BRB No. 98-1299

FRANK MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME CORPORATION	)	DATE ISSUED: April 28, 1999
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand and the Supplemental Decision and Order Awarding Attorney's Fees of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Joshua T. Gillelan II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand and the Supplemental Decision and Order Awarding Attorney's Fees (93-LHC-2648) of Administrative Law Judge Thomas M. Burke 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). The Board heard oral argument in this case on January 27, 1999, in Savannah, Georgia.[1]

Employer appeals an award of benefits on remand from the Unites States Court of Appeals for the Fourth Circuit. Claimant was injured on November 18, 1991, when, descending a ladder inside a container, he slipped and landed on his right knee. Employer voluntarily paid claimant temporary total disability benefits from November 20, 1991 to February 7, 1993. Claimant sought permanent total disability benefits under the Act for injuries to his right knee and back.

[1]In a supplemental Memorandum, employer objected to the Director's participation in the appeal and oral argument thereof. We reject employer's objection as the Director has standing to appeal or to respond to an appeal before the Board as a party-in-interest, even if he has not participated in the proceedings below. 20 C.F.R. §§802.201(a), 802.212; *see also* 20 C.F.R. §801.2(a)(10); *Ahl v. Maxon Marine Inc.*, 29 BRBS 125 (1995). Moreover, the regulation at 20 C.F.R. §802.308(c) contains discretionary, not mandatory, language in permitting the Board to deny a party the right to participate in oral argument.

In his initial Decision and Order, the administrative law judge invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's back injury was work-related, and found no rebuttal evidence. In addition, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer's vocational expert failed to identify actual jobs claimant could perform, but instead listed general categories without providing any specific names of prospective employers. Inasmuch as he could not determine the precise nature and terms of any of the jobs, the administrative law judge found that suitable alternate employment was not established, and thus awarded claimant permanent total disability benefits.[2]

The case was administratively affirmed by the Board on September 12, 1996, pursuant to Public Law No. 104-134, Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321 (1996), and was subsequently appealed to the United States Court of Appeals for the Fourth Circuit by employer. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997). The court held that the administrative law judge erred in finding that the evidence was insufficient to establish rebuttal of the Section 20(a) presumption with regard to claimant's back condition. Therefore, the court remanded the case to the administrative law judge to apply the statutory presumption in the proper manner.[3] *Moore*, 126 F.3d at 263, 31 BRBS at 124 (CRT). In addition, the court affirmed the administrative law judge's finding that as a result of the condition of both knees, claimant is incapable of performing the bending and climbing required by his former work. However, the court held that the administrative law judge erred in finding that employer did not establish suitable alternate employment. It held that employer may meet its burden of establishing suitable alternate employment by demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the

[2]The administrative law judge also found that claimant had an average weekly wage of $1,000.92, pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), that employer is not entitled to a credit for the vacation, holiday, and container royalty pay received in 1991, but is entitled to a credit for the 1992 and 1993 special payments made to claimant, and that claimant is entitled to all necessary medical treatment for his injured right knee and back.

[3]The court also held that the administrative law judge erred in finding that claimant's back condition had reached maximum medical improvement, and that the administrative law judge did not abuse his discretion in excluding a surveillance videotape from evidence. In addition, the court held that the administrative law judge improperly calculated claimant's average weekly wage under Section 10(a) of the Act, 33 U.S.C. §910(a), and must recalculate it, but that the administrative law judge did not err in concluding that employer forfeited its Section 8(f), 33 U.S.C. §908(f), claim by its failure to raise the issue at the initial hearing before the administrative law judge on the merits of the claim.

qualifications for performing such jobs. The court further held that the employer need not contact the prospective employer for its specific requirements in order to establish a valid vocational survey. Therefore, the court remanded the case to the administrative law judge for further consideration. *Moore*, 126 F.3d at 264-265, 31 BRBS at 125 (CRT).

On remand, the administrative law judge found that, based on inconsistent testimony by claimant with regard to the onset of his back problems, as well as the fact that no physician of record attributes these problems to his November 1991 injury, the evidence is insufficient to establish that his back problems are work-related. Decision and Order Awarding Benefits on Remand at 2. With regard to the extent of disability due to his knee problems, the administrative law judge reviewed the vocational evidence submitted by employer and the job descriptions found in the *Dictionary of Occupational Titles* (4th ed. rev. 1991) (DOT) of the positions listed in the labor market survey, and found that none of the positions was within claimant's educational or physical abilities. Thus, as he found that employer did not establish the availability of suitable alternate employment, the administrative law judge again awarded claimant permanent total disability benefits. Pursuant to the court's instructions, the administrative law judge recalculated claimant's average weekly wage under Section 10(a), and found it to be $853.47 per week. The administrative law judge concluded by ordering employer to pay medical benefits, including any necessary continuing medical care for injuries to both knees pursuant to Section 7 of the Act, 33 U.S.C. §907, and instructed claimant's counsel to file a petition for an attorney's fee and costs.

Subsequently, the administrative law judge reviewed claimant's counsel's petition for an attorney's fee in which counsel requested $3,150, representing 10.5 hours of legal services at the hourly rate of $300, plus costs. The administrative law judge reduced the hourly rate requested to $200 and awarded the number of hours requested, given the complexity of the case and the number of issues on remand from the circuit court, but rejected the request for unspecified costs. Therefore, the administrative law judge awarded claimant's counsel a fee of $2,100, for work performed before the administrative law judge on remand to be paid by employer.

On appeal, employer contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Employer contends that the entire DOT was not entered into evidence, but that the administrative law judge nonetheless referred to various sections of the DOT to fashion his own opinion of whether claimant would be capable of performing the jobs listed in employer's labor market survey. Employer contends that the administrative law judge was not empowered to look beyond the DOT classifications given by its vocational expert. In addition, employer contends that the administrative law judge erred in awarding medical benefits for treatment of claimant's left knee as his work injury involved only the right knee. In a supplemental appeal, employer

contends that the administrative law judge erred in awarding claimant's attorney a fee at the rate of $200 per hour, as this rate is higher than that awarded by the Board in the same case in 1996, and that claimant has not been awarded any additional compensation since the previous decision. Claimant responds, urging affirmance of the administrative law judge's Decision and Order Awarding Benefits on Remand and Supplemental Decision and Order Awarding Attorney's Fee. The Director, OWCP, responds, urging affirmance of the administrative law judge's award of permanent total disability benefits and medical benefits for both of claimant's knees.

Initially, employer contends that the administrative law judge erred in finding the evidence insufficient to establish the availability of suitable alternate employment. Where, as here, a claimant establishes that he is incapable of returning to his usual employment, the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of a range of jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988)*; Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). The Fourth Circuit has held that an employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant and to determine if they would in fact consider hiring the candidate for their position, as this would substantially increase the employer's burden without a commensurate benefit. *Tann*, 841 F.2d at 542, 21 BRBS at 15 (CRT); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). Based on the same reasoning, in the instant case, the court held that employer need not contact the prospective employers listed in the labor market survey to obtain their specific job requirements before determining whether the claimant would be qualified for such work, and that demonstrating the availability of specific jobs in a local market, such as through the South Carolina Job Service in the instant case, may be sufficient. *Moore*, 126 F.3d at 264, 31 BRBS at 125 (CRT). However, contrary to employer's contention, the court's inquiry did not end there. Recognizing that the administrative law judge, as the fact-finder, must be able to evaluate the appropriateness of the proposed positions given claimant's physical and educational qualifications, the court held that employer may rely on standard occupational descriptions, including those provided in the DOT, to fill out the qualifications for performing the listed jobs. *Id*.

As the Fourth Circuit affirmed the administrative law judge's finding, based on Dr. Brilliant's opinion, that claimant cannot return to his former work, the burden shifted to employer to establish available jobs for which claimant is physically and educationally qualified. The Fourth Circuit noted that claimant had completed the eighth grade and had reading and math skills at the third grade level. *Moore,* 126 F.3d at 260, 31 BRBS at 120 (CRT). Dr. McConnell gave the following assessment of claimant's abilities: (1) may

continuously sit, or continuously stand for 6 hours per day; (2) may intermittently walk for 6 hours per day; (3) may intermittently lift 20-50 pounds 4 hours per day; (4) may intermittently bend, squat, or kneel for 2 hours per day, and (5) may intermittently climb for 3 hours per day. Dr. McConnell stated claimant can operate foot controls and can operate a car, truck or other motor vehicle. Emp. Ex. 4. The administrative law judge stated that Dr. McConnell's restrictions are of limited probative value because they are based solely on claimant's knee complaints, and do not account for claimant's significant, albeit non work-related, back problems. Decision and Order on Remand at 3. Nancy Pesolano, a Physical Therapist Assessment Specialist, had claimant perform various tests to ascertain his functional capacity. She found that claimant could sit for an 8 hour day (but only for 1 hour at a time without a break), could stand for 4 hours a day for 45 minutes at a time, could walk moderate distance 5 to 6 hours per day, and could bend/stoop or climb stairs occasionally, and could minimally squat, crawl, and crouch. She found that claimant's maximum lifting weight was 23.5 pounds, and that claimant could use his feet for repetitive foot controls. Cl. Ex. 13. This evaluation was done on the basis of claimant's back and knee conditions. The administrative law judge never specifically stated claimant's residual physical capacities as a result of the knee injury, nor did he state the specific restrictions from the back condition. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C.J., dissenting on other grounds), *motion for recon. denied*, 17 BRBS 160 (1985) (Ramsey, C.J., dissenting).

A rehabilitation specialist, David Price, took into account Dr. McConnell's restrictions on claimant's knee, and then assumed that claimant has restrictions "normally associated with a chronic lumbar strain." His labor market survey lists the following positions as appropriate given these restrictions and available in the relevant geographic area:

> Concession Stand Operator $5.50 per hour
> North Charleston, SC
> Exertion: Light
> SC 2602438
> DOT#: 313.374-014
>
> Security Guard - training provided
> Exertion - light
> Summerville, SC x 1 $5.00 hour
> North Charleston, SC x 4 $4.25
> Charleston, SC x 2 $4.25 hour
> Isle of Palms, SC x 1 $5.40 hour
> SC2600107, SC 2507940, SC 10026311, SC02602011, SC2617361, SC2618492, SC2502155, SC2100144
> DOT#: 372.667-038

Shoe Repair Trainee $4.50
Exertion - light
North Charleston, SC
SC2507355
DOT#: 356.361-014

Pizza Delivery Person $4.50-$5.50 per hour
Exertion - light
Charleston - 4 positions
North Charleston - 2 positions
Mt. Pleasant - 3 positions
Isle of Palms - 1 position

Emp. Ex. 18. Mr. Price noted the DOT reference numbers on the survey[4] and testified that he relied on the DOT descriptions as he did not know the precise nature and terms of the positions, as this is the nature of the service providing the job listings. H. Tr. at 131. The Fourth Circuit held that standard occupational descriptions, including those provided in the DOT, may be used to fill out the qualifications of the identified positions. Each job identified by Mr. Price is listed in the DOT as being in the "light work" category, which requires lifting of under 20 pounds.[5] H. Tr. at 130. In addition, each listing in the DOT

[4]It appears from Mr. Price's testimony that the South Carolina job service provided the DOT number. H. Tr. at 130.

[5]The DOT defines "light work" as:

> Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

DOT at 1013.

position has a description of the potential duties, and states the educational requirements of the position. DOT at 1009-1012.

Employer's contention is that the administrative law judge used the occupational descriptions in the DOT that do not correspond to those provided by the vocational expert. Initially, with regard to all jobs but the pizza delivery job, we agree with employer that the administrative law judge erred in looking outside the DOT listing for the given position under the facts of this case. He gave no reason for believing that the descriptions given by Mr. Price were incorrect, nor is there any reason apparent from the record. For the position of Concession Stand Operator, the expert lists DOT #313.374.-014, a listing for Short Order Cook , with the following duties:

> 313.374-014 COOK, SHORT ORDER (hotel & rest.)
>
> Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables.
> GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 81

DOT at 243. The administrative law judge, however, did not review these job duties to see if claimant could perform them, but instead, reviewed the jobs listed in the 342 Series, Amusement Device & Concession Attendants, which states "This group includes occupations concerned with operating games of chance or skill or other types of amusement equipment, such as the Ferris wheel, roller coaster, and merry-go-round; and running fairs, carnivals, circuses, or amusement parks. Includes spielers or barkers who solicit patronage." DOT at 251. None of the enumerated jobs under this series deals with food, but the administrative law judge stated that based on his review of the Series 342 jobs, claimant may be required to engage in significant bending and lifting to prepare food or to stock items, and that the lifting requirements are unknown. The administrative law judge further stated that claimant likely would have to be able to read and perform some math, and thus it is uncertain whether he could perform the job.

We hold that the administrative law judge's treatment of this job listing is in error. The administrative law judge had no basis in the record for finding that the job was in the 342 series. Moreover, the administrative law judge overlooked the fact that the listed job is in the "light" category, and therefore that no lifting over 20 pounds would be required. Furthermore, each listing in the DOT has a math and reading level indicated, and the administrative law judge did not consider whether claimant's educational limitations are

compatible with the job's requirements. The administrative law judge merely assumed that the job required an educational level that claimant does not possess. Thus, the administrative law judge's finding that the position of concession stand operator does not establish the availability of suitable alternate employment is vacated, and the case is remanded to the administrative law judge to reconsider the suitability of this position consistent with this opinion. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

> The next job listed is that of a security guard. The listing is for:
>
> 372.667-038 MERCHANT PATROLLER (business ser.) alternate titles: doorshaker; guard; security guard
>
> Patrols assigned territory to protect persons or property: Tours buildings and property of clients, examining doors, windows, and gates to assure they are secured. Inspects premises for such irregularities as signs of intrusion and interruption of utility service. Inspects burglar alarm and fire extinguisher sprinkler systems to ascertain they are set to operate. Stands guard during counting of daily cash receipts. Answers alarms and investigates disturbances [ALARM INVESTIGATOR (business ser.)]. Apprehends unauthorized persons. Writes reports of irregularities. May call headquarters at regular intervals, using telephone or portable radio transmitter. May be armed with pistol and be uniformed. May check workers' packages and vehicles entering and leaving premises.
> GOE: 04.02.02 STRENGTH: L GED: R2 M1 L2 SVP: 3 DLU: 77

DOT at 269. The administrative law judge went to DOT #372.667-038, a more general listing for Security Guard. The administrative law judge rejected the job of security guard because it is uncertain what reports would need to be completed, and whether such reading, writing, and math are beyond claimant's skills. Again, however, the administrative law judge did not review the educational requirements of the job as indicated in the DOT, and the listed job requires a lower reading comprehension level than that required by the more general listing. However, any error in this regard is harmless, as the administrative law judge found that if claimant would be required to apprehend or expel "miscreants," these duties would not fall within his physical capabilities given that he has considerable back and knee problems. As this inference is reasonable, we affirm the administrative law judge's finding that this job fails to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The vocational expert did not list a DOT number for the pizza delivery position. The administrative law judge therefore rationally reviewed the position requirements at DOT

#299.477-010 for a Merchandise Deliverer. He found that the physical requirements were beyond claimant's capacity. This job description is:

> 299.477-010 DELIVERER, MERCHANDISE (retail trade)
>
> Delivers merchandise from retail store to customers on foot, bicycle, or public conveyance: Unpacks incoming merchandise, marks prices on articles, and stacks them on counters and shelves [STOCK CLERK (retail trade) 299.367-014]. Walks, rides bicycle, or uses public conveyances to deliver merchandise to customer's home or place of business. Collects money from customers or signature from charge-account customers. Sweeps floors, runs errands, and waits on customers [SALES CLERK (retail trade) 290.477-014]. May drive light truck to deliver orders. May be designated according to merchandise delivered as Deliverer, Food (retail trade); Deliverer, Pharmacy (retail trade).
> GOE: 09.04.02 STRENGTH: M GED: R2 M2 L2 SVP: 2 DLU: 77

DOT at 237. The administrative law judge noted that this position requires considerable bending at the knees to get in and out of a car, or pressure on the knees to operate a bike or to walk. Moreover, he concluded, it is reasonable that there would be steps to climb while delivering pizzas which would further exacerbate claimant's injuries. Finally, the administrative law judge found that claimant may not be capable of computing the math to determine what change to give. These findings and inferences are reasonable, and thus the administrative law judge's rejection of this job as suitable alternate employment is affirmed.

Lastly, the administrative law judge rejected the position for shoe repairer. The expert lists DOT#356.361.014[6] for the shoe repair trainee position, while the administrative law judge reviewed the requirements for the shoe repairer helper at DOT#365.674-010, and for a cobbler at DOT#788.381.010. The listed description is:

> 365.361-014 SHOE REPAIRER (personal ser.) alternate titles: cobbler; shoemaker
>
> Repairs or refinishes shoes, following customer specifications, or according to nature of damage, or type of shoe: Positions shoe on last and pulls and cuts off

[6]The vocational expert appears to have transposed the numbers of this position, as the shoe repairer position is found in the DOT at #365.361-014, rather than #356.361-014.

> sole or heel with pincers and knife. Starts machine, and holds welt against rotating sanding wheel or rubs with sandpaper to bevel and roughen welt for attachment of new sole. Selects blank or cuts sole or heel piece to approximate size from material, using knife. Brushes cement on new sole or heel piece and on shoe welt and shoe heel. Positions sole over shoe welt or heel piece on shoe heel and pounds piece, using machine or hammer, so piece adheres to shoe; drives nails around sole or heel edge into shoe; or guides shoe and sole under needle of sewing machine to fasten sole to shoe. Trims sole or heel edge to shape of shoe with knife. Holds and turns shoe sole or heel against revolving abrasive wheel to smooth edge and remove excess material. Brushes edge with stain or polish and holds against revolving buffing wheels to polish edge. Nails heel and toe cleats to shoe. Restitches ripped portions or sews patches over holes in shoe uppers by hand or machine. Dampens portion of shoe and inserts and twists adjustable stretcher in shoes or pull portion of moistened shoe back and forth over warm iron to stretch shoe. May build up portions of shoes by nailing, stapling, or stitching additional material to shoe sole to add height or make other specified alterations to orthopedic shoes. May repair belts, luggage, purses, and other products made of materials, such as canvas, leather, and plastic. May quote charges, receive articles, and collect payment for repairs [SERVICE-ESTABLISHMENT ATTENDANT (laundry & rel.; personal ser.) 369.477-014]. GOE: 05.05.15 STRENGTH: L GED: R3 M2 L1 SVP: 6 DLU: 82

DOT at 364. The administrative law judge rejected this position as too strenuous, finding it to be a position requiring intensive manual labor and that may require significant bending, pushing and pulling which would be beyond claimant's physical capabilities and could further damage his back and knees. The cobbler position in the 788 Series is listed as a "medium" duty job, but the administrative law judge's finding that the listed job is beyond claimant's capabilities is not supported by substantial evidence, as, again, he did not state which of the job duties claimant would not be able to do given his restrictions, and he again did not consider that the listed job is categorized as "light," so there is no basis for viewing the job as requiring "intensive labor." Thus, the administrative law judge's finding that this position does not establish suitable alternate employment is vacated and the administrative law judge is instructed on remand to reconsider its suitability.

In addition, the administrative law judge found that the trainee descriptions in DOT often have high school or vocational school as a prerequisite. He stated that it is not known whether the trainee position listed in the survey would require such an educational background for which claimant would not qualify. However, the DOT states that an "apprentice" may require a high school or vocational school education, and that, although the term "apprentice" and "trainee" are often used interchangeably, this "is technically incorrect

and leads to confusion in determining what is meant," as "apprentice" is a more technical term. DOT at 1. Thus, the administrative law judge is instructed on remand to examine the educational requirements of the shoemaker position against claimant's actual educational background.

In light of the administrative law judge's errors, the award of permanent total disability benefits is vacated, and the case is remanded for further consideration. First, the administrative law judge should specifically state what medical restrictions claimant has from both his work-related and non work-related conditions. *Hernandez v. Nat'l Steel & Shipbuilding* Co., 32 BRBS 109 (1998); *Villasenor*, 17 BRBS at 103. Then, the administrative law judge should examine the duties of the concession stand operator and shoe repair trainee in the DOT section supplied by employer to determine whether the duties, described as being "light" under the DOT definition, are within claimant's restrictions. He also should determine whether the jobs are appropriate for claimant given the educational requirements of the jobs as described in the DOT, and thus whether employer satisfied its burden of establishing the availability of suitable alternate employment.

Employer next contends that the administrative law judge erred on remand in awarding medical benefits for both knees. We agree with employer's contention and vacate the award of medical benefits for claimant's left knee. Claimant had a pre-existing left knee condition. The record reflects that claimant never requested medical benefits or compensation for an injury to, or an exacerbation of, a previous injury to his left knee. The claim for benefits was for his right knee condition only, the recitation of the issues before the administrative law judge includes claimant's right knee condition and his back condition, *see* Brief of Employee in Support of His Claim For Benefits, February 16, 1994, and the issue of the work-relatedness of claimant's left knee injury was not before the circuit court.[7] In his first decision, the administrative law judge awarded benefits only for injuries to claimant's right knee and back, and the issue of medical benefits for a left knee condition was not before the court of appeals or within the scope of its remand to the administrative law judge. The administrative law judge's award, moreover, is just in the "Order" portion of his decision, and there is no analysis of this issue. Therefore, we reject claimant's and the Director's arguments to the contrary and hold that the administrative law judge erroneously included medical benefits for claimant's left knee in his award of benefits.[8] *See generally* 20 C.F.R.

[7]The Fourth Circuit referred to the administrative law judge's initial decision as finding claimant incapable of returning to his usual work because of the conditions of both of his knees. This does not appear to be the case.

[8]There is no basis for the Director's assertion that claimant's left knee condition is work-related under the aggravation rule, because this theory of recovery was never raised by claimant.

§702.317; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In a supplemental appeal, employer contends that the administrative law judge erred in his award of an attorney's fee of $2,100 as the hourly rate of $200 is higher than that awarded by the Board in 1996, *see Moore v. Universal Maritime Corp.*, BRB No. 95-575 (Oct. 4, 1996) (fee order), and is unreasonable in view of the fact that claimant did not obtain additional benefits by virtue of the decision on remand. After considering employer's contentions and the customary rates awarded in the Charleston, South Carolina region, the administrative law judge considered claimant's request for $300 per hour and found that the appropriate rate for the geographic region was $200 per hour. As the administrative law judge specifically considered the hourly rate that was reasonable and appropriate in the geographic region, and reduced the amount requested from $300 to $200 per hour, employer has not met its burden of showing the hourly rate awarded is unreasonable. [9]

Although, as employer contends, claimant did not receive additional compensation as a result of the administrative law judge's decision on remand, he successfully defended against employer's argument that claimant is not entitled to permanent total disability benefits and should be restricted to permanent partial disability under the schedule for his knee injury. Given our disposition of this case, if the administrative law judge again awards claimant permanent total disability on remand, the fee award is affirmed. The administrative law judge may reconsider the fee award in light of his decision on remand if he finds claimant entitled to a lesser award.

Accordingly, the administrative law judge's finding that the positions of Concession Stand Operator and Shoe Repair Trainee do not establish the availability of suitable alternate employment is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's decision is affirmed in all other respects. In addition, the administrative law judge's finding that claimant's counsel is entitled to a fee at the hourly rate of $200 is affirmed. However, the administrative law judge may reconsider the amount of the fee award in light of his decision on remand.

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[9]In its fee award in 1996, the Board reduced the requested rate for work performed before the Board from $200 per hour to $150 per hour. The administrative law judge is not bound by an hourly rate awarded by the Board two years prior. Moreover, the Board has recently affirmed an administrative law judge's award of a fee based on an hourly rate of $200 for a claim prosecuted in South Carolina, *see McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), and has itself recently awarded a fee based on an hourly rate of $200 in this region. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998) (Decision and Order on Recon. *En Banc*).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge