BRB No. 97-1207

THEODORE J. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Bernard G. Link, Lutherville, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-32491) of Administrative Law Judge Robert G. Mahony 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).[1] 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).

[1]By Order dated April 9, 1998, the Board remanded this case to the district director for reconstruction of the record or, alternatively, to remand the case to the Office of the Administrative Law Judges for a new hearing. By Order dated November 25, 1998, the Board notified the parties that the record had been received on November 3, 1998, and that the one year period for review would commence on that date.

Claimant, while working as a shipfitter for employer on January 12, 1994, sustained a work-related injury to his left shoulder. Although claimant returned to work briefly on June 6, 1994, he subsequently underwent a surgical procedure related to his work injury. Upon his return to work on August 23, 1994, claimant was assigned to light duty work at employer's facility within the restrictions set by his doctor. Claimant continued to perform light duty work from August 23, 1994 through April 30, 1995, at which time he retired. Claimant thereafter accepted employment with Barret Business Service and later Pinkerton Security Services, a position which he continued to hold at the time of the formal hearing before the administrative law judge. Employer paid temporary total disability benefits from April 13, 1994 until June 5, 1994, and from June 21, 1994 to August 22, 1994. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that employer offered and claimant accepted a light duty position at employer's facility post-injury, that claimant voluntarily retired, that claimant thereafter sought and obtained other employment, and that claimant did not sustain a loss in wage-earning capacity. Based upon the foregoing, the administrative law judge denied claimant's claim for ongoing disability compensation.

On appeal, claimant challenges the administrative law judge's denial of his claim for ongoing disability compensation. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that the administrative law judge erred in denying him ongoing compensation as of April 30, 1995; in support of this allegation, claimant asserts that the administrative law judge failed to take into consideration evidence that claimant was advised by employer on April 20, 1995, that he would be laid-off on April 27, 1995, prior to the date of his retirement.

Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light-duty position in its facility so long as the position is tailored to claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where claimant is laid off from a suitable post-injury light duty job within employer's control, for reasons unrelated to any actions on his part, and demonstrates that he remains

physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In the instant case, claimant does not challenge the administrative law judge's determination that his post-injury light-duty work for employer constitutes suitable alternate employment which he is capable of performing.[2] However, in cases where claimant is unable to return to his usual work, and employer withdraws light duty employment at its facility for reasons unrelated to any misconduct on claimant's part, the burden to establish suitable alternate employment remains with employer if its seeks to avoid liability for total disability benefits. *Mendez*, 21 BRBS at 25. In *Mendez*, the employer withdrew the opportunity for the claimant to do light duty work in its facility by laying off the claimant with the result that suitable alternate employment in employer's facility was no longer available. The Board affirmed the administrative law judge's finding that the claimant was totally disabled since the claimant's light duty job with employer was no longer available and as employer did not establish the availability of other suitable alternate employment. *Mendez*, 21 BRBS at 25.

In the instant case, claimant submitted evidence which may establish that his light duty suitable alternate employment at employer's facility became unavailable to him due to a layoff prior to his decision to retire. *See* CX E. Thus, in the instant case, if light duty suitable alternate employment at employer's facility became unavailable to claimant due to a layoff prior to the date on which claimant retired, claimant may be entitled to temporary total disability compensation during the period subsequent to the layoff. *See Mendez*, 21 BRBS at 22. In addressing this issue, however, the administrative law judge focused on claimant's date of retirement, April 30, 1995, and thus he did not address the issue of whether claimant's light duty position was made unavailable to him prior to that time. *See* Decision and Order at 4-5. Accordingly, as the administrative law judge did not discuss the evidence regarding this issue, we remand the case for the administrative law judge to address claimant's assertions under the proper legal standard.

Claimant next argues that the administrative law judge erred by failing to address his entitlement to permanent partial disability compensation based on the difference between his average weekly wage at the time of his injury and his post-injury wage-earning capacity.

[2]Similarly, claimant does not assert that his employment with Pinkerton Security does not establish the availability of suitable alternate employment.

Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act 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; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are 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 (1979). 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); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the case at bar, the administrative law judge did not address claimant's assertions regarding the applicability of Section 8(c)(21) and (h) of the Act; specifically, in addressing this issue, the administrative law judge summarily stated that, as claimant performed light-duty work post-injury at his usual wages, he suffered no loss in wage-earning capacity. *See* Decision and Order at 5. Next, after finding that claimant's present wages with Pinkerton Security Services fairly and reasonably represent his wage-earning capacity in the open labor market, the administrative law judge concluded that claimant is not entitled to additional compensation under the Act. *See id.* As evidenced by both of these summary statements, the administrative law judge did not properly analyze whether claimant's actual post-injury wages fairly and reasonably represent his post-injury wage-earning capacity.[3] *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Although the parties are in agreement that claimant returned to light duty employment with employer at his pre-injury wages, this fact is not dispositive, as consideration of the Section 8(h) factors may result in a finding that claimant's actual post-injury wages did not reasonably represent his

[3]We note that it is undisputed that claimant earned $12.92 per hour post-injury while working for employer, and that claimant's position with Pinkerton Security Service pays $6.50 per hour.

wage-earning capacity.[4] *See, e.g., Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54 (CRT)(1997); *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Moreover, even if claimant's post-injury wages with Pinkerton Security Services fairly and reasonably represent his wage-earning capacity, those wages must be adjusted back to the wage level paid at the time of claimant's injury and compared to claimant's pre-injury average weekly wage. *See, e.g., Richardson,* 23 BRBS at 330-331. Based upon the foregoing, the administrative law judge on remand must consider all of the relevant evidence of record pursuant to Sections 8(c)(21) and (h) of the Act. Accordingly, we vacate the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity, and we remand for the administrative law judge to apply the applicable law to the relevant evidence and redetermine claimant's post-injury wage-earning capacity, which he must then adjust for inflation and compare with claimant's pre-injury average weekly wage.

Finally, claimant seeks an award of interest on all past due compensation. Although interest is not specifically addressed in the Act, the courts and the Board have held that an award of interest on past-due compensation serves the humanitarian purpose of the Act by making a claimant whole for his work-related injury, as the employer had the use of the money until an award was issued. *See, e.g., Foundation Contractors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Quave v. Progress Marine,* 912 F.2d 798, 24 BRBS 43 (CRT) (5th Cir. 1990), *aff'd on reh'g,* 918 F.2d 33, 24 BRBS 55 (CRT), *cert. denied,* 500 U.S.916 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 594 F2d 986, 9 BRBS 1089 (4th Cir. 1979). Accordingly, should the administrative law judge on remand award claimant compensation, he must also award claimant interest on the amount due.

[4]The party seeking to prove that actual wages do not fairly and reasonably represent wage-earning capacity bears the burden of proof. *See, e.g., Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge