BRB Nos. 93-253
and 93-253A

ROBERT COMSTOCK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TRAILER MARINE TRANSPORT	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits, Decision and Order-Upon Reconsideration, Order of Modification, Order-Approving Stipulation, and Modification of Order Approving Stipulation of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Eugene Mattioni (Mattioni, Mattioni, & Mattioni, Ltd.), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits, Decision and Order-Upon Reconsideration, Order of Modification, Order-Approving Stipulation, and Modification of Order Approving Stipulation (91-LHC-1441) of Administrative Law Judge Frank D. Marden 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 was injured on June 29, 1988, when he slipped from a ladder and fell to the deck of the ship. Upon hitting the deck, claimant turned his right ankle. Claimant was examined at the hospital immediately following the incident, but x-rays revealed no broken bones. However, claimant sought treatment for instability, pain and swelling in his ankle. He attempted to work for several periods following the incident, but has not returned to work since January 25, 1989. Claimant sought temporary total disability benefits from the date of the injury until the date of maximum medical improvement, September 30, 1991, and a scheduled award for a 12 percent loss of use of his right leg pursuant to Section 8(c)(2) of the Act. 33 U.S.C. §908(c)(2).

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant reached maximum medical improvement on September 30, 1991, and that the evidence demonstrates that claimant is disabled from performing his work as a longshoreman. The administrative law judge also found that employer established the availability of suitable alternate employment that the claimant was capable of performing as of the date of maximum medical improvement. Thus, the administrative law judge awarded temporary total disability benefits from June 30, 1988 through September 30, 1991, 33 U.S.C. §908(b), and thereafter a schedule award for a 12 percent impairment of the foot, 33 U.S.C. §908(c)(4). In his decision on reconsideration, the administrative law judge found that employer established the availability of suitable alternate employment as of September 1, 1990, and thus that claimant is entitled only to temporary partial disability benefits from September 1, 1990 through September 30, 1991, 33 U.S.C. §908(e). The administrative law judge also found that claimant is entitled to a permanent partial disability benefits for a 12 percent impairment to the leg, 33 U.S.C. §908(c)(2), instead of to the foot.

On appeal, claimant contends that the administrative law judge erred in finding that claimant was temporarily partially disabled from September 1, 1990 through September 30, 1991. Claimant also contends that the administrative law judge erred in permitting employer's vocational expert to testify beyond the scope of her written reports, and in finding that employer established the availability of suitable alternate employment. Employer contends on cross-appeal that it should be entitled to a credit for the amount of money claimant was able to retain as a result of his staying at home with his young children while receiving temporary total disability benefits from employer.

Initially, claimant contends that the administrative law judge erred in finding that claimant was not entitled to ongoing temporary total, rather than temporary partial, disability benefits as the relevant date for showing the availability of suitable alternate employment is no earlier than the date of claimant's maximum medical improvement. We disagree. Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. Once claimant shows an inability to return to his usual employment, the burden shifts to employer to demonstrate the existence of suitable alternate employment. The same standard applies whether the claim is for permanent or temporary total disability. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). If the employer establishes suitable alternate employment for a claimant with a scheduled injury which has not yet reached maximum medical improvement, that claimant is temporarily partially disabled until the date of maximum

medical improvement, and permanently partially disabled thereafter. Thus, during the period of temporary partial disability, the claimant is entitled to an award for reduced earning capacity. *See* 33 U.S.C. §908(e), (h); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791 (1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979). Moreover, an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Thus, contrary to claimant's contention, the date of maximum medical improvement does not affect when employer may attempt to establish that the extent of claimant's disability has changed from total to partial.

Claimant also contends that the administrative law judge raised the issue of temporary partial disability *sua sponte*, and that employer did not contest that claimant was totally disabled prior to the date of maximum medical improvement. However, a claim for total disability implicitly includes any lesser degree of disability. *See Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985). Moreover, employer raised the issue of claimant's post-injury wage-earning capacity before the administrative law judge, in addition to the issue of when claimant reached maximum medical improvement. Thus, the administrative law judge properly reviewed the evidence of suitable alternate employment to determine when the extent of claimant's disability became partial, even though this date fell in the period of temporary disability. *Mills*, 21 BRBS at 117.

Claimant next contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment, and in allowing the vocational expert to testify regarding positions not identified in her labor market survey. As it is undisputed that claimant cannot return to his usual employment due to his work-related injury, the burden shifted to employer to establish the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). An administrative law judge may credit a vocational expert's opinion even if the expert did not test the employee's capabilities, as long as the expert was aware of the employee's age, education, industrial history and physical limitations when exploring local job opportunities. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Contrary to claimant's contention, he need not be informed of identified positions. *Id.*

In his decision on reconsideration, the administrative law judge stated that he found credible the testimony of employer's vocational expert, Sonya Mocarski, as she adequately assessed claimant's physical limitations, his transferable skills, and his educational background. Decision and

Order-Upon Reconsideration at 5 n.3. Ms. Mocarski testified that she performed a labor market survey in September 1990, and she testified regarding the results of the survey, although the survey itself was not admitted into the record. The administrative law judge found that Ms. Mocarski identified three positions claimant was capable of performing that were actually available in September 1990.[1] *Id.;* Tr. at 113. Thus, contrary to claimant's contention, the credited portion of Ms. Mocarski's testimony pertained to the positions identified in the September 1990 labor market survey, and not to positions identified shortly before the hearing. Thus, we reject claimant's contention that the administrative law judge erred in relying on Ms. Mocarski's testimony in finding that employer established the availability of suitable alternate employment as of September 30, 1990. *See generally Mendoza v. Marine Personnel Co.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995). Furthermore, we affirm the administrative law judge's finding that claimant was entitled to temporary partial disability benefits from September 1, 1990 through September 30, 1991, the date of maximum medical improvement.

Employer contends on cross-appeal that the administrative law judge erred in failing to credit employer the amount of money claimant was able to retain as a result of his caring for his children while staying home on temporary disability. Employer contends, based on the testimony of Ms. Mocarski, that claimant's domestic services are worth $325 per week on the open market. Employer seeks to have this amount credited against its liability for benefits. The extent of claimant's disability changes from total to partial upon a showing by employer that claimant retains a post-injury wage-earning capacity as established by suitable alternate employment which claimant is capable of performing. *Mills*, 21 BRBS at 117. Employer has not established alternate positions as a domestic worker that were reasonably available during the period of temporary disability, which claimant could have realistically secured and performed. In addition, employer has not shown that claimant was paid for domestic services during this period. Therefore, we reject employer's assertion that the administrative law judge failed to award employer a credit against its liability for temporary disability benefits based on claimant's personal domestic housework.

[1]These positions are a small parcel deliverer, a cashier for a garage, and a telemarketing position with Sears. Tr. at 113.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge