BRB No. 01-0735

JAMES PULASKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J.H. STEVEDORING	)	DATE ISSUED: June 10, 2002
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Continuing Permanent Partial Benefits and Order Denying Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

Richard N. Held (Post & Schell, P.C.), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Continuing Permanent Partial Benefits and Order Denying Motion for Reconsideration (00-LHC-1922) of Administrative Law Judge Ainsworth H. Brown rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 28, 1999, claimant injured his left shoulder during the course of his

employment as a longshoreman. Claimant underwent surgery to repair a fractured scapula, a biceps tendon tear, and a rotator cuff tear. He has not returned to work. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from February 8, 1999, to July 15, 2000, and for temporary partial disability, 33 U.S.C. §908(e), from July 16, 2000, and continuing.

In his decision, the administrative law judge found that employer established the availability of suitable alternate employment, which claimant failed to rebut. The administrative law judge determined that employer's evidence of suitable alternate employment established a range in pay from $6.50 to $9 per hour. The administrative law judge concluded that claimant has a wage-earning capacity of $8.50 per hour, which is the rate on which employer based its voluntary payments of partial disability benefits. Claimant's motion for reconsideration was denied.

On appeal, claimant challenges the administrative law judge's determination of his post-injury wage-earning capacity. Specifically, claimant contends that the administrative law judge erred by not specifying the positions he credited to find an hourly wage-earning capacity of $8.50, and by not averaging the hourly rates of the positions identified as suitable alternate employment to derive an hourly wage-earning capacity of $7.50. Employer responds, urging affirmance.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). If they do not or if claimant does not have any actual earnings, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See* 33 U.S.C. §908(h); *see, e.g., Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT).

In this case, the administrative law judge credited the labor market survey of employer's vocational consultant, Jacqueline Flora, to find that employer established the availability of suitable alternate employment.[1] The administrative law judge then stated that the jobs identified in the survey pay between $6.50 to $9.00, and that he would accept the hourly rate of $8.50 by which employer was compensating claimant for temporary partial disability. On reconsideration, the administrative law judge denied claimant's request that he average the hourly rates listed in the survey to determine claimant's post-injury wage-earning capacity. The administrative law judge found no reason to reward claimant's lack of diligence in seeking suitable work by finding a lower post-injury hourly wage.

We agree with claimant that the administrative law judge's finding that claimant has a post-injury wage-earning capacity of $8.50 per hour cannot be affirmed as it is not supported by substantial evidence. The administrative law judge did not state which specific jobs he credited in employer's labor market survey in finding that employer established the availability of suitable alternate employment. The administrative law judge stated only that "Despite Ms. Flora's flawed analysis, she has set forth several entry level jobs that are within Claimant's physical capacities," Decision and Order at 3, and that "Since there was a considerable range in pay between $6.50 to $9.00, I will accept the Employer's alternative of $8.50 per hour to continue the current partial disability rate of $347.85." *Id.*

[1]Claimant does not challenge the finding that employer established the availability of suitable alternate employment.

We must remand this case for further findings, as the administrative law judge's wage-earning capacity determination is not reviewable as it lacks an evidentiary basis. Contrary to claimant's contention, the administrative law judge is not required to average the wages of the suitable alternate jobs.[2] Nonetheless, we agree with claimant that, without identifying which of the identified jobs are suitable, the administrative law judge cannot conclude that claimant's post-injury wage-earning capacity is $8.50 per hour, as jobs paying this wage may be part of Ms. Flora's "flawed analysis."[3] Moreover, it is not apparent from the administrative law judge's decision that the rate at which employer voluntarily compensated claimant is based on record evidence, and thus the administrative law judge's finding is not supported by substantial evidence. The administrative law judge must, in the first instance, determine which of the identified positions are suitable for claimant. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge then must base his finding of claimant's post-injury wage-earning capacity on relevant factors as applied to the evidence of record. The objective of the inquiry concerning claimant's post-injury wage-earning capacity is to determine the post-injury wage to be paid to claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). In this regard, the administrative law judge must apply any relevant factors enumerated in Section 8(h), *see Devillier*, 10 BRBS 649, to determine claimant's post-injury wage-earning capacity. Thus, we vacate the administrative law judge's finding that claimant's wage-earning capacity is $8.50 per hour, and we remand this case for a determination of claimant's wage-earning capacity based on credited evidence of record.

Accordingly, the administrative law judge's Decision and Order Continuing Permanent Partial Benefits and Order Denying Motion for Reconsideration are vacated in part, and the case is remanded to the administrative law judge for further consideration

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[2]The United States Court of Appeals for the Fifth Circuit has held that an average of the range of salaries identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, the court stated, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam,* 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied,* 523 U.S. 1095 (1998). The administrative law judge, however, did not err by finding that he is not required to average the wages paid by the jobs he credits as establishing the availability of suitable alternate employment.

[3]This may refer to the testimony of claimant's vocational expert, Dennis Mohn, that some of the security guard positions identified in the survey were not in claimant's geographic area, or that Ms. Flora incorrectly identified claimant's longshore work. *See* Decision and Order at 2-3. The administrative law judge on remand should address any flaws in employer's labor market survey in determining if the identified jobs are suitable for claimant.

consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge