the court held that where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his reasons for relocating, whether those reasons are legitimate, the length of time he has resided in a new community, his ties to the community, the availability of suitable jobs in the new community and the degree of undue prejudice to employer in proving suitable alternate employment in a new location.

In the instant case, the administrative law judge considered the economic necessity of claimant's relocation to Biloxi, Mississippi, the fact that employer anticipated this relocation, and the fact that claimant and his wife intended to relocate to Biloxi at the end of her tour of duty with the United States Air Force, as well as other factors set forth in *See*. Employer contends that *See* is distinguishable inasmuch as claimant herein was actually offered and performed a modified job with employer in England. Employer asserts that unlike *See*, where employer was seeking to prove suitable alternate employment in the open market, in this case the open market is irrelevant in view of the job offered by employer. We reject this argument. Initially, an administrative law judge may rely on the open market in analyzing wage-earning capacity if he finds it relevant, despite the fact that claimant is working in an alternate job. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). More importantly, while the fact that employer offered claimant a job is a relevant factor, as the administrative law judge properly recognized, it is not controlling but should be weighed with other relevant factors in evaluating the relevant labor market. On the facts of this case, the administrative

[2]We deny employer's Motion to Strike the Director's brief as it was timely mailed on April 22, 1996. We accept the motion as employer's reply to the Director's brief.

law judge's evaluation of the factors and his determination that the relevant job market is Biloxi, Mississippi, are rational and supported by substantial evidence. Accordingly, we affirm the administrative law judge's finding in this regard.[3]

We will now address the contentions raised by claimant in his appeal of the administrative law judge's decision. BRB No. 95-2244. Claimant initially challenges the administrative law judge's calculation of his average weekly wage at the time of his injury, contending that the administrative law judge should have calculated his average weekly wage under Section 10(a) of the Act rather than Section 10(c) of the Act. 33 U.S.C. §910(a), (c). We disagree. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[4] *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

In the instant case, the administrative law judge determined that Section 10(a) was inapplicable since claimant's payroll records indicate only the number of hours worked and the wages paid during two-week pay periods; thus, the administrative law judge found that he would have to speculate as to what claimant's average daily wage was if Section 10(a) was to be utilized in calculating claimant's average weekly wage. The administrative law judge thus declined to use Section 10(a) and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). Our

[3]The Director, in his response brief, asserts that the administrative law judge erred in failing to apply the criteria of *See* to claimant's subsequent relocation to the Azores, Portugal. Initially, we note that claimant did not raise this issue either below or in his appeal of this case. Moreover, the administrative law judge specifically stated that the rationale of *See* would not apply to claimant's move to the Azores. We affirm the administrative law judge's determination in this regard, as the court in *See* specifically stated that one of the factors to be considered in determining the relevant labor market is the evidentiary hardship which would be visited upon an employer by an excessively transient claimant. *See See*, 36 F.3d at 383, 28 BRBS at 104 (CRT).

[4]In the instant case, no party contends that Section 10(b) is applicable.

review of the record reveals that claimant's payroll records fail to apportion the number of hours worked by claimant during a pay period to specific days. *See* Employer's Exhibit 6. We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that claimant's average weekly wage should be calculated pursuant to Section 10(c). Accordingly, as the administrative law judge's calculation under Section 10(c) is unchallenged, it is affirmed.

Claimant next contends that the administrative law judge erred in finding that, subsequent to December 20, 1994, claimant's loss in wage-earning capacity should be based on the labor market survey submitted into evidence by employer. Specifically, claimant asserts that, since he was employed as a cashier/checker at Kessler Air Force Base, the administrative law judge erred in considering his wage-earning capacity in the open market. Alternatively, claimant challenges the administrative law judge's decision to rely upon employer's labor market survey in determining his post-injury wage-earning capacity.

Where, as in the instant case, it is uncontested that claimant is unable to perform his usual employment duties, the burden shifts to employer to demonstrate the availability of specific jobs within the specific geographic area where claimant resides, in this case, Biloxi, Mississippi, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores*, 661 F.2d at 1031, 14 BRBS at 156; *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). In order for employment opportunities to be considered realistic, employer must establish their precise nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). The post-injury wage-earning capacity of a partially disabled claimant shall be determined to be his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. *See* 33 U.S.C. §908(h). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983).

We initially reject claimant's contention that the administrative law judge erred in looking to the open market subsequent to December 20, 1994, in determining claimant's post-injury wage-earning capacity. In the instant case, the administrative law judge specifically noted that while claimant worked approximately 30 hours per week post-injury as a cashier/checker, no physician or physical therapist limited the number of hours claimant could work and claimant himself testified that he was capable of performing his prior, 40 hour per week position with employer but for that position's lifting requirement. *See* Decision and Order at 11. We therefore affirm the administrative law judge's decision to look at the open labor market in calculating claimant's post-injury wage-earning capacity subsequent to December 20, 1994, as that decision is rational and supported by substantial evidence. *See Penrod Drilling*, 905 F.2d at 84, 23 BRBS at 108 (CRT).

Alternatively, claimant challenges the administrative law judge's reliance on employer's labor market survey in determining his post-injury wage-earning capacity. In the instant case, the

administrative law judge found that employer established the availability of suitable alternate employment based on the manager trainee position listed, among other positions, in employer's labor market survey. *See* Employer's Exhibit 27. Specifically, the administrative law judge found that claimant was capable of performing the identified manager trainee position given his experience, background, and physical restrictions, and that this identified employer was impressed with claimant's skills, knowledge and abilities. *See* Decision and Order at 11. As the administrative law judge's finding that employer established the availability of suitable alternate employment as of December 20, 1994, based on employer's labor market survey, is rational, supported by substantial evidence and in accordance with applicable law, we affirm his determination that claimant is not entitled to further permanent partial disability compensation under the Act subsequent to December 20, 1994. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Lastly, claimant challenges the attorney's fee awarded by the administrative law judge, contending that the administrative law judge's reduction of the requested hourly rate was arbitrary in light of the administrative law judge's finding that the requested hourly rate of $100 was reasonable, and the fact that counsel gained additional benefits for claimant. Claimant's counsel requested a fee of $8,925, representing 89.25 hours of work at $100 per hour, plus $568.44 in costs. After initially stating that the hourly rate sought by counsel was reasonable and justified by the excellent quality of counsel's representation, the administrative law judge considered counsel's fee request in light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The administrative law judge thereafter found that the relief obtained by counsel was limited in comparison to the scope of the litigation and that to pay counsel the fee requested would result in an excessive fee. Based upon these findings, the administrative law judge determined that fifty percent of counsel's hourly fees should be disallowed and he reduced counsel's requested hourly rate to $50. The administrative law judge thus found that a fee of $4,462.50, representing 89.25 hours of services rendered at $50 per hour, was appropriate and awarded that fee.

We affirm the $4,462.50 attorney's fee awarded by the administrative law judge in view of the decision of the Supreme Court in *Hensley*. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be

reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In the present case, the administrative law judge specifically noted, in reducing the fee pursuant to *Hensley*, that claimant was not successful in all of his claims; specifically, claimant, although successful in obtaining limited periods of compensation benefits, was unsuccessful in obtaining either a higher average weekly wage or compensation benefits subsequent to December 20, 1994. Accordingly, as claimant was only partially successful in the prosecution of his claim, and the administrative law judge applied the *Hensley* test when considering counsel's fee request and awarding counsel's fee, we affirm the administrative law judge's consequent award of an attorney's fee totalling $4,462.50, in this case.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY J. HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge