BRB Nos. 98-0826,
98-0826A and 98-0826B

ROOSEVELT EZELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DIRECT LABOR, INCORPORATED	)	DATE ISSUED: March 8, 1999
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Claimant's Motion to File Certified Record and Motion to Supplement Evidence, Order Denying Claimant's Motion to File Post-Hearing Exhibits and Motion for Reconsideration; Order Granting Claimant's Motion to Amend, and Supplemental Decision and Order Awarding Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

H. Edward Sherman (Law Offices of H. Edward Sherman), New Orleans, Louisiana, for claimant.

Robert S. Reich and Lawrence R. Plunkett, Jr. (Reich, Meeks & Treadway, L.L.C.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, Order Denying Claimant's Motion to File Certified Record and Motion to Supplement Evidence and Order Denying Claimant's Motion to File Post Hearing Exhibits and Motion for Reconsideration; Order Granting Claimant's Motion to Amend, employer cross-appeals the Decision and Order Awarding Benefits, and claimant appeals, and employer cross-appeals, the Supplemental Decision and Order Awarding Attorney's Fees (95-LHC-2763) of Administrative Law Judge Clement J. Kennington 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).

Employer was a company that supplied labor for Chet Morrison Contractors. Claimant was assigned to work as a rigger on an inshore oil production facility near Gibson, Louisiana, which was surrounded by water and marsh and accessible only by boat via various canals. Claimant suffered a work-related back injury on August 10, 1994, when, while riding on a boat returning from the Gibson job site, the boat took a sharp turn and claimant struck his back against the side of the boat. After being treated at a hospital, claimant returned to light duty work the following day at his usual wage. Employer referred claimant to an orthopedist, Dr. Walker, who diagnosed claimant as suffering from a lumbar spine contusion and recommended that claimant be limited to light duty activities with no lifting or handling objects weighing more than 30 to 40 pounds and occasional bending, stooping and twisting.

Claimant's light duty position with employer was supervised by Cindy Matherne, employer's health and safety director, who assigned claimant to work in the purchasing trailer under the supervision of Craig Guidry, employer's purchasing manager, performing such tasks as emptying trash, sweeping the floor, and making coffee. Ms. Matherne also encouraged claimant to perform work in employer's yard whenever his tasks in the trailer were completed, but advised claimant not to perform any work in the yard that caused him discomfort, even if they were within Dr. Walker's restrictions. Ms. Matherne monitored claimant's medical condition, accompanying him to his medical appointments. Although claimant complained to Dr. Walker that his work activities were causing him pain, claimant never specified

the tasks which caused him pain, and admitted that he never directly complained to Ms. Matherne, Mr. Guidry or any supervisor that the work he performed in the yard was too difficult for him to perform. After leaving work on September 7, 1994, claimant secured a letter from Dr. Walker stating his physical restrictions, and gave it to his wife, who then gave it to employer. Thereafter, claimant did not return to work for employer and has not been gainfully employed since September 7, 1994, although employer continued to leave open for claimant its light duty position at claimant's usual pay rate. Claimant continued treatment with Dr. Walker until January 19, 1995, when Dr. Walker, noting a lack of effort or malingering with respect to claimant's functional capacities evaluation with non-physiological findings, opined in his report that surgery would not benefit claimant, that claimant would not progress under his care, and suggested that claimant be referred elsewhere for additional treatment. Dr. Walker maintained claimant on light duty restrictions for an additional month. Claimant thereafter filed a claim under the Act seeking permanent total disability compensation.

In his Decision and Order, the administrative law judge determined that the canal where claimant was injured was navigable water as it connected with an intercoastal waterway. Thus, as claimant's injury occurred on navigable waters while in the course of his employment, the administrative law judge found that claimant was covered under the Act. The administrative law judge next found that claimant reached maximum medical improvement on January 19, 1995, based on the report of Dr. Walker. Thereafter, the administrative law judge determined that employer established the availability of suitable alternate employment by virtue of its light duty position, discrediting claimant's testimony that he was required to perform tasks in excess of his physical requirements. Thus, the administrative law judge denied claimant's claim for permanent total disability compensation, and found that claimant was entitled to temporary total disability compensation from August 10, 1994, until January 19, 1995, based on an average weekly wage of $307.50. 33 U.S.C. §908(b). Lastly, the administrative law judge determined that claimant was not entitled to reimbursement for the treatment of Dr. Vogel, as claimant failed to seek authorization for this treatment. In addressing this issue, the administrative law judge determined that Dr. Walker's suggestion that claimant seek treatment elsewhere was not tantamount to a refusal to treat claimant. The administrative law judge did award claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, for all other future reasonable medical treatment.

In subsequent post-decision orders, the administrative law judge denied claimant's requests to submit additional exhibits into the record, and denied claimant's motion for reconsideration. Claimant's counsel filed a fee petition with the administrative law judge requesting a fee of $54,000, representing 423.3 hours

of services performed at an hourly rate of $125, plus $17,416.18 in costs. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $3,100, and $17,079.18 in costs.

Claimant appeals the administrative law judge's Decision and Order and subsequent orders, and employer cross-appeals the administrative law judge's Decision and Order and the fee award in this matter. In his appeal, claimant challenges the administrative law judge's finding that employer's light duty position constituted suitable alternate employment, contending that the administrative law judge erred in relying on the testimony of Ms. Matherne and Mr. Guidry. In addition, claimant contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on January 19, 1995, and in denying claimant reimbursement for the medical treatment provided by Dr. Vogel. Lastly, claimant asserts that the administrative law judge erred in failing to accept post-hearing exhibits into the record. Employer responds, urging affirmance of the administrative law judge's findings with respect to these issues.

In its cross-appeal, employer challenges the administrative law judge's finding that claimant is covered under the Act. Specifically, employer asserts that pursuant to the holding of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999)(*en banc*), claimant was only transiently and fortuitously on navigable waters at the time of his injury, and therefore, coverage should not be conferred in the instant case. In addition, employer contends that the administrative law judge erred in his calculation of claimant's average weekly wage. Lastly, employer contends that the administrative law judge's award of temporary total disability compensation should be reduced to reflect that claimant actually worked and received his usual pay rate from August 11, 1994, through September 7, 1994. Claimant responds, urging affirmance of the administrative law judge's finding that claimant is a covered employee under the Act, as well his findings with respect to average weekly wage and the temporary total disability award.

Claimant and employer have also appealed the administrative law judge's fee award. In his appeal, claimant challenges the administrative law judge's reductions in the attorney's fee petition. In its cross-appeal, employer asserts that the administrative law judge's reduced award of an attorney's fee is still excessive in light of the limited success achieved by claimant's counsel.

Coverage

Inasmuch as the issues regarding coverage are fundamental to the disposition of the instant case, we will address them first. Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972,

Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 15 BRBS 62 (CRT)(1983), the United States Supreme Court determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77 (CRT). Thus, the Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also Crapanzano v. Rice Mohawk, U.S. Const. Co., Ltd.,* 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Const. Co., Ltd.,* 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP,* No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). The Court, however, expressed no opinion whether coverage under the Act would be conferred for workers injured while fortuitously upon navigable water. *See Perini*, 459 U.S. at 324 n.34, 15 BRBS at 80 n.34 (CRT). In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), the Court, in holding that an employee who welded and maintained fixed offshore platforms in state territorial waters was not a covered maritime employee under the Act, noted the fact that the employee might have been covered had he been injured while traveling by boat to work on the platform. Declining to address this issue, the Court "noted in passing" that there is "a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.*, 470 U.S. at 427 n.13, 17 BRBS at 84 n. 13 (CRT).

In addressing the issue of coverage in the instant case, the administrative law judge determined that the canal on which claimant was injured was navigable water within the meaning of the Act, and therefore claimant was covered under the Act. This finding is not challenged on appeal. Rather, employer asserts that the Fifth Circuit's decision in *Bienvenu*, which was issued subsequent to the administrative law judge's decision, is dispositive of the coverage issue. Specifically, employer argues on appeal that claimant was "transiently and fortuitously" on navigable waters at the time of his injury, and therefore, pursuant to *Bienvenu*, claimant is not covered under the Act. In response, claimant contends that he was not fortuitously on board a vessel at the time of his injury, since employer owned and maintained a fleet of vessels which were used to regularly transport its employees to job sites.

In *Bienvenu*, the claimant, an oil production pumper, was twice injured while performing work on board a vessel, the MISS JACKIE, in the course of his employment with employer. The administrative law judge found that during the claimant's 12 hour work day, he spent approximately 75 percent of his time working on fixed production oil platforms, 16.7 percent of his time in transit as a passenger on the MISS JACKIE, and 8.3 percent of his time performing repair and maintenance work on the MISS JACKIE. The administrative law judge denied coverage, finding that since the claimant spent a vast majority of his time working on fixed platforms, he was not a maritime employee under the Act. The Fifth Circuit reversed the administrative law judge's decision, concluding that the claimant met the status requirement under the Act since he was injured on navigable waters. *Bienvenu v. Texaco, Inc.*, 124 F.3d 692, 31 BRBS 144 (CRT)(5th Cir.), *reh'g en banc granted*, 131 F.3d 1135 (5th Cir. 1997). On rehearing, the Fifth Circuit held that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous, thereby overruling its previous decision in *Randall v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5th Cir.), *cert. denied*, 513 U.S. 994 (1994);[1] *see also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)(land-based electrician injured on navigable water not covered under the Act).[2] Declining to set the exact amount of

[1]In *Randall*, the court concluded that it was bound by *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81 (CRT)(5th Cir. 1991), which it interpreted as holding that workers injured while transiently and fortuitously upon navigable waters are covered under the Act. In *Fontenot*, the court held that a worker who spent 40 percent of his work time on shore, 30 percent on fixed platforms, and 30 percent on oil exploration and production vessels, was engaged in maritime employment because he was injured while on navigable waters. In *Bienvenu*, the court reasoned that given the substantial duties the worker in *Fontenot* had on navigable waters, its holding was entirely consistent with the *Fontenot* decision.

[2]The *Bienvenu* court cited *Brockington,* stating it joined the Eleventh Circuit in holding that a workman transiently or fortuitously on navigable waters is not covered by the Act. Although the facts in *Brockington* provide an example of a worker transiently on navigable waters, *see* n. 4 *infra*, the Eleventh Circuit did not cite *Perini* and discussed neither its holding regarding coverage, any pre-1972 cases on coverage of employees injured on navigable water, nor the pertinent language from *Perini*. Instead, the court relied on the occupational test of *Herb's Welding* and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), and claimant's *de minimis* connection to maritime activity. Thus, while the court's result in *Brockington* is consistent with *Perini,* there are serious gaps in its rationale.

work on navigable waters that would be sufficient to confer coverage under the Act, the court provided some guidance. The threshold amount of work on navigable waters, the court stated, "must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat." *Bienvenu*, 164 F.3d at 908. The routine activity of assisting in tying a vessel to the dock and loading or unloading tools onto the vessel would also not confer coverage. *Id.* The court thereafter held that the claimant's repair and maintenance work on board the MISS JACKIE, which constituted 8.3 percent of his time, was sufficient to trigger coverage under the Act.

The court in *Bienvenu* was not specifically asked to decide the question of whether an employee who regularly travels by boat during the course of his work day to a worksite or sites, and is injured during transport on navigable waters, is covered under the Act.[3] While *Bienvenu* rules out coverage for employees who are transiently and fortuitously on navigable water at the time of injury, it does not hold that a worker injured on navigable water during the course of his employment should be denied coverage under the Act if he is regularly required by his employment to travel by boat over navigable water, as well as where he performs some work on a vessel. Indeed, the court specifically noted the distinction between a worker who performs a set of tasks that require him to be both on and off navigable water, and a land-based worker who merely commutes to work by boat. *Id.* at 906, *citing Herb's Welding*, 470 U.S. at 427 n.13, 17 BRBS at 84 n.13 (CRT). While it focuses on the Supreme Court's statement in *Perini* regarding those "transiently and fortuitously" on navigable waters, *Bienvenu* must be applied consistently with the Court's holding in that case that those employees who would have been covered prior to 1972 by virtue of their injuries on navigable water remain covered post-1972. Pre-1972 case law thus provides guidance in applying *Perini* and *Bienvenu*.

In this regard, in *Parker v. Motor Boat Sales,* 314 U.S. 244 (1941), one of the Supreme Court cases on which the *Bienvenu* court relied, the Court held that a janitor who was killed in an accident while accompanying a salesman during a

[3]The employee in *Bienvenu* spent 16.7 percent of his work time as a passenger on the MISS JACKIE, traveling around the Caillou Island production field, a five-mile by twelve-mile area containing 150 to 175 active fixed oil production platforms. *Bienvenu*, 164 F.3d at 903. Because Bienvenu's work on equipment aboard the vessel was sufficient to confer coverage, the court specifically did not consider whether his time on the vessel being shuttled from platform to platform should be included in determining whether he spent more than a modicum of his work time on navigable waters.

demonstration of a motor boat was covered under the Act. The Court reasoned that habitual performance of other duties on land did not alter the fact that at the time of the accident the employee was riding in a boat on navigable water, and cited Section 2(4) of the Act, which provides for its application to "employees [who] are employed . . . in whole or in part upon the navigable waters of the United States." *Id.*, 314 U.S. at 247; *see* 33 U.S.C. §902(4)(1994). Similarly, in *Pennsylvania Ry. Co. v. O'Rourke*, 344 U.S. 334 (1953), the Court rejected a "duties test" in determining coverage when a worker is injured on navigable water, holding that a railroad employee who suffered an injury on a car float was covered under the Act, as the injury occurred on navigable water.

In the instant case, claimant testified that prior to his injury, his job with employer consisted of cleaning up employer's yard, stacking pallets, and relocating oxygen bottles, pipes and saws that were about the yard. In addition, he worked in the mechanic shop, where he ground wells, stored a drag line and disposed of welding rods. Claimant also on occasion mopped and swept the trailer, cut the grass and cleaned employer's barges. Tr. at 241-246. On the day of claimant's work accident, he was assigned to assist in the threading of pipe on an inshore platform which was located approximately 35 to 40 minutes away by boat from employer's shore side facility, and accessible only by boat through a series of bayous, canals, and the Intercoastal Waterway. *Id.* at 257-263. Applying *Bienvenu*, it is clear that claimant suffered his injury on navigable waters during the course and scope of his employment. *See Bienvenu*, 164 F.3d at 907. What is unclear from the record is how often claimant was required to travel by boat over navigable waters in the course and scope of his employment and how much work he performed on water, and thus, under *Bienvenu*, whether claimant's presence on water at the time of his injury was transient and fortuitous. Accordingly, the case must be remanded in light of *Bienvenu* for consideration of whether claimant was "transiently and fortuitously" over navigable water at the time of his injury, taking into consideration how often claimant was required to go aboard a vessel to work or travel by boat in order to perform his employment duties.[4] If the administrative law judge finds that

[4]Comparison of the facts in *Brockington* may be helpful to this inquiry. In that case, claimant was a land-based electrician employed by a non-maritime employer, an electrical contractor, whose only connection to maritime activity was riding in a boat to an island where he was to work. At the time of his injury aboard this vessel in the Intracoastal Waterway, he thus was only transiently on water. Contrast these facts with those where an employer maintains a fleet of vessels and assigns employees to travel and work on those vessels. In the latter situation, a connection with the hazards of the maritime environment is not "fortuitous" but is part of the regular work environment of the employer.

claimant was "transiently and fortuitously" on navigable water, and thereby not covered pursuant to *Perini*, the administrative law judge must then consider whether claimant's overall employment duties independently satisfy the status requirement under Section 2(3) of the Act, and therefore, whether coverage would be conferred on that basis.[5] *See* 33 U.S.C. §902(3)(1994).

For reasons of judicial economy, in the event the administrative law judge again finds that claimant is covered under the Act, we now consider the merits of claimant's and employer's appeals.

Maximum Medical Improvement

On appeal, claimant contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on January 19, 1995. Specifically, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Walker in reaching this conclusion. For the reasons that follow, we affirm the administrative law judge's finding.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

[5]Inasmuch as it is undisputed that claimant's injury occurred on navigable water, the situs requirement under Section 3(a) of the Act is met. *See* 33 U.S.C. §903(a)(1994).

In the instant case, Dr. Walker treated claimant from the time of his injury in August 1994 until January 19, 1995. In his report of January 20, 1995, Dr. Walker stated that during claimant's functional capacities evaluation, there were several episodes of lack of effort or malingering. Dr. Walker went on to state that surgery would not benefit claimant and, further, that claimant would not progress under his care. While Dr. Walker recommended that another physician determine the "point of maximum medical benefit," the physician reiterated that claimant did not appear to be progressing or cooperating with his instructions. *See* Emp. Ex. 5 at 2. Claimant correctly points out that the administrative law judge erred in stating that claimant did not seek further treatment after January 19, 1995. Nevertheless, the administrative law judge credited Dr. Walker's assessment of claimant's condition as being supported by the finding of Dr. Vogel, whose neurological examination showed moderate distress, *see* Cl. Ex. 18 at 8,[6] as well as the opinions of Drs. Kinnard and Murphy, each of whom witnessed no neurological impairment and the ability on the part of claimant to perform at least light duty work. *See* Emp. Ex. 3; Tr. at 628-629; Cl. Ex. 29 at 69-70. Like Dr. Walker, all three physicians recommended conservative care, not surgery.

On appeal, claimant asserts that Dr. Walker mischaracterized Dr. McKowen's opinion. A review of the evidence reveals no such mischaracterization. After examining claimant and reviewing an MRI, Dr. McKowen stated that claimant had a disc protrusion at L5-S1, but that it was nothing dramatic and there was no evidence of disc herniation. Dr. McKowen recommended no surgery. *See* Emp. Ex. 6. In his December 7, 1994 report, Dr. Walker agreed with Dr. McKowen's assessment, diagnosing only a lumbar strain. *See* Emp. Ex. at 3. In addition, the administrative law judge discredited claimant's testimony that he suffered disabling pain subsequent to January 19, 1995. *See* Decision and Order at 28. Even if the administrative law judge had made a contrary finding, that would not conflict with the administrative law judge's finding that claimant's condition reached permanency on that date. While Dr. Walker recommended that another physician assess whether claimant has reached maximum medical improvement, the medical evidence reflects that claimant's condition plateaued as of January 19, 1995. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). As the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical

[6]The administrative law judge noted that Dr. Vogel failed to provide any medical notes or personal treatment records. *See* Decision and Order at 28.

improvement on January 19, 1995, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Suitable Alternate Employment

On appeal, claimant next contends that the administrative law judge erred in finding that employer established suitable alternate employment and asserts that employer's light duty job offer was sheltered employment. Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *Larsen v. Golten Marine* Co., 19 BRBS 54 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if he cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

We hold that the administrative law judge's determination that employer established suitable alternate employment by virtue of its light duty position is rational and supported by substantial evidence. In addressing this issue, the administrative law judge accepted Dr. Walker's recommendation that claimant be restricted to light duty work which should include no lifting or handling of objects weighing more than 30 to 40 pounds, with only occasional bending, stooping, or twisting activities. *See* Emp. Ex. 5 at 2, 7. The administrative law judge rejected claimant's testimony that employer's light duty position was too physically demanding for him to perform,[7] and credited the testimony of Ms. Matherne and Mr.

[7]Claimant contended that in addition to light duty sweeping and cleaning of the trailer, he was required to perform strenuous activities in employer's yard, such as pressure washing, cleaning out trash from under the trailer, driving pegs into the ground, pouring sand into a pot for use by sandblasters, painting bumpers on cars, stacking pallets by hand, and walking with a tow line for up to 5 hours without a

Guidry that they never assigned work that was outside claimant's physical restrictions, that claimant was specifically told not to perform work that might cause him discomfort, and that claimant never complained to them that his post-injury work was too demanding. The administrative law judge noted that claimant, changing his earlier testimony, conceded that he never complained directly to his supervisors that his light duty work caused him discomfort. *See* Tr. at 369-370; Decision and Order at 11-12. Specifically, the administrative law judge discredited claimant's testimony, finding that his testimony with respect to other issues was contradictory. The administrative law judge acknowledged that Drs. Walker, Kinnard and McKowen noted a lack of cooperation on the part of claimant, and further, the administrative law judge credited Ms. Matherne's testimony that claimant angrily told her that employer would have to pay him to sit at home. *See* Decision and Order at 23, 29; Tr. at 1202.[8] In addition, the administrative law judge noted that while claimant alleged that he had trouble performing sweeping and cleaning duties, he admitted that he performed such activities as mowing the grass and plumbing repairs on his own house. Tr. at 341-344.

Claimant contends that the administrative law judge erred in crediting the testimony of Ms. Matherne and Mr. Guidry rather than his testimony. However, in adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On the basis of the record before us, we cannot say that the administrative law judge's negative assessment of claimant's credibility is either inherently incredible or patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision to instead credit the testimony of Ms.

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break. *See* Tr. at 276-282.

[8]The administrative law judge incorrectly cited page 1132 of the Hearing Transcript for this assertion. In fact, Matherne's testimony in this regard appears at page 1202 of the Hearing Transcript. *See* Decision and Order at 23; Tr. at 1202.

Matherne and Mr. Guidry is rational and within his authority.

The administrative law judge also determined that employer's light duty position did not constitute sheltered employment. In addition to finding that the light duty position was not too physically demanding on claimant, the administrative law judge found that employer presented credible evidence that claimant was performing a necessary function as part of the light duty program, supported by the fact that the position occupied by claimant is currently performed by another worker.[9] *See* Decision and Order at 28; Tr. at 1106-1107. This finding is rational and supported by substantial evidence. Based on the foregoing, we affirm the administrative law judge's finding that employer established suitable alternate employment at the same wages claimant earned before the injury. *See, e.g., Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Extent of Disability

While the administrative law judge placed no credence on claimant's allegation that he was required to perform tasks in excess of his light duty restrictions, the administrative law judge nevertheless found that claimant did suffer from accident-related pain during his return to work following his injury. Based on this finding, the administrative law judge awarded claimant temporary total disability compensation from August 10, 1994, until January 19, 1995, the date on which claimant's condition stabilized and he was released to return to light duty work. *See* Decision and Order at 29-30. In its cross-appeal, employer challenges this award, arguing that it conflicts with the administrative law judge's finding that claimant returned to work on August 11, 1994, and continued to work until September 7, 1994, at the same wages he earned before the injury. Employer asserts that

[9]On appeal, claimant contends that in his analysis of the issue of suitable alternate employment, the administrative law judge did not consider the fact that employer is no longer in business. While employer did go out of business in 1996, Ms. Matherne, whom the administrative law judge credited, testified that employer's employees were transferred to Chet Morrison Contractors, and that those employees who were not, left employer for other reasons. *See* Tr. at 1123-1124, 1193-1197.

claimant should be entitled only to an award of temporary total disability compensation from September 7, 1994 until January 19, 1995. Alternatively, employer contends that it should be entitled to a credit for the salary it paid claimant from August 11, 1994, through September 7, 1994.

The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 216 (1989). Where claimant's pain and limitations do not rise to this level, such factors nonetheless are relevant in determining post-injury wage-earning capacity and may support an award of partial disability based on reduced earning capacity despite the fact that claimant's actual earnings may have increased. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

As stated above, the administrative law judge determined that claimant's light duty position was regular and necessary, that another employee is currently performing this function, and therefore, this position did not constitute sheltered employment. We agree with employer that this determination conflicts with the administrative law judge's award of temporary total disability benefits from August 10, 1994 through September 7, 1994. While the administrative law judge credited the restrictions Dr. Walker imposed on claimant on January 19, 1995, these restrictions were unchanged from the ones Dr. Walker set out in his August 24, 1994 report. Emp. Ex. 5 at 2, 7. The administrative law judge further found that claimant was capable of performing his light duty work and that this work was well within claimant's physical limitations, crediting the testimony of Ms. Matherne and Mr. Guidry that claimant was never asked to perform any task that would cause him discomfort. The administrative law judge made no determination that claimant was working only through extraordinary effort or that the pain he experienced while working was excruciating. Thus, an award of temporary total disability benefits from August 10, 1994 through September 7, 1994 is not appropriate. *See Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Nevertheless, since the administrative law judge did find that claimant experienced some pain while performing his light duty work with employer from August 10, 1994 through September 7, 1994, an award of temporary partial disability benefits under Section 8(e), 33 U.S.C. §908(e), may be appropriate during this period. Accordingly, we vacate the administrative law judge's award of temporary total disability from August 10, 1994 through September 7, 1994, and remand the case for the administrative law judge to consider whether

claimant is entitled to an award of temporary partial disability benefits for this period. *Id.*, 19 BRBS at 84.

Average Weekly Wage

In addressing the issue of average weekly wage, the administrative law judge found that claimant worked 34.8 weeks during the year prior to his injury, and therefore it was appropriate to apply Section 10(a) of the Act, 33 U.S.C. §910(a), in the calculation of claimant's average weekly wage. The administrative law judge next divided claimant's earnings for this 52-week period, $10,701.20, by the number of days he worked, 174, and found that claimant's daily wage was $61.50, with corresponding annual earnings of $15,990. After dividing that figure by 52 pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), the administrative law judge found that claimant's average weekly wage was $307.50, with a corresponding compensation rate of $204.98.

In its cross-appeal, employer asserts that at the hearing, the administrative law judge summarized claimant's past earnings, finding that claimant worked 180 days and earned $9,648 during the 52-week period prior to his injury. Thus, employer asserts, claimant's daily wage was $53.60, and, applying a Section 10(d) computation, claimant's average weekly wage should have been $268, with a corresponding compensation rate of $178.65.

We reject employer's contention. At the hearing, the administrative law judge stated that he was presented with evidence that showed that claimant earned $9,648 during the year prior to his injury, but he was not bound to use this figure. In fact, the administrative law judge asked that counsel independently confirm this figure. *See* Tr. at 1069. Thereafter, in his Decision and Order, the administrative law judge applied the figures that claimant submitted into evidence, which showed that claimant earned $10,701.20 for 174 days of work during the 52 week period prior to his injury, implicitly crediting the evidence claimant submitted in this regard. *See* Cl. Ex. 20 at 23-27; Decision and Order at 31. Accordingly, as the administrative law judge's determination of claimant's average weekly wage is supported by substantial evidence, we affirm that finding.

Medical Expenses

In his appeal, claimant challenges the administrative law judge's finding that employer is not liable for the medical treatment provided by Dr. Vogel. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the

injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). An employer must consent for a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).

In addressing the issue of reimbursement for medical expenses for the treatment rendered by Dr. Vogel, the administrative law judge found that there was no evidence that claimant sought authorization from employer for this treatment. The administrative law judge further found that although Dr. Walker suggested that claimant continue treatment with another doctor, this did not amount to a refusal by Dr. Walker to treat claimant. Lastly, the administrative law judge found there was no evidence to indicate that Dr. Vogel's treatment resulted from an emergency situation. Thus, the administrative law judge denied claimant's request for reimbursement for the medical treatment provided by Dr. Vogel.

On appeal, claimant asserts that the administrative law judge failed to recognize Dr. Vogel as his treating physician, and further, that the administrative law judge improperly placed the burden on claimant to establish that he sought authorization from employer for the treatment by Dr. Vogel after Dr. Walker "abandoned" treatment. Claimant's contentions are meritorious. In the instant case, it is unclear whether Dr. Walker was employer's or claimant's physician and thus, whether Dr. Walker's discharge of claimant from his care on January 19, 1995, could be construed as a refusal by employer to provide treatment. *See, e.g., James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Claimant was referred to Dr. Walker

by employer initially, and claimant continued to treat with Dr. Walker until January 19, 1995. Additionally, Cindy Matherne accompanied claimant on all his visits to Dr. Walker, which is supportive of a finding that Dr. Walker was employer's physician. While the administrative law judge did not make a specific finding as to whether Dr. Walker was claimant's or employer's physician, he did find that Dr. Walker's suggestion that claimant continue treatment elsewhere was not a refusal to treat. However, in his January 20, 1995 report, Dr. Walker stated affirmatively that he believed claimant will not progress under the physician's care, suggesting that claimant be referred elsewhere for treatment, as well as for a determination of maximum medical improvement, as claimant was not progressing or cooperating with his recommendations. *See* Emp. Ex. 5 at 2.

Moreover, there is evidence in the record that was not considered by the administrative law judge that, if credited, could support a finding that claimant did seek authorization from employer for treatment by Dr. Vogel. At his deposition, Dr. Vogel testified that he requested permission to perform additional testing on claimant from employer's carrier and that the carrier denied permission for any care rendered by Dr. Vogel. *See* Cl. Ex. 18 at 23-24. Lastly, the administrative law judge did not consider whether Dr. Vogel, who is a board-certified neurosurgeon, *id.* at 5, is a specialist skilled in treating claimant's injury; if he is, employer may be required to consent to such treatment.[10] *See generally* 20 C.F.R. §702.406; *Armfield*, 25 BRBS at 303. Based on the foregoing, the administrative law judge's denial of reimbursement for treatment provided by Dr. Vogel is vacated, and the case is remanded for reconsideration of this issue. In determining whether claimant is entitled to the treatment provided by Dr. Vogel, the administrative law judge, on remand, must consider whether Dr. Walker was claimant's or employer's physician and reconsider whether Dr. Walker's discharge of claimant amounted to a refusal to treat claimant. The administrative law judge must also reconsider whether claimant sought authorization for Dr. Vogel's treatment, and lastly, whether Dr. Vogel is a specialist and thus, whether employer is required to consent to Dr. Vogel's treatment.

Exclusion of Evidence

In his Decision and Order, the administrative law judge excluded from evidence the medical records of Dr. Pearce and an additional vocational report of John W. Grimes, which claimant attempted to attach to the post-hearing deposition of Nathaniel Fentress, a vocational counselor. The administrative law judge rejected

[10]Dr. Walker is an orthopedic surgeon. *See* Cl. Ex. 17 at 5.

these reports as untimely and beyond the scope of Mr. Fentress's deposition. *See* Decision and Order at 4 n.3. In motions filed subsequent to the hearing, claimant attempted to submit additional exhibits into the record, which included: the records of Dr. Kinnard; the April 1996 deposition of Craig Guidry; the January 11, 1995 emergency room records; the medical records of Charity Hospital and Leonard J. Chabert Medical Center; and the medical records of Dr. Vogel. In two orders issued subsequent to the hearing, the administrative law judge denied claimant's motions, as these records were obtainable by claimant with diligent effort, and, moreover, claimant was granted permission to supplement the record, but claimant's request did not include the items presented in claimant's motion. *See* Order Denying Claimant's Motion to File Post-Hearing Exhibits and Motion for Reconsideration; Order Granting Claimant's Motion to Amend, and Order Denying Claimant's Motion to File Certified Record and Motion to Supplement Evidence. On appeal, claimant contends that the administrative law judge committed reversible error by excluding the abovementioned exhibits. We disagree.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g., Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In the instant case, the administrative law judge's reasons for excluding the exhibits requested by claimant are rational. Specifically, while claimant contends that the records of Dr. Pearce and Mr. Grimes were dated subsequent to the close of the hearing on October 22, 1997, the administrative law judge found that these exhibits went beyond the scope of Mr. Fentress's post-hearing deposition of November 20, 1997, which was permitted by the administrative law judge for the specific purpose of rebutting the additional jobs listed by employer's vocational counselor, Allan Crane. Thus, the exclusion of these exhibits, as well as the other requested exhibits, is not arbitrary, capricious or an abuse of discretion, and claimant has not met his burden in this regard. *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing).

Attorney's Fees and Costs

Subsequent to the administrative law judge's Decision and Order in the instant case, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of $54,000, representing 423.3 hours of services performed at an hourly rate of $125, plus $17,416.18 in costs. In a Supplemental Decision and Order, the administrative law judge considered only the entries for services performed while the case was before the Office of Administrative Law Judges, and

thereafter, due to claimant's counsel minimal success, disallowed 90 percent of counsel's requested hours. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of $3,100, and $17,079.18 in costs.

Claimant and employer have appealed the administrative law judge's award of an attorney's fee. In his appeal, claimant, at the outset, asserts that the administrative law judge incorrectly calculated the number of hours counsel requested for work performed before the administrative law judge; the administrative law judge determined that the number of hours for work performed before him totaled 248, while claimant argues that the total is 347.5 hours. Claimant also contends that the administrative law judge erred in disallowing 90 percent of the requested hours without specifically determining which entries were excessive, and further contends that the administrative law judge erred in concluding that counsel's efforts produced limited success. Lastly, claimant avers that the administrative law judge failed to consider the hours of work performed by assistant counsel Jim Cazalot and Travis Causey. Employer responds, urging that the administrative law judge's determinations with respect to claimant's arguments not be disturbed. In its appeal, employer challenges the attorney's fee award, asserting that the fee awarded was still excessive in light of claimant's limited success, suggesting that a fee of $1,500, based on the amount of benefits claimant received, is a more appropriate award. Employer further argues that costs awarded to claimant's counsel were excessive and not statutorily permissible.

Initially, we agree with claimant that the administrative law judge's calculation of the number of hours claimant's counsel asserted for work performed before the administrative law judge was in error. In his Supplemental Decision and Order, the administrative law judge considered only the entries incurred between August 15, 1995 and February 12, 1996, and between March 25, 1997, until the time of the referenced supplemental decision, while the case was before the Office of Administrative Law Judges. The administrative law judge found that this number totaled 248 hours. A review of claimant's counsel's attorney's fee petition, however, reveals that the entries for work performed while the case was before the administrative law judge totaled 347.58 hours. The administrative law judge's finding to the contrary is therefore vacated.

In challenging the fee awarded by the administrative law judge, employer argues, citing *Hensley v. Eckerhart,* 461 U.S. 421 (1983), and *Vincent v. Consolidated Operating Co.*, 17 F.3d 782 (5th Cir. 1994), that since claimant was only partially successful before the administrative law judge, the fee awarded by the administrative law judge cannot be upheld. In support of this assertion, employer notes that claimant requested an award of permanent total disability benefits, and

only received a limited award of temporary total disability compensation for 23.29 weeks. Claimant asserts that his success was not insubstantial, and that the administrative law judge erred in concluding otherwise, and moreover, argues that the administrative law judge erred in reducing the requested hours by 90 percent without specifying the entries that were excessive.

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 Const. 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. As the Supreme Court stated in *Hensley,* the most critical factor is the degree of success obtained. *Hensley,* 461 U.S. at 437.

In the present case, employer raised the applicability of *Hensley* before the administrative law judge. In addressing this objection, the administrative law judge agreed that the hours claimant's counsel requested were grossly exaggerated, offering five examples of such exaggeration. *See* Supplemental Decision and Order at 3. Taking into account the quality of representation, the lack of complexity of the legal issues, and the amount of benefits ultimately awarded, the administrative law judge concluded that an attorney's fee award constituting 10 percent of the requested 248 hours represented an appropriate award.

Inasmuch as the administrative law judge properly considered employer's *Hensley* argument, and in light of claimant's limited success, we hold that the administrative law judge properly reduced claimant's counsel's attorney's fee request. While the administrative law judge did not specify which of counsel's entries were excessive, other than the five mentioned in the supplemental decision, the Board has affirmed an across the board reduction where the administrative law judge determined that claimant achieved minimal success.[11] *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998).

[11]The administrative law judge found that counsel did not specify the identity of other attorneys that assisted in counsel's legal work. *See* Supplemental Decision and Order at 2. In fact, counsel's fee petition does identify attorney Jim Cazalot performing 6 hours of work and Travis Causey performing 10.5 hours of legal work. The administrative law judge's error is harmless, however, as these hours were considered by the administrative law judge regarding counsel's overall fee request.

Employer's contention that the award should be further reduced, based on the specific amount of benefits claimant was awarded, is rejected. It is well-established that although the amount of benefits awarded is a valid consideration, one which the administrative law judge in fact applied, the amount of the fee is not necessarily limited to the amount of compensation gained, as to do so would drive competent counsel from the field.[12] *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). Accordingly, the administrative law judge's decision to reduce claimant's counsel fee request by 90 percent of the entries while the case was before the Office of the Administrative Law Judges is affirmed. However, the fee award is modified to reflect that the requested hours for work performed before the administrative law judge totaled 347.58, not 248, and on remand, the administrative law judge must consider whether the award should be increased in view of this change.

Lastly, in his Supplemental Decision and Order, the administrative law judge found that with the exception of a request for mediation fees, counsel's requests for costs for witness fees, hearing and deposition transcripts, medical reports and travel expenses were reasonable and necessary. Thus, the administrative law judge awarded claimant's counsel costs in the amount of $17,079.18. In rendering his decision, the administrative law judge rejected employer's contention that a *Hensley* analysis must be applied with respect to the issue of costs. In arguing that the administrative law judge's award of costs was excessive, employer again argues that a *Hensley* analysis should be applied to the award of costs. We disagree.

Section 28(d) of the Act, 33 U.S.C. §928(d), the only statutory provision authorizing the administrative law judge to assess litigation costs, provides that where an attorney's fee is awarded against an employer or carrier there may be a further assessment against such employer or carrier as costs, fees, and mileage for necessary witnesses attending the hearing at the instance of claimant. Section 28(d) requires analysis of the reasonableness and necessity of the costs incurred by

[12]Employer also asserts that much of the work claimant's counsel performed before the administrative law judge was in furtherance of other civil actions. However, the Board has held that an attorney is entitled to a fee for services which relate to state claims, as long as the services are also necessary to the claim under the Act and counsel has not been previously paid for them. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). Employer does not aver that counsel has received payment for services that relate to claimant's other actions, and does not specify the services that were in furtherance of the other actions.

counsel in litigating the case, and no additional analysis is required. As the administrative law judge found that counsel's requested costs were necessary and reasonable, we hold that the administrative law judge acted within his discretion in awarding these costs and decline to disturb this award.

Accordingly, the Order Denying Claimant's Motion to File Certified Record and Motion to Supplement Evidence, and the Order Denying Claimant's Motion to File Post-Hearing Exhibits and Motion for Reconsideration; Order Granting Claimant's Motion to Amend of the administrative law judge are affirmed. The administrative law judge's findings that claimant established coverage under the Act, that claimant is entitled to an award of temporary total disability compensation from August 10, 1994 through September 7, 1994, and that claimant is not entitled to reimbursement for the medical treatment provided by Dr. Vogel are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits of the administrative law judge is affirmed. The administrative law judge's Supplemental Decision

and Order Awarding Attorney's Fees is modified to reflect that the number of hours claimant's counsel requested for work performed before the administrative law judge totals 347.58. In all other respects, the Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge