BRB Nos. 97-0980
and 97-0980A

JOSENELSON SODUSTA	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND	)	
DRY DOCK CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. MacBeth, Jr. (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Jimese L. Pendergraft and Robert A. Rapaport (Knight, Dudley, Clarke & Dolph, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (95-LHC-2357) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits 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 if they 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, a native of the Phillippines, was employed as a first-class pipefitter for employer on December 28, 1990, when he sustained an injury to his lower back. Subsequent to his injury, claimant worked in a light duty capacity for employer through December 1994. Employer also voluntarily paid a period of temporary total disability benefits concluding on May 22, 1995, when it reduced claimant's benefits to temporary

partial disability payments based upon employer's labor market survey. Claimant worked briefly with Hollywood Limousines as a driver from September 1995 through November 1995, and Goodwill Industries as a meat-freezer custodian during January 1996, but left both positions in part because of his physical condition.[1] Claimant thereafter filed the instant claim seeking continuation of temporary total disability benefits from May 22, 1995.

In his decision, the administrative law judge found that although claimant was not capable of returning to his usual employment, employer established the availability of suitable alternate employment through its vocational evidence, and that claimant had not shown reasonable diligence in attempting to secure alternate work. Consequently, temporary total disability benefits were denied. The administrative law judge, however, determined that claimant has a loss in wage-earning capacity and thus, concluded that claimant is entitled to temporary partial disability benefits. The administrative law judge also awarded continuing medical benefits pursuant to Section 7, 33 U.S.C. §907, of the Act.

On appeal, claimant challenges the administrative law judge's denial of temporary total disability benefits. In its cross-appeal, employer challenges the administrative law judge's determination of claimant's post-injury wage-earning capacity.

Claimant initially argues that employer's evidence as to the availability of suitable alternate employment is deficient as it fails to take into consideration claimant's language barrier and does not provide evidence of the wage rates paid in the identified jobs at the time of the 1990 injury. In addition, claimant argues that employer's failure to provide the wage rates at the time of the injury forced the administrative law judge to engage in an improper extrapolation from a percentage comparison of the national average weekly wage in 1990 and 1996 in order to calculate claimant's loss in wage-earning capacity.

In his decision, the administrative law judge explicitly determined that claimant, a native of the Philippines with a Philippine high school education, does not have a significant language problem. The administrative law judge based his finding first on the fact that all of employer's specialists, Eileen Bryant, Kenneth Langford, Elizabeth Montavo, and Dora

[1]Specifically, claimant testified that he left his employment with Hollywood Limousines due to many factors, including having a customer smoke drugs while he was driving, numerous maintenance problems such as flat tires and engine trouble and because the driving was causing him back pain. HT at 20-21, 32, 74. Claimant testified that he was unable to continue his employment as a meat-freezer custodian because the cold temperatures caused problems with his sinuses. HT at 18.

Mack, said that claimant had no problem understanding any directions they gave him, Decision and Order at 9-10; Hearing Transcript (HT) at 93, 108-9, 125; Joint Exhibit 3 at 17, and second because Mr. Langford testified that claimant was tested to read at a "high school level." Claimant's Exhibit (CX) 45. In addition, we note that the administrative law judge had the ability to assess claimant's potential language problems first-hand, as claimant testified in English at the formal hearing. HT at 13-49. Consequently, as the administrative law judge's determination that claimant does not have any language barrier is rational and supported by substantial evidence, it is affirmed.

An award for temporary partial disability compensation is determined based on the difference between claimant's pre-injury average weekly wage and his wage-earning capacity thereafter. 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In determining wage-earning capacity based on post-injury wage rates, the administrative law judge must use those rates in effect for the post-injury job at the time of claimant's injury. *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); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). The Board has held that in the absence of evidence concerning the wages paid in post-injury employment at the time of injury, the administrative law judge must use the percentage increase in the national average weekly wage to make this calculation. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Thus, contrary to claimant's contention, employer is not precluded from establishing the availability of suitable alternate employment due to the absence of the pay rates as of the 1990 date of injury. Moreover, as the administrative law judge's use of the national average weekly wage to adjust claimant's post-injury wage-earning capacity for inflation is rational and in accordance with law, *see Quan*, 30 BRBS at 124, *Richardson*, 23 BRBS at 327, it is affirmed.[2] Consequently, we affirm the administrative law judge's determination that employer has established the availability of suitable alternate employment as that finding is rational and supported by substantial evidence. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

[2]The administrative law judge specifically found that the national average weekly wage at the time of claimant's injury, December 28, 1990, was 87 percent of the national average weekly wage on the date of the hearing, and thus, multiplied his post-injury wage-earning capacity determination of $180 by .87 to arrive at an adjusted post-injury wage-earning capacity of $156.60. Decision and Order at 11.

Claimant lastly argues that the evidence of record nevertheless establishes that he diligently sought suitable alternate employment, and thus claimant maintains that he is entitled to temporary total disability benefits. In the instant case, the administrative law judge found that the uncontradicted testimony of two vocational experts, Ms. Montavo and Mr. Langford, demonstrates that claimant was uncooperative at significant times during his job-search activities. The administrative law judge therefore concluded that claimant did not exercise reasonable diligence in attempting to procure post-injury employment. In her testimony, Ms. Montavo stated that she accompanied claimant on two interviews at which claimant presented himself rather poorly and during which time claimant put forth additional physical restrictions to those specifically set out by his treating physician. HT at 116-120. In addition, Ms. Montavo testified that claimant applied to only three of the approximately seventeen different job leads that she provided him, and that there were several problems with the applications submitted to those three potential employers.[3] HT 119-127. Similarly, Mr. Langford testified that claimant on one occasion wore a back brace outside his clothing to an interview in order to draw attention to his condition, and that claimant's actions most likely affected the potential employer's view of claimant's ability to work. Joint Exhibit 3 at 24-25. Mr. Langford also provided testimony that claimant refused the efforts of one employer to work with claimant to see if they could salvage claimant's aborted training effort and proceed with his employment. CX 1 at 41-44. Inasmuch as the testimony of Ms. Montavo and Mr. Langford supports the administrative law judge's determination on this issue, it is affirmed. *See generally Tann,* 841 F.2d at 540, 21 BRBS at 10 (CRT); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J. dissenting). Consequently, the administrative law judge's denial of temporary total disability benefits in the instant case is affirmed.

In its cross-appeal, employer argues that the administrative law judge erred in finding that claimant's wage-earning capacity at the time of the hearing was $4.50 per hour. Employer maintains that the hourly wages provided in the labor market survey of Dora Mack, upon which the administrative law judge relied to find suitable alternate employment, clearly establish that claimant's post-injury wage-earning capacity exceeds $4.50 per hour. In addition, employer argues that the administrative law judge erred by concluding that the janitor position held by claimant at Goodwill Industries was not suitable alternate employment, since that job description was approved by claimant's treating physician. Employer therefore urges that claimant's wages in that position, $6.05 per hour, more accurately reflect his post-injury wage-earning capacity, and thus should have been used to determine claimant's compensation rate. Alternatively, employer argues that the relevant evidence establishes that claimant's post-injury wage-earning capacity is at least $5.29 per hour.

[3]For instance, one employer was unable to consider claimant for a position as a delivery driver because he failed to provide a Department of Motor Vehicles record with his application. HT at 121. Ms. Montavo further added that claimant never asked her for assistance to procure this information. *Id.*

In his decision, the administrative law judge found that employer identified jobs which are suitable for claimant in his post-injury condition. Decision and Order at 8-9. The administrative law judge, however, rejected employer's assertion that the job of a meat-freezer custodian at Goodwill Industries was suitable, as claimant's pre-existing sinus condition prevented him from performing that work.

In order to meet its burden of establishing the existence of suitable alternate employment, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992). In making this determination, pre-existing limitations must be addressed in resolving the issue of whether a job is realistically available. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). As the administrative law judge noted, claimant testified that his family physician, Dr. Leo Pet, restricted him from working in any cold or hot environment because of his sinus condition. HT at 46; *see also* Employer's Exhibit 11, Deposition at p. 9. Consequently, we affirm the administrative law judge's finding that the custodial position with Goodwill Industries is not suitable alternate employment in this case. Thus, contrary to employer's contention, claimant's wage-rate of $6.05 with Goodwill Industries is not relevant to determining claimant's post-injury wage-earning capacity.

As for determining claimant's post-injury wage-earning capacity, the administrative law judge initially found that the jobs which he determined were suitable for claimant involving a forty hour work week paid $4.50 or more. The administrative law judge however further determined that while claimant is qualified to perform each of these jobs, "it would be unrealistic to expect any of the companies identified to pay a new hire more than $4.50 per week initially." Decision and Order at 10. As employer suggests, there is no evidence in the record to support the administrative law judge's decision on this matter.

In her labor market survey, upon which the administrative law judge relied, Dora Mack indentified ten full-time positions which fall within claimant's physical limitations and which she felt were viable job opportunities in light of claimant's situation. Each of those positions was listed as a current opening and included the hourly wage that claimant could be expected to earn upon the commencement of employment with those companies. Only four of those ten jobs listed an hourly rate of $4.50 per hour, with the remaining six positions offering wage rates of $4.75, $5.00 (2), $5.25, $6.89, and $8.25. In addition, Ms. Mack explicitly stated that based on her labor market survey, "there are viable employment opportunities for which claimant could apply for on a regular basis and which could have an average weekly wage earning capacity of $5.29 per hour." EX 12. This relevant statement by Ms. Mack was never discussed by the administrative law judge. Similarly, while the statement of Eileen Bryant, who noted that claimant continues to remain employable at a wage range of $4.25 to $6.05 per hour and acknowledged that her opinion was confirmed by Ms. Mack's assessment of claimant's post-injury wage-earning capacity in her labor market study, was briefly acknowledged by the administrative law judge in his decision, it is

unclear as to whether it received any consideration in determining claimant's post-injury wage-earning capacity. Given the evidence in the record regarding full-time suitable alternate employment positions which paid in excess of $4.50 per hour, and as the administrative law judge's finding that such wages would not be paid to a new hire is not supported by substantial evidence, we vacate the administrative law judge's finding that claimant's post-injury wage-earning capacity is $4.50 per hour and remand the case for reconsideration of claimant's post-injury wage-earning capacity (again taking into account the effect of inflation, *see* n. 2 *supra*). *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, at 318, 31 BRBS 129 (CRT) (5th Cir. 1997); *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192, 205 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994).

Accordingly, the administrative law judge's calculation of claimant's post-injury wage-earning capacity in determining the extent of his temporary partial disability is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge