BRB Nos. 98-1164
and 00-520

RONALD BRICKHOUSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order, the Order Denying Motion for Reconsideration, and the Decision and Order on Motions for Modification of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, the Order Denying Motion for Reconsideration, and the Decision and Order on Motions for Modification (1997-LHC-1183; 1999-LHC-1476) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a senior quality inspector, and, in September 1993,

during the course of his employment, he injured his back. Tr.1 at 63-64.[1] Employer paid temporary total disability benefits for periods in 1993 and from February 15, 1994, through January 5, 1997. 33 U.S.C. §908(b); Emp. Ex.1-6. Claimant has not been able to return to his usual work, and permanent restrictions were assigned on April 17, 1995, by Dr. Garner. Emp. Ex. 1-3; Tr.1 at 64. In 1994, claimant began working with Ms. Puckett, a vocational rehabilitation counselor certified by the Department of Labor's Office of Workers' Compensation Programs (DOL or OWCP). Tr.1 at 19. Together they formulated a retraining plan whereby claimant would attend college in order to obtain an Associate of Applied Science degree in graphic communications. Cl. Ex. 1-1; Tr.1 at 20. OWCP approved this plan for a period of two years, expiring on May 15, 1997. Cl. Ex. 1-1. In January 1997, employer interviewed claimant for three potential light-duty positions at its facility. Tr.1 at 26, 29-30. It offered claimant a position as a senior engineering analyst at a salary of $31,068. Emp. Ex. 1-1. Claimant declined the position, and employer ceased paying disability benefits. Emp. Ex. 1-6; Tr.1 at 73-74. In May 1997, claimant graduated from the community college with the sought-after degree and began to seek employment. Tr.1 at 32, 76. In December 1997, he was hired by the Newport News Gazette as a graphic designer at a rate of $7.50 per hour. Tr.1 at 77. Claimant filed a claim for temporary total disability benefits from January 1997, and continuing. Cl. Ex. 1-7; Emp. Ex. 1-7.

The administrative law judge conducted a formal hearing on January 15, 1998. In his decision, he found that claimant has been permanently disabled since Dr. Garner issued permanent restrictions on April 17, 1995. Decision and Order at 7. He also found that the job offered by employer, while within claimant's physical restrictions, was not available suitable alternate employment because claimant was enrolled in an OWCP-sponsored retraining program and could not have worked at the same time. *Id.* at 9-10. Accordingly, the administrative law judge held employer liable for permanent total disability benefits from January 6 through December 29, 1997, when claimant commenced working. *Id.* at 11. The administrative law judge denied employer's motion for reconsideration. Employer appealed these decisions, but prior to any decision by the Board, claimant filed a motion to dismiss, as he had filed a motion for modification with the administrative law judge based on a change in

[1]There were two hearings in this case. Tr.1 and Tr.2 refer to the transcripts of the respective hearings, Cl. Ex. 1-_ and Emp. Ex. 1-_ refer to the exhibits from the first hearing, and Cl. Ex. 2-_ and Emp. Ex. 2-_ refer to the exhibits from the second hearing.

his economic condition.[2] The Board granted claimant's motion and dismissed the appeal, BRB No. 98-1164. Order (April 16, 1999).

[2]Employer also filed a motion for modification based on a mistake in a determination of fact.

Claimant lost his post-injury job when the newspaper closed on December 31, 1998. At the second hearing, on February 16, 1999, claimant testified that he was due to begin part-time work on March 3, 1999, at Hypnotic Changes where he would earn $8.75 per hour for the first 90 days and then be eligible for a full-time position and a pay increase.[3] Tr.2 at 33-34. Due to the loss of his job with the newspaper, claimant filed the motion for modification based on the change in his economic condition, seeking permanent partial disability benefits from December 29, 1997, and continuing.

Employer obtained information from Dr. Davis, the dean of instruction at the college claimant had attended. Dr. Davis testified on deposition that, as of January 1997, claimant needed two classes to graduate. He stated that one of these classes was offered at night in the spring 1997 semester and the other was offered at night in the summer 1997 semester. Emp. Ex. 2-7 at 3-5. The dean did not know, however, whether the courses required lab work. In light of the information that the courses were offered at night, employer filed a motion for modification based on a mistake in the determination of a fact regarding claimant's ability to accept its job offer and still maintain his course work.

The administrative law judge initially found there was a mistake in a determination of fact. In particular, he modified his finding that the courses claimant was required to complete for graduation were not offered at night. The administrative law judge, however, did not change his conclusion that the courses may not have been available to claimant, especially if he did not know they were offered at night. Moreover, the administrative law judge stated that claimant testified there was lab work involved and that working at the shipyard would not be conducive to completing the necessary course work. Decision on M/Modif. at 5. Therefore, the administrative law judge reaffirmed his conclusion that the job employer offered while claimant was enrolled in the retraining program was not suitable alternate employment available to claimant. *Id.* at 6. With regard to claimant's motion that he suffered a change in his economic condition, the administrative law judge found that claimant's condition had changed because he lost his post-injury job through no fault of his own and that there was no evidence that the job previously offered by employer was still available. The administrative law judge determined that claimant has a post-injury wage-

[3]According to Ms. Puckett's final report dated April 2, 1999, which was submitted and accepted into evidence after the second hearing, claimant also began a full-time position with Harris Publishing on March 10, 1999, earning $9 per hour. He was unable to maintain both jobs and eventually retained only the full-time position at Harris. Emp. Ex. 2-6.

earning capacity of $314.28 and is entitled to permanent partial disability benefits at a rate of $182.62 per week from December 30, 1998, and continuing. *Id.* at 6-7.

Employer appeals the decision on modification, BRB No. 00-520, and also requested reinstatement of its prior appeal.[4] It argues that the administrative law judge erroneously awarded claimant permanent disability benefits, that claimant is not entitled to total disability benefits while he was attending college, as he could have accepted its offer of suitable alternate employment with no loss in wage-earning capacity, that the administrative law judge erred in finding that claimant suffered a change in condition which warranted modification of the award, and that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance on all issues.

Permanency

Employer first argues that the administrative law judge erred in considering claimant's condition to be permanent and in awarding permanent total disability benefits from January 6 through December 29, 1997. It asserts that claimant sought only temporary total disability benefits, and that in raising the issue without notifying the parties, the administrative law judge prevented employer from seeking Section 8(f), 33 U.S.C. §908(f), relief.[5]

An employee has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1980). These issues must be raised prior to the hearing, and if they are raised thereafter, the administrative law judge

[4]By Order dated February 28, 2000, the Board reinstated employer's previous appeal, BRB No. 98-1164, and consolidated the two appeals for purposes of decision.

[5]Employer also contends that claimant's five-year limit on entitlement to temporary total disability benefits had expired as of March 27, 1995. As the injury occurred in September 1993, it is unclear how employer arrives at a five-year date of March 27, 1995. In any event, the five-year limit is on temporary partial disability benefits and not on temporary total disability benefits. 33 U.S.C. §908(e).

may not address them without first notifying the parties. *See Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); 20 C.F.R. §702.336. Consequently, if only temporary disability benefits were sought, an administrative law judge may not award permanent disability benefits. *Ferrell v. Jacksonville Shipyards, Inc.*, 12 BRBS 566 (1980); *Seals v. Ingalls Shipbuilding, Div. of Litton Systems, Inc.*, 8 BRBS 182 (1978). However, where a claimant raises entitlement to permanent disability benefits for the first time at the hearing, having previously claimed temporary total disability benefits, an administrative law judge may award permanent total disability benefits without further notice to the employer, if the administrative law judge determines that no further notice or preparation by the parties is necessary, because there is no significant difference in the burdens of proof for permanent versus temporary total disability. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); 20 C.F.R. §702.336(a).

In this case, employer is correct in arguing that claimant sought temporary total disability benefits from January 6, 1997, and continuing, and that employer disputed the nature and extent of claimant's disability. Tr.1 at 6; Cl. LS-18 (Feb. 12, 1997). Employer's defense, both below and on appeal, however, is somewhat circular: employer argues that claimant is not entitled to temporary disability benefits because his condition is permanent but that the administrative law judge may not award permanent disability benefits because claimant did not seek benefits for a permanent disability. We reject this reasoning and affirm the administrative law judge's finding that claimant's condition is permanent. First, the administrative law judge's finding that claimant received permanent restrictions from Dr. Garner on April 17, 1995, is supported by the record. Emp. Ex. 1-3. Moreover, employer had sufficient time to prepare for a claim for permanent disability, as this case was transferred to the Office of Administrative Law Judges on March 5, 1997, and the first hearing was held on January 15, 1998, both dates which were well after claimant's permanent restrictions went into effect in 1995. As employer itself asserted that claimant's condition was permanent based on the 1995 medical restrictions, it cannot now be permitted to argue it was unprepared for a claim of permanency. *See Duran*, 27 BRBS at 12; *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983); 20 C.F.R. §702.336(a).

We also reject employer's contention that the administrative law judge's *sua sponte* award of permanent disability benefits prejudiced its right to seek Section 8(f) relief. An employer is obliged to raise the applicability of Section 8(f) at the earliest hearing after it became aware permanency was an issue in the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979); *see also* 33 U.S.C. §908(f)(3); 20 C.F.R. §702.321. By its own admission, employer considered claimant's condition permanent as of April 1995 and, thus, could have anticipated the need to apply for Section 8(f) relief at the first hearing before the administrative law judge. *See Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT)

(11th Cir. 1985); *see also Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). Therefore, we reject employer's contention that the administrative law judge erred in awarding claimant permanent disability benefits from January 6 through December 29, 1997.

Suitable Alternate Employment

Employer contends the administrative law judge erred in finding that claimant was entitled to total disability benefits while he was enrolled in an OWCP-sponsored retraining program, pursuant to *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). Where a claimant has established he is incapable of returning to his usual employment, he has established a *prima facie* case of total disability, and the burden shifts to his employer to show the availability of suitable alternate employment which the claimant can perform. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). If the employer makes such a showing, the claimant nevertheless can prevail in his quest for total disability benefits if he demonstrates he diligently tried but was unable to secure alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Where a claimant is enrolled in a retraining program, he bears the burden of showing that he is unable to perform such suitable alternate employment due to his participation in that program. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998)

The case before us involves the question of whether claimant satisfied his burden of establishing that the suitable alternate employment presented by employer was unavailable due to his participation in an OWCP-sponsored rehabilitation program. The seminal case on this issue is *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). In that case, a claimant was enrolled in a retraining program sponsored by the DOL. The employer submitted minimum-wage jobs as evidence of suitable alternate employment the claimant could perform. The United States Court of Appeals for the Fifth Circuit affirmed the Board's determination that the jobs could not be secured by the claimant due to his participation in the rehabilitation program and, therefore, were not shown to be available. The court also noted that, in completing the retraining program, the claimant increased his wage-earning capacity well-above the minimum wage level, thereby reducing the employer's long-term liability for benefits. Consequently, the claimant was entitled to total disability benefits while he was in the program. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT).

It is undisputed that claimant here cannot return to his usual employment with employer. It is also undisputed that employer presented evidence of suitable alternate employment at its facility as of January 1997 which the administrative law judge found was within claimant's physical restrictions. Thus, the burden shifted to claimant to show that he was unable to perform such work due to his participation in the DOL-sponsored rehabilitation program. *Kee*, 33 BRBS 221. Based on relevant factors,[6] the administrative

[6]Factors to consider in determining whether *Abbott* applies to a particular case include,

law judge found: 1) claimant diligently pursued his studies; 2) OWCP approved the program; 3) employer knew about the program and did not object; 4) claimant's wage-earning capacity would not have immediately benefited from retraining, as employer offered claimant a job which paid $31,000, but a labor market survey indicated that as a graphics designer claimant could start at a salary of $22,500-25,000, and future increases in that field were speculative; and, 5) claimant's participation in the program precluded employment, as although night classes were offered, there is no evidence they were available to claimant. Decision and Order at 10; Decision on M/Modif. at 5.

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but are not limited to: whether enrollment in the program precluded employment, whether the DOL approved the rehabilitation plan, whether the employer was aware of the claimant's participation in the program and agreed to continue making temporary total disability payments, whether completion of the program would benefit the claimant, whether the program would affect the claimant's wage-earning capacity, and whether the claimant diligently completed the program. *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26-27(CRT); *Brown v. National Steel & Shipbuilding Co.*, __ BRBS __, BRB No. 00-419 (Jan. 10, 2001); *see also Gregory*, 32 BRBS at 266.

Initially, employer argues that the two remaining courses required before claimant could graduate in 1997 were offered at night in the Spring and Summer 1997 semesters; thus, it avers claimant could have accepted the position it offered and still have graduated in 1997. We reject employer's assertion that claimant's participation in the retraining program did not preclude his acceptance of its offer of employment. The administrative law judge specifically found that, although the evidence established that one of the courses necessary for claimant to graduate from the program was offered at night in each of the Spring and Summer semesters of 1997, the courses may not necessarily have been available to claimant because claimant did not know they were available at night and because one may have involved additional lab work. The administrative law judge's conclusion is supported by evidence of record. Cl. Ex. 1-1; Tr.1 at 75; Tr.2 at 43. Moreover, claimant submitted a copy of the OWCP approval document which outlined the requirements for claimant's participation in the retraining program. Specifically, OWCP required completion of the program within two years: between May 22, 1995, and May 15, 1997. It also stipulated that claimant had to be a full-time student each session, including summers, had to attend classes and maintain a 2.0 GPA, had to have his official transcript submitted to OWCP after each semester and could not change the curriculum without prior approval. Cl. Ex. 1-1. This document, though not discussed by the administrative law judge, is uncontradicted and supports the determination that claimant could not have accepted employer's job offer. Because only one of the courses claimant needed to take was offered at night in the Spring semester of 1997, claimant could not have completed his retraining program within the time allotted by OWCP, *i.e.*, by May 15, 1997, if he had accepted employer's offer of employment. For this reason, the administrative law judge correctly concluded that employer's proffered employment was not available to claimant.[7] *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998).

Employer also challenges whether claimant's participation in a program which does

[7]We reject employer's allegation that claimant was working while he took classes, thereby establishing that he was not prevented from working while enrolled in the retraining program. The evidence of record shows that, after he graduated and while he was working for the newspaper, claimant took additional classes, at his own expense, to enhance his career. Tr.2 at 30-31. This course work occurred after the completion of the rehabilitation program.

not have the immediate potential of increasing his wage-earning capacity renders *Abbott* inapplicable. Although an increased wage-earning capacity benefits not only the claimant, but also the employer by ultimately reducing its liability for disability compensation, *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Gregory*, 32 BRBS 264; *Bush*, 32 BRBS 213, the Board has recently held that *Abbott* may apply even when an increased wage-earning capacity does not result from the vocational retraining program. *Brown v. National Steel & Shipbuilding Co.*, __ BRBS __, BRB No. 00-419 (Jan. 10, 2001). In *Brown*, the claimant sustained an injury to his wrists and was unable to perform his usual work. He entered into a vocational rehabilitation program under the auspices of the California Workers' Compensation Act. Upon completion of the program, he successfully secured a position as a press operator. *Brown*, slip op. at 1-2. The administrative law judge found, and the Board affirmed, that *Abbott* applied and the claimant was entitled to total disability benefits while he was enrolled in the program. *Id.* at 2-3. The Board rejected the employer's assertion that application of *Abbott* was unwarranted in a case involving an injury under the schedule, 33 U.S.C. §908(c)(1)-(20), as the claimant's wage-earning capacity did not affect his award of partial disability benefits and would not serve to reduce the employer's liability. Rather, based on the recognized goal of the Act of rehabilitating injured employees, *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991), and in conjunction with the Fifth Circuit's reasoning which recognized that the degree of disability is not affected solely by a claimant's physical condition, but is also based on factors such as age, education, employment history, rehabilitative potential and the availability of work the claimant can perform, the Board held that *Abbott* was applicable. *Brown*, slip op. at 3, 5-6. The Board acknowledged that the claimant's vocational interests were furthered by his retraining in that he would obtain additional skills which would enhance his ability to resume his place as a productive member of the labor market. *See, e.g., Abbott*, 40 F.3d at 127, 29 BRBS at 26(CRT). Such skills, the Board concluded, would then increase the claimant's chances of securing suitable alternate employment and would benefit the employer by releasing it from the obligation of paying total disability benefits. *Brown*, slip op. at 6. In light of the Board's holding in *Brown*, therefore, we reject employer's contention that *Abbott* is not applicable because claimant was retrained for lower paying work, and we hold that the administrative law judge correctly applied *Abbott* to this case. Thus, we affirm the administrative law judge's award of total disability benefits between January 6 and December 29, 1997. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Brown*, slip op. at 6.

Change of Condition

Employer lastly contends the administrative law judge erred in granting claimant's motion for modification because claimant's economic condition did not change merely because he was laid off from his post-injury job. Section 22 of the Act, 33 U.S.C. §922, permits the modification of a decision if the proponent of the modification can establish

either a change in a claimant's condition or a mistake in a determination of fact. The Supreme Court has held that modification pursuant to Section 22 may be appropriate where there is a change in an employee's wage-earning capacity, even without a change in his physical condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). However, modification is not permitted with every change in actual wages or with every transient change in the economy. *Id.*; *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). In this case, claimant's economic condition changed, through no fault of his own, with the loss of his post-injury position due to the closing of the newspaper. As such a loss affected claimant's capacity to earn wages, it was more than a transient change in the economy or a periodic change in his actual wages. Therefore, we affirm the administrative law judge's decision to modify claimant's award based on a change in his economic condition. *Id.*

Employer also asserts that if modification is warranted, then the administrative law judge erred in determining claimant's post-injury wage-earning capacity. Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In a brief analysis, the administrative law judge discussed claimant's post-injury job with the newspaper and his part-time job with Hypnotic Changes which started on March 3, 1999, at a rate of $8.75 per hour. He found that claimant's actual wages of $314.28 per week from his job with the now-defunct newspaper reasonably represented his post-injury wage-earning capacity. Accordingly, he awarded permanent partial disability benefits from December 30, 1998, and continuing, at a rate of $182.62. Decision on M/Modif. at 6-7. The evidence reveals, however, that claimant also held another job prior to the issuance of the decision on modification, which the administrative law judge did not address. In Ms. Puckett's April 2, 1999, report, which was admitted into the record post-hearing, there is evidence that claimant obtained a full-time job with Harris Publishing which he started on March 10, 1999, earning $9 per hour, Emp. Ex. 2-6, and that claimant subsequently stopped working for Hypnotic Changes. Thus, there is evidence of a post-injury job paying actual wages higher than those found to be representative of claimant's earning capacity. As the administrative law judge did not consider all relevant evidence on this issue, we must remand the case for him to reconsider all evidence relevant to claimant's post-injury wage-earning

capacity.[8] 33 U.S.C. §908(h); *see Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Mangaliman*, 30 BRBS 39.

[8]The administrative law judge reasonably rejected employer's assertion that claimant's wage-earning capacity should be based on the estimated salary of $48,000 for a position for which claimant testified he applied but did not secure. Decision on M/Modif. at 6 n.5.

Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge