BRB Nos. 09-0198
and 09-0291

B.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 09/16/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Evergreen, Louisiana, for claimant.

Paul B. Howell (Franke & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (2007-LHC-01999) of Administrative Law Judge C. Richard Avery and the Compensation Order Award of Attorney's Fees (Case No. 07-166513) of District Director David A. Duhon 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is

discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, while working as a chipper/grinder for employer on March 25, 2003, sustained an injury to her lower back. Dr. Black diagnosed a low back contusion and strain, prescribed physical therapy, and removed claimant from work as of March 28, 2003. Dr. Black released claimant to return to work on April 14, 2003, with restrictions of limited crouching and bending, and she thereafter returned to light-duty work with employer. Claimant continued to experience low back pain while working which led Dr. Black to remove claimant from all work on June 17, 2003, and refer her to a neurosurgeon, Dr. Graham. Dr. Graham treated claimant conservatively, sending her to Dr. Aldridge for pain management, and returning her to work with restrictions in August 2003. Claimant worked for employer within these restrictions until May 10, 2005, when Dr. Graham prescribed additional restrictions, which employer was unable to accommodate.

Upon leaving employer in May 2005, claimant began working with a vocational rehabilitation counselor, Ms. Kreuter, who subsequently identified jobs for claimant in November 2005.[1] Mr. Sanders, a vocational rehabilitation counselor hired by employer, also identified jobs within claimant's restrictions on December 12, 2005. Claimant, however, stated that she did not seek these jobs until January 2006, because she had no transportation. Claimant subsequently found work painting and cleaning, first with Gulf Coast Drywall and Paint Services, LLC (Gulf Coast), from April 10, 2006, until the end of August 2006, and then with American Labor Force, Incorporated (ALF), where she worked in September 2006. At that point, claimant stated she left ALF to pursue a job offer from employer which never materialized. Claimant stated that she did not look for work between October 2006 and January 2007 in the hopes of returning to work for employer, and she afterward obtained a position as a firewatcher with employer. Claimant held that position from January 10, 2007, until February 27, 2007. Claimant stated that she eventually resumed working for employer in its cable shop on June 25, 2007, and that in the interim she applied for several jobs without any success. Claimant continued to work in the cable shop position as of the date of the hearing.

[1] Claimant's work with Ms. Kreuter was interrupted by Hurricane Katrina, which destroyed claimant's house and car on August 29, 2005.

Employer voluntarily paid periods of temporary total and temporary partial disability benefits and all of claimant's medical expenses arising from her work-related back injury.[2] Additionally, employer made a settlement offer on May 8, 2006, of $36,000 plus open medicals which claimant rejected. Claimant subsequently filed a claim seeking additional benefits under the Act. Employer controverted it, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

In his decision, the administrative law judge found that claimant established a *prima facie* case of total disability as she is incapable of returning to her usual employment as a chipper/grinder. He then found that employer established suitable alternate employment from November 10, 2005, based initially on jobs identified in Ms. Kreuter's labor market survey, then on claimant's work for Gulf Coast and ALF between April 10 and September 23, 2006, and thereafter based on claimant's subsequent stints of work with, and eventual permanent return to, employer. The administrative law judge awarded claimant additional temporary total disability benefits for the period between March 28, 2003, through April 13, 2003, permanent total disability benefits from May 10, 2005, through November 9, 2005,[3] and additional permanent partial disability benefits for the period from November 10, 2005, through January 9, 2007.

Claimant's counsel thereafter sought attorney's fees for work performed before the administrative law judge and the district director.[4] After addressing employer's objections to the fee petitions, the administrative law judge and district director each made reductions to reflect claimant's degree of success and counsel's excessive travel time. Accordingly, the administrative law judge awarded claimant's counsel an attorney's fee totaling $2,500, plus expenses of $722.99, and the district director awarded an attorney's fee totaling $3,528.74, plus $448.74 in costs.

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[2] Specifically, employer paid temporary total disability benefits, at a weekly rate of $338.14, for the periods from March 28, 2003, through April 13, 2003, from June 17, 2003, through August 4, 2003, and from May 10, 2005, through February 27, 2006, and temporary partial disability benefits, at a weekly rate of $135.92, from February 28, 2006, through January 15, 2007, and from February 13, 2007, through June 24, 2007.

[3] The administrative law judge found that claimant reached maximum medical improvement for her work-related injury on November 11, 2003.

[4] Claimant's counsel sought an attorney's fee from the administrative law judge totaling $12,985, plus expenses of $813.39, and an attorney's fee from the district director totaling $10,627.82, plus expenses of $607.82.

On appeal, claimant challenges the administrative law judge's findings with regard to five distinct periods of alleged disability. With regard to the attorney's fee awards, claimant challenges both the administrative law judge's and district director's reductions for "limited success" and "excessive" travel expenses. Employer responds, urging affirmance of the administrative law judge's decisions and the district director's compensation order.

Claimant first argues that for the period from November 10, 2005, through April 9, 2006, the administrative law judge erred in finding that employer established suitable alternate employment, because claimant was incapable of traveling to any jobs as her sole means of transportation had been destroyed by Hurricane Katrina. Claimant alternatively argues, with regard to this time period, that the administrative law judge erroneously found that the job with Aerotek, which was located more than an hour's drive from claimant's residence, constituted suitable alternate employment. Claimant further contends that this particular job, which paid nearly twice as much as any of the other positions identified as suitable, should not have been used to calculate her post-injury wage-earning capacity.

A claimant's inability to drive as a result of a work-related injury is a factor which the administrative law judge should take into consideration in determining the extent of her disability. *See Sampson v. F.M.C. Corp.*, 10 BRBS 929 (1979); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1033, 8 BRBS 658 (5th Cir. 1978). In the present case, the administrative law judge found that claimant is physically able to drive, but her car was destroyed as a result of Hurricane Katrina. The administrative law judge relied on claimant's testimony that, despite not having access to her own vehicle, she was nonetheless able to obtain rides for her work with Gulf Coast and ALF, which commenced on April 10, 2006, and continued through most of September 2006, HT at 43-44, and moreover, that it was "nothing to catch a ride to Northrop Grumman." HT at 45. Claimant also testified that she made no effort to try to arrange transportation for other jobs identified by Ms. Kreuter. HT at 106. Additionally, the administrative law judge relied on Mr. Sanders's statement, in his vocational rehabilitation report dated December 13, 2005, that claimant "has a valid driver's license but does not have a vehicle as it was lost during Katrina, however, [she] advised she did have access to transportation." EX 16. Based on this evidence, the administrative law judge rationally found that claimant's lack of a car did not preclude employer from establishing suitable alternate employment in this case. *See generally Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998).

We agree, however, with claimant's contention that the administrative law judge did not adequately consider whether the Aerotek position constituted suitable alternate employment. The proper community or geographic area in which an employer must

identify suitable jobs is based on the facts of each case. *See Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001); *Kilsby*, 6 BRBS 114. Typically, the relevant community is where the claimant resides or where she resided at the time of injury. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). In the present case, the administrative law judge did not explicitly consider whether the extended commuting distance to the Aerotek position, which was approximately 58 miles, one way, from claimant's residence, rendered that job unavailable to claimant, particularly in view of claimant's lack of an automobile.[5] *See Beumer*, 39 BRBS 98. As the administrative law judge did not address the suitability of the Aerotek position in terms of its distance from claimant's residence, we must vacate the administrative law judge's finding that the Aerotek position constitutes suitable alternate employment and remand for further consideration.

Additionally, we agree with claimant that the administrative law judge's calculation of claimant's wage-earning capacity for the period from November 10, 2005, through April 9, 2006, cannot stand as it is, in large part, based on the wages paid by the Aerotek position. Specifically, the administrative law judge took the average of the hourly rates of only the lowest and highest paying suitable alternate employment identified in the three labor market surveys, which resulted in an hourly rate of $10.08, and corresponding weekly rate of $403.20. While an average of the salaries of the jobs identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity, *see Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), the administrative law judge's wage-earning capacity finding for this period does not reflect a true average of the potential wages paid by all eight of the positions he found to be suitable alternate employment. Rather, it gives too much weight to the wages of the

[5] In this regard whether claimant could reasonably obtain other transportation to this site should be considered. We note, moreover, that the site of the Aerotek position, Waveland, Mississippi, is approximately three miles west of Bay St. Louis. As such, it falls beyond the geographic scope for a job search initially identified by Ms. Kreuter. Specifically, Ms. Kreuter's report stated that the "geographic boundaries" for claimant's job search would encompass "Gautier, Ocean Springs, Bay St Louis, Biloxi, & Pascagoula," with Bay St. Louis presumably signifying the western edge of that boundary. EX 15.

Aerotek position, which paid nearly twice as much as any of the other seven jobs.[6] Thus, we also vacate the administrative law judge's finding that claimant's wage-earning capacity for the period between November 10, 2005, and April 9, 2006, is $403.20, and remand for reconsideration of this issue.[7]

Claimant next argues that for the period from April 10, 2006, through September 23, 2006, the administrative law judge erred by using claimant's LS-200 Report of Earnings form in calculating her wage-earning capacity as $414.41. Claimant avers that the report contains mistakes and that the record contains more reliable evidence regarding her actual earnings during this period of time, *i.e.*, the W-2s prepared by her two employers, Gulf Coast and ALF.

Section 8(h) of the Act provides that claimant's earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. 33 U.S.C. §908(h); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). In addressing claimant's wage-earning capacity for her period of employment with Gulf Coast and ALF, the administrative law judge acknowledged that the record contains conflicting accounts as to how much claimant earned in this work. Noting that claimant's W-2s indicate total earnings of $8,710.38, CXs 9, 10, while claimant's Report of Earnings forms (LS-200s) indicated total earnings of $11,826.88, EX 17, the administrative law judge averaged the highest salary range of $498.81 per week, as indicated by the LS-200 form, with the lowest range of $330 per week, based on claimant's testimony that she earned $8.25 per hour for a portion of this work, resulting in a wage-earning capacity of $414.41 per week. As the administrative law judge's calculation of claimant's wage-earning capacity for this time period is reasonable, and is based on substantial evidence of record, it is affirmed. *Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT); *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

[6] The record establishes, with regard to suitable alternate employment, that Ms. Kreuter identified the position at Aerotek as a debris monitor, at $15 per hour, as well as a hostess position at Applebees paying $7.50 per hour. In addition, Mr. Sanders identified a job as a hostess, at $5.15 per hour, four cashier positions, two paying $6 per hour, one paying $7 per hour and a fourth paying $7.75 per hour, and a customer service representative position paying $8 per hour.

[7] If, on remand, the administrative law judge determines that the Aerotek position is not suitable alternate employment it cannot be included in the calculation of claimant's wage-earning capacity.

Claimant further argues that the administrative law judge's finding that claimant was only partially disabled for the period from September 24, 2006, through January 9, 2007, because she voluntarily withdrew from her job with ALF, is erroneous. In support of her contention, claimant put forth employer's letter dated September 20, 2006, in which she was advised that employer had work for her at its facility. EX 18.

If suitable alternate employment is established, and claimant leaves the position for reasons other than her work-related injuries or voluntarily removes herself from the workforce, employer does not bear a renewed burden of establishing new suitable alternate employment thereafter. *See generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). In this case, claimant contended she quit her position with ALF on September 23, 2006, based on a letter she received from employer's carrier dated September 20, 2006, which, in pertinent part, stated:

> The Work Restriction Coordinator, Melinda Wiley, has located employment within the accommodations you require as outlined by your treating physician. You will be returned to work in your same department in a modified position. You will be paid at the same rate of pay prior to your injury. You are required to report back to work by October 2, 2006.
>
> Failure to report back to work by October 2, 2006, may result in termination of your workers' compensation benefits and/or employment.
>
> For your convenience, in order to expedite your return to work, you should contact Ms. Melinda Wiley at (228) 935-3352 prior to October 2, 2006 to schedule an appointment.

EX 18. This letter has the appearance of an actual offer of employment by employer, particularly in light of its command that claimant is "required to report back to work by October 2, 2006."[8] EX 18. This view is supported by evidence in the record that

[8] Claimant testified that when she contacted Ms. Wiley within the specified time frame, Ms. Wiley indicated that she had not yet heard from claimant's former department regarding whether they had a position available for claimant. HT at 65. Claimant added that Ms. Wiley indicated that she would get back to claimant in the near future. HT at 65. Claimant stated it took "between two and three weeks" for Ms. Wiley to inform claimant that employer had no work available for her, and that at that time, Ms. Wiley suggested that claimant attempt to return to her former work with ALF, an effort which claimant stated that she made without any success. HT at 67.

claimant, on two other occasions, obtained work with employer following her receipt of two almost identical letters subsequently sent by employer.[9]

The administrative law judge did not make any determination as to whether this letter constituted an actual offer of employment and thus, whether claimant reasonably left her job with ALF in reliance thereon. We, therefore, vacate the administrative law judge's finding that claimant voluntarily withdrew from the workforce on September 23, 2006, and consequent conclusion that claimant remained entitled to permanent partial rather than permanent total disability benefits for the period from September 24, 2006, through January 9, 2007. On remand, the administrative law judge must determine whether employer's September 20, 2006, letter constitutes an actual offer of employment on which it failed to follow through. If so, he must then consider whether employer otherwise established the availability of suitable alternate employment and thus, reevaluate claimant's entitlement to benefits for this period. *Hord*, 193 F.3d 797, 33 BRBS 170(CRT).

Claimant next asserts that the administrative law judge's finding that she is owed no compensation from February 13, 2007, through June 24, 2007, following her termination by employer on February 12, 2007, cannot stand since her brief period of work for employer, from January 10 through February 12, 2007, is insufficient to support a finding of continuing suitable alternate employment. Claimant maintains that following her termination by employer on February 12, 2007, employer was under a renewed obligation to establish suitable alternate employment, something employer did not do until June 25, 2007, when it returned claimant to work at its facility. Claimant therefore maintains that she is entitled to an award of total disability benefits for the entire period in which she was unemployed.

In *Hord*, 193 F.3d 797, 33 BRBS 170(CRT), the court held that when employer makes a suitable job at its own facility unavailable, it bears a renewed burden of demonstrating the availability of other suitable alternate employment. Specifically, as a position at employer's facility became unavailable as of the time of a layoff, the court ruled that employer could not satisfy its burden thereafter by relying upon a position that was no longer available. *Hord*, 193 F.3d at 801, 33 BRBS at 172-173(CRT). Similarly, in *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), the Board held that where an employer provided claimant with a job in its facility but then laid claimant off

[9] The record contains two subsequent letters dated December 22, 2006, and June 18, 2007, containing the essentially the same language as this September 20, 2006, letter. EX 18. Claimant was reinstated to light-duty work with employer on January 10, 2007, and on June 25, 2007, as a result of these later two letters.

for economic reasons, that job did not meet its burden of establishing suitable alternate employment during the layoff period. Once it withdrew the opportunity for such work, suitable alternate employment in employer's facility was no longer available. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

Pursuant to this precedent, we affirm the administrative law judge's finding that claimant's employment as a firewatcher constituted suitable alternate employment for the period from January 10, 2007, through February 12, 2007, but vacate his conclusion that claimant's work as a firewatcher continued to satisfy employer's burden to show the availability of suitable alternate employment as of the date of its economic layoff on February 12, 2007, as it is uncontroverted that employer made this alternate work unavailable to claimant as of this date. Employer, thus, bore a renewed burden of establishing the availability of suitable alternate employment in order to avoid liability for total disability benefits. *See Hord*, 193 F.3d 797, 33 BRBS 170(CRT); *Vasquez v. Continental Maritime of San Francisco*, 23 BRBS 428 (1990); *Mendez*, 21 BRBS 22. Consequently, the administrative law judge, on remand, must reconsider claimant's entitlement to benefits for the period from February 13, 2007, through June 24, 2007.[10]

Claimant lastly challenges the administrative law judge's finding that she is not entitled to a nominal award, contending that she has not been guaranteed a permanent position with employer. A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when a worker's work-related injury has not diminished her current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, claimant did not allege the likelihood that her physical condition would deteriorate. Rather, she averred that her light-duty position with employer was not permanent and that the loss of the light-duty job would cause future economic harm. The administrative law judge rejected this contention.

The administrative law judge found that while claimant stated she had been informed by her supervisor that her present job in employer's cable shop was coded as "restricted" or "light duty" and that she had no guarantee that the position would continue to be available, claimant admitted she was never told that her particular job would be discontinued, HT at 137-140. Additionally, the administrative law judge found that claimant was aware of other similar jobs coded as "restricted" but which were permanent

[10] The record establishes that work within employer's facility became available to claimant on June 25, 2007. EX 18.

in nature, that claimant conceded that her job was necessary in that she assisted in determining the amounts of the payments that employer was owed, and that she had been successfully performing this work consistently from June 25, 2007, through the date of the hearing, April 30, 2008. Moreover, the administrative law judge found that claimant informed a vocational counselor, Mr. Walker, in September 2007, that she was of the understanding that her position had become a permanent assignment. CX 16. As the administrative law judge's findings are sufficient to support his conclusion that claimant failed to demonstrate a significant possibility of future economic harm, we affirm the denial of a nominal award. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Gilliam v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 69 (2001).

With regard to the attorney's fee awards, claimant argues that the administrative law judge's significant reduction in the requested fee by $9,915, representing 49.575 hours of work, and the district director's reduction of the requested fee by two-thirds, based on the "limited success" achieved by claimant is arbitrary, capricious, an abuse of discretion and not in accordance with the law. Claimant also argues that both the administrative law judge and district director erroneously reduced counsel's travel time and expenses as excessive. Citing the Board's decision in *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006), claimant argues that the adjudicators in this case did not make explicit determinations regarding the geographic area constituting claimant's locality, nor did they cite any information regarding the number of qualified attorneys within claimant's locality who represent longshore claimants.

The United States Supreme Court has held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also George Hyman Constr. 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.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436; *see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where the adjudicator has determined that the claimant has achieved only limited success, he may make an across-the-board reduction in claimant's counsel's

fee. *See e.g., Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999).[11] Thus, there is no error *per se* in the reductions made to account for the relative degree of success achieved. *Id.* However, in light of our decision to remand this case, the administrative law judge and district director must consider whether the fee awarded is reasonable in view of any increase or decrease in the award of benefits on remand. *See generally Hensley*, 461 U.S. 424; *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

As for the travel expenses, the administrative law judge found that while claimant is free to choose an attorney, the fact that counsel, whose office is located in Louisiana, elected to undertake representation of claimant, who lives in Mississippi, is no reason to impose the undue travel time and expenses upon employer. In reducing counsel's travel expenses by half, the administrative law judge observed that other counsel were more geographically suited to handle this claim. The district director likewise reduced the total number of travel hours requested by four, as well as the mileage costs related to counsel's travel by two-thirds, finding that these expenses are excessive since competent counsel is available in claimant's geographic location.

Fees for travel time may be awarded where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Claimant's attorney is entitled to reimbursement of reasonable travel expenses and a fee for her travel time which may be awarded where the travel is necessary, reasonable and in excess of that normally considered to be part of the overhead. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Ferguson*, 27 BRBS 16. In this case, however, neither the administrative law judge nor the district director provided any factual support for their implicit conclusions that competent, experienced counsel was available in claimant's community.[12] *See* Supplemental Decision and Order Awarding Attorney's Fees at 2; Compensation Order Award of Attorney's Fees at 3. Moreover, neither adjudicator in this case took judicial

[11] In *Fagan*, 33 BRBS 91, the Board affirmed the administrative law judge's 50 percent reduction in an attorney's fee as reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits. In *Ezell*, 33 BRBS 19, the Board held that the administrative law judge's 90 percent reduction in an attorney's fee was reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits.

[12] Although employer raised this objection below, it submitted no evidence regarding the availability of local counsel. *See* Employer's Objections to Petition for Attorney Fees dated November 14, 2008.

notice of any information relevant to this issue. *See generally Story v. Navy Exch. Serv. Center*, 33 BRBS 111, 119-120 (1999) (administrative law judge could rely on Survey of Law Firm Economics regarding hourly rates). Furthermore, neither the administrative law judge nor the district director made findings regarding the explicit geographic area constituting claimant's locality nor did they cite any information regarding the number of attorneys within claimant's locality who represent longshore claimants,[13] the extent of such attorneys' experience with the Act, or any other indicia of their competence to represent longshore claimants. *See generally Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979). Insofar as the adjudicators implicitly found that competent local counsel experienced with the Act was available to claimant, such a finding is unsupported by any factual foundation and must therefore be vacated. *Baumler*, 40 BRBS 5. As there is no evidence that claimant could have retained local counsel, claimant's decision to retain counsel from Louisiana is not unreasonable and claimant's counsel therefore is entitled to reimbursement for her reasonable travel time and expenses. *See Baumler*, 40 BRBS 5; *Brinkley*, 35 BRBS at 64; *O'Kelley*, 34 BRBS 39; *Griffin*, 29 BRBS 135; *Swain*, 14 BRBS 657. We, therefore, remand the case to the administrative law judge and district director for determinations as to the reasonableness and necessity of each of these specific charges. *See Baumler*, 40 BRBS 5; *see generally Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001).

Accordingly, the administrative law judge's findings that employer established the availability of suitable alternate employment for the period from November 10, 2005, through April 9, 2006, that claimant's wage-earning capacity for the period from April 10, 2006, through September 23, 2006, is $414.41, and that claimant is not entitled to a nominal award in this case, are affirmed. The administrative law judge's findings that the Aerotek position constitutes suitable alternate employment, that claimant's wage-earning capacity for the period from November 10, 2005, through April 9, 2006, is $403.20, that claimant was only partially disabled for the period from September 24, 2006, through January 9, 2007, and that employer continued to satisfy its burden to establish the availability of suitable alternate employment from February 12, 2007, are vacated and the case is remanded for further consideration consistent with this opinion. The attorney's fee

[13] In this case, counsel stated that her representation of claimant started after Hurricane Katrina hit. The availability of counsel could have been affected as a result of the devastation inflicted by Katrina.

awards of the administrative law judge and district director are also vacated and remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge