BRB No. 97-977

FREDDIE KNIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
	)	DATE ISSUED: _____
HALTER MARINE	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Peter L. Hilbert, Jr. and Dorothy S. Watkins (McGlinchey Stafford, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees (94-LHC-1469) of Administrative Law Judge Lee J. Romero, Jr., 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 the 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).

Claimant injured his back while working for employer as a crane supervisor on September 17, 1991, when he fell off a portable fuel tank. He attempted to return to work on January 6, 1992, but worked only a half a day before leaving, allegedly due to back pain. From the date of his injury until May 18, 1992, claimant was treated by Dr. Judice, a neurosurgeon. At that time, Dr. Judice released claimant from his care, opined that he had no residual permanent impairment, and released him to return to work without restrictions. Claimant continued to experience back pain thereafter and sought further treatment. On January 26, 1993, claimant began treatment with Dr. Rhymes, an orthopedic surgeon, who released claimant to return to work with restrictions on May 20, 1993. However, claimant did not return to any work prior to July 1995, at which time he attempted to perform a modified crane foreman position at employer's facility. Claimant continued to miss a significant amount of time due to back pain and ceased working altogether as of August 31, 1995, at which time he was declared unfit for work by his treating physician, Dr. Rhymes. Claimant, who has not returned to work since August 31, 1995, sought temporary total disability compensation from September 7, 1991 until May 18, 1992, and permanent total disability benefits thereafter, as well as medical benefits for treatment subsequent to May 18, 1992, and in the future. Employer disputed liability for any disability compensation after May 18, 1992.[1]

In a Decision and Order dated March 12, 1997, the administrative law judge awarded claimant temporary total disability compensation from the date of injury until January 23, 1993, and permanent total disability compensation thereafter. In addition, he ordered employer to pay all reasonable, appropriate and necessary medical expenses connected with claimant's work-related injury, a 10 percent assessment pursuant to Section 14(e), 33 U.S.C. §914(e), and interest. Subsequently, claimant's counsel filed a fee petition for work performed before the administrative law judge. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded counsel a fee of $23,674.70, representing 100.5 hours at an hourly rate of $125 and 66.2 hours at an hourly rate of $100, plus $4,492.20 for reimbursement for expenses.

On appeal, employer argues that the administrative law judge erred in awarding claimant any disability compensation after May 18, 1992, when Dr. Judice released him for

[1]Two formal hearings were held in this case on December 27, 1994, and March 13, 1996.

full duty work and found no permanent residual impairment. Employer also asserts that inasmuch as Drs. Judice, McKowen, and Rhymes opined that claimant was capable of returning to light duty work and it offered claimant suitable modified light duty work as a crane foreman at its facility paying his former wages in May 1992, the administrative law judge erred in finding that claimant had any compensable disability after May 18, 1992. Employer further asserts that because it again offered claimant a suitable light duty job as a crane foreman at its facility following the December 27, 1994, formal hearing and upon returning to work on July 31, 1995, claimant did not make a diligent effort to perform his job duties, it also established the availability of suitable alternate employment sufficient to terminate its liability for disability benefits on this basis. In the alternative, employer contends that it met its burden of establishing the availability of suitable alternate employment based on jobs identified in the community by its vocational expert, Mr. Nebe, and argues that the administrative law judge improperly rejected this evidence. Employer also contends that the administrative law judge erred in finding that its application for Section 8(f), 33 U.S.C. §908(f), relief was untimely, and, in addition, challenges the administrative law judge's award of an attorney's fee. Moreover, employer maintains that in awarding medical benefits for the treatment provided by Dr. Rhymes, the administrative law judge erred in finding that Dr. Judice had constructively refused to provide treatment as of May 1992, thereby obviating the need for claimant to seek employer's approval for a change in physicians. Neither claimant nor the Director has responded to employer's appeal.

We affirm the administrative law judge's Decision and Order and Supplemental Decision as his findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. Initially, employer argues that the administrative law judge erred in awarding claimant any disability compensation after May 18, 1992, as he was released by Dr. Judice on this date and suitable work was available to him. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury.[2] *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). To the extent that employer is arguing that claimant was capable of performing his usual work[3] and accordingly failed to establish a

[2]Employer also asserts on brief that claimant's disability is not related to his work injury, but to degenerative disc disease, and argues that claimant bears the burden of proving this causal nexus as well. Claimant is, however, aided by the Section 20(a), 33 U.S.C. §920(a), presumption in establishing causation and thus does not bear the burden of proof on this issue as he clearly established a *prima facie* case for invocation of the presumption. In any event, employer did not raise causation as an issue below, and we will not address it further on appeal.

[3]Employer's argument in this regard is unclear because throughout its brief, employer refers to claimant's pre-injury work as a crane supervisor and a modified crane foreman position it offered claimant post-injury interchangeably.

prima facie case of total disability, we affirm the administrative law judge's finding to the contrary. Crediting claimant's testimony that his pre-injury job required heavy lifting, climbing, frequent bending, operating heavy machinery, and frequent walking and standing, which he was unable to perform without pain, over the contrary testimony of employer's managers, Mr. Loupe and Mr. Herbert, that claimant's former position was strictly supervisory and did not involve manual labor, the administrative law judge rationally found that claimant was incapable of performing his former job. *See* Decision and Order at 25, 28-29. In addition, based on claimant's subjective complaints of pain, the symptoms he experienced in performing most activities, his regular visits to physicians for pain relief, and the fact that Dr. Rhymes did not release claimant to perform any work until May 20, 1993, at which time he imposed restrictions, the administrative law judge rationally concluded that for all time periods relevant to the current proceedings claimant remained incapable of performing his usual work. *See id.* at 28-29. Inasmuch as the administrative law judge's findings in this regard are rational and supported by substantial evidence, and employer has failed to establish that the credibility determinations made by the administrative law judge were either inherently incredible or patently and unreasonable, we affirm his determination that claimant established his *prima facie* case of total disability.[4] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997).

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to establish the availability of suitable alternate employment by demonstrating the availability of jobs within the geographic area where claimant resides which claimant, considering his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a suitable job performing necessary work at its facility. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the present case, employer argues that claimant had no compensable disability as of May 18, 1992, because when Dr. Judice released claimant for work, it offered him a suitable modified light duty job as crane foreman at its facility. The administrative law judge considered this contention below, but rejected it, crediting claimant's testimony that the purported offer never occurred, 1994 Tr. at 70-72, over the testimony of employer's managers, Messrs. Loupe and Herbert, to the contrary. 1994 Tr. at 176-179, 224. Inasmuch as employer has not established reversible error in the administrative law judge's decision to credit claimant's testimony rather than that of employer's managers, we affirm

[4]We thus reject employer's related argument that claimant reached maximum medical improvement in May 1992, as the administrative law judge rationally relied on Dr. Rhymes and his decision is supported by substantial evidence.

this determination and consequently his finding that employer failed to establish the availability of suitable alternate employment by offering claimant a light duty job at its facility in May 1992.[5]

[5]In any event, the administrative law judge found the modified job as a crane foreman was not suitable given claimant's physical limitations. *See* discussion, *infra.*

In the alternative, employer argues that its compensation liability should have ceased as of July 28, 1995, as it offered and claimant accepted a modified crane supervisor position at its facility on this date and claimant thereafter did not make a diligent attempt to perform this job. Based on claimant's testimony that he could not perform the walking required in this job without constant pain, Tr. at 37-38, his failure to work the entire month of August, his frequently having to leave work in the middle of the day, and the fact that as of August 31, 1995, Dr. Rhymes found claimant unfit for duty, the administrative law judge rationally concluded that the job provided by employer in July 1995 was not in fact suitable. Inasmuch as employer has failed to establish any reversible error made by the administrative law judge in evaluating the record evidence relevant to this issue and he credited substantial evidence in support of his findings, we affirm this determination.[6] *See Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Employer next asserts that even if the modified position at its facility was not suitable alternate employment, the administrative law judge nonetheless erred as it met its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Nebe, an employee with Genex Services Incorporated. Based on the work restrictions assigned to claimant by Dr. Murphy in March 1993, Mr. Nebe performed labor market surveys in August, September, and October 1994 and identified a number of specific available job opportunities which he believed were suitable for claimant.[7] EX 19. Thereafter, in December 1994, Mr. Nebe sent representative job descriptions of seven positions to Dr. Murphy, who approved them as being within claimant's physical restrictions. EX 18. In assessing the extent of claimant's disability, the administrative law judge considered Mr. Nebe's testimony but rejected his opinion for various reasons.

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[6]Inasmuch as the job provided by employer in July 1995 was not suitable, whether claimant diligently tried to perform it is not dispositive. *See generally Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990). In addition, in light of our affirmance of the administrative law judge's determination that the modified crane foreman position was not suitable, we need not address employer's assertion that the administrative law judge erred in concluding that this job was sheltered employment.

[7]These positions were: dispatcher, telemarketer, front desk clerk, telephone operator, cashier, delivery driver, and dental assistant.

Although employer's argument with respect to the treatment of Mr. Nebe's opinion has merit,[8] we nonetheless affirm his ultimate conclusion that the alternate positions identified by Mr. Nebe are insufficient to establish the availability of jobs suitable for claimant. The administrative law judge rationally concluded that employer failed to establish that the job duties of the positions approved by Dr. Murphy, as well as the other positions identified in Mr. Nebe's labor market surveys, were actually consistent with the physical restrictions imposed upon claimant by Drs. Murphy and Rhymes. Dr. Murphy placed the

[8]Employer correctly argues that the administrative law judge erred in discounting Mr. Nebe's testimony because it was based on erroneous information concerning claimant's educational background, in that his notes stated that claimant had a high school diploma whereas claimant testified that he had a GED. Inasmuch as this is a distinction without a difference, it is not a reasonable basis for questioning Mr. Nebe's conclusions. We also agree with employer that the administrative law judge erred in concluding that Mr. Nebe's opinion was not credible because he did not review all of claimant's medical records, as Mr. Nebe relied upon the restrictions of Dr. Murphy, which are the most restrictive limitations of record. Finally, employer also correctly asserts that the administrative law judge improperly discredited Mr. Nebe's testimony on the basis that he did not consider the fact that claimant's prior work history consisted solely of manual labor positions. However, Mr. Nebe deposed that from his review of the file he was aware that claimant's prior work experience consisted of positions as a yard superintendent foreman for various companies and as a crane foreman for employer. EX 21 at 41. In the overall context of the administrative law judge's decision, these problems are insufficient to establish reversible error.

following physical restrictions on claimant as of December 4, 1994: intermittent sitting up to 8 hours a day; intermittent walking up to 6 hours per day; intermittent lifting of no more than 1 to 10 pounds; no bending or climbing ladders, equipment, buildings or machinery; occasional stair climbing; intermittent squatting and kneeling; and intermittent standing for up to 6 hours. EX-17 at 7; EX-18 at 22-23; Tr. at 90-91. Dr. Rhymes provided similar, although less encompassing, restrictions.[9] After considering the jobs approved by Dr. Murphy in light of Mr. Nebe's testimony, the administrative law judge rationally found that the dispatcher, telemarketer, delivery driver and telephone operator positions which required frequent or constant sitting and only allowed claimant to walk and stand during breaks or on an occasional basis were not in fact consistent with Dr. Murphy's restrictions because they did not allow for intermittent sitting, standing, and walking. In addition, he found that the cashier and dental assistant job approved by Dr. Murphy also did not constitute suitable alternate employment in that they required occasional bending which both Dr. Murphy and Dr. Rhymes stated claimant could not do.

[9]Dr. Rhymes found that claimant could frequently lift not more than 10 lbs; rarely lift no more than 20 lbs; and could not bend, squat, twist or turn.

Employer argues on appeal that in finding that the dispatcher, telemarketer, delivery driver and telephone operator positions were unsuitable, the administrative law judge exceeded his adjudicatory authority by assuming facts not in evidence because the job descriptions for these positions do not indicate that claimant was required to sit constantly. We disagree. Inasmuch as Dr. Murphy's restrictions provided that claimant was limited to intermittent sitting, the sitting required in these jobs was substantial, and the representative descriptions for these jobs did not specifically reflect that intermittent sitting would be allowed, the administrative law judge acted within his discretionary authority in concluding that employer did not meet its burden of showing that these jobs were suitable.[10] Inasmuch as the administrative law judge's conclusion that the jobs identified by Mr. Nebe and approved by Dr. Murphy were not, in fact, suitable is rational and supported by substantial evidence, and employer does not contest the administrative law judge's determination that the descriptions provided for the remaining jobs identified by Mr. Nebe were insufficiently detailed, Decision and Order at 32, his determination that employer failed to meet its burden of establishing the availability of suitable alternate employment through the vocational testimony of Mr. Nebe is also affirmed.

Employer also contends that the administrative law judge erred in remanding the case for further findings regarding the compensability of medical expenses for unauthorized treatment claimant procured on his own initiative subsequent to May 1992.[11] Employer specifically argues that the administrative law judge erred in concluding that Dr. Judice's release of claimant from his care and his return of claimant to work without restrictions as of May 1992 was a refusal to provide treatment and that claimant was thereafter no longer obligated to obtain authorization from employer for further medical care. Employer avers

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[10]The dispatcher job description indicated that claimant would be required to sit while answering phones and monitoring a radio, and could stand on breaks and walk on a "very limited" basis. The telemarketer and delivery driver job description noted that claimant was required to sit frequently (34-66 percent) and stand and walk occasionally (1-33 percent) but offered no indication regarding whether claimant could perform these functions intermittently. Similarly, the front desk hotel clerk description indicated that claimant was required to stand while assisting customers, and sit while answering phones, but did not indicate that claimant could change between the two intermittently or identify the specific amount of sitting and standing required. The description of the telephone operator position indicated only that claimant was required to sit while answering phones, and could walk for "very limited" periods and stand on breaks. EX-18.

[11]Although the administrative law judge found that employer constructively refused to provide further medical treatment as of May 18, 1992, he did not award claimant reimbursement for the medical expenses he incurred after that date based on his determination that only the district director has the authority to determine whether to excuse the physicians' failure to timely file their first reports within 10 days of treatment as is required under 33 U.S.C. §907(d)(2) pursuant to *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting).

that the record is devoid of any evidence supporting a refusal to provide claimant medical care. In addition, employer argues that the administrative law judge's reliance on Dr. Judice's May 1992 medical records to support his finding was misplaced because Dr. Judice subsequently examined claimant in December 1992, thereby demonstrating that he remained available to treat him.

We reject employer's argument. Under Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to recover medical benefits if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert denied,* 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Contrary to employer's assertions on appeal, inasmuch as Dr. Judice released claimant to return without restrictions and discharged him from his care in both May and December 1992, the administrative law judge rationally found that Dr. Judice refused to provide further treatment.[12] EX-3; *see James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Consequently, we affirm the administrative law judge's determination that as of May 18, 1992, claimant was relieved of the obligation of obtaining authorization from employer in order to obtain additional medical care.

Next, we address employer's contention that the administrative law judge erred in denying its application for Section 8(f) relief as untimely. Employer did not file its request for Section 8(f) relief until after the case was transferred to the Office of Administrative Law Judges (OALJ). After the transfer on March 8, 1994, employer requested that the case be remanded to the district director to enable it to prepare and file an application for Section 8(f) relief. This request was granted by the administrative law judge on June 20, 1994. Employer filed an application for Section 8(f) relief on July 18, 1994. The district director found the application was submitted untimely because employer did not raise the issue or submit a fully documented application prior to referral of the case to OALJ. Thereafter, the case was again referred to OALJ, and the Director filed a motion to dismiss employer's request for Section 8(f) relief. In his Order granting Director's motion, the administrative law judge found employer's Section 8(f) application was not timely submitted, holding that it was not fully documented as required by the pertinent regulation, 20 C.F.R. §702.321, and that employer was not excused from its failure to file it as permanency was at issue prior to the initial referral of the case to the administrative law judge. The administrative law judge rejected employer's assertions that the application was not timely because it was not aware that permanency would be an issue until the case was before the administrative law judge. Employer requested reconsideration of this Order, and, in his Decision and Order, the administrative law judge reiterated his prior conclusion.

[12]We note that employer does not challenge the administrative law judge's characterization of Dr. Judice as employer's physician on appeal.

On appeal, employer challenges the administrative law judge's finding, contending that it did not have notice of permanency as an issue prior to referral of the case to the OALJ. Employer asserts that under *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT) (5th Cir. 1992), it may be charged with a reason to believe permanency would be an issue if one of three prerequisites is met: 1) employer had knowledge that claimant is permanently disabled; 2) permanent disability benefits are paid; or 3) an informal conference is held. Employer asserts that since none of these three prerequisites is met in this case, it did not have notice that permanency was at issue prior to the initial referral of the case. Employer contends that as Dr. Rhymes, claimant's treating physician, had not assigned a date of maximum medical improvement as of the time of the filing of the Section 8(f) application, it was unaware that permanency could be an issue. Employer also notes that claimant's pre-hearing statement did not list permanency as an issue and that claimant's counsel stated in that document that an issue to be resolved was whether claimant remains disabled due to the work accident.

Section 8(f)(3) provides that a request for Section 8(f) relief and "a statement of the grounds therefor, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner."[13] Failure to do so is "an absolute defense to the special fund's liability unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. §908(f)(3) (1994). Section 702.321(b)(3) of the regulations provides that the defense is an affirmative one which must be raised and pleaded by the Director; the defense does not apply where permanency was not at issue before the district director. Under Section 702.321(b)(3), therefore, an application need not be filed with the district director where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised, but in all other cases failure to submit a fully documented application by the date established by the district director is an absolute defense to the liability of the special fund. *See Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991).

We affirm the administrative law judge's finding that employer's entitlement to Section 8(f) relief is barred by Section 8(f)(3) because it is rational, supported by substantial evidence, and in accordance with law. Contrary to employer's contention, the Fifth Circuit in *Cajun Tubing* did not provide a list of prerequisites which must occur in order for employer to be alerted that permanency is an issue in the case; rather, the court held that employer need not file an Section 8(f) application unless it has reason to believe claimant has suffered a permanent disability, and discussed illustrative situations where an employer would be put on notice that permanency was an issue. In concluding that employer failed to file a timely request for Section 8(f) relief herein, the administrative law judge discussed evidence that employer should have known that permanency was at issue and accordingly of its need to seek Section 8(f) relief. Specifically, the administrative law judge found that

[13]The title "deputy commissioner" used in the statute has been changed to "district director" by regulation. 20 C.F.R. §701.301(a)(7).

the record contained medical reports dated prior to the March 1994 referral which stated claimant's permanent impairment rating or a date of maximum medical improvement. Furthermore, the administrative law judge found claimant's December 1993 claim raised permanent disability. A review of the claim form supports the administrative law judge's determination that its plain language should have alerted employer that permanency was an issue in the case. Claimant responded affirmatively to the question of whether the injury resulted in permanent disability, and also stated on the claim form that he was permanently disabled. Inasmuch as the administrative law judge rationally found that employer should have known that permanency was at issue based on the medical evidence and the claim stated by claimant, we affirm his finding that employer's request for Section 8(f) relief is barred by Section 8(f)(3). *See Cajun Tubing*, 951 F.2d at 72, 25 BRBS at 109 (CRT); *Bath Iron Works*, 950 F. 2d at 56, 25 BRBS at 55(CRT); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

Finally, we address employer's appeal of the fee award. Initially, we reject employer's contention that photocopying expenses are not reimbursable costs in this case because they are part of an attorney's overhead. It is within the administrative law judge's discretion to award such costs, and employer has failed to demonstrate that he abused his discretion in doing so in this case. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 12 (1989)(Order). Employer also contends that two entries awarded by the administrative law judge should be disallowed as double billing. Specifically, employer challenges an entry for 2 hours on December 12, 1995, for a conference with claimant where counsel was awarded 2.5 hours for work performed on the same day while counsel waited to take a deposition. Employer also contends that the administrative law judge's allowance of entries totaling .35 hours for written and telephone correspondence to claimant's prior counsel constitutes double billing. The administrative law judge considered employer's contentions below and awarded counsel .5 hours for the conference with claimant on December 12, 1995, and the total .35 hours, finding that the work performed was necessary to the successful prosection of the claim. Employer's arguments on appeal are rejected, as it has not shown that the administrative law judge abused his discretion in this regard. *Ross v. Ingalls Shipbuilding Inc.,* 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics, Corp.*, 13 BRBS 97 (1981). Inasmuch as employer has not otherwise challenged the administrative law judge's award of attorney's fees, it is affirmed.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge