BRB Nos. 03-0529
and 03-0529A

LLOYD RHINE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	DATE ISSUED:April 29, 2004
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeals of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (1998-LHC-02090) of Administrative Law Judge Jeffrey Tureck 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).

Claimant injured his left arm, neck, and back on October 22, 1997, when he was struck by a heavy cable during the course of his employment as a longshoreman. Claimant was diagnosed with a left arm contusion and an upper back and neck sprain. On May 1, 1998, claimant was released to attempt to work by his treating physician, Dr. Craven. Claimant was assigned various longshore jobs. Claimant determined that his work injury precluded his working as a millwright and gear locker; however, he was able to work as a sweeper, master consoleman, and driver. On September 14, 1998, claimant complained to Dr. Craven of numbness on the left side of his face, jaw, and tongue. Claimant stopped working on September 28, 1998, and on October 2, 1998, he was diagnosed with neck-tongue syndrome. Claimant returned to work on December 2, 1998, with permanent work restrictions of no climbing, minimal lifting over 35 pounds, and minimal pushing or pulling over 50 pounds. Claimant underwent non-work-related carpal tunnel surgery for his right hand on January 29, 1999, and for his left hand on April 9, 1999. Claimant returned to work after the latter surgery on June 5, 1999. On August 5, 1999, claimant was working as a master consoleman when he had an onset of neck-tongue syndrome symptomatology, which included slurred speech and drooling. Thereafter, claimant was informed by the union secretary that this symptomatology created risks at work for claimant and his co-workers, and that he could not return to work until he was released by his treating physician for work with no physical restrictions. Claimant has not obtained such a work release. Consequently, claimant has not returned to longshore employment. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from October 23, 1997, to March 3, 1998, June 2 to 3, 1998, August 6, 1999, to February 22, 2001, and for permanent partial disability at a rate of $615 per week, 33 U.S.C. §908(c)(21), from August 13, 2001, to November 26, 2001.

In his decision, the administrative law judge found claimant entitled to compensation for temporary total disability from October 23, 1997, to May 1, 1998, when claimant was released to return to work by Dr. Craven. The administrative law judge found that at this time claimant was able to obtain jobs he was physically capable of performing, and that he averaged 32.5 hours of work per week, until he stopped working after September 28, 1998, due to the onset of neck-tongue syndrome. Based on the average weekly wage previously utilized by employer when it voluntarily paid claimant compensation, the administrative law judge found that claimant sustained a weekly loss of wage-earning capacity of $177.90 during his return to work from May 4 to September 28, 1998. 33 U.S.C. §908(e). The administrative law judge also found claimant entitled to compensation for temporary total disability from September 29 to

December 1, 1998. The administrative law judge next determined that, other than the periods when he was off work due to his non-work-related carpal tunnel surgeries, claimant worked an average of over 35 hours per week from December 2, 1998, to August 5, 1999, and that claimant did not sustain a loss of wage-earning capacity during this time. The administrative law judge found that claimant is entitled to compensation for temporary total disability from August 6, 1999, to July 11, 2000. On July 11, 2000, claimant's treating physician, Dr. Won, authorized claimant's return to work subject to the restriction of no repetitive lifting over 20 pounds. The administrative law judge found that claimant has not returned to longshore employment work due to the requirement imposed by claimant's union that his treating physician provide an unrestricted release to return to work. The administrative law judge concluded that, under these circumstances, employer is not liable for compensation after July 11, 2000.

With regard to claimant's average weekly wage, the administrative law judge stated that the parties agreed that it should be calculated pursuant to Section 10(c), 33 U.S.C. §910(c). The administrative law judge, however, found the record evidence insufficient to determine an average weekly wage. Since employer had voluntarily paid claimant compensation based on an average weekly wage of $1,037.04, and this average weekly wage is favorable to claimant, the administrative law judge concluded that claimant's average weekly wage is $1,037.04. Finally, the administrative law judge determined that the intervenor, ILWU-PMA Welfare Plan, is entitled to a lien totaling $20,910, representing benefits it paid claimant due to his work injury.

On appeal, claimant challenges the administrative law judge's findings regarding the extent of claimant's disability and his average weekly wage. BRB No. 03-0529. Employer cross-appeals the administrative law judge's average weekly wage finding. BRB No. 03-0529A. In all other respects, employer responds, urging affirmance.

Claimant first argues that the administrative law judge erred by ending his initial compensation award for temporary total disability on May 1, 1998, as he was not released to return to work by his treating physician, Dr. Craven, until May 4, 1998. We agree. Compensation for total disability is payable during the continuance of the disability. *See* 33 U.S.C. §908(a), (b). In this case, the administrative law judge awarded claimant compensation for temporary total disability from October 23, 1997, to May 1, 1998. The administrative law judge credited Dr. Craven's opinion that claimant could return "for regular duty on May 4th." CX 8 at 41. Thus, Dr. Craven's report does not support the administrative law judge's termination of claimant's compensation for temporary total disability on May 1, 1998. In the absence of any evidence that claimant could return to work on May 2, 1998, we modify the award to provide claimant compensation for temporary total disability from October 23, 1997, through May 3, 1998, pursuant to Dr. Craven's opinion.

Claimant next challenges the administrative law judge's findings with respect to his entitlement to compensation for temporary partial disability, 33 U.S.C. §908(e), during the periods he was able to return to work from May 4 to September 28, 1998, and from December 2, 1998, to August 5, 1999. The administrative law judge found that claimant had a loss of wage-earning capacity of $177.90 per week for the former period, but that claimant's wage-earning capacity during the latter period exceeded his average weekly wage. Claimant's specifically challenges the administrative law judge's crediting of his actual wages to calculate claimant's post-injury wage-earning capacity during these periods, alleging that he performed jobs beyond his physical capabilities.

The party seeking to prove that claimant's actual post-injury wages are not representative of claimant's wage-earning capacity bears the burden of proof. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *see also Carpenter v. California United Terminals*, 37 BRBS 149 (2003); *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990). In this case, claimant's counsel did not make any specific contentions in his opening statement concerning claimant's entitlement to partial disability benefits for the periods at issue. At the close of the formal hearing, the administrative law judge asked counsel for post-hearing briefs that are "very very specific" given the size of the record. Tr. at 270. In his post-hearing brief, counsel merely asserted entitlement to temporary partial disability benefits for the periods in question, and asserted that the case should be remanded to the district director to calculate the compensation to which he is entitled during the periods he was able to return to work. *See* Claimant's post-hearing brief at 13-14, 21-22. It is the function of the administrative law judge, not the district director, to determine the amount of compensation due or to provide a means of calculating the correct amount without resort to extra-record facts. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Thus, it was proper for the administrative law judge to address the issue of claimant's loss in wage-earning capacity.

In his post-hearing reply brief, claimant contended that his benefits for the period between May 4 and September 28, 1998, should be calculated by using his actual earnings reduced to 1997 wage levels. Claimant's closing Reply brief at 3-4. This is exactly the approach used by the administrative law judge for both periods of alleged partial disability. Decision and Order at 16; *see generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). As claimant did not contend before the administrative law judge that his actual post-injury earnings were not representative of his wage-earning capacity and as the administrative law judge utilized the computation method urged by claimant, we decline, on the facts of this case, to entertain claimant's contention that his actual post-injury wages did not fairly and reasonably represent his wage-earning capacity. Thus, we affirm the temporary partial

disability award for the period of May 4 to September 28, 1998, and the denial of benefits for the period of December 2, 1998 to August 4, 1999.

Claimant next argues that the administrative law judge erred by denying compensation benefits after July 11, 2000. In his decision, the administrative law judge found that after his release to work on July 11, 2000, claimant was physically capable of performing the job duties he had successfully performed from December 2, 1998, to August 4, 1999. Claimant does not challenge the administrative law judge's finding that he was physically able to return to work on July 12, 2000, when Dr. Won authorized his return to work subject to the restriction of no repetitive lifting over 20 pounds. Claimant argues that he nonetheless is entitled to compensation because his union prohibited his returning to work unless he was released to return with no physical work restrictions. The union imposed this requirement after claimant had an episode of neck-tongue syndrome symptomatolgy at work on August 5, 1999. Claimant's union viewed his condition as creating a safety risk for himself and his co-workers.[1] Tr. at 177-178, 184-185.

The administrative law judge found that claimant's not working is due to his union's prohibiting his return to work with restrictions and that employer is not liable for the consequences of the union's action. The administrative law judge also found that claimant had not attempted to utilize specific procedures to overcome this impasse, which were adopted by the Joint Coast Labor Relations Committee to implement the Americans with Disabilities Act (the ADA). The administrative law judge further found that employer's November 13, 2001, labor market survey identified suitable alternate employment, but that claimant has not pursued alternate employment because he might lose his union status if he engaged in non-longshore employment.

In this case, claimant was working in a limited capacity at the time of the onset of his neck-tongue syndrome symptomotology. The administrative law judge found that employer cannot be held liable for claimant's loss in wage-earning capacity because such loss is due to the union's arbitrary decision prohibiting claimant from returning to work. We cannot affirm the denial of benefits on this rationale. The administrative law judge stated that were it not for the union's action, claimant could perform his "pre-injury" job. Decision and Order at 16. The administrative law judge found, however, that claimant was able to work only in certain jobs due to his initial work injury. *See id.* Thus, the issue before the administrative law judge does not concern claimant's ability to return to his pre-injury work, but whether employer established the availability of suitable

[1] Employer does not dispute that claimant's neck-tongue syndrome is related to the October 22, 1997, work injury.

alternate employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The longshore jobs claimant performed after he returned to work on May 4, 1998, and on December 2, 1998, constituted suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The opportunity for claimant to return to this suitable alternate employment was withdrawn by the union when it refused to allow claimant to work without an unrestricted medical release.

The issue in this case, therefore, concerns whether employer bears the renewed burden of establishing suitable alternate employment. In *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), the Fourth Circuit held that when employer withdraws suitable alternate employment at its facility for economic reasons, it bears the renewed burden of establishing suitable alternate employment in order to avoid liability for total disability. In contrast, if suitable alternate employment becomes unavailable due to claimant's own misconduct, employer need not establish the availability of other suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, *aff'd*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). The fact that claimant is physically capable of performing the same jobs after July 11, 2000, that he did in his previous returns to work is not sufficient to establish suitable alternate employment, as "disability" under the Act is an economic as well as a medical concept, and cannot be measured by claimant's physical condition alone.[2]

[2] For example, in *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), the administrative law judge found the claimant physically capable of returning to his usual job; however, employer did not allow claimant to resume working. Instead, employer offered claimant retraining and placement in less strenuous work in another city. On appeal, the United States Court of Appeals for the District of Columbia held the administrative law judge erred by finding that claimant could perform his original job based solely on the medical evidence, rather than on the economic factors as well. The court held that since claimant's work injury was the precipitating factor that rendered his former job unavailable, claimant fulfilled his burden of showing that he was unable to return to his usual work due to his injury. Similarly, in *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989), the administrative law judge found that the claimant was physically capable of returning to work; however, pursuant to *McBride*, the Board held that claimant established that he is not able to perform his usual employment because none of the doctors who examined claimant gave him a full release to return to work and the employer refused to give claimant his job back without such a release.

Pietrunti v. Director, OWCP, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Rather, employer must establish the availability of actual suitable jobs claimant can perform given his vocational and educational background and the restrictions imposed due to the work injury. *See Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660.

In view of employer's burden to establish suitable alternate employment when, as here, claimant is unable to return to his usual work, the fact that the union refused to allow him to return to work without a release cannot meet employer's burden.[3] Moreover, the unavailability of the suitable jobs claimant performed after his initial work injury is due solely to the effects of that injury and not to any misconduct on claimant's part. Where suitable alternate employment at employer's facility is withdrawn, employer must establish the availability of other suitable alternate employment in order to avoid liability for total disability. *See Hord*, 193 F.3d 797, 33 BRBS 170(CRT). We therefore vacate the denial of disability benefits after July 11, 2000. On remand, the administrative law judge must discuss in fuller detail the evidence relating to suitable alternate employment.

In this regard, the administrative law judge should further discuss whether employer established the availability of actual, suitable jobs by virtue of the ADA program adopted by the union and PMA, as of January 19, 2001. The administrative law judge stated that claimant had not attempted to return to work by utilizing the procedures implemented the Joint Coast Labor Relations Committee (the Committee) to comply with the ADA. Decision and Order at 17-18; *see* Tr. at 72-74, 207-210. The Committee adopted this policy on January 19, 2001, EX 138, and it is thus relevant to the availability of suitable jobs after this date. The administrative law judge found that claimant is physically capable of performing many longshore jobs, and he should have very little difficulty in obtaining jobs he could perform if he were given the accommodation of having the dispatcher select a job within claimant's limitations whenever his normal turn to work arose. Decision and Order at 7 n.3.

The administrative law judge also must re-address employer's labor market survey. In his decision, the administrative law judge summarily credited employer's November 13, 2001, labor market survey to find that employer established the

[3] Claimant asserts that the dispatch system is operated jointly by the union and employers. The administrative law judge did not discuss whether the union's action was taken pursuant to a collective bargaining agreement with employer or PMA, in which case employer certainly must bear responsibility for an agreement into which it entered.

availability of suitable alternate employment.[4] Decision and Order at 17. The administrative law judge, however, did not identify which specific jobs are suitable for claimant. Thus, we must remand the case for specific findings of fact. Employer's survey lists jobs available after July 11, 2000. EX 153. On remand, the administrative law judge should determine which jobs in employer's retrospective survey are sufficient to establish suitable alternate employment. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The administrative law judge must then determine whether claimant is entitled to compensation after July 11, 2000, for partial disability due to a loss of wage-earning capacity based on any of the jobs found suitable and available. 33 U.S.C. §908(c)(21), (e), (h).

Claimant also asserts that the administrative law judge erred by not considering his entitlement to a *de minimis* award. Employer responds that claimant did not raise this issue below. In *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, considered the claimant's entitlement to a nominal award on appeal even though the claimant did not specifically raise the issue before the administrative law judge. The circuit court held that that the claimant was asserting entitlement to an award of any size by his contesting downward modification of his award. *Rambo,* 81 F.3d 840, 30 BRBS 27(CRT). Thus, on remand, should the administrative law judge find that claimant is not entitled to an award based on a present loss of wage-earning capacity, the administrative law judge must address claimant's entitlement to a *de minimis* award.[5] *See Metropolitan*

[4] We reject claimant's assertion that the survey cannot establish suitable alternate employment on the basis that claimant would risk his union status by accepting non-longshore employment. Should claimant be unable to return to longshore employment, the potential loss of his union registration by performing non-longshore work is not a relevant consideration. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

[5] We reject claimant's contention that the administrative law judge erred by not issuing his decision until over a year after the record closed. While the Act requires that decisions be issued within 20 days after the close of the record, 33 U.S.C. §919(c), failure to issue a decision within 20 days requires remand only where the aggrieved party shows it was prejudiced by the delay. *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981); *see also* 20 C.F.R. §702.349. In this case, claimant asserts prejudice based on the administrative law judge crediting of employer's vocational consultant, Mr. Katzen, over claimant's consultant, Mr. Huckfeldt, the administrative law judge discrediting the testimony of the union secretary, Mr. Lunde, regarding claimant's dispatch rights, and his not discussing claimant's credibility and efforts to return to work. These assertions of

Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001); *Ramirez v. Sea-Land Services, Inc*., 33 BRBS 41 (1999).

We next address claimant's appeal and employer's cross-appeal of the administrative law judge's average weekly wage determination. In his decision, the administrative law judge found that the parties agree that claimant's average weekly wage must be calculated under Section 10(c). The administrative law judge, however, stated that the use of Section 10(b), 33 U.S.C. §910(b), would be the most reasonable approach because during the year prior to his injury claimant's seniority status changed from casual laborer to B-man, which more than doubled his income, but claimant worked only eight weeks as B-man. Decision and Order at 19, 21. The administrative law judge found that, instead of the parties' reliance on concrete data from which he could apply Section 10(b), claimant proposed an esoteric and complex scheme to derive an average weekly wage of $1,303.10, while employer suggested an artificially low figure of $877.96 per week, which it later abandoned in favor of arguing for an average weekly wage of $1,037.04. The administrative law judge found that this latter figure was proposed by claimant years previously, and that it has no basis in the record evidence. Decision and Order at 21.

The administrative law judge found that based on this record, the most reasonable average weekly wage based on the best data available is employer's assertion that claimant's average weekly wage is $877.96, which represents the composite average weekly wage of B-men in 1997. *Id.; see* EX 9. Nonetheless, the administrative law judge found this evidence flawed as it is based on the calendar year 1997 rather than the year prior to claimant's work injury on October 22, 1997. Also, the B-man average weekly wage includes all workers who earned one or more hours of pay as a B-man during 1997, and there is no breakdown of the number of hours worked by each B-man. Accordingly, the administrative law judge found that the average may be artificially low if it includes a number of workers who worked limited hours as a B-man in 1997. Conversely, the administrative law judge found that the figure may be artificially high if it reflects the earnings of workers who worked an inordinately high number of hours. *Id*. The administrative law judge concluded that, since employer had paid benefits based on an average weekly wage of $1,037.04, he would credit this figure as claimant's average weekly wage. The administrative law judge reasoned that an average weekly wage of $1,037.04 is more favorable to claimant than the average weekly wage of $877.96 he derived from the best evidence in an incomplete record.

---

error in the administrative law judge's weighing of the evidence are insufficient to establish prejudice by virtue of the delay in administrative law judge's issuing of his decision. *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). In rendering his determination that claimant's average weekly wage is $1,037.04, the administrative law judge stated that he did not rely on evidence of record. Section 19(d) of the Act, 33 U.S.C. §919(d), states that all decisions must be rendered in accordance with the Administrative Procedure Act, 5 U.S.C. §554 (the APA). The APA requires that decisions be based on the evidence of record. 5 U.S.C. §557(c); *see also McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P.Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). The administrative law judge found that the average weekly wage of $1,037.04 "seems to have no basis in the record," and "apparently relies on evidence not in the record." Decision and Order at 21. Moreover, the administrative law judge found that, for purposes of determining claimant's average weekly wage, the record "clearly is incomplete." *Id*. The administrative law judge stated that the wage records of comparable workers provide the most reasonable approach for determining claimant's average weekly wage. Section 702.338 of the Acts regulations, 20 C.F.R. §702.338, permits the administrative law judge to reopen the record for admission of relevant evidence that he believes is available. While the administrative law judge is not required to credit the wages of comparable workers to determine claimant's average weekly wage, we must vacate the administrative law judge's average weekly wage finding and remand this case for the admission of evidence into the record if appropriate, and a determination of claimant's average weekly wage based on the evidence of record. *See McCracken v. Spearin, Preston and Burrows, Inc.*, 36 BRBS 136 (2002); 29 C.F.R. §18.57(b).

We also agree with claimant that the administrative law judge erroneously found that vacation pay earned during the year of injury, 1997, but not actually paid to claimant until 1998, may not included in calculating claimant's average weekly wage under Section 10(c). *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The administrative law judge further discussed without deciding whether a four percent raise claimant received shortly before his October 1997 work injury should be fully reflected in determining claimant's average weekly wage at the date of injury. Decision and Order at 20. Under Section 10(c), however, claimant's average weekly wage should reflect this increase in pay. *See Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *see also Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

We reject claimant's contention that employer is precluded on remand from arguing for an average weekly wage less than $1,037.04, because employer assented to this average weekly wage when the case was initially before the administrative law judge.

See Employer's Closing Argument at 26, 30. Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). In this case, employer's contention in its closing brief to the administrative law judge that claimant's average weekly wage is $1,037.04 does not estop employer from arguing on remand that a lower average weekly wage is applicable because employer did not obtain any advantage from its initial average weekly wage contention. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997). We also reject employer's contention that the evidence of record is sufficient to establish claimant's average weekly wage under either Section 10(b) or Section 10(c). Employer submitted a chart showing the average yearly earnings of all B-men from 1968 to 1998. EX 9. The administrative law judge rationally found that this evidence is inadequate to determine claimant's average weekly wage under Section 10(b) because this evidence does not indicate the actual earnings of comparable workers during the year prior to claimant's work injury on October 22, 1997. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). Moreover, although the administrative law judge found this evidence "the best data available," he also found that the resulting average weekly wage of $877.96 "artificially low," and "far from perfect." Decision and Order at 21. The administrative law judge found that these earnings do not reflect the precise average earnings by B-men during the 365 days prior to claimant's work injury in October 22, 1997. The administrative law judge also found that since the average of $877.65 includes the wages of all 63 B-men who worked as little as one hour during 1997, the average may be artificially low depending on the number of B-men who worked only a limited number of hours in 1997.[6] Decision and Order at 21. Thus, the administrative law judge rationally rejected this evidence, which is within his discretion under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

[6] In response, claimant also argues that this average is artificially low because it includes only the wages earned during 1997 as B-men who were formerly casual workers, like claimant, whose status changed to B-man in 1997, workers who were B-men in 1997 who became A-men during 1997, B-men whose hours were reduced due to injury in 1997, and B-men who otherwise limited the number of hours they worked. Claimant's Reply Memorandum at 7; Claimant's Response to Employer's Petition at 5.

Accordingly, the administrative law judge's decision is modified to award claimant compensation for temporary total disability from October 23, 1997, through May 3, 1998. The administrative law judge's denial of additional benefits after July 11, 2000, is vacated, as is his average weekly wage finding, and the case is remanded for the administrative law judge to re-open the record for evidence from which he can determine claimant's average weekly wage, and to address claimant's entitlement to compensation after July 11, 2000. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge