BRB Nos. 02-0273
and 02-0285

JOHN R. POLOMIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINETTE MARINE CORPORATION	)	
	)	
and	)	
	)	
CRUM AND FORSTER	)	DATE ISSUED:Nov. 20, 2002
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
		DECISION and ORDER

Appeals of the Decision and Order, Decision and Order on Reconsideration, and Supplemental Decision and Order-Partial Approval of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, and the Compensation Order Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

Michael B. Kulkoski (Law Office of Michael B. Kulkoski, LLC), Green Bay, Wisconsin, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision and Order on Reconsideration, and Supplemental Decision and Order-Partial Approval of Attorney Fees (00-LHC-2407) of Administrative Law Judge Richard T. Stansell-Gamm and the Compensation Order Award of Attorney's Fees (Case No. 10-36836) of District Director Thomas C. Hunter rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 26, 1997, claimant injured his back during the course of his employment as an electrician for employer. Claimant underwent back surgery in September 1997; thereafter, he returned to light duty work for employer until March 1998, when he underwent a spinal fusion. Claimant participated in a work hardening program in December 1998, after which he was released to return to work by Dr. Robinson with restrictions against lifting more than 15 pounds, climbing, and driving more than three to five hours a day. Claimant has not returned to work. Employer terminated its compensation payments to claimant based on evidence of suitable alternate employment.

In his Decision and Order, the administrative law judge initially determined that Green Bay, Wisconsin, a distance of over 70 miles from claimant's residence in Wausaukee, Wisconsin, is not part of the local community for purposes of demonstrating the availability of suitable alternate employment. Claimant commuted approximately 37 miles to employer's facility in Marinette, Wisconsin. Thus, the administrative law judge defined the local community for purposes of establishing suitable alternate employment as the area within a 37-mile radius of Wausaukee. The administrative law judge found that employer identified an estimator position that claimant is physically capable of performing, but for which he is otherwise unqualified, and concluded that employer failed to establish the availability of suitable alternate employment within this community. Claimant was awarded compensation for permanent total disability, 33 U.S.C. §908(a), commencing March 5, 1999. The administrative law judge found employer entitled to Section 8(f) relief.

33 U.S.C.§908(f) In his Decision and Order on Reconsideration, the administrative law judge found that employer also identified a sales representative position within claimant's local community that is physically unsuitable for claimant. The administrative law judge rejected employer's motion that he reconsider his finding as to the local community for purposes of establishing suitable alternate employment.

Subsequent to the administrative law judge's decisions, claimant's attorney submitted a fee petition to the administrative law judge requesting $7,293, representing 44.2 hours of attorney services before the administrative law judge at an hourly rate of $165, and costs of $1,181.29. Claimant's attorney also submitted a fee petition to the district director requesting $3,473.25, representing 21.05 hours at an hourly rate of $165, and costs of $741.49. Employer filed objections to the fee requests.

In his Supplemental Decision and Order-Partial Approval of Attorney Fees, the administrative law judge, after considering the objections raised by employer, approved the hourly rate, reduced by 0.7 the number of hours requested, and deducted $108.50 from the requested costs. Accordingly, the administrative law judge awarded claimant's attorney a fee of $7,177.50 and costs of $1,072.79. In his Compensation Order Award of Attorney's Fees, the district director approved the hourly rate and the number of hours requested, and deducted $78.31 from the requested costs. Accordingly, the district director awarded claimant's attorney a fee of $3,473.25, and costs of $663.18.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Employer also challenges the administrative law judge's fee award. BRB No. 02-0273. In addition, employer appeals the district director's fee award. BRB No. 02-0285. Claimant responds, urging affirmance of the administrative law judge's decisions awarding benefits and an attorney's fee, and the district director's order awarding an attorney's fee.

Employer challenges the administrative law judge's finding that the area within 37 miles of claimant's residence in Wausaukee is the appropriate geographic area for purposes of establishing the availability of suitable alternate employment, and thus, employer argues that the administrative law judge improperly excluded from consideration several positions identified by employer's vocational expert in the Green Bay area. Where, as here, it is uncontested that claimant is unable to return to his usual employment, 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 or psychological restrictions, is capable of performing. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available

and suitable for the claimant. *Id.*

The administrative law judge found that commuting from claimant's residence in Wausaukee to Green Bay, a distance of 74 miles, takes approximately an hour and a half, Decision and Order at 19 n.10, and that the side effects of claimant's pain medication would not impede this commute. The administrative law judge noted, however, that the vocational experts disagreed on the reasonableness of a commute from Wausaukee to Green Bay. Claimant's vocational expert, Mr. Thompson, testified that the typical commuting range is 45 minutes to an hour, and that a commute from claimant's residence to Green Bay is unreasonable. Tr. at 101, 120. Employer's vocational expert, Ms. Godsey-Ivans, testified that, based on her experience, such a commute is not unusual. Tr. at 124, 134-135. The administrative law judge next credited evidence that claimant lived and worked in Wausaukee for decades prior to commencing work for employer and commuting 37 miles to employer's facility. The administrative law judge found that requiring claimant to commute twice as far to work in Green Bay would impose a fundamental change in his work lifestyle. The administrative law judge also determined that a daily commute totaling three hours approaches claimant's driving restriction of three to five hours, EX 1, and that, while Dr. Robinson did not restrict claimant from a three-hour round-trip commute, there is no evidence that Dr. Robinson approved claimant's commuting to Green Bay. The administrative law judge also found that this commute would increase claimant's workday by another hour and a half and his costs without any corresponding increase in compensation. Finally, the administrative law judge reasoned that, since employer chose to locate its facility in an economically suppressed location, employer should bear the burden of establishing suitable alternate employment in the surrounding area, rather than requiring claimant to

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[1]We reject employer's contention that the claimant should bear the burden of establishing the absence of any suitable alternate employment in order to be entitled to total disability benefits. It is well established that once, as here, claimant establishes his inability to perform his usual work, the burden shifts to employer to produce evidence of the availability of suitable alternate employment in order to show that claimant is, at most, partially disabled. *See*, *e.g., Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). No court has found that this scheme of shifting burdens is inconsistent with the Supreme Court's holding in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), and we decline employer's suggestion that we overrule case law shifting the burden to employer to produce evidence of suitable alternate employment. Claimant's burden of showing that he diligently sought suitable work does not arise until employer establishes the availability of such work. *See 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).

double his usual commuting time and spend nearly three hours a day in his car. The administrative law judge determined that, based on claimant's typical commute to employer's facility before his work injury, a commute of 37 miles, or 45 minutes, is reasonable, and thus, the administrative law judge concluded that a 37-mile radius from claimant's residence in Wausaukee is the local community for purposes of employer establishing the availability of suitable alternate employment. In his decision on reconsideration, the administrative law judge rejected employer's contention that he apply a "reasonable person" standard for purposes of defining the local community because it would not account for claimant's physical limitations.

In evaluating whether employer has established the availability of suitable alternate employment, the administrative law judge is afforded considerable discretion in determining the relevant labor market. *See Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994)(where claimant relocates after his injury, administrative law judge must weigh a variety of factors to determine relevant labor market). In the instant case, we hold that the administrative law judge's defining of the local community for purposes of suitable alternate employment as the area within a 37-mile radius of claimant's residence in Wausaukee is rational and supported by substantial evidence. Specifically, the administrative law judge rationally accounted for factors such as claimant's physical restrictions, his long-term residence in Wausaukee, and employer's location of its facility in an economically disadvantaged area. Moreover, the administrative law judge's rationale is consistent with the testimony of employer's vocational expert, Ms. Godsey-Ivans, who testified that the reasonableness of a commute is subject to change and is best determined on a case-by-case basis. Tr. at 131-135; *See Wood,* 112 F.3d 592, 31 BRBS 43(CRT); *See,* 36 F.3d 375, 28 BRBS 96(CRT). Accordingly, we affirm the administrative law judge's finding that the relevant community for purposes of employer establishing the availability of suitable alternate employment is the 37-mile radius around Wausaukee. Thus, we affirm the administrative law judge's rejection of the jobs employer identified in Green Bay.

Alternatively, employer argues that the administrative law judge erred by finding that the positions it identified at Capital Interiors and Bay Lakes Ecowater Systems did not establish the availability of suitable employment within claimant's local community. In his decision, the administrative law judge found that employer identified one estimator position at Capitol Interiors that claimant is physically capable of performing. The administrative law judge determined that the estimator position is unsuitable for claimant, as the job description listed as desired an associates degree and computer skills, neither of which claimant possesses, and, upon inquiry, Capitol Interiors informed claimant that the job was unavailable. EX 7 at 2; Tr. at 58-59. On reconsideration, the administrative law judge found that employer also identified a sales representative position at Bay Lakes Ecowater Systems. The administrative law judge determined that the job

was physically unsuitable for claimant, as it requires driving up to 50 percent of the workday, as well as a regular commute of more than 37 miles from claimant's home. EX 7 at 3; EX 8 at 2; Tr. at 88-90.

Employer's challenge to the administrative law judge's conclusion that it failed to establish the availability of suitable alternate employment is without merit. The administrative law judge rationally rejected the position at Capital Interiors based on claimant's lack of computer skills and an associates degree, as well as claimant's testimony that, upon inquiry, he was informed the job opening had been filled. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Wilson v. Crowley Marine*, 30 BRBS 199 (1996). Moreover, the administrative law judge properly compared claimant's physical restrictions as determined by his treating physician, Dr. Robinson, to the physical requirements of the sales position at Bay Lakes Ecowater Systems, and he rationally concluded that the position was not suitable for claimant. *See Hernandez v. National Steel & Shipbuilding Co*., 32 BRBS 109 (1998). Accordingly, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and his consequent award of permanent total disability compensation to claimant. *See Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Fransen]*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

We next address employer's appeal of the administrative law judge's and district director's fee awards. Employer objects to alleged bulk entry billing and it asserts that a greater burden of proof should be placed on claimant's attorney to establish the validity of an entry on the fee petition when an objection is raised. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Moyer v. Director, OWCP,* 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). We reject employer's contention that certain entries on the fee petition fail to adequately describe the nature of the time expended. A review of claimant's fee petition reveals that counsel's entries are sufficiently specific to satisfy the regulatory criteria. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132(a). The fee petition also fulfills claimant's counsel's burden to provide a complete, sworn statement of the extent and character of the necessary work done, the professional status of each person performing such work, and the normal billing rate for such person, and we reject employer's assertion that claimant's counsel has a greater burden of proof to establish the compensability of the services when employer files an objection. *See generally National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Matthews v. Walter*, 512 F. 2d 941 (D.C. Cir. 1975); 20 C.F.R. §§702.132, 802.203. Furthermore, the administrative law judge and district director adequately

addressed employer's challenge to various itemized entries on appeal, considered the response of claimant's attorney, and stated the grounds by which employer's objections were rejected. As employer has not met its burden of showing that the administrative law judge and district director abused their discretion in this regard, the number of hours awarded by the administrative law judge and district director is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

We also reject employer's contention regarding the award of costs by the administrative law judge. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that where an attorney's fee is awarded against employer, costs also may be assessed against employer. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). In the instant case, the administrative law judge disallowed as office overhead the cost of photocopying and postage, and allowed $73 for a demonstrative exhibit used at the hearing. The administrative law judge found the exhibit an appropriate and helpful litigation expense. We reject employer's objection to this expense, as employer has failed to show that the cost of the exhibit was unreasonable or that the administrative law judge erred in finding the exhibit to be necessary. *See generally O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). We, therefore, affirm the administrative law judge's and district director's attorney's fee awards.

Finally, claimant's counsel has filed a fee petition for time expended before the Board in which he requests a fee of $3,843, representing 18.3 hours at hourly rate of $210. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeals. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Employer contends that claimant prematurely filed his fee petition, alleging that the regulation at 20 C.F.R . §802.203(c) mandates that a fee petition can be filed only after the issuance of the Board's decision on the merits. We reject this construction of the regulation. The regulation does not mandate that counsel wait until the Board issues a decision until he or she may file a fee petition. It is not inappropriate for claimant's attorney to file a fee

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[2]In addition to his November 26, 2001, Compensation Order, the district director issued a letter to all parties the same day, in which he addressed employer's specific objections to the fee petition.

[3] Section 802.203(c) states, in relevant part,

> Within 60 days of the issuance of a decision or a non-interlocutory order by the Board, counsel . . . for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee.

20 C.F.R. §802.203(c).

petition during the pendency of the appeal, or for the Board to award an attorney's fee at the same time as it addresses the parties' substantive contentions. *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980); *see e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Nonetheless, we afford employer 10 days from receipt of this decision in which it may file any objections to counsel's fee petition. *See* 20 C.F.R. §§802.203(g), 802.219(e).

Accordingly, the administrative law judge's award of benefits and an attorney's fee are affirmed. The district director's attorney's fee award also is affirmed. Employer may file objections to counsel's fee petition for work performed before the Board within 10 days of its receipt of this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge