JOHN E. EICHOLTZ	)	BRB No. 93-1233A
	)	
Claimant Cross-Petitioner	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
Employer Cross-Respondent	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Servicing Agent	)	
	)	
JOHN E. EICHOLTZ	)	BRB Nos. 96-139
	)	and 96-139A
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Servicing Agent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Permanent Partial Disability Benefits, the Decision and Order-Granting Employer Modification and Affirming Claimant Medical Benefits Entitlement, and Supplemental Decision and Order Awarding an Attorney's Fee of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Mary Nelson Morgan (Cole, Stone & Stoudemire, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Permanent Partial Disability Benefits and the Decision and Order-Granting Employer Modification and Affirming Claimant Medical Benefits Entitlement, and employer appeals the Supplemental Decision and Order Awarding an Attorney's Fee (92-LHC-1088)[1] of Administrative Law Judge Julius A. Johnson 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 contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his lower back on June 12, 1989, while working as an outside machinist when he was removing a pump valve from a Navy survey ship. As a result of this injury, claimant underwent a left L4-5 hemilaminotomy on August 1, 1989. Claimant thereafter held various jobs. In May 1992, claimant began working as a commercial painter for Lincoln Properties, a property management firm, where he remained employed as of the time of the initial hearing. Claimant sought permanent partial disability compensation under the Act and medical benefits for treatment of an umbilical hernia, which he claimed resulted from his work-related injury. In his original Decision and Order, the administrative law judge awarded claimant permanent partial disability benefits under 33 U.S.C. §908(c)(21),(h), of $145.84 per week commencing as of May 9, 1990, the date of

[1]Employer initially appealed the administrative law judge's Decision and Order Granting Permanent Partial Disability Benefits, and this appeal was assigned Board docket number BRB No. 93-1233. On January 9, 1995, however, the Board granted employer's request that the case be remanded to the Office of Administrative Law Judges for modification proceedings and dismissed employer's appeal, instructing employer that if it wished the Board to consider the issues in its appeal, it must request reinstatement of its appeal following modification. Claimant's appeal, BRB No. 93-1233A, was held in abeyance pending the administrative law judge's decision on modification. By Order dated July 9, 1996, the Board lifted from abeyance claimant's appeal, BRB No. 93-1233A, and consolidated it with the appeals following modification in BRB Nos. 96-139/A. As employer did not request that its appeal in BRB No. 93-1233, be reinstated, this case is not currently before the Board. In an Order issued September 9, 1996, the Board indicated that claimant's appeal, BRB No. 93-1233A, would not be considered administratively affirmed on September 12, 1996, pursuant to Public Law 104-134 because it was consolidated with BRB Nos. 96-139/A.

maximum medical improvement. This figure was based on the difference between claimant's average weekly wage of $440.50 and his actual post-injury earnings adjusted for inflation of $221.74 per week working as a painter for Lincoln Properties. Both parties appealed this decision. BRB Nos. 93-1233/A.

Subsequently, employer sought modification of the administrative law judges's award of permanent partial disability compensation pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that there had been a change in claimant's economic condition and that claimant was no longer disabled. In a Decision and Order- Granting Employer Modification and Affirming Claimant Medical Benefits Entitlement, the administrative law judge found that while employer had established a change in claimant's wage-earning capacity sufficient to reduce the award of permanent partial disability benefits as of the date of his decision, claimant remained entitled to reduced permanent partial disability benefits of $70.67 per week based on the difference between claimant's average weekly wage of $440.50 and his residual post-injury wage-earning capacity as a commercial painter adjusted for inflation of $334.47 per week. In addition, the administrative law judge, noting that employer, in anticipation of the modification proceedings, had improperly terminated its payment of compensation, awarded claimant permanent partial disability compensation based on the initial award from April 12, 1994, to July 28, 1995. In addition, he awarded claimant interest and clarified that employer was liable for reasonable and necessary medical expenses related to the subject work injury.

On appeal, claimant argues that based on *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), the administrative law judge erred in his initial Decision and Order by failing to award him permanent total disability payments until suitable alternate employment was established in May 1992. BRB No. 93-1233A. Employer responds that while it does not dispute the legal premise of claimant's appeal, suitable alternate employment was available with employer after October 1990 and identified by its vocational rehabilitation counselor as of May 1991. Claimant replies, reiterating the arguments made in his Petition for Review. Additionally, claimant appeals the administrative law judge's reduction of his compensation benefits based on a change in his economic condition in his Decision and Order on Modification. BRB No. 96-139. Employer responds, urging affirmance. In addition, employer appeals the administrative law judge's Supplemental Decision and Order awarding claimant's counsel a fee for work performed while the case was before the administrative law judge pursuant to its motion for modification. BRB No. 96-139A.

DATE OF ONSET OF PERMANENT PARTIAL DISABILITY

Initially, we agree with claimant that because the administrative law judge in his initial Decision and Order applied his finding of suitable alternate employment retroactively to May 9, 1990, the date he found maximum medical improvement was achieved, his determination of the commencement date for claimant's award of permanent partial disability compensation does not comport with *Rinaldi*. Pursuant to *Rinaldi*, an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *See also Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991). Although employer argues in its response brief that suitable alternate employment was available at its facility after October 1990 and was identified by its vocational rehabilitation counselor as of May 1991, the administrative law judge, acting within his discretion, considered employer's evidence in this regard but rejected it, finding that employer failed to establish that work was available within claimant's restrictions at its facility or in the positions identified in its labor market survey. Thus, the administrative law judge concluded that only claimant's post-injury work as an interior painter for Lincoln Properties constituted suitable alternate employment which reasonably represented claimant's post-injury wage-earning capacity. Decision and Order at 8-10. The record reflects that claimant's employment with Lincoln Properties commenced on May 29, 1992. Accordingly, consistent with our decision in *Rinaldi*, we vacate the administrative law judge's finding that claimant's permanent partial disability award commenced as of May 9, 1990, and modify his initial Decision and Order to reflect that claimant is entitled to permanent total disability from May 9, 1990, the date of maximum medical improvement until May 29, 1992, when claimant obtained the job with Lincoln Properties which the administrative law judge found to constitute suitable alternate employment.

MODIFICATION

In his Decision and Order Granting Employer Modification, the administrative law judge rejected employer's argument that claimant was no longer disabled but found that employer had introduced evidence sufficient to establish a change in claimant's wage-earning capacity. In so concluding, the administrative law judge noted that although the initial award of benefits was based on a post-injury wage-earning capacity of $221.74, entitling claimant to permanent partial disability compensation of $145.84 per week, employer had demonstrated that subsequent to the initial proceedings claimant had higher post-injury earnings of $400 per week working 40 hours as a commercial painter. The administrative law judge further determined that as claimant's actual earnings reasonably represented his wage-earning capacity and his actual post-injury earnings adjusted for inflation equaled $334.47 per week, as of the date of his decision on modification claimant's permanent partial disability award was reduced to $70.60 per week.

In his appeal of the administrative law judge's Decision and Order on modification, claimant

concedes that his actual post-injury earnings of $10 per hour in his job with S. David & Company, a commercial painting company, reasonably represent his post-injury wage-earning capacity. Claimant asserts, however, that as he was only able to work there an average of 36 hours per week,[2] rather than 40 hours as the administrative law judge assumed in determining his post-injury wage-earning capacity, his actual post-injury wage-earning is $360 per week. Claimant maintains that when this figure is adjusted for inflation, employer has failed to establish a change in claimant's wage-earning capacity sufficient to justify granting modification.

After review of the Decision and Order-Granting Employer Modification and Affirming Claimant Medical Benefit Entitlement, we affirm the administrative law judge's determination that employer established that claimant has a post-injury wage-earning capacity based on his actual earnings as a commercial painter of $400 per week prior to accounting for inflation. Initially, we note that although the administrative law judge stated in his Decision and Order at 7 that as claimant last earned $10 per hour working at S. David & Company working 40 hours per weeks, his wage-earning capacity was $400 per week, it is evident that this job was not the sole basis for the administrative law judge's determination. Rather, the administrative law judge explained that he was accepting this figure as claimant's wage-earning capacity because his earnings were reasonably similar to other jobs in commercial painting that claimant had held. *See* Decision and Order Granting Employer Modification at 7, n. 5. In addition, the administrative law judge considered the continuity and stability of claimant's post-injury work, the consistency of his wages, and the fact that no evidence had been introduced which demonstrated that claimant's physical condition renders him less than fully able to perform his painting work. Moreover, prior to attempting to place a dollar figure on claimant's post-injury wage-earning capacity, the administrative law judge stated that he considered an earning capacity based on claimant's past two years of wages a more realistic value than the testimony of Mr. Foppiano, employer's vocational expert. Decision and Order at 7. Inasmuch as the administrative law judge did not base his post-injury wage-earning capacity determination solely on claimant's earnings at S. David & Company, but rather on the overall record before him, we reject claimant's argument regarding the administrative law judge determination of his post-injury wage-earning capacity and affirm the administrative law judge's finding on modification that claimant has a post-injury wage-earning capacity of $400 per week as a commercial painter.[3]

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[2]Claimant worked for S. David & Company a total of 4 weeks, working 40 hours the first three weeks, and 24 hours during the last week.

[3]To the extent that claimant appears to argue that modification in this case violates *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995), we disagree. The United States Supreme Court specifically recognized in *Rambo* that while modification was not warranted with every variation in actual wages or transient change in the economy, modification is appropriate where there has been a change in claimant's actual earnings and claimant's actual earnings are found to fairly and reasonably represent wage-earning capacity under the circumspect approach required under Section 8(h) of the Act, 33 U.S.C. §908(h). *Id.*, 115 S.Ct. at 2150, 30 BRBS at 5 (CRT).

ATTORNEY'S FEE

Finally, we direct our attention to employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding An Attorney's Fee, BRB No. 96-139A. Claimant's counsel submitted a fee petition for work performed before the administrative law judge relating to the modification proceeding in which he requested $5,985, representing 34.2 hours of services at $175 per hour. Employer filed objections. In a Supplemental Decision issued on February 2, 1996, the administrative law judge awarded the entire requested fee. On appeal, employer challenges the administrative law judge's determination that it is liable for claimant's attorney's fee.

We affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee in connection with the modification proceeding. Employer argues that it is not liable because there was no successful prosecution of the claim on modification and that the administrative law judge erred in basing the fee award on the affirmation of claimant's entitlement to medical benefits as no claim for medical benefits had been made for it to refuse to pay. In his Decision and Order on modification, however, the administrative law judge held that claimant's counsel was entitled to an attorney's fee because employer had improperly terminated compensation payments and the "efforts of Claimant's counsel have been successful in the restoration of...payments and in the clarification of entitlement to continuing medical benefits." Decision and Order at 9. In his Supplemental Decision and Order Awarding an Attorney's Fee, the administrative law judge stated that he based the fee award on claimant's successful defense in the modification proceeding.

The record reflects that pursuant to its motion for modification, employer, after having unilaterally stopped payment of permanent partial disability benefits to claimant on April 12, 1994,[4] sought to terminate claimant's entitlement to all disability compensation. In addition, employer sought a credit for what it allegedly overpaid claimant from November 11, 1993 through April 12, 1994. In his Decision and Order-Granting Employer Modification, the administrative law judge found that although employer established that claimant had a higher post-injury wage-earning capacity than had been determined initially, he remained entitled to continuing permanent partial disability benefits at a reduced rate. In addition, claimant was awarded permanent partial disability benefits based on the initial award totalling approximately $9,800 for the period between April 12, 1994, when employer unilaterally ceased paying claimant compensation, until July 28, 1995, the date of the administrative law judge's Decision and Order on modification. The administrative law judge also awarded interest on the amounts due and advised claimant that he could apply to the district director for a penalty under Section 14(f), 33 U.S.C. §914(f), on the amount employer owes.

[4]In April 1994 employer gave claimant an LS-200 form to determine his current wages. Claimant apparently called carrier's representative and informed her that he was earning more money and that employer could stop making payments. Tr. at 21, 64, 69. The administrative law judge found that employer's cessation of payments was unjustified, that Section 15(b), 33 U.S.C. §915(b), provides that claimant cannot waive his right to compensation under the Act, and that there was no Section 8(i), 33 U.S.C. §908(i), settlement agreement which would allow claimant to waive his right to future benefits. Decision and Order at 8.

As claimant's counsel was ultimately successful in establishing claimant's entitlement to disability compensation contested by employer, irrespective of whether a claim for medical benefits was ever actually made,[5] employer is liable for claimant's attorney's fee. *See Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

Accordingly, the administrative law judge's Decision and Order Granting Permanent Partial Disability Benefits is modified to reflect that the commencement date for the award of permanent partial disability compensation is May 29, 1992, the date on which claimant began his job with Lincoln Properties. BRB No. 93-1233A. The administrative law judge's Decision and Order-Granting Employer Modification and Affirming Claimant Medical Benefits Entitlement, BRB No. 96-139, and Supplemental Decision and Order Awarding an Attorney's Fee, BRB No. 96-139A, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5]In his Decision and Order on Modification, although the administrative law judge found that employer was liable for claimant's medical expenses if such were claimed, he did not resolve the issue of whether a prior request for medical benefits had been made.