BRB No. 88-4297

FRANCIS BARRIOS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SGS CONTROL SERVICES	)	
	)	
and	)	
	)	
CNA INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Randall L. Kleinman (Hulse, Nelson & Wanek), New Orleans, Louisiana, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-487) of Administrative Law Judge Ben H. Walley 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).

On January 8, 1982, claimant sustained a back injury while working for employer as an inspector of bulk cargo commodities. Following conservative treatment for back pain, he was referred by his general physician, Dr. Ward, to Dr. Jackson, a neurosurgeon. Dr. Jackson diagnosed ruptured discs at L5-S1 and L4-L5 and recommended surgery. Claimant sought a second opinion from Dr. Kinnett, another orthopedic surgeon, who agreed with Dr.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Jackson's assessment. In September 1982, Dr. Kinnett performed a laminectomy and fusions at L4-L5 and L5-S1. In 1984, claimant briefly returned to work, but his condition worsened, and in March 1984 he underwent a second surgical procedure performed by Dr. Jackson. Pursuant to claimant's request, on June 18, 1986, Dr. Jackson wrote a note, stating that claimant had reached maximum medical improvement and was discharged to return to his previous full-time work without restrictions. Dr. Jackson, however later qualified this release, stating that at the time he wrote the note, he believed that claimant would be performing light duty work, and that he would never have released him to heavy industrial work. In any event, in the fall of 1987, claimant's condition again worsened, and an abnormality was discovered at L3-L4. Employer voluntarily paid claimant temporary total disability compensation from January 13, 1982, until July 16, 1986, at which time it ceased payment of compensation based on Dr. Jackson's work release. Claimant sought continuing total disability compensation under the Act.

The administrative law judge awarded claimant temporary total disability benefits from January 8, 1982, until July 15, 1986 and permanent total disability benefits thereafter, based upon an average weekly wage of $986, the figure which employer utilized in making its voluntary payments of compensation. The administrative law judge also awarded claimant medical benefits.

Employer appeals the award of permanent total disability compensation, contending that the administrative law judge erred in addressing the question of permanency because only temporary disability was at issue. Employer further asserts that the administrative law judge erred in finding that claimant's disability was permanent, as Dr. Jackson indicated that additional healing time was needed before it could be determined whether claimant's hypertrophic spurs would be absorbed into the previous fusion, and, if they were not absorbed, additional surgery might be warranted. Employer also contests the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Finally, employer alleges error in the administrative law judge's determination of the applicable average weekly wage, reiterating the argument it made below that claimant's wage rate must be adjusted downward to account for the post-injury wage declines of individuals similarly situated to claimant. Claimant has not responded to employer's appeal.

Initially, we reject employer's argument that the administrative law judge erred in addressing the question of permanency, as claimant only requested temporary total disability in his post-trial brief. The Board has previously held that an administrative law judge may address the permanency of a disability where claimant seeks temporary total disability, as there is no significant difference in the burdens of proof required to challenge a claim for permanent total disability versus a claim for temporary total disability. *Duran v. Interport Maintenance Corporation*, 27 BRBS 8, 12 (1993); *Bonner v. Ryan-Walsh Stevedoring Company, Inc.*, 15 BRBS 321, 323-324 (1983). Moreover, while employer asserts that only the question of temporary total disability was before the administrative law judge, we note that the stipulation sheet, which was signed by the attorneys for both parties, states that the issue of permanency was disputed. Moreover, employer indicated that it was prepared to defend the permanent total disability claim at the hearing, Tr. at 17, and employer also discussed the issue of maximum medical improvement in its post-trial brief. Inasmuch as employer defended

this case as if the claim was for permanent total disability, we find no merit to employer's argument regarding the administrative law judge's consideration of permanency in this case. *See Bonner*, 15 BRBS at 323-324; *Walker v. AAF Exchange Service*, 5 BRBS 500, 505 (1977).

Employer's argument that the administrative law judge erred in finding that claimant's disability was permanent also fails. Two legal standards have developed for determining whether a disability is permanent or temporary in nature. *See Eckley v. Fibrex & Shipping Company, Inc.*, 21 BRBS 120, 122 (1988). Pursuant to the first standard, an employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Under the second standard, enunciated in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654, *reh'g den. sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (*per curiam*), *cert. denied*, 394 U.S. 976 (1969), a disability is permanent if the condition is of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

Employer argues on appeal that the administrative law judge erred in finding that claimant's disability was permanent as Dr. Jackson testified that with additional time claimant's hypertrophic spurs may be absorbed and his condition may consequently improve to the point that he could perform sedentary work, and, if not, additional surgery may be required. Employer is essentially asserting that claimant's disability has not reached maximum medical improvement because the normal healing period for his injury has not elapsed and additional surgical treatment may be warranted. We affirm the administrative law judge's finding that claimant's disability became permanent as of July 15, 1986, however, under the standard set forth in *Watson*.

In concluding that permanency had been reached, the administrative law judge noted that claimant's condition subsequently deteriorated after Dr. Jackson's work release in June 1986, that his problems continued for a lengthy period without improvement thereafter, and that claimant underwent two surgeries with only limited success. He also noted that claimant might be facing a third surgery and that Dr. Jackson was hesitant to offer an opinion as to the length of time it would take claimant to recover. In light of the aforementioned, the administrative law judge concluded that as claimant's disability has been lengthy and the time of his recovery doubtful and indefinite, his condition was permanent as of July 15, 1986. Because the administrative law judge's finding that claimant's disability was permanent as of July 15, 1986, is rational and supported by the record, we affirm this determination. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 286 (1990). Contrary to employer's assertions, the fact that the claimant's condition may improve in the future does not preclude a finding of permanency. *See Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988), *mod. on other grounds on recon.*, 22 BRBS 335 (1989); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980). Such future changes may be considered in a Section 22, 33 U.S.C. §922, modification proceeding, if and when they occur. *See Trask v. Lockheed Shipbuilding, Inc.*, 17 BRBS 56, 61 (1985).

The next issue to be addressed on appeal is employer's argument that the administrative law

judge erred in determining that it had not met its burden of establishing the availability of suitable alternate employment. Once the claimant establishes an inability to return to his or her pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156, 161 (5th Cir. 1981); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994). In the present case, the administrative law judge found that claimant established his *prima facie* case by showing that as a result of his injury he has been unable to work due to his back condition. Accordingly, the burden shifted to employer to establish the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038, 14 BRBS at 161. Employer must show that jobs within claimant's capabilities were reasonably available at critical times when he was able to perform them. *Id.*, 661 F.2d at 1043, 14 BRBS at 165.

Employer attempted to meet its burden through the report of Barbara Connors, a vocational consultant, who found that there was light duty work available to claimant in his former occupation as an agricultural/grain elevator inspector. In a report dated November 10, 1987, Ms. Connors indicated that she obtained four job analyses for agricultural inspector positions and contacted several potential employers to assess the availability of such work and whether these employers would be willing to hire someone who had sustained a back injury. Jt. Ex. 14.

After considering employer's vocational evidence,[1] the administrative law judge concluded that Ms. Connors' report was not sufficient to demonstrate the availability of suitable alternate employment. The administrative law judge found that it was deficient because Ms. Connors did not identify the person contacted with regard to one of the employment contacts, and in the other three, failed to indicate in what capacity the interviewees at the companies served the prospective employers. The administrative law judge further found that one employer stated that they would not hire someone with a history of a back injury and that another employer, who had not been clearly identified, did not indicate whether there were, or had in fact been, any job openings. The administrative law judge also found that while the third employer indicated that claimant would be considered only if he could perform the job, the parameters of that job were not discussed. Finally, the fourth employer indicated that it would consider claimant for a part-time light duty job, but no hours were provided. In light of these deficiencies and his determination that the vocational evidence did not adequately address claimant's inability to return to work, the administrative law judge found that claimant was permanently totally disabled. In so concluding, the administrative

[1]Employer also offered a written report for the purpose of establishing that claimant could return to his former employment which was based on an analysis of the job demands for an agricultural inspector taken from the *Dictionary of Occupational Titles*. Joint Exhibit 15. The administrative law judge discredited this report because it was unsigned, the identity and expertise of the writer was unknown, and the analyzed job requirements appeared to be have been based on statements given to an anonymous report writer by an employee of the employer whose position and authority was not established. The administrative law judge determined that absent these foundation elements, this evidence was extremely unreliable. *See* Decision and Order at 5.

law judge noted that while there was an "open window" for employer to show suitable alternate employment during the period after Dr. Jackson released claimant to return to work, the vocational evidence offered did not coincide with this period, and the medical evidence established that thereafter claimant's condition worsened such that he was no longer capable of even light duty employment.

On appeal, employer contends that the administrative law judge erred in finding that employer did not meet its burden of establishing suitable alternate employment, asserting that the job market survey was presented as stipulated evidence which established the availability of actual job openings within claimant's capabilities in the local economy. Employer further asserts claimant presented no rebuttal evidence to show that he was unable to perform the work identified in the survey. Initially, we reject employer's characterization of the vocational report as stipulated evidence. While this evidence was accepted by the administrative law judge as a joint exhibit relevant to both sides, claimant clearly was seeking total disability compensation. Tr. at 13, 18. Thus, employer's assertion that this evidence was uncontroverted must fail. Moreover, as it is employer's burden to establish the availability of suitable alternate employment, claimant was not required to introduce rebuttal evidence indicating that he is incapable of performing the alternate work identified. *See Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

Because the Act does not require that the vocational expert contact prospective employers directly, however, the administrative law judge erred to the extent that he discredited employer's vocational evidence on this basis. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Any error which the administrative law judge may have made in analyzing the vocational report is harmless on the facts presented, however, as the administrative law judge's finding that employer failed to show that any of the positions identified were available when claimant could perform light duty work is rational and supported by the record. On June 18, 1986, when Dr. Jackson gave claimant a release to return to work without restrictions, he did so in the erroneous belief that claimant would not be performing any work which would put a strain on his back or involve heavy lifting. At his deposition, Dr. Jackson testified that he had explained to claimant that he was not to do anything to put a strain on his back, lift over twenty-five pounds or perform repeated bending and lifting. Depo. at 36-38; Exhibit 23. On September 21, 1987 Dr. Jackson indicated that claimant's condition was worsening and strongly recommended that he undergo a CT scan and myelogram to attempt to determine the source of his pain. Exhibit 18. On November 17, 1987, claimant underwent the recommended diagnostic procedures. The myelogram revealed an abnormality at the L3-L4 level, which had not been present on a prior study, and the CT scan demonstrated a disc bulge at this level. With the exception of one employer, Charles V. Bacon, Inc., who had hired an inspector in the spring of 1986, none of the employers identified had openings during the relevant period between June 18, 1986, and the fall of 1987 when claimant's condition worsened. The job with Charles V. Bacon was not realistically available to claimant, however, because this employer was not willing to hire anyone with a back injury. Inasmuch as the remaining positions were not shown to be available until shortly before or at the time of the November 10, 1987 labor survey, after claimant's condition had worsened, the administrative law judge's finding that employer did not provide evidence of suitable job openings during the critical period when claimant was capable of

performing light duty work is affirmed. *Avondale Shipyards v. Guidry*, 967 F.2d 1039, 1045 n.11, 26 BRBS 30, 35 n.11 (CRT)(5th Cir., 1992); *see also P & M Crane*, 930 F.2d at 430-431 n.11, 24 BRBS at 121 n.11 (CRT). Accordingly, the award of permanent total disability compensation is also affirmed.

Finally, we direct our attention to employer's argument that the administrative law judge erred in utilizing the $986.60 average weekly wage figure which employer listed in its LS-208, Notice of Final Payment or Suspension of Compensation Payments, as the basis for its voluntary payment of compensation. In determining that this figure was the applicable average weekly wage, the administrative law judge noted that no evidence had been offered to show the actual hours claimant worked or his actual earnings in the year prior to the injury. The administrative law judge further noted that it appeared that employer was not disputing that this was claimant's average weekly wage in 1982, but was instead disputing the clear mandate of the law that the average weekly wage be based solely on claimant's earning power at the time of the injury without regard to post-injury events.

On appeal, employer argues, as it did below, that because active employees similarly situated to the claimant were subject to significant reductions in their earnings subsequent to 1982 because of union concessions necessitated by declining economic conditions, it is unfair to base claimant's award on his 1982 average weekly wage. Employer asserts that public policy mandates that claimant's compensation rate be reduced because if his 1982 average weekly wage figure is employed, claimant will obtain more in compensation benefits than if he had been actively employed, thereby creating an economic disincentive for rehabilitation and returning to work. Employer suggests that claimant's average weekly wage be calculated under Section 10(c), 33 U.S.C. §910(c), based on the average salary of three similarly situated workers in 1985.

Employer's average weekly wage argument is rejected. Section 10, 33 U.S.C. §910, states that the average weekly wage is determined "at the time of injury." While the Board has previously recognized that in determining claimant's annual earning capacity under Section 10(c), the administrative law judge could properly consider the earnings of four similarly situated individuals in the year subsequent to claimant's injury where the work he performed was seasonal and the continuing rapid development of employer's post facility provided increased work opportunities in the succeeding year, *see Jesse v. Tri-State Terminals*, 7 BRBS 156 (1977), *aff'd*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979), consideration of post-injury events has generally been limited to that situation. *See Klubnikin v. Crescent Wharf and Warehouse Co.*, 16 BRBS 182 (1984). Moreover, in *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 59 (1992), the Board rejected the argument that administrative law judge erred in failing to account for post-injury industry wage cuts in the Seattle area in determining average weekly under Section 10(a), an argument which is essentially the same as that raised by employer in this case under Section 10(c). Inasmuch as post-injury events are generally irrelevant to the average weekly wage determination, the administrative law judge's average weekly wage determination, which is consistent with the only relevant evidence before him, is affirmed. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *Hawthorne*, 28

BRBS at 79; *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, ___ F.3d ___, No. 93-2096 (4th Cir. September 13, 1994).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge