

## SECTION 8-DISABILITY

### DIGESTS

#### Introduction

Although the nature and extent issues were not explicitly raised before or at the hearing, the parties' stipulation regarding date of maximum medical improvement, and employer's request for Section 8(f) relief suggested that these issues could permissibly be addressed. Price v. Dravo Corp., 20 BRBS 94 (1987).

Claimant, who had been awarded permanent total disability benefits for a 1978 injury, was seeking permanent total disability benefits for a second injury. Thus, the issue of claimant's residual wage-earning capacity subsequent to the 1978 injury was implicitly raised at the hearing. Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

The Board reverses the administrative law judge's finding that the unnecessary nature of the laminectomy performed on claimant severs claimant's entitlement to compensation for his ongoing disability, and remands for the administrative law judge to determine the nature and extent of claimant's post-operative disability. Wheeler v. Interocean Stevedoring, Inc., 21 BRBS 33 (1988).

Temporary and permanent go to the nature of the disability; total and partial to the degree of disability. Maximum medical improvement is an indication of the permanency of disability and the availability of suitable alternate employment is an indication of the degree of disability. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991). *See also Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990).

It was within the administrative law judge's discretion to address whether claimant's disability is permanent, where this issue was raised for the first time at the formal hearing. Employer was not entitled to further notice of the new issues because claimant raised temporary total disability in his pre-hearing statement and there is no significant difference in the burdens of proof required to challenge a claim for permanent rather than temporary total disability. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Even though claimant did not seek a nominal award before the administrative law judge, the court will consider the propriety of such as a claim for total disability includes any lesser degree of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30 (CRT)(9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997).

Despite the existence of some statements by claimant's counsel indicating that claimant may have been seeking benefits only for permanent partial disability, the record contains evidence sufficient to establish that employer had knowledge of a claim for total disability, and specifically argued the issue of whether claimant's injury resulted in total disability. Consequently, as employer defended this case as if the claim was for total disability, the Board held that employer's argument that claimant waived his claim for permanent total disability benefits is meritless. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The Second Circuit reiterates that disability under the Act is an economic concept so that the extent of disability cannot be measured by medical condition alone. A minor injury may result in total disability if it prevents a claimant from engaging in the only type of work for which he is qualified. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The Board noted that a "bursting bubble" presumption, such as that used to analyze Section 20(a) issues, is inapplicable in this situation which involves a question of the extent of disability. Rather, claimant bears the burden of proving he is disabled, and only after he has established a *prima facie* case of total disability based on the relevant evidence of record does employer bear the burden of establishing the availability of suitable alternate employment to show that claimant's disability is, at most, partial. Because the administrative law judge used an improper analysis, and because his reason for discrediting several medical experts was irrational, the Board vacated his decision and remanded the case to him for a proper determination of the extent of claimant's disability. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

The Board rejected employer's contention that the administrative law judge erred in awarding benefits on a continuing basis beyond the date of the hearing. The Board held that the Act provides for such continuing awards and that, provided the record contains evidence to support such an award, the administrative law judge may properly award benefits into the future. Contrary to employer's assertion, Section 22 modification of such continuing awards provides appropriate relief upon the discovery of evidence of a change in conditions or a mistake in the determination of a fact when making such award. To hold that an administrative law judge cannot award continuing benefits is judicially inefficient and is tantamount to requiring perpetual re-opening of cases. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

The Fourth Circuit holds that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. The court further rejected employer's contention that its inability to recoup any overpayments that might occur between the date of maximum medical improvement and the date of any Section 22 modification decision would abridge employer's due process right to a hearing prior to being deprived of its property; the court held that the initial hearing and subsequent appeals provided employer with all the process that is constitutionally due. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4<sup>th</sup> Cir. 2000).

In this traumatic injury case, the Board affirmed the administrative law judge's finding that a claimant who becomes totally disabled after voluntary retirement is barred from receiving permanent total disability benefits as the claimant cannot establish that he has suffered a loss in wage-earning capacity. The Board noted that "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. As claimant was compensated for the degree of physical impairment, under the schedule, claimant is on equal footing with voluntary retirees with occupational diseases; neither claimant nor such retirees are entitled to total disability benefits. *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001).

### Section 8(a) - In General

In this traumatic injury case, the Board affirmed the administrative law judge's finding that a claimant who becomes totally disabled after voluntary retirement is barred from receiving permanent total disability benefits as the claimant cannot establish that he has suffered a loss in wage-earning capacity. The Board noted that "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. As claimant was compensated for the degree of physical impairment, under the schedule, claimant is on equal footing with voluntary retirees with occupational diseases; neither claimant nor such retirees are entitled to total disability benefits. *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001).

### Section 8(b) - In General

Board affirms administrative law judge's denial of benefits for temporary total disability claimed after voluntary retirement. A claim for temporary total disability requires that claimant establish a loss of wage-earning capacity. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

The Board rejects claimant's assertion that the administrative law judge erred in denying temporary total disability. Claimant had argued that the administrative law judge erred in relying on a doctor's opinion to deny him temporary total disability compensation after having rejected the same doctor's opinion in finding causation established. The Board noted that administrative law judge did not explicitly reject the doctor's opinion regarding causation but found that, even if he had, this would not have constituted error as causation and disability are separate issues, and the administrative law judge may accept or reject all or any part of any witness' testimony according to his judgment. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

### Nature: Permanent v. Temporary Disability

The administrative law judge's determination that claimant's condition had stabilized by September 24, 1985 is tantamount to a finding that claimant had reached maximum medical improvement on that date. Seidel v. General Dynamics Corp., 22 BRBS 403 (1989).

The administrative law judge properly relied upon doctors' opinions to find that there was no evidence that claimant's condition had changed in nature or degree since October 25, 1982, the date on which he determined claimant had a permanent partial disability. Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989).

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. When addressing the permanency of a claimant's disability, the administrative law judge should discuss the medical opinions of record regarding permanency rather than relying on the date claimant returned to work. Ballesteros v. Willamette W. Corp., 20 BRBS 184 (1988).

The Board modified the administrative law judge's finding of the date of maximum medical improvement based upon a subsequent medical report since the opinions of both doctors established that claimant had stabilized to its maximum point at an earlier date. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), rev'd on other grounds, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990) (en banc).

Board reverses administrative law judge's denial of death benefits based on a determination that decedent was not permanently disabled at the time of death. Board concludes that the undisputed medical evidence of this case establishes that decedent had a longstanding permanent disability of his back at the time of his death under the test for permanency enunciated in Watson, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). Eckley v. Fibrex & Shipping Co., Inc., 21 BRBS 120 (1988).

Board holds that administrative law judge rationally discredited doctor's opinion that claimant reached maximum medical improvement on November 16, 1981 because it failed to consider impact of claimant's second injury subsequent to this date and affirms administrative law judge's finding that claimant has not reached maximum medical improvement since no other medical evidence addresses this issue. James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

Board holds that the date the doctor assessed claimant with a disability rating is sufficient to determine the date of permanency. Jones v. Genco, Inc., 21 BRBS 12 (1988).

The Board vacated the administrative law judge's implicit determination that claimant's condition was permanent as of the date of his injury, given that claimant's treating physician found that he reached maximum medical improvement on a later date. Accordingly, the Board instructed the administrative law judge to modify the award to reflect the fact that claimant's condition did not become permanent until at least the later date. Leone v. Sealand Terminal Corp., 19 BRBS 100 (1986).

Where the record contains a medical opinion establishing that the employee's condition was of lasting and indefinite duration, a prognosis that the employee's condition may improve in the future does not preclude a finding of permanency. Mills v. Marine Repair Serv., 21 BRBS 115 (1988), modified on other grounds on recon., 22 BRBS 335 (1989).

Claimant's argument that doctors opined that his condition may improve takes their opinions out of context and administrative law judge's conclusion that claimant reached maximum medical improvement on May 21, 1983 is rational. Prognosis that claimant may improve in future does not support finding that maximum medical improvement has not been reached. Brown v. Bethlehem Steel Corp., 19 BRBS 200, aff'd on recon., 20 BRBS 26 (1987), aff'd in part and rev'd in part on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

Board rejects employer's argument that claimant's condition is not permanent because his congenital hearing defect is surgically correctable, especially where surgery was not anticipated, and where administrative law judge's determination that claimant's refusal to undergo surgery was reasonable is rational and supported by the record. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200 (1986).

Claimant is eligible to receive permanent disability benefits even though she is currently symptom-free based on Crum, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984), in which the D.C. Circuit held that claimant may be entitled to permanent disability benefits if symptoms are of indefinite duration. Also, the medical evidence indicates that claimant's underlying condition, which the administrative law judge found is work-related, is still present and that it is permanent, although her clinical course is unpredictable and may worsen if she is exposed to further pollutants, and she was therefore advised to leave her job. Boone v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 1 (1988).

Board reverses administrative law judge's finding that claimant's condition was temporary and holds that claimant's disability is permanent because it is indefinite in nature based on the opinions of two doctors who stated claimant's chest pains were aggravated whenever he worked, another doctor who found his symptoms would stay the same or get worse, and claimant's continued periodic chest pains after he stopped working. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988).

The Board remands the case for a determination of the nature and extent of claimant's disability noting that claimant is not limited to an award of temporary disability even if he does not suffer from chest pains continuously. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1989).

The Board holds that administrative law judge erroneously used date of firing as date of maximum medical improvement. Because the uncontradicted medical evidence establishes that the employee's back condition was continuing to improve at the time of his death, his condition was temporary until time of death. *Dixon v. John J. McMullen & Assocs., Inc.*, 19 BRBS 243 (1986).

The administrative law judge did not err in addressing the issues of the nature of claimant's disability, even though claimant was enrolled in a vocational rehabilitation program as of the date of the hearing, since medical rather than economic considerations determine whether a claimant's disability is permanent. *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

The Board affirms the finding of maximum medical improvement based on the opinion of the treating physician. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

A finding of maximum medical improvement is not necessary for an award of compensation for continuing temporary total disability. In fact, if claimant is shown to be disabled under the Act and maximum medical improvement has not yet been reached, the appropriate remedy is an award of temporary total or partial disability. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

The Board affirmed the administrative law judge's finding that claimant was permanently totally disabled as of the first work day which he missed, based on the medical evidence of record which established that his condition after that date appeared to be of an indefinite duration, despite evidence that he subsequently had major surgery and follow-up care. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

The Board holds that the administrative law judge erred in concluding that if a timely claim had been filed against Avondale, claimant would have been entitled to permanent partial disability benefits from November 6, 1970 until he became temporarily totally disabled in February due to his neck injury where the record contained no evidence of a permanent impairment on which an award could be based during this time. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

Maximum medical improvement - the time at which no further medical improvement is possible - separates temporary from permanent disability, not total from partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), *rev'g in part Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), and *rev'g on other grounds* 22 BRBS 280 (1989).

Where, according to claimant's doctor, claimant's back condition remained on a "plateau" between August 1983 and April 1984, but the doctor continued to evaluate claimant during this period and did not conclude that nothing further could be done for him until April 1984, the administrative law judge's finding that claimant reached maximum medical improvement in April 1984 was rational and supported by substantial evidence. This case is distinguished from *Trask*, 17 BRBS 56 (1985), because here it was the physician, not the administrative law judge, who considered claimant's vocational rehabilitation and training in making the permanency assessment. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994).

The Fifth Circuit affirms the Board's affirmance of the date of maximum medical improvement. If a physician believes that further treatment should be undertaken, then a possibility of success presumably exists. Even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. Although LIGA contends that the doctor impermissibly considered vocational factors, the court notes that the Board found the administrative law judge's findings adequately supported by medical evidence alone. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

Inasmuch as the date that a physician assesses claimant with a disability rating will suffice to determine the date of permanency, and as both doctors rendering relevant opinions are in agreement that further surgery will not improve claimant's condition, the Board affirmed administrative law judge's finding that maximum medical improvement was reached. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., concurring and dissenting).

The Fifth Circuit held that the administrative law judge properly reached the issue of whether claimant's disability is permanent, as the issue of maximum medical improvement was raised before him. In this case, the court affirmed the finding that claimant's condition was permanent under the *Watson* test, as five and one-half years have passed since claimant was injured, claimant was unable to work for almost the entire period following his injury, and claimant's condition was declining since his doctor released him to work. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-444, 30 BRBS 57, 61-62(CRT) (5th Cir. 1996).

The Board affirms the administrative law judge's finding of maximum medical improvement based on the opinion of claimant's treating doctor that claimant's disability had "plateaued" unless he was willing to consider surgery, despite that the doctor had previously stated claimant's condition had reached maximum medical improvement, and that claimant's symptoms remained the same throughout. *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Where claimant's condition is indisputably permanent, and where the administrative law judge expressly relied on the opinion of a doctor who stated that maximum medical improvement will occur one year after surgery, the Board affirmed the finding that maximum medical improvement will occur on that date, even though it had not occurred as of the date of the decision, as the determination was based on a normal healing period and not on the eventuality of claimant's future improvement. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

The administrative law judge's finding that claimant reached maximum medical improvement is affirmed, where she relied on a doctor's testimony that to the extent claimant's condition continued to improve, it progressed slowly at best and beyond the normal period of healing, and that claimant would not benefit from further treatment even though his shoulder continued to improve slowly, and where the administrative law judge determined that any incremental improvement after that date was minimal and did not affect his physical restrictions. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In this case where claimant sustained an injury to his knee and his doctor rated him as having a 15 percent impairment in 1989, the Board held that the administrative law judge erred in finding the date of maximum medical improvement to be January 14, 1994, without having considered other evidence of record pertaining to the nature of claimant's disability. Specifically, the Board stated that the administrative law judge need not search for a medical opinion which addresses "maximum medical improvement" but he may rely on an opinion which rates claimant's disability, as that is sufficient evidence of permanency. Therefore, the Board vacated the administrative law judge's determination that claimant's condition became permanent in 1994 and remanded the case for further consideration. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The Board affirmed the administrative law judge's finding that claimant reached maximum medical improvement on January 19, 1995, based on his crediting of a physician's opinion. Although the physician recommended that another doctor assess whether claimant reached maximum medical improvement, his opinion revealed that claimant's condition had plateaued as of January 19, 1995. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In a case where claimant suffered a work-related injury to his back on January 25, 1994, the Board affirmed the administrative law judge's finding of maximum medical improvement based on the opinion of claimant's doctor that claimant did not reach maximum medical improvement until June 27, 1996. The Board held that the administrative law judge rationally declined to accept the opinions of employer's doctors that claimant reached maximum medical improvement on February 10, 1994, as claimant's continued treatment for lower back pain showed he had not recovered from his work accident only two weeks after the accident occurred. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

In finding that claimant reached maximum medical improvement for his hand injuries on June 13, 1997, based on Dr. McGinty's assessment of a permanent impairment rating on that date, the administrative law judge determined that the surgery suggested by Dr. Eller is not a viable option and thus does not affect the date of permanency, as it may only improve claimant's symptoms temporarily, it would not alter the underlying condition, and it may only provide claimant with a 50% percent chance of returning to his prior employment. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7<sup>th</sup> Cir. 2000).

Claimant's treating physician opined that claimant had reached maximum medical improvement, but also noted that claimant needs a total knee replacement. Claimant had decided to postpone the surgery indefinitely. Thus, as claimant's treating physician stated that claimant's condition is not improving, and surgery is not anticipated nor its success ensured, the Board reversed the administrative law judge's finding that claimant had not reached maximum medical improvement and modified the award to reflect claimant's entitlement to permanent total disability benefits. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

Claimant received voluntary payments of temporary total disability benefits for 12 years. When one carrier controverted the claim, claimant raised the issue of permanent disability before the administrative law judge. The administrative law judge awarded claimant permanent total disability benefits without addressing the issue of the nature of claimant's disability. The Board vacated the award of permanent disability benefits and remanded the case for the administrative law judge to address this issue consistent with applicable law. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Fifth Circuit applied the holding in *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994), that a claimant has not reached maximum medical improvement until treatment has been completed, even if, in retrospect, it turns out not to have been effective. Dr. Bourgeois initially stated that claimant reached permanency in Sept. 2001, but later stated that, in hindsight, maximum medical improvement was reached in June 2000. The court holds that the administrative law judge and Board erred in relying on the earlier date, as claimant was still undergoing treatment with improvement in mind until Sept. 2001. The court therefore modified the date of permanency. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5<sup>th</sup> Cir. 2004).

In finding that claimant reached maximum medical improvement as of the date of his injury, February 7, 2000, the administrative law judge relied on a doctor's May 1, 2000, report stating that claimant was "permanently disabled from any type of work." As the administrative law judge did not address this doctor's subsequent deposition testimony that he could not answer the question of whether claimant's fall at work caused a permanent injury, the Board vacated the administrative law judge's finding of permanency and remanded the case for a full discussion of all of relevant evidence. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Claimant's treating physician reported in August 2000 that claimant's "condition" was permanent and stationary; five weeks later, this physician wrote that claimant's knee condition was permanent. Three years later, in 2003, the physician opined that claimant had maximized her improvement and that her condition was permanent and stationary. As the administrative law judge rationally concluded that the initial two reports referred only to claimant's knee condition, the Board affirmed the administrative law judge's finding that claimant's back condition reached maximum medical improvement in 2003, after back surgery in 2002. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

The Board affirmed the administrative law judge's award of temporary total disability benefits as the claimant was undergoing treatment with a view toward improvement. Claimant was to undergo surgery. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The administrative law judge rationally rejected the opinions of claimant's treating physicians in 1997 that claimant's back condition had reached maximum medical improvement at that time inasmuch as a subsequent MRI documented the findings leading claimant to undergo additional back surgeries. The administrative law judge acted within his discretion in crediting the opinion of claimant's treating physician subsequent to October 1997, as supported by another medical opinion, and claimant's undergoing four operations after 1997 to find that claimant's back condition reached maximum medical improvement in August 2003. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

The Sixth Circuit observed that the *Watson* test allows for a determination of permanency even when the disability is not “pronounced medically incurable.” Thus, the court stated that once the *Watson* test is met, a disability is permanent notwithstanding a medical prognosis that includes the possibility of the employee’s condition improving at some future date. The court affirmed, as supported by substantial evidence, the administrative law judge’s finding that claimant’s cognitive disability was permanent as it had lasted beyond the primary healing period and there was no evidence of actual improvement. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73 (CRT) (6<sup>th</sup> Cir. 2007).

## Extent: Establishing Total Disability

### Shifting Burdens

Where it is undisputed that claimant cannot return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *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).

Once claimant shows an inability to return to 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).

The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. Thus, where claimant demonstrated he was laid off from a job which previously was found to constitute suitable alternate employment and he remained unable to perform his pre-injury work, the burden shifted to employer to establish the availability of suitable alternate employment. The Board reversed the administrative law judge, holding that claimant was entitled to Section 22 modification based on the change in circumstances due to the layoff. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

In a traumatic injury case where claimant met employer's age and time requirements for retirement, the Board held that he need not establish that his retirement was due to his work injury in order to meet his burden of proof of disability. The Board held that the administrative law judge improperly considered claimant's longevity retirement as evidence of no loss of wage-earning capacity after the date of retirement. The Board stated that the sole relevant inquiry in a traumatic injury case is whether the work injury precluded a return to claimant's usual work, and thus, whether claimant satisfied his burden of proof under the Act of establishing a *prima facie* case of total disability. As it is undisputed in this case that claimant cannot return to his usual work because of the work injury, the Board reversed the denial of benefits after the date of retirement, and it awarded permanent total and partial disability benefits in accordance with the administrative law judges's alternate findings. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

The Board noted that a “bursting bubble” presumption, such as that used to analyze Section 20(a) issues, is inapplicable in this situation which involves a question of the extent of disability. Rather, claimant bears the burden of proving he is disabled, and only after he has established a *prima facie* case of total disability based on the relevant evidence of record does employer bear the burden of establishing the availability of suitable alternate employment to show that claimant’s disability is, at most, partial. Because the administrative law judge used an improper analysis, and because his reason for discrediting several medical experts was irrational, the Board vacated his decision and remanded the case to him for a proper determination of the extent of claimant’s disability. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

### Usual Employment

The Board affirms the administrative law judge's finding that claimant is medically disabled due to his back injury based upon restrictions imposed by doctors. *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), aff'd mem. sub. nom. *Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

Administrative law judge's finding that claimant is unable to perform his usual work is supported by Dr. Greener's impartial evaluation for the Social Security Administration. The finding of Dr. Spierer, whom employer contends controverts Dr. Greener's conclusion, that there was no evidence of organic brain syndrome is not supported by the CT scan, and the doctor never concluded that claimant could do his usual job, but only that he could benefit from vocational training at a semi-skilled level. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), aff'd mem. sub nom. *Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

The administrative law judge's finding that claimant is physically unable to perform his pre-injury duties is supported by Dr. Marrero's opinion that claimant is unable to work and by the doctor's restrictions on claimant. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

The Board affirms the administrative law judge's finding that claimant cannot return to his usual work where the administrative law judge credited claimant's complaints of pain, despite the lack of medical corroboration. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988).

Board affirms administrative law judge's finding that claimant cannot perform his usual employment, even if he did so for several months after his injury, because he must either wear ear protection, impairing his ability to hear warnings, or suffer pain due to the effect of ambient noise on his injured ear. *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986).

Claimant may be entitled to total disability benefits for period she was not working based on physicians' advice that she not return to her usual employment because it would aggravate her condition. Boone v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 1 (1988).

Board holds that administrative law judge applied inappropriate standard in finding claimant entitled to permanent total disability benefits based on his belief that claimant was unemployable because no cautious employer would hire or retain him. On remand, administrative law judge must determine whether claimant is able to perform his usual work. If claimant is unable to perform his usual work, claimant is entitled to total disability benefits since employer has offered no evidence of suitable alternate employment. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

Board reverses administrative law judge's finding that claimant is not entitled to any compensation. All three doctors agreed that claimant should not return to his usual work because his angina would be aggravated and Dr. Kent additionally found claimant was unable to perform any work. Since employer presented no evidence regarding suitable alternate employment, Board holds that claimant is entitled to permanent total disability benefits. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988).

Administrative law judge's conclusion that claimant is unable to do his usual job as a sandblaster is supported by Dr. Peterson's permanent restrictions against heavy lifting and excessive bending. Administrative law judge credited Dr. Peterson, noting that the doctor believed claimant's complaints of pain were genuine and a co-worker at a restaurant observed claimant's attempt to lift heavy objects. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

Inasmuch as the record evidence is uncontradicted that claimant cannot return to his usual work as it would expose him to asbestos, the burden shifts to employer to establish suitable alternate employment. Armand v. American Marine Corp., 21 BRBS 305 (1988).

Board vacates administrative law judge's finding that claimant is not disabled by his asbestosis because contrary to the administrative law judge's finding, the record contains medical evidence, in addition to claimant's testimony, which if credited could establish that he is unable to perform his usual work. On remand, administrative law judge is to consider whether claimant is able to perform his usual work by comparing medical opinions regarding claimant's physical limitations with the requirements of his usual job. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988).

Administrative law judge's finding that claimant cannot return to his usual work as a pump operator is supported by doctor's opinion that claimant should seek vocational rehabilitation rather than return to any type of manual labor and by other doctor's opinion that claimant should not be advised to attempt to work. Another doctor's opinion that claimant should avoid returning to vigorous physical labor also supports the administrative law judge's finding. Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989).

It was within the administrative law judge's discretion to credit doctor's opinion that claimant

is disabled from seeking gainful employment and manual labor in particular. Clophus v. Amoco Produc. Co., 21 BRBS 261 (1988).

Board affirms administrative law judge's finding that claimant is unable to return to his former employment based upon the opinions of three doctors that claimant's breathing problems would be exacerbated if he returned to usual work. Preziosi v. Controlled Indus., Inc., 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds).

Claimant's usual job is that which he was performing at the time of injury. Administrative law judge's finding that claimant cannot perform his usual job as a holdman is supported by doctor's opinion that claimant could not return to heavy work, but required lighter duty which did not require the use of his right hand for heavy grip. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Administrative law judge's finding that claimant is unable to perform his usual job is supported by testimony of Dr. Aberle and of claimant regarding her ongoing pain, which she testified prevents her from performing her usual employment. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989).

The Board affirms the administrative law judge's finding that claimant can return to her usual work, as the lifting restrictions placed by the doctors are consistent with the requirements of her job. Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

The Board affirms the administrative law judge's finding that claimant is unable to perform his usual work as a loader/checker based on medical evidence that claimant should avoid constant bending, loading and unloading containers over 80 pounds, and heavy lifting. Jennings v. Sea-Land Serv., Inc., 23 BRBS 12 (1989), vacated on other grounds on recon., 23 BRBS 312 (1990).

The D.C. Circuit holds that in determining whether claimant can perform his pre-injury job, administrative law judge erred in failing to consider the fact that claimant's job was no longer open to him after his injury. The court stated that because the lack of availability of claimant's pre-injury job was related to his work injury, the injury had resulted in claimant's "inability to return to his usual employment." The court accordingly remanded the case for the administrative law judge to consider the evidence bearing on suitable alternate employment. McBride v. Eastman Kodak Co., 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988).

Board holds that there was insufficient evidence to support administrative law judge's finding of temporary total disability as it was based on the erroneous assumption that the medical treatment claimant received for the work injury had induced a state of drug addiction which rendered him temporarily totally disabled. Board remands for administrative law judge to determine whether claimant has established prima facie case of total disability where none of the doctors who examined claimant gave him a full release to return to work and employer refused to give claimant his job back without such a release. Wilson v. Todd Shipyards Corp., 23 BRBS 24 (1989).

The Board remands for administrative law judge to consider x-ray taken after employer discontinued payments diagnosing fractured sternum and doctor's recommendation that claimant not return to her usual employment. Administrative law judge did not properly inquire as to whether claimant was entitled to temporary total disability benefits by only crediting doctor's opinion of no physical impairment due to the work accident, when doctor did not examine claimant until 8 years after work accident. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

The Board affirms the administrative law judge's finding that claimant cannot return to his usual work based upon a doctor's opinion that claimant could not perform his duties without risk of reinjury. Moreover, the doctor relied upon by employer did not take into account claimant's second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

The administrative law judge acted within his discretion to credit claimant's subjective complaints of pain, despite the absence of objective evidence of record that he is disabled. Claimant's subjective symptomatology is supported by four physicians who either suggested continuing treatment or did not conclude that he is exaggerating his subjective complaints of pain. Accordingly, the administrative law judge rationally found that this evidence, claimant's demeanor at the formal hearing and claimant's behavior since the work injury, when weighed in relation to evidence that claimant is capable of returning to his usual employment, created true doubt as to the extent of his disability, and the administrative law judge properly resolved his doubt in claimant's favor. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

The Board affirms the finding that claimant cannot perform her usual work over employer's objection that the doctors' opinions cannot be relied upon because they take into account a subsequent non work-related injury. The Board notes that although one doctor's opinion states that claimant cannot perform her usual work due to the combination of all her ailments, another doctor stated that claimant's limitation are due to the work injury alone. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The Board rejects the Director's contention that claimant established a *prima facie* case of total disability merely because he was diagnosed with an asbestos-related disorder prior to his transfer to light-duty and then continued to be exposed to asbestos. Citing *Liberty Mutual*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992), the Board held that the mere diagnosis of an occupational condition does not render the employee disabled. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

The Board affirms the administrative law judge's finding that claimant is unable to perform his usual work based on claimant's testimony that the requirements of his post-injury work with other employers was not the same as his usual work, and based on the testimony of his treating physician. The administrative law judge accounted for the discrepancies in the evidence of record, and his finding is supported by substantial evidence. *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The Board affirms the administrative law judge's finding that claimant could not perform his usual work duties, and thus established a *prima facie* case of total disability, because restrictions on lifting, climbing, and doing overhead work prevented him from performing the job of holdman or lasher, and that the job of dock-based workman, which he could arguably perform, would be difficult to obtain because he was not a member of that union, and, further, that he could not perform the duties of a dock-based clerk, as this position exceeded his ability to perform clerical tasks, as it is rational and supported by substantial evidence. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The Board vacated the administrative law judge's decision which rejected the medical opinions of employer's experts, as well as that of the impartial examiner, in favor of the opinion of claimant's expert, holding that his rejection of that evidence was not rational. The Board held that, because those physicians determined that claimant had no disability and no work restrictions, it was irrelevant whether they were aware of the duties involved in claimant's usual work as a mechanic, as they determined that claimant could return to any work. Consequently, the Board remanded the case for further consideration of claimant's entitlement to disability benefits. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

The Board held that the administrative law judge rationally inferred from the medical evidence that claimant has a permanent disability and physical restrictions which do not coincide with the duties of a welder described by claimant. Therefore, the Board affirmed the administrative law judge's determination that claimant cannot return to his usual work as a welder as a result of his permanent back impairment. In a footnote, the Board rejected employer's argument that it was denied due process, as claimant's back condition and his ability to return to his usual work had been at issue throughout the course of the case. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The Board affirmed the administrative law judge's determination that claimant is totally disabled, as the administrative law judge acted within his discretion in crediting the medical opinions that claimant's severe adjustment disorder with anxiety and depression, related to his impaired cardiovascular status, incapacitated him from his usual work. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Fourth Circuit affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant established a *prima facie* case of total disability by showing that employer expected her to perform job duties that are incompatible with her medical restrictions and that she could not perform the duties of her usual employment without substantial help from her co-workers, because of her work-related wrist injury. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

The First Circuit held that the testimony of claimant and claimant's supervisor, as well as the opinions of several medical experts, constitute substantial evidence to support the administrative law judge's conclusion that claimant cannot perform his usual work at employer's shipyard. The award of total disability benefits is affirmed. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004).

In a case wherein the administrative law judge did not address all the evidence documenting claimant's post-injury restrictions and ability to work, the Board vacated the administrative law judge's determination that claimant remained totally disabled until January 28, 2004, and remanded the case for reconsideration. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Claimant testified that he cannot return to his usual work or perform alternate work because the injury to his right shoulder has left him in "constant excruciating pain." The administrative law judge credited claimant's testimony. The Board rejected employer's argument that the administrative law judge erred because he failed to discuss other evidence which could support a different conclusion, as the record contains substantial evidence, including medical reports, that supports the administrative law judge's finding that claimant is in pain and cannot return to work. Accordingly, the Board affirmed the administrative law judge's award of permanent total disability benefits. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

## Suitable Alternative Employment

### In General

Relying upon *Berkstresser*, 16 BRBS 231 (1984), Board holds that the award of permanent partial disability commences on the date of permanency once employer establishes the availability of suitable alternate employment. *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *rev'd sub nom. Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). *See also Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

The Ninth Circuit rejects the Board's reasoning in *Berkstresser*, 16 BRBS 231 (1984), that, as a matter of law, total disability becomes partial, retroactive to the date of maximum medical improvement, upon a later showing of suitable alternate employment. Holding that a disability changes from total to partial at the same time as it changes from temporary to permanent advances the medical aspect of a disability while ignoring the economic aspect. Moreover, the job identified as suitable alternate employment may not have existed at the time of permanency or may not have been attainable until after training was completed after permanency. The statutory definition of disability, 33 U.S.C. §902(10), supports using the date of suitable alternate employment as the indicator of when total disability becomes partial since disability is defined as the incapacity because of injury to earn the wages that claimant was receiving at time of injury. The incapacity to earn is not due to the nature of the injury, but the total or partial character of the injury. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991).

The D.C. Circuit rejected, as contrary to the Act, the Board's prior holding that a showing of available alternate employment may be applied retroactively to the date of maximum medical improvement. The Board's holding ignores the concept that disability is an economic as well as a medical concept. Partial disability begins when suitable alternate employment is shown. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g in part Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), and *rev'g on other grounds* 22 BRBS 280 (1989).

The court held that claimant's entitlement to total disability benefits continues until the date when suitable alternate employment is found to be first available to claimant, not the date of maximum medical improvement, and such a showing may not be applied retroactively so as to commence partial disability status before suitable alternate employment is shown to exist. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

The Board holds that a showing of available suitable alternate employment may not be applied retroactively to the date an injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. This holding is to be applied in all circuits, and is consistent with the rationale set forth in recent decisions in the Second, Ninth, and D.C. Circuits. The Board's holding gives effect to the concept that a disability under the Act consists of both an economic and a medical concept, and will not prevent an employer from attempting to establish the existence of suitable alternate employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternate employment existed on the date of maximum medical improvement. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

The Fifth Circuit states that a change in claimant's capacity to do alternate work does not bring about a change in status of total permanent disability until suitable alternate work is actually available. Specifically, the court notes that the change from the status of total permanent disability occurs from the confluence of two factors: (i) the time of the change in physical earning capacity - a medical factor; and (ii) the availability of suitable alternate work which the employee can perform - an economic factor. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991).

The Board held that the administrative law judge erred in denying permanent total disability benefits retroactively to the date of maximum medical improvement. As claimant established an inability to return to his usual work in 1991 and employer did not establish the availability of suitable alternate employment until November 20, 1995, the Board held that claimant is entitled to permanent total disability benefits from the date of the last installment of permanent partial disability benefits, September 16, 1991, until November 20, 1995. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998).

Board affirms finding of temporary total disability as employer failed to present any evidence of suitable alternate employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Board affirms permanent total disability award as employer presented no evidence regarding suitable alternate employment. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Administrative law judge correctly found that employer produced no evidence of suitable alternate employment. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), aff'd mem. sub nom. *Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

Administrative law judge may have erred in stating that employer need not prove that claimant has actual job opportunities because the Fifth Circuit, in which this case arises, stated in New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), that employer need not actually obtain a job for claimant, but must show the existence of realistic job opportunities. Wilson v. Dravo Corp., 22 BRBS 463 (1989) (Lawrence, J., dissenting).

The Board rejects employer's argument that claimant bears the burden of demonstrating no suitable alternate employment is available based upon Air America, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), in this case arising in the Fifth Circuit. Board will follow Turner in every circuit except the First. Nguyen v. Ebbtide Fabricators, Inc., 19 BRBS 142 (1986).

The Board affirms the administrative law judge's determination that employer had the burden to establish suitable alternate employment pursuant to Air America, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), because employee's work history qualified him only for a position in shipbuilding, he was unqualified for a job without physical labor, and his education was insufficient to enable him to find a desk job that would allow him to sit all day. Board affirms administrative law judge's determination that claimant is entitled to total disability benefits because employer failed to establish the existence of any jobs in Maine, where he was injured. Dixon v. John J. McMullen & Assocs. Inc., 19 BRBS 243 (1986).

The Fourth Circuit reversed Board's determination that, in order to establish the availability of suitable alternate employment via an employment survey, employer must demonstrate that the suitable alternate employment was available as of the date the survey was taken. The Fourth Circuit held that employer meets its burden if it presents evidence of jobs which, although no longer open when located, were available during the time claimant was able to work. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988).

The Board applies Tann, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988), to case arising in the Second Circuit. Employer's burden to establish the availability of suitable alternate employment in a case involving temporary disability requires evidence of specific job openings available at any time during the critical periods when claimant is medically able to seek work. Martiniano v. Golten Marine Co., 23 BRBS 363 (1990).

The Fourth Circuit holds that a showing by employer of a single job opening is insufficient to satisfy its burden of suitable alternate employment. Employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. Lentz v. The Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

The Board reverses the administrative law judge's holding that employer met its burden of proof where the only job identified was an insurance agent which paid on a commission basis and required unpaid training claimant had not completed. The Board held that under the circumstances, claimant's ability to earn income as an insurance agent is entirely speculative. The Board noted that even if employer had adequately demonstrated the realistic availability of the insurance job, the identification of only one job might be insufficient to meet its burden under Lentz, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Hoard v. Willamette Iron & Steel Co., 23 BRBS 38 (1989).

The Board follows Fourth Circuit's holding in *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), in case arising in the Fifth Circuit. Board holds that *Lentz* is a logical extension of *Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), in light of fact that employer need not obtain an actual job offer for claimant or even inform claimant of job openings. Accordingly, employer's evidence of suitable alternate employment consisting of a single opening as a document photographer is insufficient, as a matter of law, to establish suitable alternate employment. *Green v. Suderman Stevedores*, 23 BRBS 322 (1990), *rev'd sub nom. P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

For the reasons stated in *Green*, 23 BRBS 322 (1990), the Board follows *Lentz* in this Fifth Circuit case, and holds that a single job opening as a marine dispatcher is insufficient to establish suitable alternate employment. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd in part*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

The Fifth Circuit holds that an employer may meet its burden of establishing the availability of suitable alternate employment by demonstrating the availability of general job openings in the local community that are within claimant's physical and mental capacities and which claimant has a reasonable opportunity to secure. Employer need not establish the precise nature and terms of specific job openings. Moreover, the court disagreed with the holding of the Fourth Circuit in *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988), that an employer's demonstration of the precise nature and terms of only one specific job opening is manifestly insufficient to satisfy its burden of proof. The court holds that single job opening will meet employer's burden where the evidence establishes that the job is reasonably available to claimant in the local community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), *rev'g* 23 BRBS 389 (1990), and *rev'g in part Green v. Suderman Stevedores*, 23 BRBS 322 (1990).

The Board vacated the administrative law judge's finding of suitable alternate employment where it was based upon a single job opening. The identification of a single job opening cannot satisfy the employer's burden under the Fourth Circuit's holding in *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988), and the Board has held *Lentz* applicable to cases such as this one arising in the Fifth Circuit, in *Green*, 23 BRBS 322 (1990), as the Fourth and Fifth Circuit courts have adopted the same standard for establishing suitable alternate employment. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

The Fifth Circuit in the context of a post-injury wage-earning capacity case reaffirmed *P & M Crane*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991) and *Turner*, 661 F.2d 1031, 14 BRBS (5th Cir. 1981), finding that in order to establish suitable alternate employment an employer does not need to "provide evidence of . . . specific job openings . . . [A]n employer simply may demonstrate the availability of general job openings in certain fields in the surrounding areas." *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

The Board held that where employer secures a single job offer for claimant, either within its own facility or with another employer, it satisfies its burden of establishing the availability of suitable alternate employment. The Board distinguished this case from *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), wherein the court held that a single job offer was insufficient to satisfy employer's burden of demonstrating "types" of jobs. The Board noted that employer had identified a specific, actual job as a cone inspector which claimant was capable of performing and had offered it directly to claimant through its attorney. The Board concluded that such an offer overcame the concern expressed by the court in *Lentz* that a disabled employee might have difficulty obtaining the one job opening identified as suitable. *Shiver v. United States Marine Corp, Marine Base Exchange*, 23 BRBS 246 (1990).

This case involved the issue of whether one employment opportunity, standing alone, may satisfy employer's burden of establishing the availability of suitable alternate employment within the jurisdiction of the Third Circuit, which has not yet issued a ruling on this issue. Claimant contended that it could not under the standards elucidated in *Lentz*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), that one position is insufficient to meet employer's burden. Employer countered by urging the Board to apply the holding in *P&M Crane Co.*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991). Under the circumstances of this case in which only one position was found suitable, no general employment opportunities were demonstrated, and no evidence presented that claimant had a "reasonable likelihood" of obtaining that one position, the Board held that employer failed to meet its burden under either standard. *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

In a case of first impression in a case arising in the Ninth Circuit, the Board affirms the administrative law judge's decision to follow the Fifth Circuit's decision in *P&M Crane*, 930 F.2d 424, 24 BRBS 116(CRT)(5<sup>th</sup> Cir. 1991), to conclude that employer established suitable alternate employment by virtue of employer's identifying one specific assembler job as suitable for claimant and the agreement of both claimant's and employer's vocational experts that similar assembler production work was generally available to claimant during his alleged periods of disability. The Board holds that this conclusion is consistent with *Bumble Bee*, 629 F.2d 1327, 12 BRBS 660 (9<sup>th</sup> Cir. 1980), as this decision requires that identified positions be specific as to their requirements, and does not necessarily require that more than one actual position be identified. The Board thus suggests that the Fifth Circuit has misinterpreted *Bumble Bee*. The Board also noted that the administrative law judge's correctly concluded that the Fourth Circuit case of *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT) (4<sup>th</sup> Cir. 1988), is inapplicable, as employer did not identify only one job. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

not establish the availability of alternate employment as there were no special circumstances that would suggest claimant could have obtained the single available job. *Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007).

The Seventh Circuit adopts the suitable alternate employment standard used by the First, Fourth and Fifth Circuits: evidence that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform. Employer need not identify specific employers ready and willing to hire the claimant, but it must identify enough information for the administrative law judge to determine if the jobs are within claimant's capabilities. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7<sup>th</sup> Cir. 2000), *aff'g* 33 BRBS 133 (1999).

The administrative law judge reasonably determined that job of computer operator is light work and as such that it is within claimant's physical restrictions. The administrative law judge also acted within his discretion in inferring from college courses claimant took and from his previous work that claimant is qualified to work as a computer operator. Also, administrative law judge's determination that computer operator and industrial engineer jobs are available to claimant is supported by job surveys prepared by vocational consultant. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting).

The Board rejects employer's contention that claimant's testimony regarding his ability to drive, garden, and clean his home satisfies its burden of proof. Employer does not meet its burden of demonstrating the availability of suitable alternate employment by introducing classified ads, as there is no evidence of the precise nature, terms and availability of the positions listed. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Administrative law judge properly considered whether the jobs identified by employer constituted suitable alternate employment in light of claimant's emotional problems. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

The Board rejects administrative law judge's conclusion that it is unduly speculative for him to make a finding regarding extent of employee's disability subsequent to his death, especially when the disability finding is based on the opinion of a treating physician who had prolonged contact and knowledge of the employee's case. Board accordingly remands for consideration of the issue of suitable alternate employment. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988).

Although an employee has died, the employer cannot escape liability for the work-related total disability he experienced prior to his death unless it establishes that suitable alternate employment was available during the period of the employee's life subsequent to his work injury. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

(1988), constituted a change in the law warranting remand for evidence of suitable alternate employment. In *Eckley*, it was not clear whether the claimant's back condition was permanent at the time of his death, and the administrative law judge found that posthumous evidence of suitable alternate employment was unreliable *per se*. The Board held that claimant's condition was permanent and remanded for suitable alternate employment, stating that such evidence was not unreliable *per se*. By contrast, in this case, decedent clearly was permanently disabled and limited to sedentary work thereby giving rise to employer's duty to establish suitable alternate employment during decedent's lifetime. The Board thus reaffirmed the award of permanent total disability, as the administrative law judge rationally found no evidence of suitable alternate employment. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32 (1992), *aff'g on recon.* 24 BRBS 100 (1990), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Board affirms that administrative law judge's finding that employer did not establish the availability of suitable alternate employment as a car salesman, as the administrative law judge rationally found that claimant lacked the self-confidence and aggressiveness to perform the job. Claimant had failed in this line of work prior to his employment with employer. If claimant's success in the alternate job is too speculative, it may not constitute suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Notwithstanding medical evidence and testimony that claimant is capable of some employment, the administrative law judge, as finder-of-fact, may rationally credit testimony that claimant is unable to perform any alternate work, based on his subjective complaints of constant pain, and is therefore totally disabled. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

Claimant testified that he cannot return to his usual work or perform alternate work because the injury to his right shoulder has left him in "constant excruciating pain." The administrative law judge credited claimant's testimony. The Board rejected employer's argument that the administrative law judge erred because he failed to discuss other evidence which could support a different conclusion, as the record contains substantial evidence, including medical reports, that supports the administrative law judge's finding that claimant is in pain and cannot return to work. Accordingly, the Board affirmed the administrative law judge's award of permanent total disability benefits. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

employment. The administrative law judge did not err in discussing SSA regulations for the valid proposition that a variety of factors are relevant in assessing the vocational potential of an individual. Although jobs existed within claimant's physical abilities for which an illiterate person would receive consideration, the administrative law judge rationally concluded that these jobs are unsuitable for claimant given his lack of mathematical skills, his age and the fact that his entire employment history is limited to unskilled, heavy, manual labor. *Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5<sup>th</sup> Cir. 2001).

The Board affirms the administrative law judge's finding that the work of a trainee constitutes suitable alternate employment because it is a paid position. Board also relies on facts that claimant requested to be reinstated as a trainee; he testified that he has only a little trouble performing this work and doctor stated claimant was able to work satisfactorily once a fast-working assistant left. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In order to meet its burden, employer need only show that suitable alternate employment is available to claimant within the area where the injury occurred, even if he moved. Board rejects claimant's argument, based upon *Roger's Terminal*, that the "relevant community" in which employer must show available employment is any area to which claimant subsequently moves. Employer, however, may also meet its burden by establishing suitable alternate employment in the area to which claimant moved. *Nguyen v. Ebttide Fabricators, Inc.*, 19 BRBS 142 (1986).

Employer has burden of showing suitable alternate employment in the vicinity where the employee was injured, not where the employee resides. Here, employee was injured in Maine during a one year employment contract, but his permanent home was in Mississippi. Employer must show availability of employment in Maine. *Dixon v. John J. McMullen & Assocs., Inc.*, 19 BRBS 243 (1986).

The Board states that employer may show suitable alternate employment if it shows that jobs are available where claimant resided at the time of injury if claimant relocates for personal reasons. *McCullough v. Marathon Letourneau Co.*, 22 BRBS 357 (1989).

Employer need not establish suitable alternate employment in a city where claimant relocates for personal reasons, but need only establish it in the area where claimant was injured. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

The Fourth Circuit rejects the Board's holdings that employer need only establish the availability of suitable alternate employment in the community where claimant resided at the time of injury. The court states that a variety of factors should be considered in determining the relevant labor market, including claimant's residence at the time he filed for benefits, his motivation for relocating after the accident, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in having to prove suitable alternate employment in the new community. In this case, claimant lived in the new community for two years at the time employer terminated benefits and there is substantial evidence that he had moved there to lower his cost of living. The case is remanded for the administrative law judge to consider his ties to the new community, employment opportunities in the new community and prejudice to employer. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994).

The Board noted that in *See*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994), the Fourth Circuit found the most persuasive definition of the relevant labor market to be the "community in which [claimant] lives," which in the instant case, with the exception of claimant's brief residence in Seattle, is the Portland/Vancouver area. The Board affirms the administrative law judge's finding that Portland/Vancouver is the relevant labor market for consideration of suitable alternate employment as the evidence establishes that the injury occurred in Portland/Vancouver and that although claimant moved to Seattle for a legitimate personal reason, his stay was brief and as such his ties to that community were limited, particularly when contrasted with Vancouver where claimant was born and raised. Moreover, claimant testified that he returned to Vancouver due to the dissolution of his marriage, his failure to obtain employment, and his financial hardship. *Wilson v. Crowley Maritime*, 30 BRBS 199, 203-204 (1996).

The First Circuit followed the lead of the 4th Circuit in *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT)(4th Cir. 1994), and adopted an *on the facts* approach in determining how earning capacity should be calculated when an employee, after injury, moves to a new community. Specifically, the court held that an employee's chosen community is presumptively the proper choice for determining earning capacity, unless and until employer shows that the move to the community was unreasonable, or that a refusal to move again is unreasonable, or that reasonableness aside, the prejudice to employer is just too severe. As to what constitutes justification, the court agreed that economic judgments ought generally to control and that personal grounds may not be an excuse for refusing to take a better job. *Wood v. U. S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997).

The Board holds that the administrative law judge properly looked to the criteria set out in *See*, 36 F.3d 375, 28 BRBS 96(CRT) (4<sup>th</sup> Cir.1994), and *Wood*, 112 F.3d 592, 31 BRBS 43(CRT) (1<sup>st</sup> Cir.1997), to discern the relevant labor market for purposes of establishing suitable alternate employment. The Board's holdings in *Nguyen*, 19 BRBS 142 (1986), and *Dixon*, 19 BRBS 243 (1986), that employer need show only that suitable alternate employment was available to claimant within the area where the injury occurred, even if he has since moved, are **overruled** in light of these more recent circuit court opinions. As the administrative law judge thoroughly discussed the vocational evidence in light of the *See* criteria, the Board affirms his conclusion that the community to which claimant moved following his injury is the relevant labor market. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001).

The Board held, based on the unique facts in this case, that the relevant labor market for purposes of establishing the availability of suitable alternate employment includes both the Trenton, Missouri, area in which claimant maintains a residence as well as overseas locations where suitable jobs similar to those claimant has performed are available. The facts in this case establish that claimant has extensive overseas employment, both pre- and post-injury, which support the conclusion that claimant's job market includes overseas locations. Thus, on remand, the administrative law judge must consider whether claimant's actual post-injury overseas employment is sufficient to meet employer's burden of showing the availability of suitable alternate employment and to establish a post-injury wage-earning capacity. The Board affirmed the administrative law judge's rejection of employer's job offers in Indianapolis and Washington, D.C., however, as acceptance of these jobs would require claimant to relocate without the travel and expense money offered by the overseas positions. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The Ninth Circuit has not addressed the issue of determining the relevant labor market when a claimant relocates post-injury. In this case, however, the administrative law judge addressed employer's labor market survey that identified positions it deemed suitable for claimant in both claimant's pre- and post-injury places of residence. The Board affirmed the administrative law judge's finding that claimant is incapable of performing any of the identified positions, and her consequent conclusion that employer did not demonstrate the availability of suitable alternate employment. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

The Board holds that claimant's criminal record is not relevant to a determination of suitable alternate employment because it has no bearing on his ability to work. Where claimant held a post-injury position in a bank for two months and was discharged when the employer learned of his criminal record, the Board held that the administrative law judge erred in finding that suitable alternate employment was not established. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), rev'd, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988).

The Ninth Circuit reverses Board's holding that claimant's post-injury job as a maintenance worker in a bank, which was terminated when the bank discovered the existence of claimant's criminal record, establishes the availability of suitable alternate employment. The Ninth Circuit holds that because the claimant's criminal record kept him from ever "realistically" being able to obtain a job in a bank, it was in fact relevant to the suitable alternate employment determination. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), rev'g 19 BRBS 6 (1986).

The Board applies the Ninth Circuit's holding in *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), rev'g 19 BRBS 6 (1986), to case arising in Fourth Circuit. The Board therefore affirms the administrative law judge's finding based on uncontradicted evidence that claimant's felony convictions would preclude suitable alternate employment as a security guard. *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990).

The Board held that claimant's incarceration does not preclude an award of total disability where employer has made no showing of suitable alternate employment during the period of incarceration. Sam v. Loffland Bros. Co., 19 BRBS 228 (1987).

The Board held that while some aspects of an employee's background must be considered to determine the availability of suitable alternate employment, in this case claimant's status as an undocumented worker, *i.e.* illegal alien, is not a relevant factor as it has no bearing on claimant's ability to work. Claimant's illegal status will prevent him from obtaining any job legally. Moreover, unlike factors such as a criminal record, claimant can take action to remove this impediment to his employability. Furthermore, claimant's status should not enable him to obtain a benefit unavailable to legal injured workers with similar educational and vocational backgrounds. As employer introduced evidence of suitable alternate employment within claimant's physical and educational restrictions, claimant is limited to an award of partial disability benefits. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991).

The D.C. Circuit affirmed the Board's decision which declined to treat undocumented alien status as one of the elements of an employee's background that must be taken into account when determining whether employer established the availability of suitable alternate employment. *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51 (CRT)(D.C. Cir. 1991), *aff'g* 24 BRBS 78 (1990).

The Board held that the administrative law judge properly determined that employer satisfied its burden of showing the availability of suitable alternate employment by presenting evidence of four positions, three of which require driving. The Board distinguished the facts of this case from *Hairston*, 849 F.2d 1194, 21 BRBS 122 (CRT), and *Piunti*, 23 BRBS 367, and stated that claimant's post-injury convictions for driving-under-the-influence, which resulted in a temporary suspension of his driver's license, did not constitute a permanent impediment to his authority to drive and, thus, did not render the proffered positions unsuitable or unavailable to claimant. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998).

The Fifth Circuit affirms a finding that claimant is permanent total disability as employer failed to show the availability of suitable alternate employment during the short period claimant was medically released to perform light duty work. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444, 30 BRBS 57, 62(CRT) (5th Cir. 1996).

The Board rejected employer's argument that the administrative law judge used an incorrect standard in determining the availability of suitable alternate employment, as that issue had been decided in the Board's previous decision in this case. *Armfield*, 22 BRBS 303. The Board affirmed the administrative law judge's award of permanent total disability benefits because Dr. Renick's uncontroverted opinion constitutes substantial evidence supporting the decision that the secretarial position held by claimant for 8 months following her injury was not within her psychological capabilities. *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

The Board affirms the administrative law judge's finding that a telemarketer job that claimant held for one week does not establish suitable alternate employment as he found it unsuitable based on claimant's testimony, and on the doctor's statement that he approved the job conditioned on claimant's attempting it to determine if she could physically tolerate it. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.* 29 BRBS 103 (1995).

In order to meet its burden of demonstrating suitable alternate employment, employer must demonstrate specific jobs which claimant is capable of performing, and the administrative law judge must determine whether there is a reasonable likelihood given the claimant's age, education, and background, he would be hired if he diligently sought the job. In making this determination, pre-existing limitations must necessarily be addressed in determining whether the job is realistically available. Accordingly, where a vocational expert testifies that specific jobs are available which are suitable given claimant's age, education, history and restrictions, it is implicit in such evidence that he considered any of claimant's pre-existing conditions and found these jobs reasonably available to claimant. Once employer meets this burden of demonstrating that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. If, in fact, employers will not hire applicants with claimant's non-work-related history of stroke and cardiac problems, it will be apparent when a claimant demonstrates that his diligent job search was unsuccessful. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

by illustrating claimant can perform particular physical tasks; employer, while not an employment agency for claimant, must demonstrate jobs for which claimant can realistically compete. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The Board holds that the administrative law judge applied the correct legal standard in determining whether employer established suitable alternate employment issue, as his analysis rests on the same judicial precedents as did the Second Circuit's decision in *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The Board further affirmed the administrative law judge's specific findings regarding employer's evidence of suitable alternate employment, *i.e.*, his rejection of the customer service and cashier jobs, and determination that the security positions are suitable for claimant, as they are supported by substantial evidence. *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

The administrative law judge rationally found that claimant was precluded from performing all longshore work requiring climbing, based on Dr. Peterson's restrictions regarding climbing, and rejecting the opinion of the vocational expert that claimant could perform some of the work despite those restrictions, in the face of contrary testimony that such work would require vertical climbing. Any error the administrative law judge may have committed in failing to independently review the vocational expert's videotape portraying various waterfront jobs which the expert considered suitable, is harmless, in view of the fact that the administrative law judge credited the testimony of the chairman of the union's safety committee that the tape did not accurately portray all of the physical requirements of those jobs. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The Eighth Circuit affirms the administrative law judge's finding that employer did not establish suitable alternate employment with respect to two claimants, noting that the credibility of the parties' witnesses, including physicians and vocational experts, was a matter to be resolved by the administrative law judge. Thus, the administrative law judge's finding that all but one job were physically or vocationally unsuitable for the claimants is affirmed based on the credited evidence. The administrative law judge's finding that one remaining suitable position, standing alone, was insufficient to establish suitable alternate employment is affirmed as supported by substantial evidence. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

Employer offered claimant a light-duty job after her injury, but the administrative law judge credited claimant's testimony that she could not perform the work due to constant pain. Although the positions identified were within claimant's restrictions and claimant testified that the work itself does not cause increased pain, the Board affirmed the administrative law judge's finding that claimant was not capable of any work at the time of the hearing due to the persistent pain as it was rational and supported by the evidence. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

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The Fifth Circuit remanded this case for the administrative law judge to reconsider whether claimant's post-injury car salesman job established the availability of suitable alternate employment. The physical ability to perform a job is not the exclusive determinant as to

whether the job constitutes suitable alternate employment. In the instant case, the Fifth Circuit held that the administrative law judge did not consider whether claimant had the mental ability or skills to work successfully as a car salesman, and noted that the reasons underlying his dismissal for poor sales performance must be evaluated carefully. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999)

The Board vacated the administrative law judge's determination that claimant was partially disabled during three periods between 1997 and 2004. The administrative law judge relied solely on the testimony of the doctor who stated that claimant cannot return to his usual work but had transferable skills and could perform work in the light to medium range. As medical evidence, alone, is insufficient to meet an employer's burden of establishing the availability of suitable alternate employment, the Board remanded the case for the administrative law judge to consider whether the jobs claimant worked or the jobs identified in 1995 remained suitable and available to claimant following his 1997 surgery. The Board affirmed the award of partial disability benefits as of August 31, 2004, as employer identified suitable jobs as of that date and claimant testified he did not look for work. *LaRosa v. King & Co.*, 40 BRBS 29 (2006).

In case where claimant challenged the administrative law judge's finding on remand that a job was educationally suitable and realistically available to him, the Board concludes that it need not determine whether this job was in fact suitable as this job was shown to be available only at a time when claimant's participation in a DOL-sponsored rehabilitation program precluded him from working. During the period that claimant temporarily withdrew from the program, claimant is limited to permanent partial disability compensation as claimant did not challenge the administrative law judge's finding that two other jobs identified constituted available suitable alternate employment. *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998).

In finding that employer established the availability of suitable alternate employment as a telephone surveyor on modification, the administrative law judge was not bound by his prior determination that such positions were unsuitable due to claimant's lack of articulateness. The administrative law judge found that employer presented additional evidence that overcame his previous objections to such positions. As the administrative law judge's finding regarding the suitability of the positions is supported by substantial evidence, it is affirmed. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

Where it is uncontested that claimant is capable of full-time work and that employer identified two jobs within claimant's restrictions, the administrative law judge erred in finding that employer did not establish suitable alternate employment due to the fact the claimant chose to work part-time prior to his injury affects. This factor does not affect the suitability or availability of work, but is relevant to wage-earning capacity. The Board thus holds that claimant has retained some wage-earning capacity and is at most partially disabled. *Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007).

The Board affirmed the administrative law judge's finding that employer established suitable alternate employment as his finding that the employee's alcohol abuse and emotional state would not have precluded him from performing the identified jobs is supported by substantial evidence. *V. M. v. Cascade General, Inc.*, \_\_\_ BRBS \_\_\_ (2008).

## Vocational Evidence

The Board affirms the administrative law judge's finding that employer's expert had provided only a "theoretical showing" of suitable alternate employment, because he did not identify specific job openings with specific employers but rather described general categories of jobs which he believed claimant could perform. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

Expert's testimony regarding available jobs which was based on statewide statistics, rather than her own investigation into suitable positions identifies only general job categories, rather than actual job openings with specific employers, and therefore cannot establish suitable alternate employment. *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

The Board holds that labor market survey identifying available jobs, together with vocational specialist's testimony that he met with claimant and indicated a willingness to place him in a job at the time is substantial evidence to support the administrative law judge's finding that employer established the availability of suitable alternate employment. Vocational specialist's opinion and survey properly considered claimant's background, experience, mental and physical capacities and found that he was capable of performing available jobs with or without his prosthesis. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Administrative law judge properly found that jobs identified by vocational counselor did not constitute suitable alternate employment because the precise nature, terms and actual availability of the positions were not elicited. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

Administrative law judge's finding that employer established availability of suitable alternate employment is supported by vocational expert's opinion that claimant was capable of performing the functions of a Fotomat attendant, a position which was available to him, and by doctor's opinion that claimant could work in a position which did not involve climbing, heavy lifting and repeated bending. *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Administrative law judge erred in rejecting doctor's opinion that claimant could physically perform alternate employment because the doctor was not aware that vocational counselor only considered full-time employment or that claimant would need pre-job search training and work hardening. Board reasoned that doctor's lack of awareness of the counselor's method for identifying suitable alternate employment does not detract from his medical opinion regarding whether claimant could physically perform these jobs. Administrative law judge erred in crediting vocational counselor's report, which stated that until claimant's basic needs such as survival and physical and emotional well-being are met, and her physical pain is alleviated, discussion of vocational possibilities must be postponed. This counselor failed to provide a vocational assessment and instead rendered an opinion beyond her expertise. Warren v. Nat'l Steel & Shipbuilding Co., 21 BRBS 149 (1988).

The Board affirms administrative law judge's determination that vocational expert failed to persuasively demonstrate that claimant could realistically secure any of the jobs identified because she did not inform employers she contacted of claimant's age (59) or of the nature of his occupational disease (asbestosis). Armand v. Am. Marine Corp., 21 BRBS 305 (1988).

Because employer's labor market survey and testimony of its vocational expert pertained to jobs which were available only in July, August, and November 1984, administrative law judge's failure to consider this evidence could not have affected his conclusion that claimant was entitled to temporary total disability benefits from December 28, 1982 through July 25, 1983. Also, since claimant had been working since August or September 1983 and since administrative law judge considered salaries in employer's labor market survey to determine claimant's residual wage-earning capacity, the Board rejects employer's argument that administrative law judge erred in finding it did not establish availability of suitable alternate employment. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

Administrative law judge reasonably relied upon claimant's vocational expert's testimony that claimant was not able to perform jobs identified by employer's vocational experts because he was deficient in basic skills such as verbal communication, reading, writing and math, in addition to claimant's testimony that he performed his light duty work in pain and on medication. Mendez v. Nat'l Steel & Shipbuilding Co., 21 BRBS 22 (1988).

The Board affirms administrative law judge's finding that testimony of two rehabilitation counselors fails to meet employer's burden because it did not establish the existence of any job openings which claimant could potentially fill. Preziosi v. Controlled Indus., Inc., 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds).

The Board affirms administrative law judge's finding that testimony of vocational specialist fails to meet employer's burden because she based her survey on doctor's restrictions which conflicted with claimant's account of his abilities; none of the employers contacted was made aware of claimant's limitations; some of the jobs listed required licenses which claimant does not have; and her admission that employers she contacted probably would not have hired him if they had been made aware of his physical restrictions. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

The Board affirms the administrative law judge's finding that employer established suitable alternate employment based upon letter from rehabilitation specialist, stating that after he informed the managers of two McDonald's restaurants of claimant's background, physical restrictions and functional illiteracy, they stated that were interested in scheduling an interview with claimant regarding positions involving general cleaning and maintenance, and that some modifications of the duties might be possible to accommodate his restrictions if they determine claimant was interested and motivated. *Lacey v. Raley's Emergency Road Serv.*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991).

An administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee, as long as the expert was aware of the employee's age, education, industrial history and physical limitations when exploring local job opportunities. Also, Board notes that the claimant need not be informed of identified positions, and that the expert need not contact prospective employers directly. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

The Board affirms the administrative law judge's finding that employer did not show suitable alternate employment. He rationally rejected security guard positions because they required classroom training and the vocational expert did not know if claimant, a native of Yugoslavia, was literate in English. The administrative law judge also ruled out a parking lot attendant job because the counselor agreed that claimant's leg impairment would not be considered for such a job and because she was unaware of claimant's mathematical skills. Finally, the administrative law judge properly found that manager-helper positions were not within claimant's restrictions and because one job required a couple and another was of dubious availability. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The administrative law judge rationally discredited the vocational counselor's testimony as to the suitability of the identified alternate employment in light of the administrative law judge's determination that claimant cannot read or write. The counselor did not administer tests to claimant and assumed he could read. Thus, the administrative law judge rationally determined that employer did not establish the availability of suitable alternate employment. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The Ninth Circuit affirms the finding that suitable alternate employment was not established as none of the potential employers stated they would consider employing a person with claimant's deficiencies, and a counselor stated that there was no job in the competitive labor market that claimant could perform. The administrative law judge rationally discredited the testimony of employer's witness who stated claimant did not want to work. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

The Board remands the case for reconsideration of suitable alternate employment, as the administrative law judge did not consider all the evidence in finding claimant was trained only for air conditioning and pipefitting work. He ignored evidence that claimant has two years of college education, that he trained as an assistant manager at two nightclubs and that Dr. London approved such work. Moreover, the administrative law judge did not discuss other positions located by the vocational counselor. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

The administrative law judge did not consider the vocational counselor's testimony regarding the limitations imposed by claimant's use of Tylenol 3 with codeine on his ability to perform the alternate jobs identified, nor did he discuss all employment opportunities. Therefore, the Board vacates the administrative law judge's finding that employer established the availability of suitable alternate employment and remands the case to the administrative law judge for reconsideration of that issue. *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

The Ninth Circuit held that there is substantial evidence to support the administrative law judge's award of permanent total disability based on a finding that employer did not establish the availability of suitable alternate employment where half of the jobs listed in employer's labor market surveys required experience which claimant did not have and claimant had contacted the remaining employers and other firms not listed in employer's surveys without success. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *cert. denied*, U.S. , 114 S.Ct. 1539 (1994).

The Board affirms the finding that employer established suitable alternate employment based on the vocational expert's testimony and a doctor's opinion approving the jobs located. The Board rejects the Director's contention that the administrative law judge must "independently evaluate" whether claimant can "realistically compete" for the jobs identified as medically appropriate. In this case, employer's evidence exceeds the minimum standards set forth in *P & M Crane. Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting).

Where claimant was undergoing vocational rehabilitation in the form of a full-time year-round four-year medical technology program which DOL approved, and for which it was paying tuition, the Board affirmed the administrative law judge's award of total disability compensation through the date of completion of the program despite that employer established the availability of suitable alternate minimum-wage employment. The Board found that on the facts presented the award of total disability while claimant was undergoing rehabilitation served the fundamental policies underlying the Act and its humanitarian purposes. Under *Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), among the factors considered in determining degree of disability are rehabilitative potential and availability of work claimant can perform. In this case, while claimant was capable of performing jobs employer's expert identified as available from a physical perspective, he could not realistically secure that employment due to his participation in the rehabilitation plan which precluded him from working. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994).

The Fifth Circuit affirms the Board's holding that employer did not establish suitable alternate employment while claimant was in a DOL sponsored rehabilitation program which prohibited him from working. The court stated that the restriction on outside employment rendered the minimum wage jobs unavailable under the circuit's precedent, even though claimant was physically able to perform the jobs. *Louisiana Ins. Guarantee Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

The Board vacates the administrative law judge's finding that employer failed to establish suitable alternate employment because he erroneously rejected positions proffered by employer's consultant based on his imposition of job qualifications that did not exist or because he found claimant overqualified for the work. The Board also distinguished the case from *Abbott*, 27 BRBS 192 (1992), as, in this case, claimant was not enrolled in a specific sponsored job rehabilitation program but was taking general college courses, the jobs identified paid more than the minimum wage, and there was no evidence that taking the courses precluded claimant from working. *Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994).

In case arising within the jurisdiction of the Fifth Circuit, the Board holds that *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1995), is applicable even though the case differs from *Abbott* in that claimant had a bachelor's degree as many of the policy concerns underlying *Abbott* are applicable here. Thus, the Board reverses the administrative law judge's finding that *Abbott* is distinguishable and remands for him to award claimant permanent total disability compensation for those periods in which he was precluded from working because of his participation in the DOL-sponsored rehabilitation program. *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998).

disability benefits while enrolled in a full-time course of study under the auspices of the DOL, under the holding in *Abbott v. Louisiana Ins. Guaranty Assoc.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994). In this case, claimant stipulated on remand that, while still in school, she obtained a part-time job. Thus, the administrative law judge rationally inferred that claimant's rehabilitation plan does not preclude her from working, and thus that claimant could have performed this or other entry level jobs. Claimant therefore is limited to an award under the schedule for her arm impairment following maximum medical improvement. *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

The Board holds that where employer establishes the availability of suitable alternate employment, but claimant seeks total disability due to his participation in vocational rehabilitation, see *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994), *aff'g* 27 BRBS 192 (1993), claimant bears the burden of proving that he is unable to perform the alternate employment due to his participation in a vocational training program. This holding is based on claimant's duty to diligently seek work once suitable alternate employment is identified. As claimant in this case did not submit any evidence that he was unable to work during vocational rehabilitation, the denial of total disability is affirmed. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

The Board holds that claimant, pursuant to *Abbott*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1995), may establish that identified suitable alternate employment is not reasonably available due to his participation in a state-sponsored, and subsequently DOL-approved, vocational rehabilitation program. Although the subject claim involves an injury under the schedule, application of *Abbott* advances the humanitarian purpose of the Act and furthers the interests of both claimant and employer. The Board affirms the administrative law judge's finding that claimant was precluded from working at a part-time job during his participation in a vocational rehabilitation program as it is supported by substantial evidence. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The Fourth Circuit holds that where claimant is offered a job while he is enrolled in a DOL-approved vocational rehabilitation program, claimant may, in appropriate circumstances, demonstrate that suitable alternate employment is unavailable. While the administrative law judge should consider whether participation in the rehabilitation program will increase a claimant's wage-earning capacity, this factor, standing alone, is not dispositive, as the Act seeks to ensure that covered employees have long-term economic security and emphasizes the importance of vocational rehabilitation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002).

The Fourth Circuit holds that substantial evidence supports the administrative law judge's finding that alternate employment which employer offered claimant was unavailable to

claimant while he was enrolled in a vocational rehabilitation program developed and approved by OWCP, where the administrative law judge found that claimant could not have accepted the employment offer and still completed the program, and claimant was only one semester from obtaining his degree and completing the program. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002).

The Board rejected employer's assertion that it should not apply the Fifth Circuit's decision in *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994) to this case arising within the jurisdiction of the Ninth Circuit. The Board reasoned that the *Abbott* decision, which provides that if a claimant is enrolled in a DOL-approved vocational rehabilitation program and such program precludes employment, suitable alternate employment is not *available*, is not an invalid extension of law. The Board rejects the contention that because Congress considered and declined to enact a provision providing for awards of total disability during rehabilitation, *Abbott* and its progeny create an extra-statutory type of benefit. The Board holds that the *Abbott* inquiry merely fits within the traditional suitable alternate employment analysis regarding the availability of such employment *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005, *cert. denied*, 126 S.Ct. 1023 (2006).

In assessing claimant's entitlement to total disability benefits pursuant to *Abbott*, the Board affirmed the administrative law judge's determination that claimant was not able to work during his rehabilitation program. The administrative law judge rationally found that claimant's giving up a paid internship was evidence of claimant's inability to work while he went to school, given his classes, commute and study time. The administrative law judge also rationally found that claimant's long-term earning potential was best served by claimant's completion of the program notwithstanding that his immediate wage-earning capacity would be less than that paid by the jobs employer identified. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006).

The Ninth Circuit relied on the decisions in *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994) and *Brickhouse*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002) and held that the Board did not err in affirming the administrative law judge's award of total disability benefits during the period claimant was enrolled in an OWCP-approved rehabilitation program, as suitable alternate employment was unavailable during that time. The Ninth Circuit agreed that the *Abbott* rule is consistent with the language and policy of the Act to encourage vocational rehabilitation. Further, the Ninth Circuit agreed with those two circuit courts that the rule is not rigid and that a number of factors should be considered in determining whether a claimant may receive benefits while enrolled in a program. The administrative law judge addressed relevant factors and his findings are supported by substantial evidence. The court rejected employer's contention that the scheduled nature of claimant's injury is not relevant to the consideration of a total disability award under *Abbott*. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied*, 126 S.Ct. 1023 (2006).

#### 8-18v(i)

The Board declines to address employer's contentions regarding its potential liability for disability benefits during claimant's retraining period, as that issue is properly presented to an administrative law judge in the first instance, and employer may appeal any adverse

findings. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The Board remands the case for reevaluation of suitable alternate employment. The administrative law judge erred by rejecting evidence of general job availability in this Fifth Circuit case on the grounds that employer's expert identified only eight specific job openings and that two of the identified jobs were filled when claimant inquired about them. The jobs need only have been available during the "critical period" when claimant was able to work. Moreover, the administrative law judge erred in questioning the reliability of the survey based on employer's failure to determine claimant's spelling ability without determining whether this would preclude claimant from performing the identified jobs. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The Board vacates the administrative law judge's finding that suitable alternate employment was established and remands for consideration of the suitability of the jobs identified in light of claimant's low intelligence and psychological problems. Although the vocational counselor seemingly took these problems into account, she misconstrued the opinion of claimant's psychologist. The administrative law judge's findings only took into account claimant's physical condition. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995).

The Fifth Circuit, noting that the administrative law judge considered claimant's testimony as well as the medical testimony of record, affirms the administrative law judge's finding that suitable alternate employment is available based on jobs identified in the labor market survey. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

The Board affirms the administrative law judge's finding that suitable alternate employment was not established, as he credited the vocational counselor's testimony that claimant could not perform any of the jobs listed in employer's labor market survey. Specifically, claimant lacked the requisite skills for some jobs, the jobs required activities inconsistent with claimant's restrictions, and/or the jobs were not available when claimant contacted the employers. *Wilson v. Crowley Maritime*, 30 BRBS 199, 204 (1996).

The Board remanded the case for further consideration of suitable alternate employment. The administrative law judge did not specifically consider whether the post-injury position claimant held with employer in its tool room was necessary and whether claimant was capable of performing it. Additionally, the Board held that the administrative law judge did not discuss the labor market survey submitted by employer in this case which contained several positions which may be sufficient to establish the availability of suitable alternate employment. *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

8-18v(ii)

The Eighth Circuit affirmed the administrative law judge's finding that employer did not establish suitable alternate employment where the administrative law judge credited the opinion of claimant's vocational expert that there was no work in the local economy that claimant could perform. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163,

31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998).

The Second Circuit holds that the administrative law judge erred in finding claimant to be only partially disabled despite finding that the labor market survey was insufficient to establish suitable alternate employment because the consultant failed to account for claimant's psychiatric condition, medication, and inability to read. As a matter of law, claimant is entitled to total disability benefits. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Employer may meet its burden by demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions, such as the Dictionary of Occupational Titles, to flesh out the physical and educational requirements for the identified jobs. The employer need not contact the prospective employer for its specific job requirements in order to establish a valid vocational survey. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997).

On remand from the Fourth Circuit, the administrative law judge never specifically stated claimant's residual physical capacities as a result of the knee injury, nor did he state the specific restrictions from the back condition. Moreover, rather than reviewing the job descriptions cited from the Dictionary of Occupational Titles by the vocational expert, the administrative law judge made his own assessment of the nature of the positions identified and found they were not suitable. Thus, the Board vacated the administrative law judge's finding that two of the positions identified were not suitable and remanded for further consideration of the physical and educational requirements of the positions as detailed by the sections of the DOT supplied by employer, and claimant's physical restrictions. The Board affirmed the administrative law judge's finding that two of the positions are unsuitable for claimant. *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999).

The administrative law judge considered and rejected all of the jobs listed in employer's three labor market surveys, as he found that all of the positions listed by employer's expert did not contain any description of duties or qualifications required of the applicants. The administrative law judge nevertheless, where possible, reviewed the general descriptions contained in the *Dictionary of Occupational Titles* for these positions, but concluded that there is no indication regarding the extent of any repetitive hand and arm movements, fine manipulation, or lifting of weight in excess of 20 pounds required for the jobs, and thus no means for determining whether the duties involved are within claimant's physical limitations and/or claimant's qualifications. The Board therefore affirmed the administrative law judge's conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate employment. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7<sup>th</sup> Cir. 2000).

8-18w

The Board vacated the administrative law judge's finding that employer did not establish the availability of suitable alternate employment as he discredited the vocational evidence for invalid reasons. Contrary to the administrative law judge's conclusion, the vocational specialist identified jobs that provided on-the-job training and that required no reading

ability. Moreover, the administrative law judge incorrectly assumed that further surgery was imminent. The case is remanded for the administrative law judge to specifically determine what are claimant's residual physical limitations, and then to determine the suitability of the jobs identified in light of this finding. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

8-18w(i)

The Board vacated the administrative law judge's finding that employer's labor market survey is insufficient to meet its burden of showing the availability of suitable alternate employment and remanded for reconsideration of this alternate work as, in contrast to the administrative law judge's findings, a number of the listed positions provide a sufficient

description to enable the administrative law judge to make a comparison between the job requirements and the physical limitations imposed by the credited physician. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The administrative law judge rationally found that employer established suitable alternate employment based on positions identified by employer's vocational expert which were based on claimant's medical condition as reported by the physicians of record in 1998. Thus, the Board affirmed the administrative law judge's finding that employer established suitable alternate employment as of 1998 and rejected employer's contention that the administrative law judge erred in not finding that it established suitable alternate employment as of January 1988. *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

### Jobs in Employer's Facility

The Board remands the case for the administrative law judge to determine if the light duty job offered by employer is actually available and if claimant is capable of performing the job. That the job may be tailored to claimant's restrictions does not preclude it from meeting employer's burden. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Although employer's shore-side welding positions may be light-duty work, they do not constitute sheltered employment because claimant was successfully performing the work and because at least 2 shifts involving approximately 350 out of employer's 950 welders were performing the same work. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Employer may meet its burden of establishing suitable alternate employment by offering claimant her choice of filled positions and promising to fire the person currently holding the position, if its offer is sincere and included jobs within claimant's restrictions. *Beulah v. Avis Rent-A-Car*, 19 BRBS 131 (1986).

The Board holds the administrative law judge irrationally discredited the testimony of employer's manager of workmen's compensation who testified employer was ready and willing to work with claimant in order to find a suitable job with it and envisioned no barrier to finding appropriate employment. Also, employer offered claimant several jobs which doctors stated he could perform. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), rev'd in pert. part, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

The Fifth Circuit reverses the Board's holding that suitable alternate employment was established, as it exceeded its scope of review. Notwithstanding medical evidence and testimony that claimant is capable of some employment, the administrative law judge, as

finder-of-fact, may rationally credit testimony that claimant is unable to perform any alternate work, based on his subjective complaints of constant pain, and is therefore totally disabled. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), rev'g in part 19 BRBS 15 (1986).

Board affirms administrative law judge's determination that claimant is not permanently totally disabled where claimant held a job in employer's MRA shop in which he performed tasks necessary and profitable to employer and which were within his physical capabilities. Board concludes that this job is not sheltered employment. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987).

Board affirms administrative law judge's finding that it failed to establish suitable alternate employment because although claimant failed to return to work on July 25, 1983, which employer alleges was attributable to his arrest on the preceding day, employer made no effort to determine whether it had suitable alternate employment actually available for claimant on that date since he did not appear at the shipyard. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

Board rejects claimant's contention that the post-injury warehousing job offered by employer was not within his physical restrictions and that the physical requirements of the job were not included in the record. McCullough v. Marathon Letourneau Co., 22 BRBS 359 (1989).

Claimant's post-injury job for employer does not constitute suitable alternate employment because he receives no wages for the work he does and no one would be hired like him, i.e., someone who can only perform office work, but cannot do any field work. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

The First Circuit affirmed the Board's decision that light duty clerical work was sheltered employment and did not constitute suitable alternate employment where claimant worked for employer on a part-time as needed basis, and claimant had a mattress in his office so that he could lay down during the day. The court also found that evidence was not produced regarding claimant's brief stint as a security guard, sufficient to establish suitable alternate employment where employer failed to provide any evidence regarding the precise nature, terms and availability of the job or even identify the employer and did not indicate why claimant did not continue in the job. CNA Ins. Co. v. Legrow, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

8-18y

The Fifth Circuit affirms the Board's holding that claimant's post-injury assignment to a modified joiner position within employer's facility, which claimant satisfactorily performed for one year prior to the hearing, satisfied employer's burden of showing the availability of suitable alternate employment. Noting that its decision in P & M Crane Co. v. Hayes, 930

F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991) cited with approval the Board's holding in *Darden*, 18 BRBS 224 (1986), the Court held, consistent with *Darden*, that an employer's offer of a suitable job within its own facility is sufficient to establish suitable alternate employment; the employer need not show that the claimant can earn wages in the open market. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The Board remanded the case for further consideration of suitable alternate employment. The administrative law judge did not specifically consider whether the post-injury position claimant held with employer in its tool room was necessary and whether claimant was capable of performing it. Additionally, the Board held that the administrative law judge did not discuss the labor market survey submitted by employer in this case which contained several positions which may be sufficient to establish the availability of suitable alternate employment. *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The Board upheld the administrative law judge's determination that employer established suitable alternate employment at its facility where three physicians found the written description of the light duty laundry worker position within claimant's physical capabilities and where claimant and her third line supervisor testified that the light duty position was to entail even fewer duties than outlined in the written description. Claimant's voluntary performance of additional duties beyond her required duties on her own initiative and without the request, knowledge, or acquiescence of employer did not defeat employer's attempt to tailor claimant's employment to her physical limitations. Moreover, the position was not sheltered as the work was necessary. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

The Board affirmed the administrative law judge's determination that employer established suitable alternate employment by virtue of a light duty position at its facility, where the administrative law judge rationally discredited claimant's testimony that this position was too demanding, and credited employer's witnesses that claimant was never assigned work outside his restrictions and was told not to perform work that might cause him discomfort, and that claimant never complained to them that the work was too demanding. Moreover, the administrative law judge rationally found that employer's light duty position was not sheltered employment, as employer presented credible evidence that claimant was performing a necessary function, as supported by the fact that the position is currently occupied by another worker. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Because the administrative law judge did not address all evidence relevant to the issue of whether employer established the availability of suitable alternate employment by offering claimant a job in its facility, the Board vacated his decision and remanded the case for further consideration of this issue. The administrative law judge is to determine whether a specific job offer was made, whether the job was suitable for claimant by comparing his physical restrictions with the job requirements and, if suitable, the date on which employer established its availability. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

The Board affirmed the administrative law judge's determination that employer met its burden of establishing suitable alternate employment at the same or greater wages than claimant earned before the injury by virtue of the motorman trainee position at its facility, as this finding is supported by substantial evidence. Thus, the Board affirmed the administrative law judge's ultimate denial of total disability compensation. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5<sup>th</sup> Cir. 2002) (table).

Employer offered claimant a light-duty job after her injury, but the administrative law judge credited claimant's testimony that she could not perform the work due to constant pain. Although the positions identified were within claimant's restrictions and claimant testified that the work itself does not cause increased pain, the Board affirmed the administrative law judge's finding that claimant was not capable of any work at the time of the hearing due to the persistent pain as it was rational and supported by the evidence. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment in its facility as there was insufficient evidence from which the administrative law judge could ascertain the suitability of any positions, as employer did not identify any specific jobs allegedly available to claimant. *Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007).

#### Willingness to Work

Board remands for administrative law judge to consider claimant's willingness to work if, on remand, employer establishes suitable alternate employment. Employer never had opportunity to demonstrate claimant's work capabilities because claimant refused to cooperate with employer's rehabilitation efforts. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd*, 948 F.2d 941, 25 BRBS 78 (CRT) (5<sup>th</sup> Cir. 1991).

Since the administrative law judge properly found no suitable alternate employment, he was not required to address the issue of whether the claimant had diligently sought work. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Noting that the Fifth Circuit has held in Roger's Terminal, 784 F.2d 681, 18 BRBS 79 (CRT)(5th Cir. 1986), that even if an employer shows the availability of suitable alternate employment, claimant nevertheless can establish total disability if he demonstrates that he diligently tried and was unable to secure employment, the Board remanded this case to the administrative law judge to determine whether claimant diligently tried but failed to secure the position which the administrative law judge found constituted suitable alternate employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

The Board affirmed the administrative law judge's finding that claimant is only entitled to partial rather than total disability benefits because she failed to cooperate with employer's vocational rehabilitation counselor in evaluating the extent of her disability. The administrative law judge concluded that based on claimant's pattern of resistance, which was not merely ignorance or forgetfulness, she willfully suppressed evidence necessary to employer's burden of showing alternate employment. Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104 (1989).

Claimant's unreasonable refusal to meet with employer's vocational consultant for an initial evaluation must be considered by the administrative law judge in determining the extent of claimant's disability. Moreover, if employer meets its burden of establishing suitable alternate employment, the administrative law judge must consider whether claimant has rebutted that showing by establishing he diligently sought, but was unable to secure, alternate employment. Martiniano v. Golten Marine Co., 23 BRBS 363 (1990).

The Board rejects employer's contention that claimant impeded the rehabilitative process noting that he met with the counselor and submitted to testing. Moreover, claimant need not establish that he diligently sought employment until employer has first established suitable alternate employment. Piunti v. ITO Corp. of Baltimore, 23 BRBS 367 (1990).

The Board affirmed the administrative law judge's finding that claimant's failure to cooperate with employer's vocational rehabilitation specialist was immaterial, since employer's evidence as to the availability of suitable alternate employment was otherwise flawed as it lacked the necessary information for the administrative law judge to address the jobs' suitability. Moreover, the administrative law judge found the lack of cooperation did not hinder the expert's job search. Jensen v. Weeks Marine, Inc., 33 BRBS 97 (1999).

Because the Board affirms the administrative law judge's finding that employer failed to establish suitable alternate employment, it need not address employer's contention that claimant did not diligently seek work. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Although claimant diligently tried but was unable to secure the suitable alternate employment identified by employer, Board affirms administrative law judge's determination that he is not entitled to benefits because his inability is due to his negative attitude and lack of interpersonal skills, since those factors are, unlike age, education, physical restrictions and vocational background, within claimant's control. Wilson v. Dravo Corp., 22 BRBS 463 (1989) (Lawrence, J., dissenting).

The Second Circuit holds that once employer meets its burden of establishing the availability of suitable alternate employment, claimant may rebut this showing by demonstrating that he diligently tried, without success, to find another job. If claimant so demonstrates, he is entitled to total disability benefits. The administrative law judge must make specific findings regarding the nature and sufficiency of claimant's alleged efforts. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). See also *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991).

The Board affirmed the administrative law judge's decision to allow claimant to conduct a post-hearing job search of the jobs identified by employer's vocational consultant, holding it within his discretion since employer did not inform claimant of the jobs prior to the hearing and in view of his duty to inquire fully into all relevant matters. However, the Board vacated the administrative law judge's findings that claimant conducted a diligent search and rebutted the showing of the availability of suitable alternate employment because he failed to provide employer the opportunity to cross-examine claimant or respond to his post-hearing affidavit, thereby violating its right to due process. Therefore, the Board remanded the case for further consideration after employer is given the chance to refute claimant's post-hearing statements. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

The Board rejected employer's contention that the administrative law judge abused his discretion in declining to admit new vocational evidence on remand regarding claimant's post-hearing job search, as this evidence went beyond the scope of the Board's remand order. Moreover, the administrative law judge acted within his discretion in finding that employer failed to avail itself of all the opportunities available to it in attempting to rebut claimant's showing that he diligently, but unsuccessfully, sought post-injury employment. The Board thus affirmed the finding that claimant rebutted employer's showing of suitable alternate employment and the award of total disability benefits. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

In order to meet its burden of demonstrating suitable alternate employment, employer must demonstrate specific jobs which claimant is capable of performing, and the administrative law judge must determine whether there is a reasonable likelihood given the claimant's age, education, and background, he would be hired if he diligently sought the job. In making this determination, pre-existing limitations must necessarily be addressed in determining whether the job is realistically available. Accordingly, where a vocational expert testifies that specific jobs are available which are suitable given claimant's age, education, history and restrictions, it is implicit in such evidence that he considered any of claimant's pre-existing conditions and found these jobs reasonably available to claimant. Once employer meets this burden of demonstrating that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. If, in fact, employers will not hire applicants with claimant's non-work-related history of stroke and cardiac problems, it will be apparent when a claimant demonstrates that his diligent job search was unsuccessful. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Although the Board affirmed the administrative law judge's conclusion that employer satisfied its burden of establishing the availability of suitable alternate employment, it held that remand is necessary to determine claimant's entitlement to permanent total disability benefits after November 1995 because the administrative law judge failed to address claimant's argument that he diligently sought employment but was refused work due to his physical restrictions and his illiteracy. The Board noted that the inquiry into claimant's diligence in seeking post-injury employment is not to be limited to his diligence in seeking jobs identified by employer. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

The Eighth Circuit affirmed the finding that employer did not establish suitable alternate employment, but added that, assuming, *arguendo*, employer met its burden, claimant rebutted employer's showing by demonstrating a diligent yet unsuccessful job search. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8<sup>th</sup> Cir. 1998).

The Board affirms the administrative law judge's finding that claimant was not diligent in seeking alternate employment. The Board rejected claimant's contention that he need not seek alternate employment before he reached maximum medical improvement, because it was his intention to return to longshore work after his condition became permanent. Claimant may not retain eligibility for total disability merely by alleging he prefers another type of work to that identified by employer or because he did not seek work because he was not sure if he would be hired. Moreover, the Board held that the administrative law judge rationally declined to allow claimant a longer period to seek alternate employment based on his alleged lack of fluency in English as the administrative law judge who had the opportunity to hear claimant testify, found him conversant in English, as did the vocational experts. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

The Board affirmed the administrative law judge's finding that claimant undertook a diligent yet unsuccessful post-injury job search and thus rebutted employer's showing of suitable alternate employment. The administrative law judge's analysis is consistent with the *Palombo* 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991), in that he discussed the particular jobs claimant sought, and considered the nature and sufficiency of claimant's efforts. The Board held that the administrative law judge's decision to accord determinative weight to claimant's testimony that she vigorously sought post-injury employment, and the vocational reports of Ms. Davis, which document claimant's efforts in this regard, is rational. *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

The Board affirms the administrative law judge's finding that he did not diligently seek alternate work having considered the nature and sufficiency of claimant's job search. The administrative law judge rationally found that claimant applied for jobs for which he was not qualified, made cold calls and did not apply for advertised openings, he exaggerated his infirmities through the use of unnecessary crutches, and de-emphasized his strengths such as some college education and computer skills. Claimant also refused to work weekends or mornings and did not follow up on applications. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

## Total Disability While Working

NOTE: Cite for *Walker* on p. 8-18 is 19 BRBS 171 (1986).

The administrative law judge, citing Haughton Elevator Co. v. Lewis, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978), found claimant permanently totally disabled despite his continued employment based on claimant's testimony because he believed that claimant had continued working only through considerable pain and through extraordinary effort. The Board, citing Burch, 15 BRBS 423 (1983), reversed the administrative law judge's award of permanent total disability where: (1) there was no medical evidence of record to indicate that claimant was incapable of performing his usual work; (2) claimant had worked steadily since his injury at hard manual labor at higher wages than he had earned prior to the injury; and (3) claimant had made numerous statements to various employment authorities that he was ready, willing and able to work. Jordan v. Bethlehem Steel Corp., 19 BRBS 82 (1986).

The Eleventh Circuit states that the extent of a claimant's disability should be measured by his loss of wage-earning capacity rather than by his actual reduction in earnings, and accordingly upholds the administrative law judge's determination that claimant is entitled to total disability benefits despite the fact that he was earning wages during the relevant period, since these wages were earned only by virtue of employer's "benevolence." Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988), aff'g in part. part Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

The Board affirms administrative law judge's finding that claimant is able to perform light duty job in employer's facility which was assigned after his surgery and therefore is not entitled to permanent total disability benefits as the record does not establish claimant was working only through extraordinary effort or at the beneficence of employer. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

The First Circuit affirmed the Board's decision that clerical work was sheltered employment and did not constitute suitable alternate employment where claimant worked for employer on a part-time as needed basis, and claimant had a mattress in his office so that he could lay down during the day. The court also found that evidence was not produced regarding claimant's brief stint as a security guard, sufficient to establish suitable alternate employment where employer failed to provide any evidence regarding the precise nature, terms and availability of the job or even identify the employer and did not indicate why claimant did not continue in the job. Claimant, therefore, is entitled to permanent total disability benefits. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991).

Based on his finding that claimant suffered from accident-related pain, the administrative law judge awarded claimant temporary total disability compensation from August 10, 1994, until January 19, 1995, a period in which claimant was performing light duty work for employer. The Board vacated the award, holding that the administrative law judge's earlier finding that employer's light duty work was not sheltered employment conflicted with this award. Moreover, the Board held that since the administrative law judge made no determination that claimant worked through extraordinary effort or experienced excruciating pain while performing this work, an award of temporary total disability was not appropriate. The Board remanded the case for the administrative law judge to determine whether claimant is entitled to an award of temporary partial disability benefits for this period. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board affirms the administrative law judge's finding that claimant did not work with excruciating pain or only through extraordinary efforts and thus is not entitled to total disability benefits for the post-injury period during which he worked as it is supported by substantial evidence. Specifically, the Board observed that: the administrative law judge considered but rejected claimant's conflicting testimony regarding the intense pain he allegedly incurred while working, found that there was no credible evidence to support claimant's position that he was having difficulties in performing this work, and determined that the fact that claimant worked substantial hours during this particular time period belied the notion that he was working in excruciating pain. As the administrative law judge stated claimant is entitled to partial disability benefits, but did not make findings of fact, the case is remanded. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

The administrative law judge found claimant to be totally disabled despite his continued employment, as he found that claimant returned to work out of financial necessity, despite physical pain and psychological fear. The administrative law judge also noted that claimant was working beyond the restrictions imposed by his doctors. The Board reiterates that an employee may be found to be totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. Factors such as claimant's pain and the physical or emotional limitations which cause him to avoid certain jobs offered by the hiring hall are relevant in determining post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21), based on reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

The Board affirms the denial of total disability benefits as the administrative law judge's finding that claimant was not performing his light duty work at employer's facility due only to employer's beneficence or while in excruciating pain is supported by substantial evidence. The case is remanded, however, for the administrative law judge to consider temporary partial disability benefits under Section 8(e), since the administrative law judge found that on occasion claimant experienced severe pain while performing his light duty work for employer, and eventually had to stop working, and this may have reduced his wage-earning capacity despite no decrease in his actual earnings. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The administrative law judge credited substantial evidence in the opinions of claimant's treating pain management specialist and another physician to find that claimant is able to work part-time only through extraordinary effort. Thus, the award of total disability benefits despite continued employment is affirmed. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

## Effect of Discharge and Layoff

Where claimant works for a period of time in employer's facility at a light duty job but is subsequently laid off due to lack of suitable work, employer has not established suitable alternate employment. Board distinguishes this case from cases in which employees were discharged from light duty jobs due to their own misconduct. Mendez v. Nat'l Steel & Shipbuilding Co., 21 BRBS 22 (1988).

In remanding the case for consideration of whether employer violated Section 49, the Board notes that if claimant's discharge was due to falsification of records and was not in violation of Section 49, claimant's loss of suitable alternate employment was not due to his disability but was due to his misconduct. His loss of wage-earning capacity is therefore unaffected by his discharge. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The Board notes that the administrative law judge erred in relying on claimant's light duty job for employer as establishing suitable alternate employment since employer withdrew the job, and thus alternate employment was no longer available. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence J., dissenting on other grounds).

The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. Thus, where claimant demonstrated he was laid off from a job which previously was found to constitute suitable alternate employment and he remained unable to perform his pre-injury work, the burden shifted to employer to establish the availability of suitable alternate employment. The Board reversed the administrative law judge, holding that claimant was entitled to Section 22 modification based on the change in circumstances due to the layoff. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

The Board held that employer established the availability of suitable alternate employment in a case in which claimant returned to work with a different employer following a work-related injury in a position which suited his physical restrictions, for which he had been trained and in which he performed successfully for approximately 3.5 months before being laid off due to a reduction in the work force and not for any reason associated with his work injury. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 1539 (1994).

In reversing the Board's decision, the Ninth Circuit deferred to the Director's position that claimant's short-lived 11 weeks of post-injury employment was insufficient to establish that suitable alternate work was "realistically and regularly available to claimant on the open market." In addition, the court found that there was substantial evidence to support the administrative law judge's award of permanent total disability based on a finding that employer did not establish the availability of suitable alternate employment where half of the jobs listed in employer's labor market surveys required experience which claimant did not have and claimant had contacted the remaining employers and other firms not listed in employer's surveys without success. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *cert. denied*, U.S. , 114 S.Ct. 1539 (1994).

The Board vacated the administrative law judge's finding that employer failed to establish suitable alternate employment and remanded for his reconsideration of whether a secretarial position which claimant held for eight months following her work injury terminated due to her psychological condition or her other injury-related conditions, or whether she was discharged for reasons unrelated to her disability. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., concurring in part and dissenting in part).

Where employer employed claimant in a suitable position following his injury and claimant was subsequently dismissed from this position by employer because of his failure to disclose a prior injury on his employment application, employer established suitable alternate employment, and any resulting loss of wage-earning capacity is not compensable since it was not due to claimant's work related injury but to his own misconduct; this is so even if the violation might not have come to light but for the work-related injury. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

The Fourth Circuit affirmed the Board's holding that where claimant had been fired from a suitable post-injury job with employer because of the violation of a company rule against falsifying a job application, employer had met its burden of establishing the availability of suitable alternate employment. The court agreed with the Board's determination that while claimant's violation might not have come to light but for his work-related injury, his inability to perform the post-injury job was due to his own misfeasance and not because of his work-related disability. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992).

The Board holds, consistent with *Walker*, 19 BRBS 171 (1986) and *Edwards*, 999 F.2d 1347, 27 BRBS 81 (CRT) (9th Cir. 1993), that a suitable job offered by employer and held for only a short period of time can establish claimant's wage-earning capacity if it supports a finding that suitable work was "realistically and regularly" available on the open market. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

Since the termination of claimant's usual job was not due to misfeasance, but was a result of claimant's injury, the administrative law judge properly shifted the burden of proof to employer to establish suitable alternate employment subsequent to the date claimant's doctor stated that claimant would be able to return to his usual employment. As employer failed to meet its burden, the Board affirmed the administrative law judge's finding that employer was liable for compensation subsequent to the date claimant would have been able to return to work from a psychological standpoint. In so holding, the Board distinguished this case from *Brooks*, 26 BRBS 1 (1992), *aff'd*, 2 F.3d 64, 27 BRBS 100(CRT)(4<sup>th</sup> Cir. 1993). *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 179-180 (1996).

The Fourth Circuit held that in instances where a claimant is unable to perform his usual pre-injury employment and is subsequently laid off from suitable alternate employment within employer's facility, he is entitled to compensation for total disability absent employer's establishment of other suitable alternate employment. Although the court noted that an employer may establish suitable alternate employment within its own facility, it held that an employer cannot satisfy its burden when it subsequently makes that internal position unavailable to claimant. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4<sup>th</sup> Cir. 1999).

The Fourth Circuit held that employer did not establish the availability of suitable alternate employment, as employer discharged claimant from a job outside of her restrictions, and employer has not shown the availability of any suitable employment outside the company. Thus, pursuant to *Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4<sup>th</sup> Cir. 1999), claimant is entitled to total disability benefits. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4<sup>th</sup> Cir. 2001).

The Board rejected the contention that claimant is not entitled to benefits because he was debarred by military authorities from the Johnston Atoll due to engaging in unauthorized behavior, *i.e.*, he could no longer work for employer. It was uncontested that claimant was unable to work at the time he was expelled. Thus, this case is distinguishable from *Brooks*, 26 BRBS 1 (1992) in that claimant was not performing suitable alternate employment at the time of discharge, nor was there any evidence that suitable work would have been available to claimant on the atoll but for his expulsion. *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 125 S.Ct. 36 (2004).

The Ninth Circuit affirmed the Board's rejection of employer's argument that claimant is not entitled to compensation for an injury he sustained after hours during horseplay in a social club on Johnston Atoll. The court distinguished this case from *Brooks*, 26 BRBS 1 (1992), *aff'd*, 2 F.3d 64, 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993), because *Brooks* stands for the narrow proposition that a claimant's post-injury job from which he is later fired for cause, may satisfy an employer's burden of showing suitable alternate employment, while in this case claimant was not performing suitable alternate employment at the time of discharge. *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9<sup>th</sup> Cir. 2004), *aff'g Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *cert. denied*, 125 S.Ct. 36 (2004).

## Section 8(c) - Permanent Partial Disability

### Schedule-In General-Substantial Evidence/Calculation

The Board vacates administrative law judge's finding that claimant could not receive compensation for permanent partial disability for a scheduled injury. The administrative law judge reasoned that claimant had voluntarily retired, and thus did not establish a loss of wage-earning capacity. Board holds that for a schedule award, loss of wage-earning capacity is presumed and economic factors, such as voluntary retirement, are not taken into consideration. Burson v. T. Smith & Son, Inc., 22 BRBS 124 (1989).

Administrative law judge improperly computed schedule award by applying 10% loss of use of the leg to the compensation rate for total loss of use of the leg (2/3 of AWW) and extended the award for the full 288 weeks provided in Section 8(c)(2) for loss of use of the leg. A schedule award pursuant to Section 8(c)(1)-(20) runs for the proportionate number of weeks attributable to loss of use of the scheduled body part at the full scheduled compensation rate. Byrd v. Toledo Overseas Terminal, 18 BRBS 144 (1986).

The Board reaffirms principle that a schedule award runs for the amount of time yielded by multiplying the number of weeks provided in the pertinent schedule provision by the percentage of the claimant's impairment, and the claimant receives the full compensation rate during each week of this period. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

A schedule award runs for the proportionate number of weeks attributable to the loss of use of the body part, at the full compensation rate. As claimant has a seven percent leg impairment, the Board modifies the compensation rate to reflect an award of  $66\frac{2}{3}$  percent of claimant's average weekly wage for seven percent of 288 weeks, pursuant to Section 8(c)(2). Boone v. Newport News Shipbuilding & Dry Dock Co., 37 BRBS 1 (2003).

The Board held that where a schedule injury to a greater member results in impairment to a smaller, connected member, claimant may not receive separate awards for the impairment to each member. The schedule accounts for impairments necessarily caused to smaller members as a result of injuries to larger, connected members. The Board therefore reversed the administrative law judge's dual awards where claimant injured his forearm which necessarily affected his ability to use his hand. Mason v. Baltimore Stevedoring Co., 22 BRBS 413 (1989).

A below-the-knee amputation renders employer liable for 205 weeks of compensation pursuant to Section 8(c)(4), (15), rather than 288 weeks for total loss of use of the leg under Section 8(c)(2), because Section 8(c)(15) explicitly equates such amputations with loss of a foot. Higgins v. Hampshire Gardens Apartments, 19 BRBS 77 (1986) (Brown, J., dissenting), order denying recon. en banc, 19 BRBS 192 (1987).

A below-the-knee amputation renders the employer liable for 205 weeks of compensation under ' 8(c)(4), pursuant to §8(c)(15), because the latter provision explicitly equates such amputation with the loss of a foot. Jones v. Genco, Inc., 21 BRBS 12 (1988).

Where claimant suffered direct injury to his forearm resulting in a 50 percent loss of use of the arm, the Board held that he was entitled to an award under Section 8(c)(1). The Board rejected employer's position that Section 8(c)(15), which provides that where the arm is amputated below the elbow, the claimant shall be compensated for loss of use of the hand rather than the arm, limited claimant to an award for impairment to the hand because his injury occurred below the elbow. Mason v. Baltimore Stevedoring Co., 22 BRBS 413 (1989).

The Board holds that the administrative law judge erred in failing to give employer a credit for payments claimant received for a prior knee injury. Under the credit doctrine, employer is liable only for the increase in claimant's impairment to avoid double recovery to claimant. Employer receives a credit for the actual amount of compensation paid for the prior injury rather than for the prior percentage of impairment so as to avoid derogation of the aggravation rule. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in part and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1988).

The Fifth Circuit affirms the Board's holding that credit for a prior knee injury should be on a dollar for dollar basis, rather than on a percentage basis. The court states that this method is consistent with the Section 3(e) credit scheme, is easier to calculate, and accords with the reality of informal settlement negotiations. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1988), *aff'g in part Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987).

Board affirms administrative law judge's decision to allow employer a credit for previously paid compensation where claimant reinjured the scheduled member for which the previous compensation had been paid. Von Lindenbergh v. I.T.O. Corp. of Baltimore, 19 BRBS 233 (1987).

Credit doctrine does not apply where claimant was compensated for a prior injury to his knee with a 10 percent service aggravated disability discharge from the Navy and subsequently sustained a work injury which increased the disability to his knee and which was compensable under the Act. Employer is liable for claimant's entire disability to his knee pursuant to the aggravation doctrine. Clark v. Todd Shipyards Corp., 20 BRBS 30 (1987), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988).

The general credit doctrine applies to provide employer an offset for amounts paid to claimant by other potentially liable longshore employers in settlement of claimant's claim. The Board applies the rationale articulated by the Fifth Circuit in *Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986), to a situation involving one occupational disease claim against multiple employers for the same injury. The Board found this situation similar to the one in *Nash*, which involved the liability of successive employers for claimant's traumatic injuries, noting that, like the facts in *Nash*, in an occupational disease case, one employer is liable for the totality of the same injury. *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998), *rev'd sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT)(9th Cir. 2002).

The Ninth Circuit reverses the Board's holding that the last responsible employer is entitled to a credit for Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The general credit doctrine is not applicable, as that doctrine acts to prevent double recoveries that would be obtained due to the application of the aggravation rule. In this case, the settlements claimant received were alternative to an entire award against any one of the three settling employers, who might have been liable for an entire award if it had been found to be the responsible employer. The aggregation rule was not applicable here. *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002), *rev'g in part Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1999) and 34 BRBS 34 (2000).

Citing *Alexander*, 32 BRBS 40 (1998), the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples*, 883 F.2d 422, 22 BRBS 126(CRT) (5<sup>th</sup> Cir. 1989), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *rev'd in part and aff'd on other grounds*, 317 F.3d 480, 36 BRBS 93(CRT) (5<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S.1141 (2004).

The Fifth Circuit reverses the Board's holding that the employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The court defers to the Director's position that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5<sup>th</sup> Cir. 2003) (Jones, J., dissenting on the basis that there is no reason not to apply the *Nash* credit doctrine, applicable in "aggravation rule" cases, to cases involving a single occupational injury), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S.1141 (2004).

The Fifth Circuit held that a second employer, found responsible for claimant's permanent total disability, is not entitled to a credit for sums paid by an earlier employer in settlement of a claim for permanent partial disability to a non-scheduled body part. The court distinguished the credit doctrine enunciated in *Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5<sup>th</sup> Cir. 1986), which applies to successive scheduled injuries. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5<sup>th</sup> Cir. 1989).

The parties' settlement agreement contained a "credit provision" stating that if claimant

returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. No credit is applicable where there has been no aggravation, and even if an aggravation were to occur, *Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) does not apply because the courts have declined to extend the *Nash* credit doctrine to cover non-scheduled injuries. The Board vacated the settlement approval and remanded the case for further proceedings to resolve claimant's claim. *J.H. v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

The Board affirms the administrative law judge's award of benefits under Section 8(c)(21) where the injury was to claimant's shoulder, even though impairment to the arm resulted. The shoulder is not expressly listed in the schedule. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

The Board rejects claimant's argument that the shoulder is a part of the arm and therefore compensable under Section 8(c)(1). Instead, the Board held that the shoulder is not expressly listed under the schedule and is not covered thereunder, even if a "disability" to the arm subsequently occurs. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

Where the administrative law judge's finding that claimant did not injure his hand and that the hand impairment may be due to an injury to his back and shoulder, is rational and supported by substantial evidence, the Board affirmed the administrative law judge's denial of compensation under Section 8(c)(3), as the schedule is not applicable where the actual situs of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. Claimant's compensation remedy lies under Section 8(c)(21) of the Act. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995).

The Ninth Circuit rejects claimant's contention that his shoulder injury should be compensated as a scheduled injury to the arm under Section 8(c)(1); the court rejects both the argument that the shoulder is part of the arm for purposes of Section 8(c)(1) and the argument that the resultant impairment in the use of the arm below the shoulder entitles claimant to recovery under the meaning of "arm lost." *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

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Where the administrative law judge rationally found that claimant suffered a 50 percent impairment of his middle finger and a 20 percent impairment of his ring finger, the Ninth

Circuit affirmed the administrative law judge, rejection of claimant's argument that claimant was entitled to an award based on loss of use of the hand under Section 8(c)(3), (17), and (19). *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85 (CRT) (9th Cir. 1990).

The Board affirms the administrative law judge's finding that claimant did not sustain a residual shoulder impairment. The negative objective test results, and the inability of claimant's treating physician to explain his continuing complaints on an orthopedic basis are substantial evidence to support the administrative law judge's finding. Claimant's recovery for his left arm injury is therefore limited to Section 8(c)(1) of the schedule, as employer established suitable alternate employment. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991).

The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability under the schedule. The Act does not require impairment ratings based on medical opinions using the criteria of the *AMA Guides* except in cases involving compensation for hearing loss and voluntary retirees. See 33 U.S.C. §§908(c)(13), 902(10). *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

The Board held that the administrative law judge erred in rejecting a doctor's disability assessment/impairment rating based on *Young*, 17 BRBS 201 (1985). Distinguishing *Young*, the Board held that the doctor's impairment rating in this case did not involve an augmentation of claimant's disability to reflect pain and suffering but rather was based on medical factors establishing loss of use, which may be compensated under the schedule. Accordingly, the Board remanded for reconsideration of the extent of claimant's disability under the schedule, noting that *Young* did not hold that pain and its symptoms should not be considered when a doctor rates the loss of use of a member or that pain and its symptoms should be disregarded in their entirety. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

The Fourth Circuit rejects claimant's argument that the administrative law judge erred in failing to consider loss of wage-earning capacity in translating claimant's medical impairment into a disability rating under the schedule. The court ruled that *PEPCO*, 449 U.S. 268, 14 BRBS 363 (1980), precludes consideration of economic factors in the computation of disability under scheduled awards notwithstanding that, unlike the case in *PEPCO*, the claimant in this case was not pursuing his claim under Section 8(c)(21), but, rather, sought to have economic factors considered in calculating the scheduled award. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

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In this case where claimant sustained an injury to his knee, the Board held that the administrative law judge erred in ordering an award of continuing permanent partial disability benefits. As claimant's injury was to a scheduled member, benefits are properly

awarded under Section 8(c)(2) and not Section 8(c)(21). Therefore, the Board vacated the award of permanent partial disability benefits and remanded the case for the administrative law judge to reconsider the nature and extent of claimant's disability. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The Board affirms the administrative law judge's award under the schedule. Contrary to employer's contention, the case does not present an issue of first impression. The administrative law judge's finding is based on a medical report which was based on subjective factors, such as weakness due to pain, and not, as employer alleges, based on claimant's testimony of pain alone. *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000).

The Board affirms the administrative law judge's award based on a medical report which uses the California rating system as a guide in rating claimant's subjective complaints of pain, as the physician stated the *AMA Guides* do not provide for a rating absent objective abnormalities. The Act does not require impairment ratings based on medical opinions using the criteria of the *AMA Guides* except in cases involving compensation for hearing loss and voluntary retirees. *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000).

The Board affirms an administrative law judge's decision to award claimant permanent partial disability benefits pursuant to Section 8(c)(1) for injuries to claimant's wrists since evidence in the record referred to claimant's carpal tunnel injuries as resulting in an impairment of the upper extremities. Moreover, the Board affirms the administrative law judge's determination of the degree of claimant's impairment, as substantial evidence supports the finding that claimant suffers from a 28 percent impairment to his upper extremities. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The Board holds that the administrative law judge erred in awarding claimant permanent partial disability benefits based on a loss in wage-earning capacity, inasmuch as claimant's injury is to his leg. Pursuant to *PEPCO*, 449 U.S. 268, 14 BRBS 363 (1980), claimant's recovery for permanent partial disability is to that provided in the schedule at Section 8(c)(2) based on the percentage of claimant's physical impairment. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

## Hearing Loss - Section 8(c)(13)

### Introduction

An employer is liable for claimant's entire hearing loss even though all of the loss was not sustained while in the employ of this employer. Employer does not dispute the administrative law judge's finding that claimant's exposure to injurious stimuli while employed by it combined with his pre-existing hearing loss to create a greater hearing loss, and the Board therefore affirms the administrative law judge's holding that employer is liable for the entire hearing loss. Statements in Sicker v. Muni Marine Co., 8 BRBS 268 (1978) and Whitlock v. Lockheed Shipbuilding & Construction Co., 12 BRBS 91 (1980), indicating that if a pre-employment audiogram with a second employer indicates a hearing loss, claimant must recover compensation for the initial hearing loss from the first employer and can only obtain compensation for the subsequent increase in loss due to employment with the second employer, are no longer valid precedent. Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986) (Brown, J., concurring).

Board rejects employer's argument that the administrative law judge erred by holding it liable for claimant's entire hearing loss, rather than by factoring out the effects of presbycusis, because of the aggravation rule. Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989), aff'd in part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991).

### Timeliness of Notice and Filing

The Board holds that the extended time limitations for occupational diseases apply to hearing loss claims. Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989). But see Vaughn v. Ingalls Shipbuilding, Inc., 28 BRBS 129 (1994) (*en banc*), aff'd on other grounds 26 BRBS 27 (1992) (under Bath Iron Works Corp. v. Director, OWCP, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), hearing loss is not an occupational disease which does not immediately result in disability so extended limitations are not applicable).

Pursuant to the Supreme Court's decision in *Bath Iron Works Corp.*, 113 S.Ct. 692, 26 BRBS 151(CRT)(1993), that occupational hearing loss is not a disease that does not immediately result in disability or death, Section 12(a) dictates a 30-day notice period in this hearing loss case. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The administrative law judge erred by finding that claimants' knowledge of their audiogram results constitutes constructive compliance with the requirements of Section 8(c)(13)(D). Claimant must actually physically receive a copy of an audiogram and its accompanying report to start the running of the notice and filing requirements of Sections 12 and 13. Ranks v. Bath Iron Works Corp., 22 BRBS 301 (1989).

The Eleventh Circuit holds that in a hearing loss case, the employee must both receive an audiogram and be aware of the connection between the disability and the employment before the statute of limitations begins to run. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

The Board held that oral explanation of the results of an audiogram will not suffice as an accompanying report and that claimant's actual physical receipt of the audiogram and written accompanying report is required under Sections 12 and 13 of the Act. Accordingly, the Board vacated administrative law judge's finding to the contrary. Because the earliest possible date that claimant received an audiogram and accompanying written report in this case occurred on January 6, 1986, the Board modified the administrative law judge's decision to reflect this date of awareness under Section 8(c)(13)(D) and affirmed the administrative law judge's determination that the notice provided to SAIF on February 13, 1986, and the claim dated January 11, 1986, but filed on February 11, 1986, were timely pursuant to Sections 12 and 13. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

The Board holds that counsel's receipt of an audiogram is not constructive receipt by the employee, as Section 8(c)(13)(D) states that the Section 12 and 13 time limitations do not begin to run until claimant has physical receipt of an audiogram and accompanying report indicating a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

The Board rejects employer's agency and constructive receipt arguments, holding that Congress specified that the statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (*en banc*), *aff'g* 26 BRBS 27 (1992).

Although claimant did not personally receive a copy of his audiogram and did not personally see the report until after the administrative law judge rendered a decision, it is uncontested that claimant's attorney received the audiogram. Under the principles of agency, the Ninth Circuit holds that the deadline for giving notice was not tolled until claimant personally received the audiogram, as the attorney's receipt of the audiogram is constructive receipt by the employee under Section 8(c)(13)(D). The court rejects the Board's contrary holding in *Vaughn*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board holds that a letter accompanying an audiogram, which indicates that claimant has "fair" and "below normal" hearing and is silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, is inadequate to constitute an accompanying report which would trigger the running of the Section 13 time limitations. Such a letter is insufficient to confer "awareness" of an employment-related hearing loss as contemplated by the statute. Moreover, Section 8(c)(13)(C) and 20 C.F.R. §702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, is not related to timeliness determinations under Sections 8(c)(13)(D), 12 and 13. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Where the administrative law judge found that claimant received an audiogram and report in 1988 which showed a 31.88% hearing loss, but she continued to work for employer and be exposed to additional injurious noise, and she underwent another audiogram in 1994 showing a greater loss of hearing, the Board held that claimant's 1994 claim properly included the original 31.88% loss. As claimant's continued employment aggravated her hearing loss, and as each aggravation is a new injury, claimant is entitled to be compensated for the entire loss (the combination of her pre-existing loss and her current loss) under the aggravation rule. Therefore, the Board rejected employer's argument that the claim for the initial 31.88% loss was time-barred pursuant to Sections 8(c)(13)(D) and 13(a), and it affirmed the administrative law judge's conclusion that employer is liable for the entire hearing loss. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

## Determining the Extent of Loss

**NOTE:** Cases decided before *Bath Iron Works* involving the issue of 8(c)(13) vs. 8(c)(23) are of historical significance only.

The Supreme Court holds that hearing loss is not an occupational disease which "does not immediately result in ... disability," and thus Section 10(i) is inapplicable. The Court holds that a hearing loss injury occurs simultaneously with exposure to excessive noise, and therefore the injury is complete on the date of last exposure. Average weekly wage is thus calculated from the date of last exposure. Inasmuch as Section 10(i) is inapplicable, Sections 10(d)(2) and 8(c)(23) also are inapplicable and all hearing loss is to be compensated pursuant to Section 8(c)(13). *Bath Iron Works Corp. v. Director, OWCP*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

The Board modifies the award to reflect claimant's entitlement to benefits under Section 8(c)(13) rather than Section 8(c)(23) at the percentage of binaural impairment found by the administrative law judge, consistent with the Supreme Court's decision in *Bath Iron Works. Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (Decision on Remand); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, modified on other grounds on recon., 28 BRBS 156 (1994).

Pursuant to the Supreme Court's holding in *Bath Iron Works*, the Board vacated the administrative law judge's finding that the date of claimant's filing audiogram is the commencement date for benefits, and held that claimant's hearing loss benefits commence on the date of his last exposure to injurious noise levels, which in this case was the date of his retirement. Moreover, the Board, *sua sponte*, modified the award to reflect that claimant is entitled to hearing loss benefits under Section 8(c)(13) rather than Section 8(c)(23) as it would be incongruous to commence a Section 8(c)(23) award on the date of last exposure. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

The First Circuit holds that benefits for voluntary retirees with hearing loss are to be calculated pursuant to Section 8(c)(13), rejecting the position taken by the Fifth Circuit in *Fairley*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), that benefits are to be calculated under Section 8(c)(23). The court reasoned that unlike asbestosis, a disease with symptoms that often do not appear until after retirement, hearing loss symptoms occur before retirement, whether or not they are noticed by the worker, and thus, the "time of injury" is prior to retirement, rendering Section 10(i) and the post-retirement injury provisions inapplicable. *Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), *aff'g on other grounds Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990)(*en banc*)(Stage, C.J., concurring in the result)(Brown, J., dissenting on other grounds)(McGranery, J., dissenting), *aff'd*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993).

For the reasons stated in *Machado*, 22 BRBS 176 (1989) and *Fairley*, 22 BRBS 184, the Board reasserts the applicability of Section 8(c)(13) in retiree hearing loss cases. *Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990)(*en banc*) (Stage, C.J., concurring in the result) (Brown, J., dissenting on other grounds) (McGranery, J., dissenting), *aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT)(1st Cir. 1991), *aff'd*, U.S. , 113 S.St. 692, 26 BRBS 151 (CRT) (1993).

Benefits for voluntary retirees who suffer hearing loss are to be calculated pursuant to Section 8(c)(13) and are to be based on the percentage of actual hearing loss under the AMA Guides. *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*) (Brown, J., concurring); *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*) (Brown, J., concurring), *rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990); *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds).

The Fifth Circuit reverses the Board's holding that claimants are entitled to compensation under Section 8(c)(13), and holds that they are entitled to compensation under Section 8(c)(23) pursuant to the 1984 Amendments. It remanded the case for the Board to make the appropriate adjustments under the retiree scheme embodied in Sections 8(c)(23), 10(d)(2), 10(i), and 2(10). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part and aff'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*) (Brown, J., concurring), and *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (*en banc*) (Brown, J., concurring).

The Board modifies the award to one for a whole man impairment under Section 8(c)(23) consistent with the Fifth Circuit's directive in the case. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (Decision on Remand).

The Board holds that when compensation for hearing loss is awarded under Section 8(c)(23) the award commences on the date that the hearing loss became permanent, which often is the first audiogram indicating a loss of hearing. *Howard v. Ingalls Shipbuilding, Inc.*, 25 BRBS 192 (1991) (decision on recon.).

The Board reconsiders its position that hearing loss should be compensated pursuant to Section 8(c)(13) in light of the Fifth Circuit's decision in *Fairley* and the Eleventh Circuit's decision in *Sowell* on Section 10(i). The Board therefore overrules *Machado*, and holds that a retiree's hearing loss should be compensated under Section 8(c)(23). *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting), *rev'd in part part mem.*, 17 F.3d 396 (9th Cir. Feb. 10, 1994).

The Board applied the holding of *Machado*, 22 BRBS 176, that Section 8(c)(13), not Section 8(c)(23), applies to hearing loss cases involving voluntary retirees, reiterating that it will apply this holding to all cases except those arising in the Fifth Circuit. *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp.*, 953 F.2d 633 (1st Cir. 1991).

Board holds that Section 8(c)(23), which provides that a permanent partial disability award for a claimant whose occupational disease becomes manifest post-retirement is payable during the continuance of his impairment, does not apply in hearing loss cases. Reasoning that Section 8(c)(23) is intended to compensate "continuing impairment of the whole man," Board holds that the award in this case--which involves an injury falling under the schedule must be granted pursuant to Section 8(c)(13) rather than Section 8(c)(23). Claimant is therefore entitled to receive permanent partial disability benefits for the amount of time yielded by multiplying the number of weeks provided by Section 8(c)(13) by the percentage of his binaural hearing loss, rather than for the amount of time his impairment lasts. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

Because permanent partial disability for degree of permanent impairment in hearing loss cases is covered by the schedule contained in Section 8(c)(1)-(20), claimant, who was not retired, is limited to an award under Section 8(c)(13) which is based upon the degree of impairment attributed to the loss of use of the particular body part to which the subsection refers. The Board thus rejects employer's argument that the administrative law judge erred in calculating claimant's impairment based solely on his binaural hearing loss rather than on the impairment of his whole person. *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988).

All hearing loss determinations must now be either initially rendered or later converted under the *Guides* standards to be used in calculations rendered pursuant to the Act. *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds).

The Board rejects employer's contention that administrative law judge erred in awarding benefits for claimant's monaural hearing loss under Section 8(c)(13)(A) rather than converting his monaural loss to a binaural hearing loss under Section 8(c)(13)(B) because Section 8(c)(13)(E) requires that the AMA *Guides* be utilized to calculate hearing loss and the AMA *Guides* only allow for assessment of binaural hearing loss. Section 8(c)(13)(E) does not provide that the AMA *Guides* be used to determine whether claimant's hearing loss is monaural or binaural for the purposes of determining compensation under the Act. This is a legal issue answered by Section 8(c)(13)(A) which specifically provides compensation for the loss of hearing in one ear. *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 345 (1990), *rev'd on recon. en banc*, 24 BRBS 173 (1991) (Smith and Dolder, JJ., dissenting), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992).

reverses the administrative law judge's award of benefits under Section 8(c)(13)(A) for a monaural loss where claimant had a zero percent loss in his left ear and a 3.75 percent loss in his right ear. Board holds that the AMA *Guides* mandate that the determination of the extent of an occupational noise-induced hearing loss must be made on a binaural basis under Section 8(c)(13)(B). *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991)(*en banc*) (Smith and Dolder, JJ., dissenting), *vacating on recon.* 23 BRBS 345 (1990), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992).

In a Fifth Circuit case, the Board held that where a non-retiree claimant has a 0 percent hearing impairment in one ear and a measurable noise-induced impairment in the other, the administrative law judge properly awarded benefits on a binaural basis, pursuant to Section 8(c)(13)(B). The majority reiterated their position as stated in *Garner*, 24 BRBS 173 (1991) (*en banc*) (Smith and Dolder, JJ., dissenting), *vacating on recon.* 23 BRBS 345 (1990), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992), noting that the Fourth Circuit's reversal of *Garner II* is an unpublished decision without precedential effect. Additionally, the majority states that Section 8(c)(13)(A) is limited to traumatic monaural impairments. *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992)(*en banc*) (Smith and Dolder, JJ., dissenting), *rev'd*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir. 1993).

In reversing the Board, the Fifth Circuit held that where claimant has a measurable occupational hearing loss in only one ear, his compensation should be calculated on a monaural basis pursuant to Section 8(c)(13)(A). This section is not in conflict with Section 8(c)(13)(E) which requires hearing loss to be calculated under the AMA *Guides*. *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993), *rev'g* 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, JJ., dissenting).

For the reasons set forth in the Board's decision in *Tanner*, 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, JJ., dissenting), *rev'd*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993), the Board affirmed the administrative law judge's award of permanent partial disability pursuant to Section 8(c)(13)(B) for a binaural impairment. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring in part and dissenting on other grounds), *modified on recon.*, 28 BRBS 102 (1994) (*en banc*), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

on reconsideration, vacated its prior decision and modified the administrative law judge's award to reflect that claimant is entitled to receive permanent partial disability benefits pursuant to Section 8(c)(13)(A) of the Act for his 5.6 percent monaural impairment. *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994)(*en banc*), *modifying on recon.* 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

The Second Circuit reverses the Board's decision to convert claimant's monaural hearing impairment into a binaural hearing loss. If a claimant has a monaural impairment rating under the *AMA Guides* of 0 percent in the better ear, she has a "loss of hearing" within the meaning of Section 8(c)(13) in only one ear and is to be compensated accordingly under Section 8(c)(13)(A). *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT)(2d Cir. 1993).

The Fourth Circuit followed its unpublished *Garner* decision, and the decisions of the Second and Fifth Circuits in *Rasmussen* and *Tanner*, and reversed the Board and held that where claimant has a measurable occupational hearing loss in only one ear, his compensation should be calculated on a monaural basis pursuant to Section 8(c)(13)(A). This section is not in conflict with Section (c)(13)(E) which requires hearing loss to be calculated under the *AMA Guides*. *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27 (CRT)(4th Cir. 1994).

As an aggravation of a covered injury occurring after termination of covered employment is not compensable, the Board holds that claimant may not receive benefits for any work-related hearing loss claimant suffered after leaving covered employment. The case is remanded for the administrative law judge to determine the extent of claimant's hearing loss at the time he left covered employment. *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989).

Claimant worked in covered longshore employment from 1941 to 1963, and in non-covered employment from 1963 until he voluntarily retired in 1979. Claimant was awarded benefits for work-related hearing loss based on an October 1986 audiogram. The Board affirmed the award, since the administrative law judge rationally found that the 1986 audiogram was the only credible evidence rendered pursuant to the *AMA Guides*. The Board holds that claimants need not recreate the precise extent of their hearing loss at the date covered longshore employment terminated and that the administrative law judge may evaluate the evidence of record and rely on the most credible evidence in determining the extent of claimant's work-related hearing loss. Thus, the Board holds that the administrative law judge rationally discredited a 1967 audiogram because it failed to indicate the credentials of the tester. The Board distinguishes *Brown*, 22 BRBS 384 (1989) and *Leach*, 13 BRBS 231 (1981), noting that claimant herein is a retiree with an occupational disease, and that such persons routinely are awarded benefits based on the full extent of their disabilities after retirement. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

Based on *Labbe*, 24 BRBS 159 (1991), the Board held that the administrative law judge acted within his discretion in awarding claimant benefits based on evidence reflecting the extent of his hearing loss in 1988, even though he last worked at a covered situs in 1971, inasmuch as there was no evidence reflecting claimant's hearing loss at the time he left covered employment and the administrative law judge rationally found the 1988 evidence more credible than earlier evidence. This case does not involve a retiree. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

In this hearing loss case factually similar to *Dubar*, 25 BRBS 5 (1991), claimant left covered employment in 1953; the earliest audiogram was administered in 1968. After concluding that he could not project the 1968 audiogram's test values back to 1953 to find that claimant sustained a compensable hearing loss by the time he left covered employment, the administrative law judge denied claimant benefits. As it was within the administrative law judge's discretionary authority to evaluate the medical evidence of record and to draw inferences from that evidence, the Board affirmed the administrative law judge's conclusion that claimant did not meet his burden of establishing the existence of a measurable hearing impairment at the time he left covered employment in 1953. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

The First Circuit upheld claimant's award as the issue of the compensability of claimant's hearing loss claim was decided in claimant's favor by the first administrative law judge, whose decision was affirmed by the Board. The second administrative law judge did not have the issue of compensability before him but was merely to determine the extent of claimant's work-related hearing loss until claimant transferred to the non-covered facility. *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

Claimant's last covered employment occurred in 1975. Following a discussion and explanation of the Board's prior relevant decisions on this issue, *i.e.*, *Brown*, 22 BRBS 384 (1989) [see 194 F.3d 1, 33 BRBS 162(CRT) (1<sup>st</sup> Cir. 1999)], *Bruce*, 25 BRBS 157 (1991), *Dubar*, 25 BRBS 5 (1991), and *Labbe*, 24 BRBS 159 (1991), the Board concluded that claimant is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record, which the administrative law judge rationally determined are the two audiograms administered in 1998. In so holding, the Board rejected employer's contention that *Bruce* requires that the results from later audiograms be projected back to determine whether claimant sustained a compensable hearing loss at the time he left covered employment. Moreover, the Board distinguished the instant case from its decision in *Bruce*, as claimant herein retired from all employment in 1975, he was not exposed to noise in subsequent non-covered employment, and all audiograms of record revealed a measurable impairment. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Board held that the administrative law judge, after finding that the 1985 and 1992 audiograms were not of equal probative value to the 1998 audiograms in view of the lack of evidence that the earlier tests were performed in accordance with the procedures set forth in the Act and regulations, rationally relied on the average of the two audiograms administered in 1998 in determining the extent of claimant's work-related hearing loss. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Board affirms the administrative law judge's award of benefits as he rationally credited the audiogram showing a measurable loss of hearing over one showing no measurable loss under the *AMA Guides*. The administrative law judge is not required to credit the lowest audiogram. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds).

The Board affirms the administrative law judge's crediting of one audiogram over one reflecting a higher loss because the former was taken closest to claimant's last exposure to noise with the covered employer. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

The Board rejected the Director's argument that 20 C.F.R. §702.321, which states that the pre-existing hearing loss "must be documented by audiogram which complies with the requirements of Section 702.441," requires that employer produce a "presumptive" audiogram pursuant to 20 C.F.R. §702.441(b) in order for it to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. The Board explained that the key question relating to hearing loss for purposes of Section 8(f) relief, as well as for establishing the extent of hearing loss in adjudicating any other aspect of the claim, is whether there is sufficient probative evidence, applying the *AMA Guides* and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

pre-existing hearing impairment is deficient under 20 C.F.R. §702.441(d). The administrative law judge found that the examiner, type of equipment, and calibration date were on the audiogram results. The administrative law judge also found that claimant's current physical condition was noted in materials accompanying the audiogram. The administrative law judge relied on a doctor's testimony concerning the reliability of the audiogram, and the hearing loss was calculated under the *AMA Guides*. Thus, the Board affirmed the finding that the pre-existing permanent partial disability element for Section 8(f) relief was met, as well as the award of Section 8(f) relief. *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

In this Section 8(f) case, the administrative law judge rationally credited the uncontradicted medical opinions stating that audiogram test results at any particular frequency that fall within a 5 decibel range of each other are within the range of test/retest variability and thus are a measure of the same hearing loss. In this case, the 2002 and 2003 audiogram results are within the range of test/retest variability such that the 2003 audiogram does not represent an increase in claimant's hearing loss since the 2002 audiogram. *G.K. v. Matson Terminals, Inc.*, \_\_ BRBS \_\_ (2008).

As the unequivocal evidence of record establishes that the 100 percent hearing impairment of the left ear is solely the result of a non work-related intervening cause, the aggravation rule is not applicable. As claimant's right ear impairment measures zero percent under the *AMA Guides* and the left ear loss is not work-related, claimant is not entitled to disability compensation. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

## Section 8(f)

The Board holds that in apportioning Section 8(f) liability under the 1984 Amendments, the relevant hearing loss figures must be calculated in accordance with the AMA Guides. The Board rejected employer's proposal to compare claimant's pre-employment decibel-loss figure with a later decibel-loss figure. The Board also rejected employer's contention that the administrative law judge erred by calculating Section 8(f) liability by converting claimant's pre-existing monaural hearing loss into binaural hearing impairment. McShane v. General Dynamics Corp., 22 BRBS 427 (1989).

Under the Act as amended in 1984, in hearing loss cases, employer's liability is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the employment. Therefore, employer is only liable for its contribution to the hearing loss, and the Special Fund is liable for the remainder, even if the total award is less than 104 weeks. Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986).

Section 8(f) as amended in 1984 limits employer's liability in hearing loss claims to the lesser of 104 weeks or the extent of hearing loss attributable to the subsequent injury. Machado v. General Dynamics Corp., 22 BRBS 176 (1989). (Note: in Reggiannini, 17 BRBS at 257, the standard was referred to as "extent of hearing loss attributable to the employment")

Where claimant, who began working for employer in 1933, received his first audiogram in 1959 which indicated a 15.7 percent binaural hearing loss, and retired from his position with employer in 1975 with a 33.7 percent binaural hearing loss, the Special Fund is liable for the 15.7 percent hearing loss which occurred before the 1959 hearing test, and employer is liable for the remainder, based on the precept that Section 8(f) was enacted in part to encourage the retention of disabled workers. Pre-employment audiogram is not a prerequisite to Section 8(f) relief under amended Act. Risch v. General Dynamics Corp., 22 BRBS 251 (1989).

Claimant became employed as a supervisor for employer from 1964 to 1983, at which time he had a 23.4 percent binaural hearing loss. Claimant was given a pre-employment audiogram in 1964 which indicated a high frequency hearing loss, but the hearing loss was too minimal to be quantifiable under the AMA Guides. Because the 1964 audiogram interpreted under the Guides indicates no binaural hearing loss, the Board held that the 1964 audiogram can not establish a pre-existing permanent partial disability cognizable under Sections 8(c)(13) and 8(f) of the Act as amended in 1984. The Board, however, remanded for the administrative law judge to determine whether other audiograms included in the record could establish a pre-existing permanent partial disability. Fucci v. General Dynamics Corp., 23 BRBS 161 (1990) (Brown, J, dissenting).

Where there was no creditable evidence of the extent of claimant's hearing loss prior to 1984, and claimant left covered employment in 1971, the Board affirmed administrative law judge's findings that employer did not meet its burden of establishing that claimant had a pre-existing disability which was manifest to employer prior to his leaving covered employment. Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991).

The Board rejected the Director's argument that 20 C.F.R. §702.321, which states that the pre-existing hearing loss "must be documented by audiogram which complies with the requirements of Section 702.441," requires that employer produce a "presumptive" audiogram pursuant to 20 C.F.R. §702.441(b) in order for it to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. The Board explained that the key question relating to hearing loss for purposes of Section 8(f) relief, as well as for establishing the extent of hearing loss in adjudicating any other aspect of the claim, is whether there is sufficient probative evidence, applying the AMA *Guides* and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

The Board rejected the Director's contention that the audiogram documenting claimant's pre-existing hearing impairment is deficient under 20 C.F.R. §702.441(d). The administrative law judge found that the examiner, type of equipment, and calibration date were on the audiogram results. The administrative law judge also found that claimant's current physical condition was noted in materials accompanying the audiogram. The administrative law judge relied on a doctor's testimony concerning the reliability of the audiogram, and the hearing loss was calculated under the AMA *Guides*. Thus, the Board affirmed the finding that the pre-existing permanent partial disability element for Section 8(f) relief was met, as well as the award of Section 8(f) relief. *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

The administrative law judge erroneously addressed the issue of contribution as whether claimant's 2003 audiogram demonstrated a materially and substantially greater disability than that demonstrated on the 2002 audiogram. Section 8(f)(1), however, requires that the ultimate disability be greater as a result of the pre-existing disability than that which would result solely from the second injury. The issue before the administrative law judge was whether the 2003 audiogram represents a "second injury." If claimant's disability is solely due to the pre-existing disability, then employer is not entitled to Section 8(f) relief. *G.K. v. Matson Terminals, Inc.*, \_\_ BRBS \_\_ (2008).

The administrative law judge rationally credited the uncontradicted medical opinions stating that audiogram test results at any particular frequency that fall within a 5 decibel range of each other are within the range of test/retest variability and thus are a measure of the same hearing loss. In this case, the 2002 and 2003 audiogram results are within the range of test/retest variability such that the 2003 audiogram does not represent an increase in claimant's hearing loss since the 2002 audiogram. The Board, therefore, affirmed the administrative law judge's finding that employer did not establish a second injury for purposes of Section 8(f) by virtue of the 2003 audiogram. *G.K. v. Matson Terminals, Inc.*, \_\_ BRBS \_\_ (2008).

The administrative law judge erred by rejecting employer's claim for Section 8(f) relief by finding that 20 C.F.R §§702.321, 702.441 requires that employer provide claimant with a copy of the audiogram and interpreting report in order for the test to be valid for purposes of Section 8(f). Claimant need not be informed of the prior test results for employer to be entitled to Section 8(f) relief. Moreover, employer's entitlement to Section 8(f) relief need not be predicated on an audiogram that meets all of the criteria of Section 702.441(b)-(d), *citing R.H.*, BRBS . The Board remanded the case for the administrative law judge to address employer's entitlement to Section 8(f) relief based on any of the audiograms pre-dating the audiogram that established claimant's compensable second injury. *G.K. v. Matson Terminals, Inc.*, \_\_ BRBS \_\_ (2008).

## Miscellaneous

The Board reversed the administrative law judge's award of benefits based on claimant's hearing loss. Section 8(c)(13)(E) which was added to the Act by the 1984 Amendments, requires that hearing loss must be calculated in accordance with the AMA Guides. Since both physicians of record opined that claimant sustained no hearing loss under the AMA Guides, the Board reversed the administrative law judge's award pursuant to amended Section 8(c)(13). West v. Port of Portland, 20 BRBS 162, modified on recon., 21 BRBS 87 (1988).

The Board reversed the administrative law judge's award for tinnitus under Section 8(c)(21). The Board held that since tinnitus is a work-related condition that is manifested as a problem related to hearing loss, an award for disability due to tinnitus is subsumed in a hearing loss. Thus, a claimant who suffers from tinnitus is limited to seeking an award under Section 8(c)(13). West v. Port of Portland, 20 BRBS 162, modified in pert. part on recon., 21 BRBS 87 (1988).

The Board modified its original decision, holding that an award for tinnitus under Section 8(c)(21) may be appropriate where claimant has a distinct physical impairment due to tinnitus and has established a loss in wage-earning capacity due to the condition. However, the Board reaffirmed its reversal of the administrative law judge's award of benefits for tinnitus under Section 8(c)(21) because claimant failed to prove he had any loss in wage-earning capacity due to tinnitus. West v. Port of Portland, 21 BRBS 87, modifying in pert. part on recon. 20 BRBS 162 (1988).

## Disfigurement

The Board rejected claimant's argument that he is automatically entitled to disfigurement benefits because his head, neck and face were burned. Under the Act, a claimant need not prove that a disfigurement to his head, neck or face impeded his employability; however, disfigurement to those parts of the body must be shown to be "serious" before benefits may be awarded. The Board affirmed the administrative law judge's determination that claimant failed to prove he sustained "serious" disfigurement as he considered claimant's employability, lack of physical complications and medication, and that he has returned to his usual work with no reduction in seniority. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

## Unscheduled Injuries - Section 8(c)(21) - In General

Where uncontradicted evidence establishes that claimant's occupational disease caused his pre-retirement work difficulties and subsequent reductions in income, Board reverses administrative law judge's finding that claimant experienced no compensable disability until after he retired in 1983, and holds that claimant is entitled to permanent partial disability benefits from the 1978 date on which his difficulties began to affect his income until his last day of work. In addition, since claimant retired due to his occupational disease and since employer did not present any evidence pertaining to the availability of suitable alternate employment, claimant is entitled to permanent total disability benefits from the retirement date. Since claimant's partial disability preceded his retirement, his partial disability award must be based on claimant's actual pre-retirement wage-earning capacity loss under Section 8(c)(21) and (h), rather than on the extent of his medical impairment under Sections 2(10) and 8(c)(23). Wayland v. Moore Dry Dock, 21 BRBS 177 (1988).

The Eighth Circuit affirms the administrative law judge's denial of benefits for unscheduled injuries to claimant's nose and teeth because claimant failed to establish that his injuries affect his wage-earning capacity. Arrar v. St. Louis Shipbuilding Co., 837 F.2d 334, 20 BRBS 79 (CRT)(8th Cir. 1988).

The Board modified its original Decision, holding that an award for tinnitus under Section 8(c)(21) may be appropriate where claimant has a distinct physical impairment due to tinnitus and has established a loss in wage-earning capacity due to the condition. However, the Board reaffirmed its reversal of the administrative law judge's award of benefits for tinnitus under Section 8(c)(21) because claimant failed to prove he had any loss in wage-earning capacity due to tinnitus. West v. Port of Portland, 21 BRBS 87 (1988), modifying on recon. 20 BRBS 162 (1988).

Where a claimant has sustained an unscheduled injury, a physical impairment alone will not entitle him to benefits pursuant to Section 8(c)(21); rather, compensation for unscheduled injuries is to be awarded based upon the wage-earning capacity lost as a result of the injury. Freiwillig v. Triple A South, 23 BRBS 371 (1990).

Higher post-injury wages do not preclude compensation under Section 8(c)(21) if claimant has suffered a loss in wage-earning capacity. Container Stevedoring Co. v. Director, OWCP [Gross], 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

Administrative law judge relying on *Manders*, 23 BRBS 19 (1989), found that claimant who left the workforce due to an arm injury was a voluntary retiree for purposes of his occupational disease claim and that as his lung impairment was temporary rather than permanent, denied claimant compensation pursuant to Sections 2(10) and 8(c)(23). Board holds that claimant cannot be said to have been retired at the time his occupational disease became manifest in that there was no evidence that claimant had withdrawn from the workforce and lacked a realistic expectation of returning at the time his disease became manifest. See 20 C.F.R. §702.601(c). The Board noted that the claim for the arm injury was not resolved until it was settled subsequent to the manifestation of his occupational disease and whether claimant was able to work despite his arm injury remained in dispute. Board also noted that when a claimant is diagnosed with an occupational disease while convalescing from a work-related injury which effectively precludes his returning to the workforce, it cannot be said that he has "voluntarily" withdrawn from the workforce. As claimant was not retired under either part of the regulatory definition of 20 C.F.R. §702.601(c), Board remands for administrative law judge to enter an award based on claimant's loss of wage-earning capacity under Section 8(c)(21). *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992).

The Fifth Circuit held that a second employer, found responsible for claimant's permanent total disability, is not entitled to a credit for sums paid by an earlier employer in settlement of a claim for permanent partial disability to a non-scheduled body part. The court distinguished the credit doctrine enunciated in *Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986), which applies to successive scheduled injuries. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

The parties' settlement agreement contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. No credit is applicable where there has been no aggravation, and even if an aggravation were to occur, *Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) does not apply because the courts have declined to extend the *Nash* credit doctrine to cover non-scheduled injuries. The Board vacated the settlement approval and remanded the case for further proceedings to resolve claimant's claim. *J.H. v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

## Section 8(c)(23)

NOTE: Hearing loss cases discussing Section 8(c)(23) are digested under Section 8(c)(13).

The Board rejects employer's contention that the claimants are involuntary retirees for purposes of their hearing loss claims because when they filed separate claims for asbestosis, they alleged that they left the workforce due to their respiratory impairment. Since claimants did not leave the workforce due to their hearing losses, they are voluntary retirees for purposes of their hearing loss claims. Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989).

Administrative law judge relying on *Manders*, 23 BRBS 19 (1989), found that claimant who left the workforce due to an arm injury was a voluntary retiree for purposes of his occupational disease claim and that as his lung impairment was temporary rather than permanent, denied claimant compensation pursuant to Sections 2(10) and 8(c)(23). Board holds that claimant was not retired at the time his occupational disease became manifest since there was no evidence that claimant had withdrawn from the workforce and lacked a realistic expectation of returning at the time his disease became manifest. 20 C.F.R. §702.601(c). The Board noted that the claim for the arm injury was not resolved until after the manifestation of his occupational disease and whether claimant was able to work despite his arm injury remained in dispute. Board also noted that when a claimant is diagnosed with an occupational disease while convalescing from a work-related injury which effectively precludes his returning to the workforce, it cannot be said that he has "voluntarily" withdrawn from the workforce. Board remands for administrative law judge to enter an award based on claimant's loss of wage-earning capacity. *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992).

The Board holds that claimant, a voluntary retiree because he left the workforce for reasons unrelated to his stomach cancer, for which he now seeks benefits, is not entitled to benefits under Section 8(c)(23). The retiree provisions were not intended to provide additional compensation to claimants such as this one who have already received compensation under the Act for permanent total disability due to asbestosis and subsequently develop stomach cancer. Hoey v. Owens-Corning Fiberglas Corp., 23 BRBS 71 (1989).

In a case decided prior to *Keener*, 800 F.2d 1173 (D.C. Cir. 1986), cert. denied, 480 U.S. 918 (1987) (1984 Amendments do not apply to cases arising under the 1928 D.C. Act), administrative law judge incorrectly applied Aduddell, 16 BRBS 131 (1984), to this D.C. workers' compensation case and that claimant did suffer a loss of wage-earning capacity due to his occupational disease. Thus, it appears that claimant was not a voluntary retiree and that the 1984 Amendments post-retirement provisions do not apply. Case is remanded for a determination consistent with the 1984 Amendments. Pryor v. James McHugh Constr. Co., 18 BRBS 273 (1986).

Administrative law judge properly found that the post-retirement injury provisions of the 1984 Amendments to the Act limited claimant's recovery to a permanent partial disability award in this case in which the parties stipulated that claimant first learned that his occupational disease was related to his employment after his retirement. Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988).

Benefits under Section 8(c)(23) commence when the employee's impairment becomes permanent, and on the facts of this case, the date on which claimant's asbestosis was diagnosed represents the date his impairment became permanent because there are no earlier diagnoses or findings of permanent pulmonary impairment to support an earlier onset date. The administrative law judge reasonably credited the opinion of one physician who found claimant has a 50 percent Class IV respiratory impairment over two other physicians who stated claimant is totally disabled. Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

The Board holds that chest x-ray evidencing pleural thickening was insufficient to establish commencement date for decedent's permanent partial disability award under Section 8(c)(23) since evidence of pleural thickening alone is not a basis for permanent impairment under the *AMA Guides*. However, Board holds that a physician's report stating that decedent had disability of his lungs related primarily to bronchitis and to a lesser extent to pulmonary asbestosis which are sufficient to permit rating established the commencement date for the Section 8(c)(23) award as a matter of law. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

The administrative law judge's finding that claimant is a voluntary retiree is supported by substantial evidence, as there is no evidence indicating that claimant was instructed by his physician to stop working because of his acute bronchitis and because claimant never asked to be rehired and has sought no other employment since he requested to be and was laid-off. 20 C.F.R. §702.601(c). His disability compensation, therefore, must be based only on the degree of his permanent physical impairment, and not on economic factors. Smith v. Ingalls Shipbuilding Div., Litton Sys. Inc., 22 BRBS 46 (1989).

Board rejects contention that administrative law judge erred by awarding benefits based on a constant 50 percent rate of permanent impairment, where the record establishes that the employee had an impairment related to a progressive occupational disease which ultimately was fatal and is devoid of any medical opinion regarding the course of the employee's progressive rate of impairment. The Board holds that the administrative law judge's award based on a flat 50 percent rate is therefore not irrational. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

The Board held that although a voluntary retiree is not entitled to an award for permanent total disability, he nonetheless may be entitled to an award for a 100 percent permanent impairment. The Board also held that the administrative law judge impermissibly substituted his own opinion for that of the physician by applying a table from the AMA Guides relating to respiratory impairment different from the table applied by the physician upon whom the administrative law judge relied to evaluate the degree of claimant's permanent impairment. Donnell v. Bath Iron Works Corp., 22 BRBS 136 (1989).

The Board affirms the administrative law judge's finding that claimant left the workforce in order to receive SSA and pension benefits, reasons unrelated to his asbestosis. Since the wage-earning capacity of a voluntary retiree is irrelevant, the Board rejected claimant's argument that the administrative law judge erred in failing to consider whether employer established suitable alternate employment and that physician's recommendation that claimant avoid further exposure to asbestos caused a loss in claimant's wage-earning capacity. Frawley v. Savannah Shipyard Co., 22 BRBS 328 (1989).

A decedent, who indicated to claimant, his widow, that he "decided to retire" at age 62, and who began receiving Social Security retirement benefits at the time, but who returned to part-time employment several months later and was subsequently diagnosed as having work-related lung cancer which ultimately lead to his death, was held to be a retiree at the time he left his full-time job. The part-time position did not constitute a return to the workforce. The administrative law judge erred in awarding permanent total disability benefits since the employee's occupational disease became manifest after his retirement. The employee is limited to an award under Section 8(c)(23). Jones v. U.S. Steel Corp., 22 BRBS 229 (1989).

Administrative law judge's finding that claimant voluntarily retired is supported by substantial evidence where claimant filed for Social Security retirement benefits just prior to leaving employer but alleged no disability; his separation papers indicated voluntary retirement; claimant failed to subsequently seek any other employment; and the medical evidence does not establish a pre-retirement breathing impairment. Since the administrative law judge did not discredit doctor's opinion that claimant's breathing difficulties due to both his COPD and asbestosis result in a 50% permanent impairment, the Board applies the "aggravation rule" and holds that claimant is entitled to an award based upon the 50% figure. Johnson v. Ingalls Shipbuilding Div., Litton Sys., Inc., 22 BRBS 160 (1989).

The Board affirms administrative law judge's determination that decedent was a voluntary retiree where the only evidence submitted to establish that decedent had a disabling lung disease at the time of his retirement was his testimony and statements to doctors, which the administrative law judge discredited because of a lack of corroborating medical evidence. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The Ninth Circuit rejects employer's argument that the aggravation rule should not apply to retired workers. The court holds that the rehabilitation of injured workers is only one purpose of the aggravation rule, and that, as the Act is to be liberally construed, the rule therefore applies to working and retired longshoremen equally. The court also rejects employer's argument that the AMA *Guides* overrule the aggravation rule, and require that respiratory disabilities be apportioned between environmental causes and tobacco use. The court held that the *Guides* simply provide instructions on how an apportionment might be made, and further noted that the doctors relied upon by the administrative law judge were unable to determine what portion of claimant's disability was attributable solely to asbestos exposure and what was attributable to other causes. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990).

The Board holds, assuming, *arguendo*, that two separate impairment ratings for asbestos-related lung disease and esophageal cancer are supported by the record, the administrative law judge erred in fashioning separate overlapping permanent partial disability awards for the period from May 31, 1985-November 5, 1986. Where a voluntary retiree has two or more impairments, the value of each impairment must be determined separately and related to the "whole person" under the Combined Values Chart found in the AMA *Guides*. The retiree is entitled to only one award representing his overall disability from his conditions. The Board vacates award for a 65 percent disability due to esophageal cancer where the administrative law judge failed to discuss an earlier report of the doctor upon whose rating he relied which stated that decedent was disabled due to a combination of asbestos-related lung disease, esophageal cancer and the secondary effects of his malignancy. Because the Board was unable to determine whether the 65 percent impairment rating was based on decedent's esophageal cancer alone, the case was remanded for the administrative law judge to consider both reports and to determine the extent of decedent's impairment resulting from his esophageal cancer and his asbestos-related lung disease accordingly. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The Board holds that the administrative law judge erred in concluding that claimant would have been entitled to permanent partial disability if he had filed a timely claim against one employer, as the record contains no permanent impairment rating during the period prior to the onset of claimant's total disability. Thereafter, claimant cannot receive an award under Section 8(c)(23) while he is receiving an award for total disability. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The Board affirmed, as within the administrative law judge's discretion and supported by substantial evidence, his determination that claimant, a voluntary retiree, was 90 percent permanently impaired. The only medical opinion relevant to the degree of claimant's respiratory impairment arising out of his occupational disease, placed claimant in class 4, 50-100 percent severe impairment of the whole person, under the *AMA Guides*. *Larrabee v. Bath Iron Works Corp.*, 25 BRBS 185 (1991).

As there was no evidence that claimant is medically impaired because of his lung condition, the Board affirmed the administrative law judge's finding that claimant retired voluntarily, rather than due to his lung condition, as being supported by substantial evidence. The Board rejected the Director's request that the case be remanded for further findings in accordance with the decision of the First Circuit in *White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). In a later decision, the First Circuit clarified its *White* decision, holding that the mere diagnosis of an occupational disease does not constitute a disability as a matter of law. *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT)(1st Cir. 1992). Thus, the Board rejected the Director's argument that claimant established a *prima facie* case of permanent total disability when he was first diagnosed as suffering from an asbestos-related lung disorder. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

The Board affirms the administrative law judge's finding that claimant cannot return to his former employment at least in part due to his pulmonary condition, and not due solely to orthopedic problems as employer alleged, as the finding is supported by claimant's testimony, medical evidence, and the settlement for the orthopedic injuries which states that claimant is partially disabled. Claimant therefore established a *prima facie* case of total disability under Section 8(a) and is not limited to an award under Section 8(c)(23). *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

The Board reversed the administrative law judge's determination that a May 6, 1983 pulmonary function study, prepared by the only physician who offered an opinion of record regarding onset of disability, was not indicative of a Class II impairment under the *AMA Guides*, as the administrative law judge misapplied the *AMA Guides*, and held that the objective evidence was sufficient as a matter of law to establish that claimant's pulmonary impairment commenced as of May 6, 1983. The Board consequently remanded the case for an award of benefits under Section 8(c)(23) as of that date. *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002).

The Board rejected employer's argument that the administrative law judge improperly utilized the 3rd Edition of the *AMA Guides* in determining the extent of claimant's respiratory impairment as of 1983. The Board upheld the administrative law judge's reliance on a physician's assessment of a Class 2 respiratory impairment in 1983 based on the 3rd Edition, which was the current version of the *Guides* at the time the physician's opinion was rendered in 1989, and, as such, represented the state of the art standards for the evaluation and rating of claimant's respiratory impairment. *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9<sup>th</sup> Cir. 2002).

The Board rejected claimant's assertion that the administrative law judge erred in determining that his disability commenced in 1993 rather than in 1985. The Board had previously held that claimant was a voluntary retiree and that the evidence did not support a finding that there was a permanent respiratory impairment in 1985. On remand, the administrative law judge used a 1999 medical report in conjunction with a 1993 report to conclude that claimant's disability commenced in 1993, as the impairment was essentially the same at both times. The Board affirmed, as the finding is rational and supported by substantial evidence. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007).

## Conflicts Between Applicable Sections

### Schedule Injuries and Total Disability

The Supreme Court's decision in PEPCO does not apply where an employee who sustains an injury to a scheduled member becomes permanently totally disabled. Carter v. Merritt Ship Repair, 19 BRBS 94 (1986).

Board affirms administrative law judge's finding that claimant was permanently totally disabled at the time of his death, and not limited to a schedule award where doctor testified claimant would never have been able to return to his former employment due to leg fracture and the record fails to indicate the existence of suitable alternate employment. Mills v. Marine Repair Serv., 21 BRBS 115 (1988), modified on recon. on other grounds, 22 BRBS 335 (1989).

The administrative law judge's finding that claimant is unable to perform his usual job as a holdman is supported by doctor's opinion that claimant requires lighter duty which did not require use of his hand for heavy grip. Because employer failed to establish the availability of suitable alternate employment, claimant is permanently totally disabled as a result of an injury to 2 fingers of his hand, scheduled members, and is not limited to a scheduled award. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Board notes that as claimant injured his hand, his recovery is limited to the schedule if employer establishes suitable alternate employment, and loss of wage-earning capacity is irrelevant. If, however, claimant is totally disabled he may receive benefits under Section 8(a) or (b). Sketoe v. Dolphin Titan Int'l, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds).

The Eighth Circuit rejects employer's contention that the Supreme Court's decision in PEPCO precludes claimants who are disabled by an injury to a scheduled member from receiving a permanent total disability award under Section 8(a). DM & IR Ry. Co. v. Director, OWCP, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

### The Schedule v. Section 8(c)(21)

Claimant is limited to two schedule awards where he suffered a right leg injury which combines with a prior injury to the left leg to result in an arguably greater overall economic loss. To adopt Director's argument that claimant is entitled to a Section 8(c)(21) award for the second injury for loss of wage-earning capacity would be contrary to the holding of PEPCO. Byrd v. Toledo Overseas Terminal, 18 BRBS 144 (1986).

Where claimant suffers a work injury to his ankle and thereafter develops back pain as a result of the ankle cast, claimant is not limited to a schedule award for his ankle injury, which would deny him recovery for his work-related back condition, but rather is entitled to an award pursuant to Section 8(c)(21) for loss of wage-earning capacity based upon the combined back and ankle impairments. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94 (1988).

The Board concludes that where claimant suffers two distinct injuries, a scheduled injury and a non-scheduled injury, arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(c)(21). However, where harm to an unscheduled body part results from the natural progression of a scheduled injury, claimant's recovery is limited to an award under Section 8(c)(21) for the combined effects of his injuries. Because the record contained conflicting evidence as to whether claimant's back problems were due to a distinct back injury or were due to the natural progression of his ankle injury, Board remands for the administrative law judge to make this determination. Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988).

The Board holds that while the administrative law judge properly found that claimant's work accident resulted in disability to both his right shoulder and right arm, the administrative law judge erred in awarding benefits under Section 8(c)(21), rather than under the schedule, based on his reasoning that the primary site of disability determines the type of compensation to be awarded. The Board remanded, pursuant to *Frye*, 21 BRBS 194 (1988), for the administrative law judge to reconsider whether claimant is entitled to a schedule award for the right arm injury in addition to the Section 8(c)(21) award for the right shoulder injury. The Board also noted that if, on remand, the administrative law judge finds claimant's left shoulder injury to be compensable, the award must be made in accordance with *Frye*. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

The Board held, as a matter of law, that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to an award under the schedule for the initial injury. To the extent that the Board's prior decision in *Frye*, 21 BRBS 194 (1988), is inconsistent with this holding, it is overruled. While the Board affirmed the finding that claimant's back condition was the natural and unavoidable result of his work-related knee injury, the Board vacated the denial of benefits under Section 8(c)(21) for the back condition, and remanded the case for reconsideration of this issue. In light of its decision to overrule *Frye*, the Board also vacated the administrative law judge's finding that claimant is not entitled to an increased disability rating for his knee condition, and instructed the administrative law judge to also reconsider this issue. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

When, as in the instant case, it is not the combined effects of the scheduled knee injury and the "equally" disabling shoulder injury which caused the loss in wage-earning capacity, but rather each injury on its own resulted in claimant's inability to do his usual work and to perform suitable alternate employment, claimant is entitled to both a full scheduled award and a full award under Section 8(c)(21) for the separate injuries. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

In a case in which claimant is entitled to concurrent permanent partial disability benefits for a scheduled and an unscheduled injury, the Fourth Circuit held that the amount of benefits claimant receives cannot exceed the amount he would have received if he was permanently totally disabled. Thus, in this case, as claimant was receiving unscheduled benefits for a shoulder injury (\$200 per week), the court held that claimant was entitled to half the weekly benefits for his scheduled ankle injury (\$200 instead of \$400 per week), but for double the number of weeks provided in the schedule. *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT)(4th Cir. 1999), *modifying* 32 BRBS 67 (1998).

The Board rejects claimant's argument that the shoulder is a part of the arm and therefore compensable under Section 8(c)(1). Instead, the Board held that the shoulder is not expressly listed under the schedule and is not covered thereunder, even if a disability to the arm subsequently occurs. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

The Board noted that *PEPCO* stands for the proposition that compensation under the schedule is the exclusive remedy for disability due to injuries to body parts enumerated within the schedule at Section 8(c)(1)-(20). *PEPCO* is not dispositive in a case where claimant did not suffer an injury to a schedule member. The Board held that the Section 8(c) schedule is not applicable where the actual injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

The Board affirms the administrative law judge's finding that claimant did not sustain a residual shoulder impairment. The negative objective test results, and the inability of claimant's treating physician to explain his continuing complaints on an orthopedic basis are substantial evidence to support the administrative law judge's finding. Claimant's recovery for his left arm injury is therefore limited to Section 8(c)(1) of the schedule, as employer established suitable alternate employment. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991).

The Fourth Circuit rejects claimant's argument that the administrative law judge erred in failing to consider loss of wage-earning capacity in translating claimant's medical impairment into a disability rating under the schedule. The court ruled that *PEPCO*, 449 U.S. 268, 14 BRBS 363 (1980), precludes consideration of economic factors in the computation of disability under scheduled awards notwithstanding that, unlike the case in *PEPCO*, the claimant in this case was not pursuing his claim under Section 8(c)(21), but, rather, sought to have economic factors considered in calculating the scheduled award. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

Agreeing with the Board and the Ninth Circuit in *Long*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985), the First Circuit held that pain or loss of function in a scheduled body part that derives from an injury to an unscheduled body part is not separately compensable under the schedule. *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

held that where claimant had received a scheduled permanent partial disability award, he may not seek increased benefits based on a loss in wage-earning capacity. *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4<sup>th</sup> Cir. 1999).

Based on the plain language of the statute and *Potomac Elec. Power Co.*, 449 U.S. 268, 14 BRBS 363 (1980), the Fifth Circuit affirmed the Board's holding that claimant who sustained a disability to the arm, a scheduled body part, which resulted from an injury to his shoulder, an unscheduled body part, may be compensated only under Section 8(c)(21), rather than the schedule. *Pool Co. v. Director, OWCP [White]*, 206 F.3d 543, 34 BRBS 19(CRT) (5<sup>th</sup> Cir. 2000).

The Ninth Circuit affirms the Board's holding that claimant's shoulder injury, with resultant impairment in the use of his arm is not a scheduled injury and, thus, could be compensable only under Section 8(c)(21). *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

The Board holds that the administrative law judge erred in awarding claimant permanent partial disability benefits based on a loss in wage-earning capacity, inasmuch as claimant's injury is to his leg. Pursuant to *PEPCO*, 449 U.S. 268, 14 BRBS 363 (1980), claimant's recovery for permanent partial disability is to that provided in the schedule at Section 8(c)(2) based on the percentage of claimant's physical impairment. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

In this case where claimant sustained an injury to his knee, the Board held that the administrative law judge erred in ordering an award of continuing permanent partial disability benefits. As claimant's injury was to a scheduled member, benefits are properly awarded under Section 8(c)(2) and not Section 8(c)(21). Therefore, the Board vacated the award of permanent partial disability benefits and remanded the case for the administrative law judge to reconsider the nature and extent of claimant's disability. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Claimant sustained an injury to her wrists and was paid permanent partial disability benefits pursuant to the schedule. Within three weeks of the last payment, she filed a motion requesting a *de minimis* award in accordance with *Rambo II*. After discussing the Supreme Court's rationale behind awarding nominal benefits, see *Rambo II*, and how Section 8(c)(21) and (h) work in conjunction to allow for a *de minimis* award, the Board held that claimant, whose injury was to a body part covered by the schedule, was not eligible for benefits under Section 8(c)(21) pursuant to *PEPCO*, and could not file a valid motion for modification requesting such benefits. Therefore, the Board held that claimant's 1999 motion was invalid, not only because she filed the motion as an attempt to keep her claim open indefinitely, but also because she based her claim on a type of benefit she cannot receive. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

Although claimant suffered an injury under the schedule which can preclude permanent partial disability benefits for a wage loss under Section 8(c)(21) pursuant to *PEPCO*, in this case, claimant never received a permanent partial disability award for her knee injury nor has her injury been termed "permanent" by her physicians; she received only temporary total disability benefits for various periods of time when she was unable to work. Thus, *PEPCO* does not preclude a temporary partial disability *de minimis* award under Section 8(e), and the case is distinguishable from *Porter*, 36 BRBS 113. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333 (4<sup>th</sup> Cir. 2004).

## Concurrent Awards

Updated Citation: *Byrd v. J.F. Shea Constr. Co.*, 18 BRBS 48 (1986), *aff'd mem.*, 802 F.2d 1483 (1986).

The Second Circuit affirms denial of claim for permanent partial disability stemming from hearing loss, since claimant was already permanently and totally disabled under the Act due to his back condition. *Korineck v. General Dynamics Corp. Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63 (CRT)(2d Cir. 1987).

This case presented the issue of whether claimant can receive a scheduled permanent partial disability award for hearing loss concurrently with total disability, either temporary or permanent, for a different injury. Based on case precedent, resolution of this issue is premised on whether the onset of the scheduled disability preceded or post-dated the onset of the total disability, regardless of which claim was filed first. If the onset of the hearing impairment precedes the onset of total disability, claimant can receive scheduled benefits for the period of time between the onset of the two disabilities. The administrative law judge erred in relying on cases permitting concurrent awards where claimant has an ongoing permanent partial disability due to a loss in wage-earning capacity at the time he suffered a permanently totally disabling second injury (e.g., *Hastings*). The Board remanded the case to the administrative law judge to apply the correct law to the several audiograms of record predating the onset of claimant's total disability. *B.S. v. Bath Iron Works Corp.*, 41 BRBS 97 (2007).

The Board holds that where a schedule injury to a greater member results in impairment to a smaller, connected member, claimant may not receive separate awards for the impairment to each member. The schedule accounts for impairments necessarily caused to smaller members as a result of injuries to larger connected members by awarding greater compensation for loss of use of greater members. The Board therefore reversed the administrative law judge's finding that claimant was entitled to dual awards where claimant suffered an injury to his forearm which necessarily affected his ability to use his hand. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

The Board rejects claimant's contention that settlement of his asbestosis claim did not constitute compensation for permanent total disability. Board therefore affirmed administrative law judge's finding that claimant was permanently totally disabled due to his asbestosis, and was compensated for his entire loss of earning capacity due to his alleged permanent total disability due to stomach cancer, which became manifest after the settlement. *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989).

The Board holds, assuming, arguendo, that two separate impairment ratings for asbestos-related lung disease and esophageal cancer are supported by the record in this case, the administrative law judge erred in fashioning separate overlapping permanent partial disability awards for the period from May 31, 1985 - November 5, 1986. Where a voluntary retiree has two or more impairments, the value of each impairment must be determined separately and related to the "whole person" under the Combined Values Chart found in the *AMA Guides*. The retiree is entitled to only one award representing his overall disability from his conditions. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The administrative law judge erred in concluding that claimant would have been entitled to permanent partial disability if he had filed a timely claim against one employer, as the record contains no permanent impairment rating during the period prior to the onset of claimant's total disability. Thereafter, claimant cannot receive an award under Section 8(c)(23) while he is receiving an award for total disability. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The Board rejects the contention that claimant is barred from recovering benefits for his hearing loss because he settled a third-party claim for a crush injury. Claimant did not receive or was not determined to be entitled to permanent total disability for the crush injury from employer, and is not seeking such benefits. Therefore, the third-party recovery cannot be equated with permanent total disability which would preclude claimant from recovering for his hearing loss. *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting), *rev'd mem. on other grounds*, 17 F.3d 396 (9th Cir. 1994).

The Fifth Circuit holds that where claimant receives a settlement from his first employer for permanent partial disability due to a work-related back injury and thereafter is permanently totally disabled due to another work injury while employed by a second employer, the second employer is not entitled to a credit for the settlement, since claimant's lost the rest of his residual wage-earning capacity after the second injury. The court relies upon the rationale of Hastings, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980). ITO Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

Administrative law judge concluded claimant had a residual wage-earning capacity of \$126.95 after her first injury and awarded permanent partial disability benefits based upon this finding. He then concluded that claimant had a \$300 average weekly wage at the time of her second injury, and awarded permanent total disability benefits based upon this amount. On remand, the Board instructed the administrative law judge to consider whether claimant's permanent partial disability award should be adjusted to reflect claimant's subsequent increase in her average weekly wage pursuant to Hastings, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980). Warren v. Nat'l Steel & Shipbuilding Co., 21 BRBS 149 (1988).

Where the approval of the parties' settlement of the claim for the first injury states that it

represented a 45% loss in claimant's wage-earning capacity, and where claimant was subsequently injured after returning to light-duty, part-time work, the administrative law judge erred in thereafter reducing his average weekly wage at the time of the second injury by 45%. Claimant is entitled to permanent total disability benefits based upon his stipulated average weekly wage in his light-duty job, which was earned in limited duties and already incorporated the reduction caused by the first injury. However, if the first claim had not settled, claimant would have been entitled to concurrent permanent partial disability and total disability awards. Facts here are indistinguishable from Morgan, 14 BRBS 784 (1982), aff'd mem. sub nom., 718 F.2d 1111 (9th Cir. 1983), cert. denied, 465 U.S. 1012 (1984), which thus is controlling. Wilson v. Matson Terminals, Inc., 21 BRBS 105 (1988).

The administrative law judge erred by awarding claimant concurrent permanent partial disability awards for his 1980 and 1983 injuries. The instant case is unlike Hastings, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), because it involves a second aggravating injury to the same body part which was injured in the first accident, requiring application of the aggravation rule so that the carrier on the risk at the time of the second injury assumes full responsibility for the results of the loss in earning capacity caused by the combination of the two injuries. Moreover, since the administrative law judge found that claimant had no actual loss in earning capacity as a result of the first injury, there is no factual basis for a concurrent award for the first injury. The administrative law judge also failed to consider claimant's actual earnings in the months prior to his second injury in calculating his 1983 average weekly wage. The case is remanded for recalculation of claimant's average weekly wage and to calculate one award compensating claimant's entire loss of earning capacity resulting from the combination of the 1980 and 1983 injuries. Kooley v. Marine Indus. Northwest, 22 BRBS 142 (1989).

Where claimant sustains an injury which results in a permanent partial disability award pursuant to Section 8(c)(21) and subsequently suffers a second injury which results in permanent total disability, he may receive concurrent awards for the two disabilities. Claimant, however, is receiving a double recovery in this case as a result of the concurrent awards because the aggregate of his disability payments represents twice as much earning capacity as he had prior to the first injury. Case is remanded for administrative law judge to determine claimant's actual wage-earning capacity after first injury and then either to modify permanent partial disability award or to recalculate permanent total award for second injury based on claimant's actual wage-earning capacity after the first injury. Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

The Board holds that the administrative law judge erred in basing claimant's award for

disability due to an 1984 injury on claimant's 1980 earnings. Where an employee sustains an injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his earnings at the time of the aggravation. The second employer is solely liable for claimant's total disability following the 1984 injury. His average weekly wage should be based on the earning capacity remaining after the disability due to the first injury he sustained while working for the first employer. The Board remands for the administrative law judge to determine whether claimant is entitled to concurrent awards: a permanent partial disability award based on the loss in earning capacity caused by the first injury payable by the first employer, and a temporary total disability award based on an average weekly wage reflective of claimant's already reduced earning capacity prior to the second injury payable by the second employer. The administrative law judge must also recalculate average weekly wage. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Where claimant was awarded benefits for a loss in wage-earning capacity as a result of a prior injury in 1978, and then subsequently was reinjured in 1984 when his average weekly wage was higher, the Board rejected employer's contention that the administrative law judge must award benefits utilizing claimant's residual post-injury wage-earning capacity as a result of the prior work injury as the applicable average weekly wage for the latter injury. As it was undisputed that claimant's increase in wages prior to the second injury was the result of a general increase in wage rates and not an increase in earning capacity, the administrative law judge properly concluded that it would be unreasonable to use the 1979 wage-earning capacity without adjustment. The Board thus affirms the use of claimant's actual average weekly wage prior to the second injury, stating that this holding is consistent with *Hastings*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980) and *Morgan*, 14 BRBS 784 (1982). Where earning capacity increases, an adjustment of the initial permanent partial disability award may be made under the modification procedures set forth in 33 U.S.C. §922. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Although courts have upheld combining an award of permanent partial disability with an award of permanent total disability, the Ninth Circuit determined that such a principle is permissible only when warranted. Where the combined benefits exceed the statutory limitation set by Section 8(a), the dual awards are not permissible. Therefore, in this case, because the administrative law judge failed to determine the cause of claimant's increased earnings between his first and second injuries (and therefore failed to accurately determine claimant's wage-earning capacity), the case must be remanded for him to make this finding and to make whatever adjustments are necessary to the award of permanent total disability benefits to insure that claimant's combined awards do not exceed the statutory limit. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995).

Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in a permanent total disability he may receive concurrent awards for the two disabilities as long as the combined awards do not exceed the 66 2/3 percent of the average weekly wage maximum of Section 8(a). The Board remands this case for the administrative law judge to determine whether claimant received more than this pursuant to the settlement for his orthopedic injuries with one employer and the benefits awarded for a pulmonary condition with the second employer. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

When, as in the instant case, it is not the combined effects of the scheduled knee injury and the “equally” disabling shoulder injury which caused the loss in wage-earning capacity, but rather each injury on its own resulted in claimant’s inability to do his usual work and to perform suitable alternate employment, claimant is entitled to both a full scheduled award and a full award under Section 8(c)(21) for the separate injuries. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

In a case in which claimant is entitled to concurrent permanent partial disability benefits for a scheduled and an unscheduled injury, the Fourth Circuit held that the amount of benefits claimant receives cannot exceed the amount he would have received if he was permanently totally disabled. Thus, in this case, as claimant was receiving unscheduled benefits for a shoulder injury (\$200 per week), the court held that claimant was entitled to half the weekly benefits for his scheduled ankle injury (\$200 instead of \$400 per week), but for double the number of weeks provided in the schedule. *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT)(4th Cir. 1999), *modifying* 32 BRBS 67 (1998).

Where the Board affirmed the administrative law judge’s awards of benefits under both Section 8(c)(2) for claimant’s knee injury and under Section 8(c)(21) for claimant’s back injury, the Board held that the administrative law judge properly followed the lead of the Fourth Circuit’s decision in *Green*, 185 F.3d 239, 33 BRBS 151(CRT) (4<sup>th</sup> Cir. 1999), in awarding concurrent benefits in this case which arises in the Ninth Circuit, as it is consistent with the dictate of *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995). Specifically, where full payment of both a scheduled and an unscheduled award would exceed the maximum benefit allowable under the Act, the administrative law judge rationally awarded claimant unscheduled benefits to be paid at the full compensation rate for the duration of the disability and scheduled benefits to be paid at a rate equal to the difference between 2/3 of claimant’s average weekly wage and claimant’s weekly unscheduled benefits until such time as those benefits are paid in full. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The second employer or carrier is entitled to a credit if claimant's concurrent permanent partial and permanent total disability awards exceed the maximum allowable compensation under Section 8(a). Since claimant's permanent total disability award may be reduced by loss of full benefit of a Section 10(f) adjustment, claimant is entitled to receive the full amount of the Section 10(f) adjustment on his permanent total disability award in calculating the amount then subject to the credit for the initial permanent partial disability award, pursuant to *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995). *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *rev'd in part and aff'd, vacated and remanded, and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004) and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9<sup>th</sup> Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

Concurrent awards for permanent partial disability and permanent total disability do not result in impermissible "double dipping" where the increase in claimant's average weekly wage between injuries is not due to an increase in his wage-earning capacity. In this case the nominal value of claimant's 1998 average weekly wage exceeded his 1979 average weekly wage, but the administrative law judge found that the increase was not due to an increase in wage-earning capacity. This finding was not challenged on appeal. Although the Board correctly held that as a result the first award could not be reduced, the Ninth Circuit holds that the Board erred in reducing the second award pursuant to *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT) (9<sup>th</sup> Cir. 1995), as there is no over-compensation in this case. *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *rev'g in part and aff'g on other grounds* 36 BRBS 56 (2002), *cert. denied*, 544 U.S. 960 (2005).

In this case involving concurrent awards, the Board affirms the administrative law judge's finding that claimant's average weekly wage at the time of the July 29, 2000, accident corresponds with claimant's residual wage-earning capacity following the March 10, 1998, accident. The Board, however, rejects the assertion that because post-injury wage-earning capacity was adjusted for inflation the average weekly wage similarly should be adjusted. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

In awarding concurrent permanent partial and permanent total disability benefits, the Board affirms the administrative law judge's finding that the combined awards, pursuant to *Anderson*, 58 F.3d 419, 29 BRBS 101(CRT), cannot exceed 2/3 of claimant's average weekly wage at the time of the first injury. In order to make claimant whole, the administrative law judge appropriately used the higher of claimant's two average weekly wages in considering the applicable maximum rate. In this regard, the Board rejects the Director's assertion that the Board's holding in *Price*, 36 BRBS at 63, is "plainly contrary to law," as the Board's statement in *Price* regarding the use of the "average weekly wage at the time of the second injury" as the basis for determining the maximum allowable compensation pursuant to Section 8(a) is not a resolute statement of law. Rather, it is a holding based on the specific facts in that case. Pursuant to *Hastings*, 628 F.2d 85, 14 BRBS 345, and consistent with other cases involving concurrent awards, the Board holds, as a general matter, that the combined awards cannot exceed 2/3 of the higher average weekly wage. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

The Board reverses the administrative law judge's finding that the statutory maximum of Section 6(b)(1) is inapplicable and instructs the administrative law judge that if, on remand, he determines that the cervical spine injury sustained while claimant was working with SSA contributed to claimant's permanent partial disability, then SSA remains liable for those benefits and CUT, the employer responsible for the second work injury, is entitled to an offset in the payment of the total disability award commensurate with that amount. Alternatively, if the administrative law judge determines that claimant's cervical spine injury does not contribute to his permanent partial disability, then CUT, as the responsible employer, is liable for the entire award of benefits, less any necessary reduction for purposes of Section 6(b)(1). *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated in pert. part on recon.*, 38 BRBS 56 (2004).

On reconsideration, the Board vacates its holding that the Section 6(b)(1) maximum compensation rate applies to the combined concurrent awards in this case, pursuant to *Price*, 366 F.3d 1045 (9<sup>th</sup> Cir. 2004). Thus, there can be no credit due to CUT for any payments made by SSA. *Carpenter v. California United Terminals*, 38 BRBS 56 (2004), *vacating in pert. part on recon.* 37 BRBS 149 (2003).

### Section 8(d)

Where the employee suffered a work-related back injury prior to his death due to a cerebral vascular accident, which was unrelated to his work injury, claimant is entitled to death benefits under Section 8(d)(3) if the deceased employee was permanently partially disabled at the time of death. If the deceased employee was permanently totally disabled at the time of death, his survivors are entitled to death benefits under Section 9. Board holds that the employee's disability was permanent but remands for administrative law judge to consider the extent of the employee's disability prior to his death. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988).

The Board reverses the administrative law judge's finding that since the decedent had settled his claim before his death, he was not receiving compensation or entitled to compensation when he died from causes other than the work-related injury and therefore his survivors were precluded from receiving death benefits pursuant to Section 8(d)(3). The Board held that the settlement of the disputed disability claim had no effect on survivor's benefits because the settlement released employer and its carrier only from future and currently disputed disability benefits owing or owed to the employee himself, and was not a waiver of potential death benefits. *Abercumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *aff'd on recon.*, 22 BRBS 18.4 (1989).

The Board affirmed its original Decision, holding that the decedent's settlement of his claim for permanent partial disability benefits prior to his death does not bar his survivors' entitlement to death benefits. The Board rejected the employer's argument that the employee must actually be receiving compensation at the time of his death in order for his survivors to receive death benefits pursuant to Section 8(d)(3). The Board also rejected the employer's argument that its holding in *Acuri*, 8 BRBS 102 (1978), does not apply to this case because the employee in *Acuri* died while awaiting resolution of his claim, whereas Mr. Abercumbia settled his claim prior to his death. The Board states that as long as the employee was permanently partially disabled under Section 8(c)(21) and was thus entitled to permanent partial disability benefits, his survivors are entitled to death benefits if he dies from a cause unrelated to the work injury. *Abercumbia v. Chaparral Stevedores*, 22 BRBS 18.4 (1989), *aff'g on recon.* 22 BRBS 18 (1988).

Section 8(d)(3) does not apply to cases where an employee who dies prior to the adjudication of his claim was found to be permanently totally disabled before his death. An employee's death terminates the stream of payments, but all unpaid compensation accrued at the time of his death is payable to his dependents, or if he had none, to his estate. *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986), *aff'g Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985).

In interpreting Section 8(d)(3) and determining whether an unpaid yet vested Section 8(c)(23) award is payable to decedent's estate or the Special Fund, the Board first analyzed Section 8(d) as a whole. Section 8(d)(1) refers to compensation payable under the schedule. Section 8(d) also provides that statutory survivors are to receive unpaid scheduled awards. Thus, where decedent is posthumously awarded benefits under Section 8(c)(23), benefits due decedent prior to his death are payable to his estate, and not to statutory survivors or to the Special Fund under Section 8(d)(3) in the absence of such persons. All other benefits under Section 8(c)(23) abate as of the date of death. In contrast, Congress intended full payment of scheduled awards under Section 8(d). *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114 (1992), *rev'd on other grounds mem. sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (5th Cir. March 10, 1993).

Where an employee dies prior to the payment of his scheduled permanent partial disability benefits, for reasons unassociated with his work-related injury, Section 8(d) provides for the disbursement of those benefits in full. The Board held, in accordance with a long-recognized concept, that an employee has a vested interest in benefits which accrue during his lifetime; thus, upon his death, his estate is entitled to those accrued benefits. Further, as unaccrued benefits abate unless otherwise provided by statute, the Board held that the term "unpaid" in Section 8(d) means "unaccrued," and upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go to either his statutory survivors [§8(d)(1)], or to the Special Fund upon his death without statutory survivors [§8(d)(3)]. As all benefits in these cases accrued prior to the employees' deaths, their estates are entitled to them. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *modified on other grounds on recon.*, 28 BRBS 156 (1994); *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994).

Following its recent decisions in *Clemon* and *Wood*, the Board held that decedent has a vested interest in benefits which accrued during his lifetime and, after his death, his estate is entitled to the accrued benefits, regardless of when the award was entered. Further, because the Board has held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon a decedent's death, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors, in this case, the Board determined that decedent's estate is entitled to the accrued scheduled permanent partial disability benefits. *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (Decision on Remand).

Where an employee dies prior to the payment of his scheduled permanent partial disability benefits, for reasons unassociated with his work-related injury, Section 8(d) provides for the disbursement of those benefits in full. In accordance with the recent holdings in *Clemon* and *Wood*, the Board held that, as all benefits in this case accrued prior to the employee's death, his estate, and not the Special Fund, is entitled to them. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting on other grounds).

Where an employee was survived by his widow who later died, prior to the adjudication of the claim under the Act, the Board held that the operative time for determining survivorship under Section 8(d) is the date of the employee's death. Because the employee's widow survived him, she was a statutory survivor within the meaning of Section 8(d)(1). Had there been any unaccrued benefits in this case, the widow would have been entitled to them and, upon her death, her right to the payments would have passed to her estate. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *modified on other grounds on recon.*, 28 BRBS 156 (1994); *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994).

This case arises under the D.C. Act, and claimant is entitled to the rights afforded under the Longshore Act as it existed prior to the 1984 Amendments. Under Section 8(d)(3), claimant, as decedent's survivor, may be entitled to death benefits because decedent was receiving permanent partial disability benefits and died due to causes unrelated to his work injury. However, because there remain disputed factual issues, such as whether claimant filed a timely claim for compensation, it was improper for the district director to award claimant death benefits. The district director has no authority to issue a compensation order absent an agreement between the parties. Therefore, the Board vacated the district director's award and remanded the case. *Durham v. Embassy Dairy*, 40 BRBS 15 (2006).

### Section 8(e)

In this particular case of temporary disability, claimant's total disability became partial as of the date identified suitable alternate employment was available. In the instant case, the administrative law judge erred in using the date of injury for the date of commencement of temporary partial disability. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

An award of temporary partial disability is determined based on the difference between claimant's pre-injury average weekly wage and his wage-earning capacity thereafter. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

Because the record does not contain evidence of a reduced wage-earning capacity, the Board held that it does not contain evidence to support an award of temporary partial disability benefits. Therefore, the Board vacated the administrative law judge's award of temporary partial disability benefits and remanded the case for reconsideration of the nature and extent of claimant's knee disability. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The Fourth Circuit holds that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4<sup>th</sup> Cir. 2000).

The Board affirms the denial of total disability benefits as the administrative law judge's finding that claimant was not performing his light duty work at employer's facility due only to employer's beneficence or while in excruciating pain is supported by substantial evidence. The case is remanded, however, for the administrative law judge to consider temporary partial disability benefits under Section 8(e), since the administrative law judge found that on occasion claimant experienced severe pain while performing his light duty work for employer, and eventually had to stop working, and this may have reduced his wage-earning capacity despite no decrease in his actual earnings. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

### Section 8(g) - Maintenance Allowance

The administrative law judge erred in concluding that OWCP properly terminated claimant's maintenance allowance on March 28, 1986. There is no evidence that as of that date, OWCP had knowledge or information by which it could have terminated the maintenance allowance pursuant to 20 C.F.R. §702.507(b). The administrative law judge Decision and Order is therefore modified to allow claimant's maintenance allowance to continue from March 28, 1986 to September 18, 1986, the date upon which OWCP properly terminated claimant's vocational rehabilitation plan. Section 8(g) provides for a maximum maintenance allowance of \$25 per week to be paid to employers undergoing rehabilitation training. Accordingly, the administrative law judge properly denied claimant reimbursement under Section 8(g) for moving and child care expenses incurred while claimant participated in vocational rehabilitation. The administrative law judge rationally found that psychological counseling and a weight reduction program are medical rather than rehabilitative expenses, and thus are not reimbursable pursuant to a vocational rehabilitation plan. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

## Section 8(h)

### In General

The Eleventh Circuit holds that disability is to be measured by loss of wage-earning capacity rather than by absolute wage decrease. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), *aff'g in part. part Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

Board affirms administrative law judge's conclusion that employer failed to establish that claimant's actual post-injury wages as a real estate salesman, which although meager have been regular and dependable, do not reasonably reflect his wage-earning capacity or that better paying realistic employment opportunities in full-time sales jobs on a commission basis exist for this claimant, whom the administrative law judge observed is not the salesman type. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

The Ninth Circuit states that, under Section 8(h), higher post-injury earnings do not preclude compensation for the claimant if the claimant has, nevertheless, suffered a loss of wage-earning capacity. In this case, the court affirms the administrative law judge's rational finding that claimant has a loss in wage-earning capacity despite higher post-injury earnings because claimant had a decrease in the number of hours worked and claimant worked in pain and with limitations. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

The Fifth Circuit in the context of a post-injury wage-earning capacity case relied on *P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991) and held that the availability of general job openings can be used to set claimant's wage-earning capacity at a rate higher than his actual post-injury earnings. The party seeking to prove that claimant's actual post-injury wages are not representative of his post-injury has the burden of proof on this issue. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

The Board holds that the administrative law judge erred in concluding claimant has a 10 percent loss in wage-earning capacity, which corresponds to the doctor's impairment rating. The administrative law judge must set a dollar figure for claimant's loss in wage-earning capacity, and the degree of medical disability is not dispositive of the loss in earning capacity. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating in part on recon.* 23 BRBS 12 (1989).

The Board rejected claimant's contention that she is entitled to recover, in a lump sum, a bonus paid out post-injury as lost earning capacity. The Board notes that a temporary partial disability award is not to be paid in a lump sum, and that it is too speculative to assume that claimant would have earned the bonus had she continued working. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

The Board reverses the administrative law judge's determination that claimant's post-injury receipt of holiday, vacation and container royalty pay is indicative of a post-injury wage-earning capacity, which thereby resulted in a lower award of temporary total disability. The receipt of these monies by virtue of a collective bargaining agreement does not create a wage-earning capacity or establish that claimant is less than totally disabled where he is physically unable to work or earn wages. *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, 96 F.3d 1438 (4th Cir. 1996) (table).

Post-injury receipt of holiday pay during a period of temporary total disability does not represent the capacity to earn wages, and thus does not constitute a post-injury wage-earning capacity. Therefore, employer is not entitled to an offset for the worker's receipt of holiday pay against its liability for temporary total disability benefits. *Eagle Marine Services v. Director, OWCP (Wolfskill)*, 115 F.3d 735, 31 BRBS 70(CRT) (9th Cir. 1997).

In accordance with *Eagle Marine* and *Branch*, the Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty payments, received during the period of his temporary total disability, do not constitute wages within the meaning of Section 2(13) and have no impact on claimant's post-injury wage-earning capacity. Employer therefore is not entitled to a credit for claimant's receipt of these payments. *Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

The Fourth Circuit affirmed the Board's determination that holiday, vacation and container royalty payments do not reflect residual, post-injury wage-earning capacity merely because they were paid after claimant was disabled. However, the court noted that, in certain circumstances, there is a potential for an inequitable double recovery if an employee receives these payments in addition to disability benefits. Contrary to employer's assertion, the double recovery would result from an inappropriate calculation of a claimant's average weekly wage, not his post-injury wage-earning capacity. Specifically, the Fourth Circuit held that if an employee already earned his holiday, vacation and container royalty payments before his injury, then, although they are "wages" under the Act, they should not be included in his average weekly wage because he had no capacity to earn more of those same payments after his injury. However, if the claimant is still disabled when the new contract year commences, and he can demonstrate a pre-injury capacity to earn the holiday, vacation and container royalty payments, his average weekly wage would have to be adjusted accordingly. The court determined that only in this way would a claimant's average weekly wage "reasonably represent" his pre-injury capacity to earn additional holiday, vacation and container royalty payments without unjustly awarding disability compensation for wages that could not have been earned. Therefore, the court remanded the case for the administrative law judge to further develop the record and reconsider this issue. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), *aff'g and remanding* 31 BRBS 195 (1997).

The Eleventh Circuit held that as post-injury container royalty and holiday/vacation payments were earned as a result of the claimant's pre-injury employment or were credited to him pursuant to a union contract without being based on any services rendered, such payments made to claimant were not to be considered in determining claimant's post-injury wage-earning capacity. *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56(CRT) (11th Cir. 1998).

The Board reversed the administrative law judge's finding that employer is entitled to a credit for income claimant earned from other employers subsequent to March 31, 1995, as the Act contains no provision which entitles employer to a credit for income earned from other employers, and such an award would contravene both Section 8(h) of the Act and the administrative law judge's finding that claimant has a residual wage-earning capacity of \$170 per week. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

The Board holds, consistent with *Walker*, 19 BRBS 171 (1986) and *Edwards*, 999 F.2d 1347, 27 BRBS 81 (CRT) (9th Cir. 1993), that the actual earnings in a suitable job lost by claimant for reasons related to his misconduct, like any other suitable job claimant holds post-injury, should be considered by the administrative law judge in determining claimant's post-injury wage-earning capacity. A suitable job offered by employer and held for only a short period of time can establish claimant's wage-earning capacity if it supports a finding that suitable work was "realistically and regularly" available on the open market. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

The fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that claimant has no loss of wage-earning capacity. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

The Board affirms the administrative law judge's calculation of claimant's wage-earning capacity after a second injury, based on the residual wage-earning capacity after the first injury and taking into account claimant's inability to work at all at his second job as a commercial fisherman. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Fifth Circuit remanded the case for the administrative law judge to reconsider claimant's post-injury wage-earning capacity in light of the Board's holding that an average of the range of salaries of the jobs identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

Although the parties apparently agreed on the amount of weekly post-injury part-time earnings actually received by claimant, employer raised the issue of claimant's loss of wage-earning capacity and submitted evidence of specific employment alternatives paying a greater weekly wage. As the administrative law judge summarily calculated claimant's compensation award without considering employer's evidence, the Board vacates the administrative law judge's calculation and remands the case for the administrative law judge to determine whether claimant's actual earnings fairly and reasonably represent his post-injury wage-earning capacity. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

In affirming the Board's decision, the Ninth Circuit held that the wages a claimant may have earned "but for" his injury are not to be taken into account in determining his loss in wage-earning capacity. The court rejected claimant's contention that, under Sections 8(c)(21) and 8(h), he should be entitled to annual benefits equal to two-thirds of the difference between the annual wages he could have been earning as a crane operator but for his work injury and the annual wages he was actually earning in his suitable alternate employment as a marine clerk. The proper comparison is between claimant's pre-injury wages and his post-injury earning capacity. As claimant's actual post-injury earnings adjusted for inflation exceeded his pre-injury average weekly wage, the Ninth Circuit held that the Board was correct in affirming the administrative law judge's termination of benefits under the Act. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002).

The Ninth Circuit affirms the denial of permanent partial disability benefits under Section 8(c)(21) for claimant's unscheduled shoulder injury where his actual post-injury wages are significantly higher than his pre-injury wages and he makes no argument that they do not fairly and reasonably represent his present earning capacity. The court rejects claimant's argument that he is entitled to compensation under Section 8(c)(21) for the difference between his actual post-injury wages and the hypothetical wages he may have earned "but for" his injury as this is contrary to the statutory scheme. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

## Factors Considered

### General

Administrative law judge erred in failing to consider whether claimant's post-injury wages fairly and reasonably represent her residual wage-earning capacity. Administrative law judge also failed to explain which Devillier factors he relied upon and how they affected his determination. Warren v. Nat'l Steel & Shipbuilding Co., 21 BRBS 149 (1988).

The determination of the extent of a claimant's disability, while based on economic considerations, cannot be deferred on grounds that the claimant is enrolled in a vocational rehabilitation program, but must be based on his wage-earning capacity at the time of the hearing. Price v. Dravo Corp., 20 BRBS 94 (1987).

The Eleventh Circuit approves the use of the *Devillier* factors in determining claimant's post-injury wage-earning capacity. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), *aff'g in part Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

The administrative law judge properly excluded from claimant's loss of wage-earning capacity calculation the value of the food produced on claimant's farm and consumed by claimant where claimant failed to present any evidence of the value of these goods, and where there is no testimony by claimant as to the amount of such consumption. Newby v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 155 (1988).

Administrative Law Judge rationally rejected claimant's actual earnings of \$3.50 per hour as representative of his wage-earning capacity since they were not equivalent to wages paid to other employees at the restaurant and may have been due to feelings of obligation possessed by claimant towards his mother-in-law, who owns the restaurant. Administrative Law Judge reasonably calculated claimant's post-injury wage-earning capacity based on the average pay of two comparable co-workers who were earning \$5 and \$4.50 per hour, noting this amount was close to wages paid for some of lower paying jobs listed in employer's market surveys and that claimant's criminal record and propensity towards absenteeism and tardiness would preclude him from finding a higher paying job which did not require physical labor. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

The Board remands the case to the administrative law judge for a second time for consideration of claimant's loss in wage-earning capacity from April 1, 1978 to August 31, 1983 due to his respiratory impairment, based on the relevant factors. The administrative law judge noted that claimant's income decreased after 1977, but stated that he was unable to determine whether the decrease represented an actual reduction wage-earning capacity because claimant was compensated on commission basis. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

If claimant does not meet the standard for receipt of total disability benefits while he is working, the Board notes that factors such as claimant's pain and the physical or emotional limitations which cause him to avoid certain jobs offered by the hiring hall are relevant in determining post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21), based on reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

The Board held that the administrative law judge rationally credited claimant's testimony and the opinion of claimant's doctor that claimant continued to work at electrician jobs subsequent to his lay-off on March 31, 1995, by using extraordinary effort to work at a level beyond his physical and medical limitations. Thus, the Board affirmed the administrative law judge's determination that claimant had a post-injury wage-earning capacity of \$170 per week subsequent to his lay-off, as claimant was not capable of performing his usual work as an electrician, and was capable of only light-duty minimum wage jobs as of March 31, 1995. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

The Board affirmed the administrative law judge's finding that although claimant returned to work post-injury for employer as a welder at his pre-injury wage rate, and his post-injury yearly earnings may have increased, he nevertheless established a loss of wage-earning capacity due to a work-related inability to perform some job opportunities since, as a result of his injury, claimant was limited to outside welding, and therefore could not be, during periods of inclement weather, reassigned to indoor work but rather was passed out of work and sent home. The Board therefore affirmed the administrative law judge's award of permanent partial disability for the specific dates in which claimant was sent home early. *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in part*, 250 F.3d 868, 35 BRBS 51(CRT)(4th Cir. 2001).

In case in which claimant's occupational disease (metal fume fever) prevents his reassignment to indoor work during periods of inclement weather, the Fourth Circuit held that substantial evidence supported the administrative law judge's finding that claimant suffered a loss in wage-earning capacity, notwithstanding that his actual wages have increased. *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT)(4th Cir. 2001), *aff'g in part*, 33 BRBS 193 (1999).

The Fifth Circuit affirmed the administrative law judge's award of permanent partial disability benefits, as the administrative law judge's finding that claimant worked in pain is supported by substantial evidence and is a relevant factor in determining whether claimant has a loss in wage-earning capacity. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Board affirmed the administrative law judge's finding that claimant's residual wage-earning capacity should be based on part-time work, even though claimant was not found to be medically restricted from working a full-time job. Pursuant to Section 8(h), the administrative law judge gave "due regard" to claimant's usual work, which was a part-time position, and thus, wages for a 40-hour week were not included in the determination of claimant's average weekly wage. The administrative law judge rationally concluded that claimant need not expend more effort to increase her post-injury wage-earning capacity. *Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007).

Where claimant chose to work part-time prior to his injury, claimant's post-injury wage-earning capacity may not be reflected by the full-time wages paid by the two positions identified as suitable alternate employment. The administrative law judge may calculate claimant's wage-earning capacity based on part-time wages extrapolated from the suitable jobs, or on any other relevant evidence of record consistent with Section 8(h). *Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007).

### Open Market

Board rejects claimant's contention that testimony of vocational expert regarding claimant's ability to earn wages on the open market provides substantial evidence to establish a dollar value for his lost wage-earning capacity. Board concludes that claimant's ability to earn wages on the open market is irrelevant because employer has provided claimant with a job within its own enterprise which claimant can perform and which is regular and continuous. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

Board remands for administrative law judge to reconsider whether claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity, where the evidence indicates claimant's employment was regular and continuous and claimant testified he has enough seniority to remain in his current position, although he can work at times for no more than 3 days in a row without pain. Board also states that evidence regarding the deterioration of claimant's medical condition and the beneficence of claimant's co-workers is unclear. Also, administrative law judge erred in considering the effects of inflation at this point. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

Where the administrative law judge found that light-duty employment in employer's facility constituted suitable alternate employment, the administrative law judge did not err in considering employer's evidence relating to claimant's earning capabilities on the open market, as Section 8(h) requires the administrative law judge to evaluate all relevant evidence under a range of relevant factors in determining post-injury wage-earning capacity. The administrative law judge is not required to find on such facts that the inquiry concerning the open market is irrelevant merely because claimant's post-injury employment is regular, continuous and necessary to employer. In this case, however, the administrative law judge did not determine whether the wages of the actual post-injury job was sufficient to establish a true wage-earning capacity or factor it into his wage-earning capacity calculation. The case is remanded for consideration of these wages as well as the open market evidence. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

The Fifth Circuit affirms the administrative law judge's use of the average of the hourly wages of suitable jobs employer found for claimant to compute claimant's post-injury wage-earning capacity as employer located more than one suitable job for claimant and as averaging ensures that claimant's post-injury wage-earning capacity reflects all available jobs. *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998).

#### Actual Earnings

The Board affirmed the administrative law judge's conclusion that employer failed to establish either that claimant's "meager" post-injury earnings as a real-estate salesman do not reasonably reflect his wage-earning capacity, or that better paying realistic employment opportunities exist. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

Board affirms administrative law judge's finding that claimant was an employee rather than an owner of a comic book store since claimant made no capital investment in the business and performed extensive services for it. Administrative law judge erred, however, in including \$5000 in claimant's wage-earning capacity, which was the estimated profit of the store claimant manages a few days per week. Claimant's receipt of this money is merely speculative because as yet no there have been no payments to claimant of any anticipated profits and no payments were anticipated. Seidel v. General Dynamics Corp., 22 BRBS 403 (1989).

The Board reverses the administrative law judge's finding that claimant's actual wages do not fairly and reasonably represent his post-injury wage-earning capacity because claimant has successfully held his current position which requires no more effort than his previous job, and the job is regular and continuous and is not provided through employer's beneficence. Jennings v. Sea-Land Serv., Inc., 23 BRBS 12 (1989), vacated in part. part on recon. 23 BRBS 312 (1990).

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On reconsideration, the Board holds that the administrative law judge's finding that claimant's actual wages do not represent his wage-earning capacity is supported by

substantial evidence. Claimant is not able to perform heavy work, less overtime is available, he works with some pain and with the awareness that if he aggravated his back, future employment prospects would be precluded, and claimant's employment with employer is not secure. Jennings v. Sea-Land Serv., Inc., 23 BRBS 312 (1990), vacating in part on recon., 23 BRB 12 (1989).

Although, subsequent to her injury, claimant was placed in the MRA shop to perform light-duty work where no overtime was available, claimant failed to establish a loss in overtime pay based on evidence submitted by employer that no overtime was available in claimant's old job and evidence that claimant worked decreasing amounts of overtime before injury. Sears v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 235 (1987).

The Board notes that a permanent partial disability award based on lost overtime is appropriate only if overtime was included in determining average weekly wage, and remands for this determination. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987).

The fact that claimant is earning the same wages working on engraving machine as other class A painters is not determinative of whether he has suffered a loss in wage-earning capacity. Board therefore remands for the administrative law judge to determine whether claimant has sustained a loss in wage-earning capacity based on a loss of overtime wages. Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988).

Board holds administrative law judge erred in requiring claimant to prove that overtime was available in her pre-injury welding job after her injury, when in fact, the focus should be on claimant's loss of previously available overtime because of her injury. Claimant must establish that absent her injury, she would have worked overtime. Board distinguishes Sears, 19 BRBS 235 (1987). Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110 (1989).

Claimant's refusal of overtime due to breathing problems associated with asbestosis and his contention that he lost the opportunity for overtime once transferred to a lighter duty position after undergoing work-related surgery may establish a loss of wage-earning capacity. Employer argues based upon Sears, 19 BRBS 235, that claimant must establish the availability of post-injury overtime opportunities in his pre-injury job to receive permanent partial disability benefits based upon lost overtime. Board distinguishes Sears, stating it is based upon particular facts which differ from those in this case. The Board vacates the administrative law judge's finding that claimant is not entitled to permanent partial disability benefits and remands for reconsideration of the issue. Everett v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 316 (1989).

The Fifth Circuit reverses the Board's conclusion that claimant's actual wages fairly and reasonably represented his wage-earning capacity because employer failed to show that claimant's current employment, at wages less than those he earned prior to his work injury, was not continuous and stable and because the job was suitable. The court holds that the Board erred in presuming from its own determination of continuous and stable employment that claimant's actual wages equaled his earning capacity. The court therefore holds that the administrative law judge's findings that actual earnings did not fairly and reasonably represent earning capacity as of the hearing date and that his true wage-earning capacity as of the hearing date exceeded his pre-injury wages are supported by substantial evidence consisting of a vocational expert's testimony regarding jobs in the Mobile area compatible with claimant's physical condition and credentials and paying salaries greater than his current job. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990).

The Board affirms the administrative law judge's finding that claimant's post-injury wages are representative of his wage-earning capacity given his seniority, age and stable work opportunity. Given the adjustment in wage rates back to the time of injury to weed out inflation, claimant has a loss in wage-earning capacity and employer's contention to the contrary is rejected. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and vacated in part on recon. en banc*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring), *aff'd in part and rev'd on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S.1155 (1997).

The Ninth Circuit held that the Board properly affirmed the administrative law judge's finding that claimant's actual post-injury earnings did not fairly and reasonably represent his wage-earning capacity. Rejecting employer's contention, the court held that even though claimant's actual post-injury earnings are greater than his average weekly wage, where wage rates had increased approximately 15 percent, the administrative law judge properly reduced claimant's post-injury earnings by 15 percent and used this adjusted amount to determine benefits. *Sproull v. Director, OWCP*, 86 F.3d 895, 898-899, 30 BRBS 49, 50-51(CRT) (9th Cir. 1996), *aff'g in part and rev'g in part Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) and 28 BRBS 272 (1994)(on recon. *en banc*), *cert. denied*, 520 U.S.1155 (1997).

Administrative law judge acted reasonably in calculating claimant's post-injury wage-earning capacity based on the average of what he actually earned as a medical technician in a public hospital and the higher salary he would have earned in a private one, where the evidence was inconclusive as to whether claimant could have obtained a position in the private hospital. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994).

The Fifth Circuit affirms the calculation of claimant's post-injury wage-earning capacity based on the average wage earned by a medical technician in private and public hospitals. The administrative law judge recognized that claimant's employment in a lower paying public hospital did not represent his true earning capacity, and the administrative law judge reasonably calculated it based on the market as a whole. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

The Board affirms the administrative law judge's finding that claimant sustained a 10 percent loss in wage-earning capacity, based on his rational crediting of claimant's testimony that he misses work 2 or 3 days a month due to his back pain. Although the administrative law judge used a percentage figure, he also translated this to a dollar amount consistent with law. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Board affirms the administrative law judge's finding that claimant's actual post-injury earnings fairly represent his post-injury wage-earning capacity. The administrative law judge found that claimant's position is secure and is not sheltered, noting that claimant was promoted fairly quickly. The administrative law judge permissibly discounted claimant's ability to earn wages on the open market in light of these factors. Moreover, that claimant receives a night shift differential does not reduce his wage-earning capacity, and the administrative law judge properly accounted for inflation by reducing the post-injury earnings by the percentage point increase in the national average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 52 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997).

The Board affirmed the administrative law judge's computation of claimant's post-injury wage-earning capacity using evidence presented by claimant which established wages for his post-injury jobs back-dated to the date of injury in 1989. He then compared these weekly wages to claimant's average weekly wage to determine whether claimant is entitled to benefits under Section 8(c)(21). As this method is proper and as his conclusion is supported by substantial evidence, the Board rejected employer's assertions regarding the calculation of claimant's post-injury wage-earning capacity. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The Board affirms the administrative law judge's finding that claimant's actual wages from September 12, 1999, to July 29, 2000, reasonably and fairly represented his residual wage-earning capacity for the March 10, 1998, injury. Claimant limited himself to jobs within his physical capabilities and the administrative law judge found that he was no longer "carried" by his co-workers. The administrative law judge also appropriately adjusted the wages for inflation. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

8(c)(21) for claimant's unscheduled shoulder injury where his actual post-injury wages are significantly higher than his pre-injury wages and he makes no argument that they do not fairly and reasonably represent his present earning capacity. The court rejects claimant's argument that he is entitled to compensation under Section 8(c)(21) for the difference between his actual post-injury wages and the hypothetical wages he may have earned "but for" his injury as this is contrary to the statutory scheme. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

### Beneficent Employer

The Eleventh Circuit affirms the finding that claimant is totally disabled while working, as he worked at employer's beneficence, and received wages which were not merited given his disability. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), *aff'g in part Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

### Inflation

Updated Citation: *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 101 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986).

The First Circuit affirms the administrative law judge's determination of claimant's loss in wage-earning capacity based on the difference between his post-injury wages as a planner and the wages of a planner at the time of his injury. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70 (CRT)(1st Cir. 1987).

In determining that claimant has suffered a loss in wage-earning capacity, the administrative law judge improperly reversed the statutory scheme by comparing claimant's annual income at the time of the hearing with his former employment calculated in 1981 dollars. Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage. *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986).

The Board has rejected methods of computing permanent partial disability based on an approximation of the amount claimant would have earned but for the injury compared with actual post-injury earnings. In order to neutralize the effects of inflation the administrative law judge must adjust post-injury wage levels to the level paid at the time of injury. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

In case arising in the Third Circuit, the Board affirms the administrative law judge's reliance on *McCabe*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1978), in which the court held that in determining loss of wage-earning capacity, the appropriate comparison should be between the wages claimant would have earned but for the injury and the wages claimant is actually earning in his present position. *Curtis v. Schlumberger Offshore Serv., Inc.*, 23 BRBS 63 (1989), *aff'd mem.*, 914 F.2d 242 (3d Cir. 1990).

making inflationary adjustments in claimant's post-injury wage-earning capacity in this Third Circuit case. The Board held that application of *McCabe* requires the administrative law judge to examine the wages that claimant's usual employment would have paid him at the time employer established the availability of suitable alternate employment; speculation as to whether claimant would have continued to be employed by employer had he not been injured is not part of the *McCabe* formula. The Board therefore rejected the administrative law judge's construction of *McCabe*, whereby he determined that no inflationary adjustment was necessary when calculating claimant's loss in wage-earning capacity because general evidence regarding employer's overall business operations indicates that claimant's earnings, but for the injury, would have decreased. Accordingly, the Board vacated the administrative law judge's finding regarding claimant's loss in wage-earning capacity and remanded for further consideration consistent with the proper analysis pursuant to *McCabe*. *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

In affirming the Board's decision, the Ninth Circuit held that the wages a claimant may have earned "but for" his injury are not to be taken into account in determining his loss in wage-earning capacity. The court rejected claimant's contention that, under Sections 8(c)(21) and 8(h), he should be entitled to annual benefits equal to two-thirds of the difference between the annual wages he could have been earning as a crane operator but for his work injury and the annual wages he was actually earning in his suitable alternate employment as a marine clerk. The proper comparison is between claimant's pre-injury wages and his post-injury earning capacity. As claimant's actual post-injury earnings adjusted for inflation exceeded his pre-injury average weekly wage, the Ninth Circuit held that the Board was correct in affirming the administrative law judge's termination of benefits under the Act. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002).

The Board holds that the percentage increase in the National Average Weekly Wage, see 33 U.S.C. §906(b)(1)-(3), should be applied to adjust claimant's post-injury wages downward when the actual wages paid at the time of injury in claimant's post-injury job are unknown. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Following its previous holding in *Richardson*, 23 BRBS 327 (1990), the Board held that inasmuch as the NAWW is a more accurate reflection of the increase in wages over time than the percentage increase in the minimum wage, the percentage increase in the NAWW for each year should be used in this case to adjust the claimant's post-injury wages downward. The administrative law judge's determination regarding claimant's post-injury wage-earning capacity is therefore vacated and the case remanded for recalculation of claimant's post-injury wages using this method. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996).

The Ninth Circuit affirmed the denial of an adjustment for inflation in calculating claimant's permanent partial disability award under Section 8(c)(21). Following his injury, claimant returned to the same job, at the same rate of pay, with the only difference being claimant's inability to work the same number of hours as he worked prior to his injury. As claimant's rate of pay at the time of injury was known, *i.e.*, remained the same before and after his injury, an inflation adjustment is not necessary because the failure to keep pace with inflation is due to a collective bargaining agreement and not due to claimant's injury. *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9<sup>th</sup> Cir. 2002).

### Finding No Loss

The Second Circuit reverses the Board's affirmance of the administrative law judge's finding of no permanent partial disability. The court stated that it was error for the Board to determine that claimant has no permanent loss of earning power based on claimant's income tax calendar-year earnings, since Section 8(c)(21) requires a comparison between a definite dollar figure representing pre-injury average weekly wages with a definite dollar figure representing post-injury wage-earning capacity. Board has precluded administrative law judge on remand from considering evidence other than claimant's nominal post-injury earnings to determine his residual earning capacity under Section 8(h), which requires an examination of the totality of the evidence. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989), rev'g *LaFaille v. General Dynamics Corp.*, 18 BRBS 88 (1986).

The D.C. Circuit holds that the administrative law judge erred in relying on claimant's disingenuous statement on a loan application that he earned \$21,000 per year to find that claimant had no loss of wage-earning capacity. Other evidence of record indicated that claimant's lawful wage-earning capacity was substantially less than \$21,000 per year. *Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90 (CRT)(D.C. Cir. 1989).

Although, subsequent to her injury, claimant was placed in MRA shop to perform light-duty work where no overtime was available, claimant failed to establish a loss in overtime pay based on evidence submitted by employer that no overtime was available in claimant's old job and evidence that claimant worked decreasing amounts of overtime before the injury. *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

The Board affirms the administrative law judge's finding that there is no basis under Section 8(h) to award benefits, as claimant's post-injury wages, which are higher than his pre-injury wages, are representative of his earning capacity. Claimant is a former welder who was an acting foreman at the time of the hearing. He had not performed welding duties for over 2 years and testified that he could reasonably perform his present job. In addition, the administrative law judge found that there was no evidence that claimant's current position was at the beneficence of employer or that claimant's physical restrictions make his chances of retaining his present job less secure. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

Where the administrative law judge considered the evidence in light of factors relevant to Section 8(h), determining that there was no record evidence that claimant could not perform his most recent job, and that claimant had previously performed an essentially identical job for another company for 13 months, the Board affirmed the administrative law judge's determination that claimant failed to establish a present loss of wage-earning capacity as he was employed at the same or higher wages than those he earned at the time of injury. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995).

In addressing the issue of claimant's post-injury wage-earning capacity under Section 8(h), the Ninth Circuit affirmed the administrative law judge's method of averaging claimant's actual wages from date of injury to present and adjusting them downwards to account for contractual wage increases. The administrative law judge properly applied the *Devillier* criteria in determining claimant's wage-earning capacity, including work opportunities due to a booming economy, and in finding that the primary reason for increased earnings was claimant's expanded marketable skills and seniority. Moreover, record evidence belies claimant's contention that he could not work as a linesman. The fact that claimant's increased wages may be due to night-shift work does not demonstrate a loss of wage-earning capacity where there is no evidence that claimant's injury was the reason for the switch to the night shift. Court affirms finding of no loss in present earning capacity, and the award of nominal benefits. *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9<sup>th</sup> Cir. 2002).

The Board affirms the denial of permanent partial disability benefits, based on the administrative law judge's rational finding that claimant had no additional loss of wage-earning capacity due to inability to perform catwalk jobs, where claimant did not submit time books he allegedly kept and his testimony was confused and contradictory. Board rejects claimant's argument that he did not submit time books because no party objected to their not being introduced into evidence and administrative law judge never asked for them, as burden is on claimant to establish loss in wage-earning capacity. Moreover, it was within the administrative law judge's discretion to consider claimant's increased post-injury earnings resulting from increased work opportunities at the port. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT)(May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 125 S.Ct. 1724 (2005).

## Miscellaneous

Updated Citation: Porras v. Todd Shipyards Corp., 17 BRBS 222 (1985), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 792 F.2d 1489, 19 BRBS 3 (CRT) (9th Cir. 1986).

The Board reluctantly affirms the administrative law judge's two percent de minimis award, following the D.C. Circuit's decision in Randall, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). The administrative law judge's conclusion is based on his finding that if claimant lost his current job, he would only be able to obtain work which pays minimum wage, claimant's IQ, his reading test results, vocational counselor's testimony that intellectually, claimant is over-employed in his current job, doctor's testimony that claimant has latent weakness in his back, and claimant's testimony he may lose his current job, be demoted or lose time because of his back problems. Spinner v. Safeway Stores, Inc., 18 BRBS 155 (1986), aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP, 811 F.2d 676 (D.C. Cir. 1987).

The Board affirmed the administrative law judge's determination that claimant is not entitled to a de minimis award where the administrative law judge found that claimant had no reasonable expectation of future loss of wage-earning capacity, based on medical reports that claimant is physically able to perform his work without the aid of co-workers, no evidence indicating claimant's condition could deteriorate, and statements that the type of position in which claimant was employed would increase in number in the future. Palmer v. Washington Metro. Area Transit Auth., 20 BRBS 39 (1987).

The Board states that if the administrative law judge, on remand, finds that claimant has not established a greater loss in wage-earning capacity due to loss of overtime, he may reaffirm his *de minimis* award of one percent, in this case which arises in the Fourth Circuit. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987).

The Board reaffirms its reversal of administrative law judge's de minimis award for claimant's tinnitus because claimant continues to perform his usual work, which he stated is more permanent than general longshoring work, he has held his current position for 10 years and earns the same wages as prior to his audiological examination. Thus, claimant has failed to establish a significant possibility of future economic harm. West v. Port of Portland, 21 BRBS 87 (1988), aff'g on recon. 20 BRBS 162 (1988).

Board reverses de minimis award because administrative law judge's finding that there is significant possibility that claimant will suffer a future loss of wage-earning capacity is not supported by evidence. Board distinguishes facts of this case from those of Randall, noting there is no evidence that 1) claimant's job performance is materially affected by his work injury; 2) claimant requires employer's beneficence; or 3) claimant's work disability will deteriorate. Also, claimant's position with employer is secure. Adams v. Washington Metro. Area Transit Auth., 21 BRBS 226 (1988).

Board reverses administrative law judge's de minimis award based on evidence that claimant has not missed any work due to work accident, his testimony that more work than ever is available as a holdman, and both claimant's wages and number of hours which he worked following his injury increased. Any decrease in claimant's ability to perform more heavy types of longshore work does not also establish a significant possibility his condition will result in any future economic harm because there is no evidence that a holdman earns more money per hour than employees who perform less arduous work for employer. Mavar v. Matson Terminals, Inc., 21 BRBS 336 (1988).

The Second Circuit accepts the rationale of Hole and Randall, and holds that if on remand the administrative law judge determines that claimant did not suffer an actual loss in wage-earning capacity, he should award claimant a de minimis periodic payment under Section 8(c)(21). LaFaille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989), rev'g LaFaille v. General Dynamics Corp., 18 BRBS 88 (1986).

The Board reverses the administrative law judge's de minimis award because claimant successfully performed his pre-injury job for 3 years following the work accident and successfully performs his current job which is regular and continuous and is not provided through employer's beneficence. Jennings v. Sea-Land Serv., Inc., 23 BRBS 12 (1989), vacated on other grounds on recon., 23 BRBS 312 (1990).

The Board reversed the administrative law judge's determination that claimant is entitled to a *de minimis* award, on the basis that claimant failed to establish a significant possibility of future economic harm. While noting the Fourth Circuit's endorsement of such awards in *Fleetwood*, the Board distinguished the present case where there was no evidence that the injury materially affected claimant's work performance and no evidence that claimant's chances of retaining his current job are less secure because of his physical limitations or that claimant's promotions were due to employer's beneficence, and where claimant's condition will not deteriorate in the future. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

The Board states that if the administrative law judge finds that claimant has no present loss in wage-earning capacity, the administrative law judge should consider claimant's entitlement to a nominal award consistent with *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

Since the administrative law judge determined that claimant's injuries would likely degenerate in the future but that claimant's loss of wage-earning capacity could not be specifically documented, the Board vacated the administrative law judge's award of permanent partial disability based on a four percent loss of wage-earning capacity as it was not based on substantial evidence. The Board modified that award to reflect a one percent *de minimis* award, noting that such an award is sufficient to preserve claimant's right to seek modification in the future pursuant to Section 22 should he suffer an actual loss in wage-earning capacity. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd in part. part mem.*, No. 91-1601 (D.C. Cir. Dec. 18, 1992).

After reviewing the criteria for a *de minimis* award, on reconsideration, the Board affirms its prior decision which modified claimant's award of benefits to reflect a one percent, *i.e.*, *de minimis*, loss in wage-earning capacity, rather than four percent loss as awarded by the administrative law judge. *Murphy v. Pro-Football, Inc.*, 25 BRBS 114 (1991), *aff'g on recon.*, 24 BRBS 187 (1991), *rev'd in part. part mem.*, No. 91-1601 (D.C. Cir. Dec. 18, 1992).

The Board rejected the Director's argument that claimant should be granted a *de minimis* award, so that if his non-disabling lung condition develops into a quantifiable disability, his right to request modification would be preserved under Section 22. *De minimis* awards are only available where a claimant has not established a loss in wage-earning capacity under Section 8(c)(21), but has established that there is a significant possibility of future economic harm as a result of the injury. In the instant case, a *de minimis* award is not necessary since claimant's right to re-file a claim for disability is already protected under Section 13(b)(2) of the Act. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

The Ninth Circuit holds that a *de minimis* award may be appropriate in either an initial award determination or in a modification proceeding as the only mechanism available to incorporate the possible future effects of a physical disability where there is no present loss in earning capacity. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30 (CRT)(9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997).

Noting that under certain circumstances there may arise a potential tension between the Section 8(h) mandate to account for the future effects of disability in determining wage-earning capacity and the Section 22 prohibition against issuing any new order to pay benefits more than one year after compensation ends or a denial is entered, the United States Supreme Court held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

No party objects to the administrative law judge's decision to fashion separate permanent partial disability awards for the projected duration of claimant's football career and for his post-football career. This is consistent with that done in other football cases. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

The Board remands case for the administrative law judge to consider granting a *de minimis* award where the administrative law judge denied such award based on his belief that the Board's position was that such awards are inappropriate. The Board noted that every circuit to address the issue approved such awards where appropriate. On remand, the administrative law judge should consider whether a doctor's prognosis that claimant will likely suffer economic injury in the future as a result of his work-related injuries, and that it is likely that he will develop arthritic changes in site of the cervical spine injuries meet claimant's burden of establishing a significant possibility of future economic harm. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995).

The Board affirmed the administrative law judge's denial of a *de minimis* award where claimant did not establish a significant possibility of future economic harm in that the medical evidence established that claimant can perform the light duty laundry worker job offered her and the job was of unlimited duration. This issue, first raised by claimant in a motion for reconsideration, was properly before the administrative law judge as a claim for total disability benefits includes a claim for any lesser award. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

The Board holds that the administrative law judge's award of continuing permanent partial disability benefits at the rate of \$3.78 per week in the instant case is not a nominal award for a future loss of earning capacity as contemplated by the Supreme Court in *Rambo II*, but rather represents claimant's current and actual loss of wage-earning capacity, although such loss is small in amount. *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in part*, 250 F.3d 868, 35 BRBS 51(CRT)(4th Cir. 2001).

The Third Circuit held that the Board erred in recharacterizing the administrative law judge's decision as a "determination that claimant did not establish a significant possibility of future economic harm" and was therefore not entitled to a *de minimis* award. The court noted that the administrative law judge, in fact, reached precisely the opposite conclusion in a decision awarding a fee, when she found that "there is proof of a present medical disability and a reasonable expectation of future loss of wage-earning capacity," but had not entered such an award due to her belief that it was contrary to Board precedent. The court concluded that the Board improperly substituted its own contrary factual determination, and it affirmed the administrative law judge's *de minimis* award as she reasonably inferred from the medical evidence that there was at least a "significant possibility" that claimant would suffer some future economic harm as a result of his injury and her determination is in accordance with the Supreme Court's decision in *Rambo I*. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3<sup>d</sup> Cir. 2001).

The Board affirmed the administrative law judge's finding that the credible evidence of record does not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of his injury. Specifically, the administrative law judge found that claimant's unreasoned, self-serving, hearsay testimony that Dr. Byrd had told him that he might need to have surgery was insufficient to meet the requisite standard for entitlement to a nominal award, particularly since Dr. Byrd had approved claimant's decision not to have surgery. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

The Board affirms the administrative law judge's denial of a nominal award where claimant continued to work after his injury without physical complaints or medical visits for a number of years while his earnings continued to increase, as there was no significant possibility of future economic harm. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Moreover, as claimant sought a nominal award following a subsequent compensable injury, such an award was not necessary to hold open the Section 22 statute of limitations for the previous injury. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9<sup>th</sup> Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9<sup>th</sup> Cir. 2004), *cert. denied*, 125 S.Ct. 1724 (2005).

Claimant sustained an injury to her wrists and was paid permanent partial disability benefits pursuant to the schedule. Within three weeks of the last payment, she filed a motion requesting a *de minimis* award in accordance with *Rambo II*. After discussing the Supreme Court's rationale behind awarding nominal benefits, see *Rambo II*, and how Section 8(c)(21) and (h) work in conjunction to allow for a *de minimis* award, the Board held that claimant, whose injury was to a body part covered by the schedule, was not eligible for benefits under Section 8(c)(21) pursuant to *PEPCO*, and could not file a valid motion for modification requesting such benefits. Therefore, the Board held that claimant's 1999 motion was invalid, not only because she filed the motion as an attempt to keep her claim open indefinitely, but also because she based her claim on a type of benefit she cannot receive. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

The Board affirms the administrative law judge's adjudication of claimant's pending modification request for a *de minimis* award. The administrative law judge rationally found that it was "part and parcel" of claimant's later claim for additional temporary total disability benefits. Moreover, the award is supported by substantial evidence in that the medical evidence notes a deteriorating physical condition, which is likely to impair claimant's earning capacity. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333 (4<sup>th</sup> Cir. 2004).

The Ninth Circuit reverses the Board's denial of a *de minimis* award and remands for a determination of claimant's entitlement to such in accordance with *Rambo II*. The court analogized claimant's position to the claimant in *Rambo* in that claimant is able to avoid using his impaired body part in his present employment as a marine clerk; the court stated that this is exactly the circumstance for which nominal compensation is designed. The court held that if there is a chance of future changed circumstances which, together with the continuing effects of claimant's injury, create a significant potential of diminished earning capacity, a *de minimis* award would be justified. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004).

### Section 8(j)

The Board held that Section 8(j), which was added by the 1984 Amendments, and which requires a disabled employee to report earnings from employment to employer at least twice a year does not apply in a death benefits case since it applies only to "disabled employees." Once claimant establishes that she is the surviving widow of the decedent, her financial situation is not relevant. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

Where a claimant willfully conceals his post-injury earnings, Section 8(j) provides for the suspension of benefits. *Freiwillig v. Triple A South*, 23 BRBS 371 (1990).

Claimant admitted at the hearing that he did not report income earned from working at home and from rental property to employer as required by Section 8(j) and 20 C.F.R. §702.285(b). The Board affirms the administrative law judge's suspension of benefits for 27 1/2 months, the period of under-reporting, rejecting claimant's contention that he should not be penalized for using the same information he reported for federal tax purposes. *Zepeda v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 163 (1991).

The statutory scheme in Section 8(j) for recovery of overpayments of compensation does not authorize an action against claimant for repayment; it contemplates only a suspension of prospective compensation payments. *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, U.S. , 112 S.Ct. 3056 (1992).

None of the three sections of the Longshore and Harbor Workers' Compensation Act which provide for recovery of overpayments (Sections 14(j), 8(j) and 22) provides that the employer may recover overpayments directly from the employee; such recovery can only be an offset against future compensation under the Act. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992).

The Board held that a claimant's duty to report his post-injury earnings is not mandatory. Therefore, it held that benefits cannot be forfeited under Section 8(j) unless the party seeking forfeiture establishes that it requested information concerning a claimant's post-injury income and that the claimant either failed to respond or responded falsely to the request. 20 C.F.R. §§702.285-702.286. The Board remanded the case to the administrative law judge for a determination as to whether benefits claimant received after December 27, 1984, the effective date of this 1984 Amendment, are subject to forfeiture because the parties have not addressed this issue. Benefits claimant received prior to December 27, 1984, are not subject to forfeiture. *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on reconsideration).

The Board held that the administrative law judge has the authority to adjudicate the question of whether benefits should be suspended in accordance with Section 8(j) in the event there is a disagreement after the informal conference. The district director's authority extends only to rescheduling repayment of benefits by crediting future compensation after considering the claimant's income and expenses. Therefore, if on remand the administrative law judge determines that claimant's post-December 27, 1984 benefits are subject to forfeiture, then he must remand the case for the district director to consider claimant's financial situation and to establish the repayment schedule. *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on reconsideration).

The Fifth Circuit notes that Section 8(j) is to be applied prospectively only, and that the legislative history states that Congress did not intend that employers could seek recovery of past compensation. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

The Board discussed the scope of Section 8(j) and affirmed the administrative law judge's finding that this section applies only to disabled employees; thus, the "period during which the employee [is] required to file" the earnings report consists only of the period during which claimant was disabled. The Board stated that one of the purposes of Section 8(j) is to keep an employer informed about an employee's post-injury earning capacity. Thus, a claimant may be required to file an earnings report only during periods of claimed disability, as those would be the only periods during which an employee's earnings could affect the employer's liability for compensation. Although claimant in this case omitted some earnings from the report requested by employer, those wages were earned prior to her period of disability and do not affect employer's liability for compensation. Consequently, the Board affirmed the administrative law judge's determination that Section 8(j) is not applicable in this case. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

The Board affirmed the administrative law judge's rational conclusion that claimant willfully under-reported his earnings on his June 1995 LS-200 Form for the period of 9/1/92 - 5/17/95. Consequently, it affirmed the determination that claimant's benefits are subject to the forfeiture provisions of Section 8(j). *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

After determining that the administrative law judge properly applied the Section 8(j) forfeiture provisions to claimant's benefits, the Board rejected claimant's assertion that the forfeiture period should be limited to six months. In so doing, the Board analyzed the language of the Act, the regulation and the legislative history of the section to conclude that Congress did not intend to create such a limitation. Rather, Congress' intent was to prevent employers from requesting post-injury earnings information more than twice per year and to apply forfeiture for omissions or under-reporting of earnings for a period equal to the period of non-compliance. Consequently, the Board affirmed the administrative law judge's determination that claimant's benefits for the period during which earnings were under-reported are subject to forfeiture. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The Board rejects claimant's contention that all forfeiture proceedings must begin with the district director, and holds, based on a consideration of Section 8(j) and its implementing regulations, 20 C.F.R. §§702.285 and 702.286, as well as 20 C.F.R. §702.336, that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the administrative law judge. Moreover, as the administrative law judge allowed claimant to fully present his defenses regarding his failure to comply with the reporting requirements of Section 8(j), and as his findings in this regard are rational, supported by substantial evidence and in accordance with law, they are affirmed. *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

The Board rejects claimant's assertion that the administrative law judge erred by not including money paid by employer to claimant as part of an aborted settlement agreement as compensation forfeited by claimant under Section 8(j). Specifically, the Board holds that the administrative law judge properly determined that once the approval of the settlement was vacated, claimant's entitlement to that money, as disability compensation, was subject to adjudication and is properly viewed as an advance payment of compensation within the meaning of Section 14(j) of the Act and not, as claimant argued, compensation already paid pursuant to Section 702.286(c). *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

The Board holds that in order for an employer to require a claimant to submit an earnings report pursuant to Section 8(j), employer or the Special Fund must be paying compensation to claimant, either voluntarily or pursuant to an award, at the time the request for information is made, pursuant to the plain language of 20 C.F.R. §702.285(a). Although Section 8(j) states only that employer may request earnings information from a "disabled employee," the Board holds that the regulation defining this phrase is not arbitrary, capricious, or manifestly contrary to the statute, and therefore is entitled to controlling weight. The regulation also is consistent with the legislative history. As employer was not paying compensation to claimant when it submitted Form LS-200 requesting earnings information, the Board reversed the decisions of the administrative law judges ordering the forfeiture of benefits pursuant to Section 8(j). *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd mem.*, 161 Fed. Appx. 178 (2<sup>d</sup> Cir. 2006).

As employer did not request claimant's earnings information on the form prescribed by the Director, the Board affirmed the administrative law judge's finding that claimant's compensation is not subject to forfeiture pursuant to Section 8(j). Employer had requested claimant's earnings information on a form used under the Maine workers' compensation program. The Board discussed the differences between the two forms and held that the state form was not sufficiently analogous to Form LS-200 to justify imposition of Section 8(j). *Cheetham v. Bath Iron Works Corp.*, 38 BRBS 80 (2004).

The Third Circuit affirmed the Board's holding that the administrative law judge erred in applying the forfeiture provisions of Section 8(j) for a period during which claimant did not report earnings as requested by employer, because employer was not paying claimant compensation during the period of its earnings requests. Claimant, therefore, was not a "disabled" employee within meaning of Section 8(j). The court stated that while Section 8(j) is ambiguous, the plain language of the implementing regulation at 20 C.F.R. §702.285(a) reasonably defines a "disabled employee," required to report earnings to employer upon employer's request, as one to whom employer is paying compensation. *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3<sup>d</sup> Cir. 2006).