BRB No. 01-0765

RONALD BRICKHOUSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/26/01
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

John H. Klein (Montagna, Breit, 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1997-LHC-1183) 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). By Order dated July 30, 2001, the Board granted employer's motion for expedited review of its appeal.

This case has previously been before the Board. Claimant sustained a work-related back injury in September 1993. The Office of Workers' Compensation Programs (OWCP) approved a retraining plan, expiring on May 15, 1997, whereby claimant would attend college in order to obtain an Associate of Applied Science degree in graphic

communications. In January 1997, employer interviewed claimant for three potential light-duty positions at its facility, ultimately offering claimant a position as a senior engineering analyst at a salary of $31,068. Claimant declined the position, and employer ceased paying disability benefits. In May 1997, claimant graduated from the community college with his degree and began to seek employment. In December 1997, he was hired by the Newport News Gazette as a graphic designer at a rate of $7.50 per hour. Claimant filed a claim for temporary total disability benefits commencing in January 1997.

The administrative law judge found that claimant has been permanently disabled since Dr. Garner issued permanent restrictions on April 17, 1995. 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 while he was attending classes. Thus, the administrative law judge held employer liable for permanent total disability benefits from January 6 through December 29, 1997, when claimant commenced working. Employer appealed, 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 his economic condition. 33 U.S.C. §922. The Board granted claimant's motion and dismissed employer's appeal.

Claimant lost his post-injury job when the newspaper closed on December 31, 1998. 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. 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. 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. 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-earning capacity of $314.28, based on his wages with the newspaper and is entitled to permanent partial disability benefits at a rate of $182.62 per week from December 30, 1998, and continuing.

Employer appealed the decision on modification, BRB No. 00-520, and also requested reinstatement of its prior appeal, BRB No. 98-1164. Employer contended 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.

The Board first rejected employer's contention that the administrative law judge erred in awarding claimant permanent disability benefits. *Brickhouse v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 98-1164, 00-0520 (Feb. 6, 2001). The Board stated that employer could not argue that claimant is not entitled to temporary disability benefits because his condition is permanent, yet also argue that the administrative law judge may not award permanent disability benefits because claimant did not seek benefits for a permanent disability. The Board held that the administrative law judge's finding that claimant's condition is permanent is supported by Dr. Garner's opinion. Emp. Ex. 1-3. Moreover, the Board held that 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 had asserted that claimant's condition was permanent based on the 1995 medical restrictions, the Board stated that employer could not later argue it was unprepared for a claim for permanent disability benefits. Similarly, the Board rejected employer's contention that the administrative law judge's raising of a claim for permanent disability benefits deprived it of its right to raise entitlement to relief from the Special Fund pursuant to Section 8(f), 33 U.S.C. §908(f), as employer did not raise a claim for Section 8(f) relief at the first hearing after permanency became an issue, given employer's admission that it considered claimant's condition to be permanent as of April 1995. *Brickhouse*, slip op. at 5.

The Board affirmed the administrative law judge's finding that employer's offer of employment to claimant in January 1997 was not realistically available to claimant due to his participation in the OWCP-approved college program, holding that one of the required courses was not offered in the period prior to the expiration of the approved program. The

Board also rejected employer's challenge to the program on the ground that it did not have the immediate potential of increasing claimant's wage-earning capacity, citing *Brown v. National Steel & Shipbuilding*, 34 BRBS 195 (2001). *Brickhouse*, slip op. at 7-8.

Finally, the Board affirmed the administrative law judge's finding that claimant's loss of the newspaper job constituted a change in his condition, and discussed the administrative law judge's finding that claimant's post-injury wage-earning capacity is based on the actual wages he earned at the defunct newspaper. The Board stated that the administrative law judge did not discuss the job claimant obtained with Harris Publishing in March 1999, which paid more than the wages found to be representative of claimant's wage-earning capacity. Thus, the Board remanded the case to the administrative law judge for further findings regarding claimant's wage-earning capacity.

On remand, the administrative law judge found that claimant's wage-earning capacity is $360 per week, based on his actual wages with Harris Publishing. Thus, he awarded claimant ongoing permanent partial disability benefits of $152.10 per week, commencing March 10, 1999. 33 U.S.C. §908(c)(21).[1]

Employer appeals the administrative law judge's decision on remand in order to preserve its right to appeal the Board's initial decision. Employer does not make specific challenges to the administrative law judge's findings on remand. Claimant responds, urging rejection of employer's contentions and affirmance of the administrative law judge's award of benefits. Employer has raised no issues with regard to the administrative law judge's decision on remand, and the Board's initial decision in this matter constitutes the law of the

[1]The administrative law judge ordered employer to pay claimant temporary total disability benefits of $152.10 per week, but it is clear from the context of this case that the award is for permanent partial disability.

case. *See, e.g., Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000). Employer has not offered a basis for departure from this rule. Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge