BRB No. 97-1756

TOMMY R. MOORE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

George W. Murphy (Parlin & Murphy), Ocean Springs, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-498) of Administrative Law Judge C. Richard Avery 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).

Claimant, working as a welder for employer, injured his back on August 1, 1994, when a flux core box fell and struck him in the neck and upper back. Claimant was ultimately treated by Dr. McCloskey who diagnosed a probable herniated disc at C5-6 with evidence of degenerative disc disease, and recommended surgery. On December 28, 1994,

Dr. McCloskey performed an anterior cervical diskectomy. In a follow-up report dated April 11, 1995, Dr. McCloskey observed that claimant was "virtually asymptomatic" and, accordingly, released him to light duty work with restrictions of no lifting over twenty pounds except for occasionally and no overhead work. Claimant returned to a welder job with employer on April 25, 1995, which was modified to his restrictions. On August 31, 1995, Dr. McCloskey concluded that claimant had reached maximum medical improvement with a ten percent whole-body impairment. Additionally, Dr. McCloskey altered claimant's restrictions to allow him to perform any work which did not require heavy lifting or overhead work.

Claimant was laid-off on January 25, 1996, due to a lack of work entirely unrelated to his injury, and for a period claimant received unemployment benefits. In March 1996, claimant obtained a full-time job as a bench-worker rebuilding starters and alternators with Jerry's Auto Electric [JAE], earning $5.80 per hour.[1] Subsequent to his hiring, claimant has made no effort to find any other employment. Claimant remained employed at JAE at the time of the hearing and testified that he was earning $6.80 per hour.

Employer voluntarily paid claimant temporary total disability benefits from August 6, 1994, to April 24, 1995, and again from January 25, 1996, to March 28, 1996, based on an average weekly wage of $460.79. Additionally, employer paid permanent partial disability benefits from March 29, 1996 to May 10, 1996, at a weekly rate of $152.52.[2] Thereafter, claimant filed his claim for continuing permanent partial disability benefits.

In his decision, the administrative law judge found that although claimant was not capable of returning to his usual employment, employer met its burden of establishing the availability of suitable alternate employment by providing claimant with the modified welding position within its facility, which did not constitute sheltered employment. The

[1]Claimant testified that he had checked into one structural welding position at Lawler's Construction Company, between his lay-off from employer and the procurement of his job at JAE, but admitted that he did not file any written application for that position.

[2]Claimant's permanent partial disability benefits were presumably calculated based on claimant's post-injury wages with JAE.

administrative law judge further concluded that claimant was not entitled to any additional permanent partial disability benefits because he failed to prove that the actual wages he earned during his modified employment with employer, which equaled his pre-injury wages, are not representative of his post-injury wage-earning capacity.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant argues that contrary to the administrative law judge's finding, as his post-injury position with employer lasted only nine months, the wages earned in that position are insufficient to establish claimant's true post-injury wage-earning capacity. Claimant maintains that his wages with JAE are more representative of his actual post-earning wage-earning capacity and therefore those wages should be used to calculate any loss in wage-earning capacity.

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, at 652-660 (1979). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In his decision, the administrative law judge, after determining that claimant could not perform his usual employment, found that claimant's modified welding position with employer met employer's burden of proving suitable alternate employment. The administrative law judge then found, citing *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996), that the actual wages earned by claimant in this modified welding position fairly and reasonably represent his post-injury wage-earning capacity, and relying on claimant's admission that he did not suffer a loss of wage-earning capacity while working in the modified welder position, the administrative law judge concluded that

claimant was not entitled to any additional compensation. In addition, the administrative law judge found that employer's January 1997 labor market survey indicated at least two welding jobs that were available in the open market and that claimant did not use due diligence in attempting to find a welding position after the lay-off from employer. Moreover, the administrative law judge noted, based on the testimony of employer's labor relations specialist, Ms. Wiley, that employer anticipated re-hiring those laid-off by December 1997, but that claimant had withdrawn his pension and knowingly forfeited his seniority and recall rights. The administrative law judge observed that claimant instead chose to take a job with JAE at a lesser wage. The administrative law judge therefore determined that claimant had not met his burden of proving that the actual wages he earned for nine months in the modified position are not representative of his post-injury wage-earning capacity.[3]

We cannot affirm the administrative law judge's finding that claimant has no loss in wage-earning capacity. Although the administrative law judge notes the labor market surveys of vocational expert Tom Stewart, he does not fully discuss this evidence as it relates to claimant's post-injury wage-earning capacity. In his report dated April 5, 1996, Mr. Stewart specifically comments:

> In consideration of Mr. Moore's age, educational achievement, work history/transferable skills and the relatively mild physical restrictions assigned by Dr. McCloskey, it is this consultant's opinion that Mr. Moore can presently obtain and satisfactorily handle a range of unskilled (Auto Electric Repairman), light to medium jobs. *As Mr. Moore has already obtained a job as an Auto Electric Repair/Technician as of this writing, it would seem evident that he has proven his residual employability*.

---

[3]As the administrative law judge has discussed claimant's post-injury wage-earning capacity and determined whether claimant has any loss in wage-earning capacity, his decision encompasses a consideration of claimant's claim for permanent partial disability benefits. Consequently, we reject claimant's contention that the administrative law judge has failed to consider his claim for permanent partial disability benefits.

Claimant's Exhibit 4a (emphasis added). Mr. Stewart's report states that claimant also could be employed in a relatively wide range of unskilled, light to medium jobs with an entry wage level between $4.25 to $6.00 per hour. *Id.* While Mr. Stewart's subsequent report dated January 10, 1997, identifies two welding positions, he does not state that his prior opinion as to claimant's residual employability has changed. *Id.* This evidence, if credited, supports claimant's assertion that the actual wages earned in his position with JAE are reflective of his post-injury wage-earning capacity, and thus, should have been discussed by the administrative law judge in its entirety prior to his making a determination as to claimant's post-injury wage-earning capacity. Inasmuch as the administrative law judge's discussion of claimant's post-injury wage-earning capacity does not include consideration of this relevant evidence, we must vacate his determination that claimant has no loss in wage-earning capacity, and thus, is not entitled to additional benefits, and remand the case for further consideration.

On remand, in making a determination of claimant's post-injury wage-earning capacity, the administrative law judge must consider and fully discuss all of the relevant evidence of record, including the labor market surveys of Mr. Stewart. Additionally, although the modified welder position within employer's facility may be indicative of claimant's ability to perform certain welding jobs, including those outlined by Mr. Stewart in his January 1997, report, it alone cannot establish claimant's post-injury wage-earning capacity subsequent to the date of his dismissal, *see generally Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), yet his wages in this job are relevant if similar jobs are available to claimant.[4] In this regard, the administrative law judge should discuss the two welding positions identified by Mr. Stewart in his January 1997 report. The administrative law judge, however, must first determine the availability and suitability of these positions consistent with law, *see generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), and then arrive at a dollar figure

[4]We hold that *Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT), is factually distinguishable from the instant case in that although Darby had at one point been laid-off by employer, he nevertheless had returned to work as a modified joiner and remained in that position at the time of hearing. Consequently, Darby's wages in the modified joiner position with employer represented his only actual earnings at the time of the hearing. Thus, the fact that Darby had been laid-off by employer at one point had no relevance to the disposition of that case. In contrast, claimant in the instant case, was laid off by employer and then sought and obtained other employment, and he continued in that employment up to the time of his hearing. Moreover, the Fifth Circuit in *Darby* remanded the case for consideration of the claimant's arguments regarding his post-injury wage-earning capacity.

representative of claimant's wage-earning capacity consistent with Section 8(h).[5] *See Penrod Drilling Co.*, 905 F.2d at 84, 23 BRBS at 108 (CRT). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

[5] The administrative law judge should address claimant's contention that a comparison of the hourly wage rates paid for the two welding positions identified in Mr. Stewart's report of January 1997 with claimant's pre-injury hourly rate of $13.50, *see* Employer's Exhibit 5, reflects a loss in wage-earning capacity.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge