

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 23-0374
and 23-0374A

MATTHEW C. DAVIDSON)

Claimant-Petitioner)
Cross-Respondent)

v.)

VIGOR-CASCADE GENERAL,)
INCORPORATED)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION LIMITED)

Employer/Carrier-)
Respondents)
Cross-Petitioners)

NOT-PUBLISHED

DATE ISSUED: 01/07/2026

DECISION and ORDER

Appeal of the Amended Decision and Order Granting in Part and Denying in Part Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

James R. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Richard M. Clark's Amended Decision and Order Granting in Part and Denying in Part Compensation and Benefits (2021-LHC-00156) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 11, 2019, Claimant began working on a yard clean-up detail at Vigor Marine Yard for Employer as a Laborer Associate 1.² Employer's Exhibit (EX) 4 at 42; Hearing Transcript (TR) at 83, 97-98, 101. On January 22, 2020, he injured his lower back at work when he lifted a 140-pound set of stairs onto a flatbed truck; he stopped working as a result. Claimant's Exhibits (CXs) 31, 51, 116 at 376; TR at 35, 109. Along with receiving conservative treatment that included physical therapy and steroid injections, Claimant underwent his first lower back surgery on February 10, 2021, and his second lower back surgery on December 8, 2021. CX 45 at 130, 46, 77, 97, 105, 107.

On March 26, 2020, Claimant filed his claim for benefits under the Act for his lower back injury. CX 52. On October 1, 2020, and on November 13, 2020, Employer filed notices of controversion disputing the claim. EX 1 at 1-2. Unable to reach an agreement, Claimant had the case referred to the Office of Administrative Law Judges (OALJ), amending his claim to include that his work-related back injury aggravated his pre-existing left shoulder condition or caused a secondary injury to his shoulder when he fell on December 26, 2020. In response, on December 27, 2021, Employer filed a notice of controversion disputing the left shoulder injury. CX 113. The ALJ determined Claimant's left shoulder condition is incorporated into his claim and held a hearing via videoconference on May 18, 2022. Amended Decision and Order (D&O) at 2, 28 n.40;³ *see* TR at 1.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in Portland, Oregon. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002); 20 C.F.R. §702.201(a).

² The parties stipulated the Act applies to this claim. D&O at 2; TR at 11-12.

³ The ALJ previously issued a Decision and Order on March 31, 2023. On April 13, 2023, Employer filed a motion for reconsideration, and Claimant filed an objection to Employer's motion on April 19, 2023. In an order dated June 12, 2023, the ALJ granted

In his Amended Decision and Order, the ALJ first determined Claimant produced sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), establishing his back injury aggravated his pre-existing left shoulder condition, and Employer successfully rebutted the presumption. D&O at 28-29. Weighing the evidence, he concluded Claimant did not sustain a work-related aggravation of his preexisting left shoulder condition and is not entitled to disability compensation or medical benefits for that injury. *Id.* at 34. Thereafter, as the parties agreed Claimant sustained a work-related back injury,⁴ the ALJ found Claimant's average weekly wage (AWW) is \$503.48 (\$26,156.20 divided by 52 weeks). *Id.* at 39. He then determined Claimant established a prima facie case of total disability because he cannot return to his usual work as a Laborer Associate 1, and Employer failed to satisfy its burden of showing available suitable alternate employment (SAE). *Id.* at 40, 47. The ALJ concluded Claimant is entitled to temporary total disability (TTD) benefits from the date of his lower back injury to the present and continuing. *Id.* He also awarded all past, present, and future reasonable and necessary medical treatment related to Claimant's work-related lower back injury pursuant to Section 7 of the Act. 33 U.S.C. §907(a) (2018); D&O at 48.

Claimant appeals the ALJ's decision, contending the ALJ erred in weighing the evidence and in finding his left shoulder condition is not compensable. He also challenges the ALJ's AWW calculation. BRB No. 23-0374. Employer cross-appeals, contending the ALJ erred in finding it did not establish the availability of SAE and in awarding TTD benefits. BRB No. 23-0374A. Each party filed a response brief and a reply brief, reiterating their contentions.

Shoulder Condition

On December 26, 2020, Claimant fell at home when his leg gave out and he hit his shoulders against the floor. TR at 114-115; *see also* CX 116 at 390-396. He claimed he

the motion for reconsideration and vacated the Decision and Order. He issued his Amended Decision and Order the same day.

⁴ The ALJ accepted the parties' stipulations that Claimant sustained a work-related lower back injury on January 22, 2020, which required back surgeries, and his condition was not at maximum medical improvement. D&O at 2. On November 4, 2020, Claimant's expert, Dr. Paul Puziss, an orthopedic surgeon, diagnosed Claimant with L3 radiculopathy, left L5-S1 facet syndrome, and pre-existing lumbar degenerative disc disease and moderate spinal stenosis at L3-L4. CX 69 at 186. Dr. Puziss concluded Claimant's work activity with Employer and his injury on January 22, 2020, aggravated his preexisting degenerative disc disease at L3-L4 causing further herniation to the discs. *Id.* at 187.

felt pain in both shoulders and later stated his left shoulder pain increased “terribly.” TR at 115, 150. On August 31, 2021, Claimant underwent left and right shoulder MRIs, which revealed pre-existing partial tears and other abnormalities. CXs 100-101, 110 at 328. On December 15, 2021, orthopedist Dr. Paul Puziss reported on his examination of Claimant and his record review.⁵ He stated Claimant complained of left, but not right, shoulder pain. CX 110 at 331. In addition to the current and pre-existing back conditions, Dr. Puziss diagnosed Claimant with “[a]ggravation of left preexisting rotator cuff partial tear” caused by “[t]wo documented falls because legs gave way.”⁶ CX 110 at 333; *see also* CX 117 at 427. Dr. Puziss further asserted Claimant’s December 2020 fall was a natural and unavoidable result of the January 22, 2020 back injury and recommended a subacromial cortisone injection in Claimant’s shoulder for the pain, indicating Claimant would “likely” need surgery to repair his rotator cuff. CXs 110 at 333-334, 125 at 556, 561-562.

On March 28, 2022, Dr. John Swanson, an orthopedic surgeon, examined Claimant at Employer’s request. EX 20. Dr. Swanson concluded Claimant suffered from preexisting left shoulder rotator cuff tendinopathy and labral degeneration. *Id.* at 202, 208-209. He determined Claimant probably had weakness that caused his leg to give out before his December 2020 fall, and the fall was an unavoidable consequence of Claimant’s L3 foraminal nerve root compression. *Id.* at 212-213. Therefore, he opined the weakness in Claimant’s left thigh due to L3 radiculopathy was likely the cause of an aggravation of Claimant’s preexisting left shoulder condition. *Id.* However, in his April 27, 2022 addendum report, after reviewing additional medical records, Dr. Swanson changed his opinion and concluded the December 2020 fall did not adversely affect or aggravate Claimant’s preexisting left shoulder condition.⁷ EX 24 at 325-326.

⁵ Following the December 2020 incident, as summarized in Dr. Puziss’s supplemental report, it does not appear Claimant received shoulder treatment, as neurosurgeon Dr. Ashok Modha’s primary focus was Claimant’s back pain radiating to his legs. Claimant underwent back surgeries on February 10, 2021, and December 8, 2021. *See* CX 110 at 325-328.

⁶ Dr. Puziss stated Claimant credibly described weakness in his legs due to his work-related back condition, which caused his December 2020 fall, resulting in aggravating his pre-existing left shoulder condition. He opined any strain to Claimant’s right shoulder from the December 2020 fall had healed and resolved. CX 110 at 333-334.

⁷ Dr. Swanson changed his opinion based on the following: 1) Claimant’s assertion that he had no significant left shoulder symptoms prior to the fall was not supported by the new records; 2) there were no contemporaneous records reporting a fall at home on December 26, 2020; 3) Claimant’s symptoms in March 2022 were “equal to or better than

The ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), based on the opinions of Drs. Puziss and Swanson. D&O at 28; *see* CXs 110, 117; EXs 20, 24. He further found Employer rebutted the presumption based on Dr. Swanson’s addendum report. D&O at 29; EX 24. As neither party, on appeal, challenges the ALJ’s findings for invocation and rebuttal of the Section 20(a) presumption, we affirm them. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

As in this case, when the presumption has been invoked and rebutted, it drops from the case. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 100 (1997), *aff’d*, 169 F.3d 615 (9th Cir. 1999). At this juncture, the ALJ must assess the credibility and weight to give the evidence as a whole.⁸ *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); *Duhagon*, 19 F.3d at 618; *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171, 174 (1996); *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Carswell v. E. Pihl & Sons*, 999 F.3d 18, 27 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022). The Board may not substitute its views for those of the factfinder but must instead accept the ALJ’s credibility findings unless they are inherently incredible or patently unreasonable. *Global Linguist Solutions LLC v. Abdelmegeed*, 913 F.3d 921, 923 (9th Cir. 2019); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010); *Cordero*, 580 F.2d at 1335. Even when evidence could support a finding in favor of either party, the Board may not disturb the ALJ’s reasonable inferences and supported credibility determinations. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-945 (5th Cir. 1991).

those he had in the six months before this reported work incident;” and 4) the August 31, 2021 MRI of Claimant’s left shoulder did not demonstrate an acute pathological change. EX 24 at 325.

⁸ The “aggravation rule” states an employer is liable for the claimant’s full disability if a work-related injury aggravates, accelerates, or combines with a pre-existing injury or condition to result in that disability; the relative contribution of the conditions is not weighed. *See Independent Stevedore Co. v. O’Leary*, 357 F.2d 812, 814-815 (9th Cir. 1966); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954) (a subsequent injury is compensable if it is the natural and unavoidable result of a compensable work injury); *see also Port of Portland v. Director, OWCP*, 932 F.2d 836, 839-840 (9th Cir. 1991); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991). An aggravation or progression of an underlying condition is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556, 565-566 (1979), *aff’d sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981).

Upon weighing the evidence in this case, the ALJ found Claimant is not a credible witness, assigned Claimant's left shoulder complaints little to no weight, and gave greater weight to Dr. Swanson's revised opinion than to Dr. Puziss's opinion. D&O at 9-17, 29-34. Claimant contends the ALJ erred in finding the fall caused by his work-related lower back condition did not aggravate his left shoulder condition. Cl.'s Brief at 25-30; Cl.'s Reply at 6-10. Specifically, Claimant argues he is credible and the ALJ erred in giving less weight to Dr. Puziss's opinion. *Id.* We reject Claimant's arguments.

The ALJ found Claimant made numerous exaggerated or inconsistent statements which led him to find Claimant incredible. D&O at 30-32. First, the ALJ acknowledged Claimant's admission that he exaggerated complaints regarding his left shoulder condition multiple times from 2015 until the day before his December 2020 fall due to his learned behavior while incarcerated.⁹ Claimant explained his exaggeration was to keep the option open for future treatment provided at the expense of the Bureau of Prisons if he later experienced a problem with his left shoulder. D&O at 6-7, 31; *see* EX 13 at 81-82; TR at 96-99, 138, 148, 150-156. Nonetheless, the ALJ found that "[w]hile it might be understandable that he would exaggerate in prison, h[is] continuation of this behavior makes it difficult to believe his subjective complaints where they are not supported by objective evidence." D&O at 31. Claimant also testified he first felt pain in his left shoulder after he rehabilitated his right shoulder in 2017. TR at 94. However, as the ALJ noted, Claimant's medical records demonstrated he complained of pain in his left shoulder in 2015, prior to his right shoulder surgery in 2017. D&O at 32; *see* CXs 6, 11, 14. The ALJ also found the lack of contemporaneous reports and complaints of shoulder pain around the time of Claimant's December 2020 fall diminished his credibility.¹⁰ D&O at 31.

In addition, the ALJ found Claimant's testimony contradicted his complaints to Dr. Swanson. D&O at 31-32. For example, Claimant argued he had not exaggerated his left shoulder symptoms since his January 2020 fall. Cl.'s Post-Hearing Br. at 14-15; TR at 138. However, the ALJ noted Dr. Swanson's report stated Claimant continued to

⁹ Claimant had been incarcerated from 2003 to 2019. CX 116 at 359-360; TR at 83, 164.

¹⁰ After his December 2020 fall, Claimant went to the emergency room on January 13, 2021, called a nurse practitioner on January 26, 2021, and re-visited the emergency room on February 1, 2021. Claimant did not report pain in his shoulders at any of these visits. EXs 16 at 106-107, 17 at 133, 18 at 163-164; TR at 117-118. Indeed, no physician examined Claimant's left shoulder in response to any complaints of pain until he saw Dr. Gregory Gramstad on March 16, 2021. CX 80 at 251-252.

exaggerate his symptoms when he saw Nurse Practitioner Crystal Williams about six months after his fall on July 28, 2020.¹¹ D&O at 15-16, 31; *see* EX 13 at 82; TR at 111-113, 155-156.

The record supports the ALJ's assessment, as he permissibly found Claimant is not credible, and his complaints regarding his left shoulder condition merited little to no weight. *Cordero*, 580 F.2d at 1335; D&O at 32. Therefore, we affirm the ALJ's credibility determination as rational and supported by substantial evidence.

Regarding the weight given to the doctors' opinions, the ALJ is entitled to weigh the medical evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical expert. *Ogawa*, 608 F.3d at 648; *Mijangos*, 948 F.2d at 945; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1325-1326 (D.R.I. 1969). In this case, the ALJ credited Dr. Swanson's revised opinion over Dr. Puziss's opinion. His conclusion is rational.

When weighing the medical opinions, the ALJ noted Dr. Puziss reviewed Claimant's MRIs, but he did not cite to any objective evidence demonstrating Claimant's left shoulder condition was aggravated by the December 2020 fall. D&O at 34. The ALJ found Dr. Puziss's testimony that he did not note any embellishment or exaggeration on Claimant's part was inadequately explained, and the ALJ questioned why Dr. Puziss did not consider Dr. Swanson's findings of numerous "behavioral signs" indicating embellishment. *Id.*; *see* CX 125 at 556; *see also* CX 110 at 333. Moreover, due to the "serious issues with Claimant's credibility" and Dr. Puziss's reliance on Claimant's statements, the ALJ rationally found Dr. Puziss's conclusion that Claimant's left shoulder condition was aggravated by the December 26, 2020 fall is unpersuasive. D&O at 33-34.

Furthermore, the ALJ determined Dr. Swanson's opinion is "more thorough" than Dr. Puziss's opinion, as he "considered several behavioral signs and appeared to factor in Claimant's credibility in rendering his ultimate conclusion." D&O at 32. The ALJ also credited Dr. Swanson's statements regarding the lack of records supporting Claimant's

¹¹ Dr. Swanson noted eight "behavioral signs" demonstrating that some of Claimant's subjective symptoms did not have a physiologic explanation. EX 20 at 204. He opined Claimant's wheelchair use was unnecessary for his back pain and, even though Claimant indicated he could only sit upright for ten to fifteen minutes without changing position, he sat in the same chair without changing position for an hour during his visit. *Id.* Claimant admitted he exaggerated his symptoms when he saw Dr. Swanson but later testified that was not his intention during his exam. TR at 125-126, 128-129.

assertions that his left shoulder condition resolved prior to the December 2020 fall and that he fell at home on December 26, 2020, when the first reports of shoulder symptoms were at his February 19, 2021 emergency room visit. *Id.* at 32-33 n.33; CX 80 at 338; EXs 15, 24 at 325; TR at 113-114.

Consequently, the ALJ concluded Claimant failed to demonstrate by a preponderance of the evidence that he suffered a work-related aggravation of his preexisting left shoulder condition and is, therefore, not entitled to disability compensation or medical benefits for his left shoulder condition. D&O at 34. The ALJ's findings are rational and are supported by substantial evidence. *Abdelmegeed*, 913 F.3d at 923; *Ogawa*, 608 F.3d at 648; *Duhagon*, 169 F.3d at 618; *see also Carswell*, 999 F.3d at 27; *Mijangos*, 948 F.2d at 944-945. We affirm the denial of benefits for Claimant's shoulder condition.

Back Condition

Average Weekly Wage

The parties agree Claimant has a compensable back condition. Claimant contends the ALJ erred in calculating his AWW. At the hearing, Claimant urged the ALJ to find his pre-injury AWW was between \$747.13 and \$817.75, based on wages he could have earned at other jobs.¹² Cl.'s Post-Hearing Brief at 11-13. Employer urges affirmance of the ALJ's AWW finding. At the hearing, it asserted the correct AWW is \$342.82, if based on the highest gross wages of seven of its employees in Laborer Associate 1 positions, but no higher than \$503 if based on the highest earning Laborer Associate 1's weekly wage.¹³ Cl.'s Post-Hearing Brief at 11-13; Emp.'s Post-Hearing Brief at 8-9.

¹² Mr. Katzen, Claimant's vocational expert, identified six companies for possible pre-injury employment. CX 79. Northwest Chemical is in Woodland, Washington, and had multiple positions Claimant could have filled in the warehouse, in delivery, and in production, with the option to shift him to different positions on an as-needed basis. CX 79 at 235; TR at 25-26, 59. Ariel Trusses, in Vancouver, Washington, had "some job openings, but not weekly" for assisting in constructing trusses. EX 22 at 276; *see* CX 79 at 235. GLISS is a "felony-friendly" staffing company in southwest Washington with "more positions than they can fill" in warehouses, construction, or landscaping-type occupations. CX 79 at 235; TR at 28-29. Landscape Aesthetics is in Portland, Oregon, and employs multiple landscape laborers and maintenance workers. CX 79 at 236; TR at 30. MLK Worker Center is in Portland, Oregon, and had laborer jobs in construction or landscaping that did not require a background check. CX 79 at 236; TR at 31, 68-69.

¹³ Employer initially paid TTD benefits for Claimant's work-related lower back injury based on an AWW of \$172.53 but terminated payments and controverted the claim

Section 10 of the Act provides for the calculation of a claimant's AWW. The ALJ found the methods for calculating average annual earnings under Sections 10(a) and 10(b) of the Act could not be reasonably and fairly applied in Claimant's case and, therefore, calculated his wages under Section 10(c).¹⁴ 33 U.S.C. §910(a)-(c); see *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056-1057 (9th Cir. 1998); *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111, 118-119 (1999). Under Section 10(c), a claimant's AWW may be based on: (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury; (2) the earnings of other employees of the same or most similar class working in the same or most similar employment; or (3) the other employment of the injured employee if it reasonably represents the annual earning capacity of the injured employee. *Palacios v. Campbell Indus.*, 633 F.2d 840, 842 (9th Cir. 1980). The objective of Section 10(c) is to calculate a sum which reasonably represents the claimant's annual earning capacity at the time of the injury. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-822 (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982). An ALJ has broad discretion when applying Section 10(c). *James J. Flanagan*

after May 25, 2020. CXs 44, 64, 78. Employer later made additional TTD payments through the date of the hearing. EX 26.

¹⁴ Section 10(c) of the Act is a catch-all provision used to calculate a claimant's AWW when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. The ALJ properly found Section 10(a) inapplicable because Claimant worked far less than substantially the whole of the year immediately preceding the injury. D&O at 34; see 33 U.S.C. §910(a) (must use claimant's wages if he worked "substantially the whole of the year."); *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 976 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006) (the Ninth Circuit adopted a bright-line rule requiring that Section 10(a) be applied where the claimant works 75% of the available workdays in a year); *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 884 (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005) (same). Additionally, the ALJ permissibly concluded Section 10(b) is inapplicable despite Employer providing the wages of comparable workers classified as "Laborer Associate 1" because those workers also did not work substantially the whole of the year. D&O at 35; see 33 U.S.C. §910(b); see generally *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Employer asserted Claimant's AWW should be calculated according to Section 10(c). The ALJ agreed. *Id.*; see 33 U.S.C. §910(a)-(c); *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 606 (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 297-298 (5th Cir. 2000); *Gallagher*, 219 F.3d at 433; *Hall*, 139 F.3d at 1030. Although Claimant did not explicitly argue for the application of a particular subsection of Section 10, the ALJ correctly noted the nature of Claimant's calculations reflected a Section 10(c) application. D&O at 34 n.45; Cl.'s Post-Hearing Brief at 9-13; Emp.'s Post-Hearing Brief at 2, 9.

Stevedores, Inc. v. Gallagher, 219 F.3d 426, 433 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1030 (5th Cir. 1998); *see generally Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

Claimant asserts the ALJ improperly disregarded wage evidence of other jobs he could have obtained instead of working for Employer, or wage evidence of other jobs he could have obtained if, after working for Employer, he had been laid off and had sought other employment. Cl.'s Brief at 10-16; Cl.'s Reply at 2-6. The law does not support his argument.

In addressing AWW, the ALJ considered Claimant's earnings as a Laborer Associate 1,¹⁵ Employer's wage records for other employees classified as Laborer Associate 1, and Claimant's statements of what he could have earned at other work in the same time frame. D&O at 35-36. The ALJ rejected Claimant's proposed earnings calculation. *Id.* at 37-38. He found Claimant had the opportunity to work at Northwest Chemical but failed to show his willingness to work there because Employer's facility was closer to the halfway house in Portland that he needed to return to each night after work. *Id.* at 37; CX 116 at 20; TR at 141-142. Further, the ALJ found the evidence for the remaining proposed potential employers was insufficient to demonstrate Claimant had the opportunity, ability, or willingness to engage in those job options.¹⁶ D&O at 37-38.

The ALJ recognized Claimant's special circumstances: prior to working for Employer, he was unable to participate in the open labor market. D&O at 36, 38. He also acknowledged Claimant's identification of several pre-injury jobs he could have accepted, and Mr. Katzen's conclusion that those jobs were open to Claimant in 2020. *Id.* However, the ALJ accepted Claimant's admission that it was "not practical" for him to work at Northwest Chemical at that time due to his supervised release requirements. *Id.* at 37; *see* Cl.'s Post-Hearing Brief at 10. He further considered Claimant's testimony that he chose work with Employer because of its facility's proximity to the halfway house, and the opportunities at Northwest Chemical and Ariel Truss were "backup" jobs. *Id.*; *see* CX 116

¹⁵ From November 11, 2019, through January 22, 2020, a total of 10.4 weeks, Claimant's gross earnings were \$10,094.05, or \$967.92 per week.

¹⁶ As the ALJ correctly stated, other than actual earnings or the proxy earnings of others similarly situated, the definition of "earning capacity" for purposes of Section 10(c) includes the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." D&O at 35 (citing *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980)); *see Palacios*, 633 F.2d at 843.

at 20; TR at 141-142. For these reasons, the ALJ reasonably found Claimant failed to show he was willing to work at Northwest Chemical or Ariel Truss. *Id.* at 38. For the remaining jobs options Claimant mentioned, the ALJ rationally determined that “providing a list of potentially suitable alternate jobs is different than showing that Claimant had the ability, willingness, and opportunity to do these jobs.” *Id.*; *see Jackson*, 12 BRBS at 416; *see also Palacios*, 633 F.2d at 843. He found there is no testimony or evidence from Claimant about his willingness to take these jobs, and any evidence that they were open and available to Claimant before his injury is “speculative” – the mere existence of these potential job openings did not mean the employers were hiring or Claimant had a likely ability or willingness to work there. *Id.*

The ALJ’s finding that Claimant failed to show he was able, willing, and had the opportunity to engage in alternate, higher-paying, pre-injury work, to be used to compute his AWW, is rational and supported by substantial evidence. *Jackson*, 12 BRBS at 416-417; *Palacios*, 633 F.2d at 843. Therefore, we reject Claimant’s allegation of error and affirm the ALJ’s calculation of Claimant’s AWW of \$503.48, based on actual wages, as rational, supported by substantial evidence, and within the broad discretion afforded under Section 10(c). *Gallagher*, 219 F.3d at 433; *Hall*, 139 F.3d at 1030. Instead, given Claimant’s consistent level of work during his time with Employer, the ALJ concluded the “best and most realistic reflection” of Claimant’s wage-earning potential at the time of his injury is the wages for the highest earning Laborer Associate 1, resulting in an AWW of \$503.48. *Id.* at 39. The ALJ properly considered both Claimant’s actual earnings in his employment at the time of his injury, as well as the earnings of other employees in the same or most similar class working in the same or most similar employment. D&O at 34-36; *see* 33 U.S.C. § 910(c); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 1165 (9th Cir. 2010); *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 1102-1103 (9th Cir. 2006); *Nat’l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1292-1293 (9th Cir. 1979).

Suitable Alternate Employment

The parties stipulated Claimant cannot return to his usual Laborer Associate 1 position. Once a claimant establishes he cannot return to his usual work, as in this case, the burden shifts to the employer to demonstrate the availability of SAE. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-969 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980) (the employer must point to specific jobs the claimant can perform). If it does so, the claimant’s disability is no longer presumed to be total.

To be suitable, alternate employment must be available work within the geographic area where the employee resides, which, by virtue of his age, education, work experience, and physical and mental restrictions, he is capable of performing. In demonstrating the availability of SAE, the employer need not obtain a job for the claimant, but it must establish the availability of realistic job opportunities which he could secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990); *see Wilson v. Crowley Maritime*, 30 BRBS 199, 203-204 (1996). Further, it is not sufficient for the employer to identify general work a claimant may be physically able to perform; rather, it must show specific jobs available to the claimant which he can perform. *Hairston*, 849 F.2d at 1196. The credible testimony of a vocational expert is sufficient to meet the burden of showing the availability of SAE. *Minick v. Levin Metals Corp.*, 14 BRBS 893, 896 (1982).

The record contains the qualifications, reports, and testimony of Claimant's vocational expert, Roy Katzen, and Employer's vocational expert, Lisa Broten.¹⁷ D&O at 17-18, 21-22, 42; *see* CX 79; EXs 21, 22; TR at 23-24, 34-47, 175-177, 189-198, 214-217. Ms. Broten identified multiple job openings with five potential employers: Opti-Staffing, Acara Solutions, Express Personnel, Aerotek Assembly Production (Aerotek), and Olympic Security.¹⁸ EXs 21, 22. Opti-Staffing and Olympic Security jobs were available in Vancouver, Washington, Acara Solutions had availabilities in Tigard and Tualatin,

¹⁷ The ALJ found the well-qualified vocational experts had identified jobs in Portland, Oregon, as well as the surrounding communities, up to fifty miles from Claimant's home in Woodland, Washington. D&O at 41-42; *see* TR at 34, 198. In doing so, he noted Claimant lived in Portland, Oregon, at the halfway house at the time of his injury, and his move to Woodland, Washington, following his injury was not sufficient to lead to the conclusion that he had relocated to a "new community." D&O at 42 n.49. He rejected Claimant's assertion that the identified jobs must be in the Woodland community instead of in Portland as he found they were both in the "local community" for purposes of establishing a relevant job market." *Id.*

¹⁸ Mr. Katzen contacted four of the five potential post-injury alternate employers in Ms. Broten's labor market survey, and he also testified regarding the suitability of jobs with all five employers. TR at 23-24, 34-57. However, Mr. Katzen's report contained only jobs options for pre-injury alternate employment. CX 79.

Oregon, Express Personnel had jobs available in Gladstone, Milwaukie, and Gresham, Oregon, and Aerotek had openings in Beaverton, Oregon.¹⁹ *Id.*

The ALJ credited Mr. Katzen's testimony that the Express Personnel job was not reasonably available to Claimant because it would require him to commute seventy-five minutes each way in a car that gets only twenty miles per gallon to earn \$17 per hour. D&O at 44 n.51, 45; *see* TR at 196-198, 215-217. He also determined the commute of seventy minutes to the Aerotek job is unreasonable given the wages would be only \$18 per hour. D&O at 45; *see* TR at 37, 80-81. Therefore, the ALJ concluded the cost and time of commuting to these jobs, relative to the level of earnings, rendered these jobs not reasonably available to Claimant. D&O at 45. The ALJ also rejected the jobs at Opti-Staffing and Acara Solutions as Claimant's criminal history would have a negative impact or disqualify him from them. *Id.* at 43-44. He further found the evidence unclear as to whether Claimant's criminal history would affect his ability to obtain the position at Olympic Security, but, in any event, found one single position is insufficient to establish the availability of SAE. *Id.* at 45-46. Generally, the ALJ credited Mr. Katzen's opinion over Ms. Broten's because he found her opinion was "vague" and " cursory."²⁰ *Id.*; *see* *Ogawa*, 608 F.3d at 650; *Duhagon*, 169 F.3d at 618. Consequently, the ALJ rejected all the jobs identified as available SAE and awarded Claimant TTD benefits.²¹ D&O at 47.

In its cross-appeal, Employer contends the ALJ erred in finding it did not establish the availability of SAE and, consequently, in finding Claimant is totally disabled by his work-related back injury. Emp.'s Brief at 6-15; Emp.'s Reply at 2-5. First, Employer argues the ALJ erred by measuring Claimant's commuting distance to alternate

¹⁹ Because no party disputes the job duties or their suitability to Claimant's physical and mental abilities, we need not address the job specifics.

²⁰ The ALJ determined Ms. Broten's "general statement" about assembly work is "not specific enough" to support a finding that the Express Personnel jobs were within a reasonable commuting distance. D&O at 45. He also found Ms. Broten's brief statement regarding the impact of Claimant's criminal history on his hiring prospects at Olympic Security is insufficient to meet Employer's burden. *Id.* at 45-46. Further, he discredited Ms. Broten's statement about the multiple available jobs at Olympic Security as unsupported and found she did not testify regarding the general availability of similar jobs. *Id.* at 46-47.

²¹ As Employer does not challenge the ALJ's reasons for finding SAE is unavailable to Claimant at Opti-Staffing and Acara Solutions, we affirm the ALJ's rejection of those jobs. *Scalio*, 41 BRBS at 58; D&O at 43-44.

employment at Express Personnel and Aerotek from Woodland, Washington, where Claimant relocated after his injury, rather than from Portland, Oregon. Emp.'s Brief at 7; Emp.'s Reply at 2. We disagree with this contention of error.

The ALJ is afforded considerable discretion in determining the relevant labor market in evaluating whether an employer has established the availability of SAE. *Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 596 (1st Cir. 1997); *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 382-384 (4th Cir. 1994).²² The proper community or geographic area in which an employer must identify suitable jobs is based on the facts of each case. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149, 153 (2003); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23, 25-26 (2001). The relevant community is usually where the claimant resides currently or at the time of injury. *Edwards*, 999 F.2d at 1375; *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98, 101 (2005); *Wilson*, 30 BRBS at 203-204.

In this case, the ALJ properly considered Mr. Katzen's testimony that Woodland, Washington, is north of Portland, and while it would not be considered a suburb of Portland, "it is a city within, oftentimes, a reasonable distance, depending on the occupations we are looking at." D&O at 41; TR at 34. He also credited Mr. Katzen's statement that, as a vocational expert, he looks at jobs within a forty-to-fifty-mile commuting distance of a claimant's residence. *Id.* The ALJ also considered Ms. Broten's testimony that Woodland is within twenty-nine miles of Portland, and all the jobs she identified in her labor market survey are within fifty miles of Claimant's residence. D&O at 41; TR at 198. The ALJ, therefore, rationally found the vocational experts "properly focused" on Portland, and the surrounding communities in Oregon, and acknowledged all the jobs identified within fifty miles of Claimant's home are within a "reasonable distance" to be considered the same local community for purposes of establishing the relevant job market. D&O at 41-42; *see Wood*, 112 F.3d at 596; *See* 36 F.3d at 382-384; *Beumer*, 39 BRBS at 101; *Wilson*, 30 BRBS at 203-204. Accordingly, the ALJ permissibly measured Claimant's commuting distance for alternate employment at Express Personnel and Aerotek from Woodland, Washington, rather than from Portland, Oregon.

²² In *See*, the court stated the ALJ's determination of the relevant labor market should include consideration of such factors as the claimant's residence at the time of his filing for disability benefits, his motivation for relocation 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 job opportunities in the new community as opposed to those near his former residence, and the degree of undue prejudice to the employer in proving available SAE in the claimant's new community. *See*, 36 F.3d at 383.

Employer further asserts the ALJ erred in finding the jobs at Express Personnel and Aerotek are not suitable based on the commute distance, time, and cost relative to the compensation Claimant would get because it is unsupported by law and substantial evidence. Emp.'s Brief at 6-12; Emp. Reply's at 2-5. Claimant asserts the ALJ's determination was correct, as the cost of a "low-paying" job is a relevant consideration. Cl.'s Response Brief at 5-8.

An ALJ must consider whether an extended commuting distance renders a SAE option unavailable in view of the facts and circumstances of the case. Courts and the Board have held that both economic considerations and physical limitations can be considered in determining SAE. A proffered job that is inaccessible to a claimant because he is unable to handle a long commute -- whether because of economic or physical limitations -- is unavailable. *See, e.g., B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129, 131 n.5 (2009) (the lack of an automobile and the inability to "reasonably obtain" other transportation to a proposed job site were proper economic considerations in determining whether the position "constituted suitable alternate employment"); *Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 1005 (5th Cir. 1978) (because "degree of disability cannot be measured by physical condition alone," other factors including "the availability of the work" must be considered and "an individual may be totally disabled for purposes of the Act when physically capable of performing certain work but otherwise unable to secure that particular kind of work."); *Sampson v. FMC Corp., Marine & Rail Equip. Div.*, 10 BRBS 929, 933 (1979) (job was unavailable because even though Claimant had the physical ability to perform the job itself, he could not physically handle the lengthy commute).

Mr. Katzen determined all the Express Personnel positions were forty to forty-five miles away from Claimant's residence. TR at 43-44, 197. Although they were within the relevant community radius of Claimant's residence, Mr. Katzen stated whether the Express Personnel assembly positions can be considered economically available depends on the level of compensation. TR at 37, 43-44. He testified that, given the commute time and distance, Claimant would need to be compensated more than minimum wage, and even \$3 or \$4 above minimum wage "would be difficult to justify." *Id.* at 38. Mr. Katzen estimated morning travel from Woodland to Portland would take forty-five minutes to an hour, and the return trip would probably take longer during rush hour. *Id.* at 20, 36-37. He also stated that to get to many of the cities listed in Ms. Broten's labor market survey, Claimant would first have to drive through Portland, and if Claimant needed to travel to Tualatin, Oregon City, Beaverton, or Hillsboro, he would need up to an hour and ten minutes to an hour and a half for travel, one way. TR at 35-37.

Based on the above, the ALJ permissibly credited Mr. Katzen's testimony regarding the significance of the commute distance and time for each position at Express Personnel

and Aerotek, as he found it “more convincing” than Employer’s arguments. D&O at 44; *see Ogawa*, 608 F.3d at 650; *Duhagon*, 169 F.3d at 618; *Holloway*, 43 BRBS at 131; *see also Marshall*, 577 F.2d at 1005; *Sampson*, 10 BRBS at 933. The ALJ also considered Ms. Broten’s testimony that the assembly job at Express Personnel is generally done in shift work, so Claimant might not have to travel in rush hour traffic,²³ but some shifts are 8:00a.m. to 5:00p.m. D&O at 44-45; TR at 196-197. Further, he considered Ms. Broten’s testimony that the Gresham positions for Express Personnel are thirty-seven miles away, and when she tested the commute time “midday” rather than during rush hour, it took thirty-eight minutes, but she later admitted she calculated the distance from Woodland, Washington, not Claimant’s residence, which is five miles out of town. D&O at 44; TR at 198, 215. The ALJ permissibly found Ms. Broten’s opinion insufficient to support a finding that the Express Personnel and Aerotek jobs were within a viable commuting distance “given the level of compensation.” D&O at 45; *see Ogawa*, 608 F.3d at 650; *Duhagon*, 169 F.3d at 618; *Holloway*, 43 BRBS at 131; *see also Marshall*, 577 F.2d at 1005; *Sampson*, 10 BRBS at 933.

Exercising his broad discretion, the ALJ permissibly credited Mr. Katzen’s testimony that it is not economically feasible to commute over an hour each way to a job at Express Personnel paying \$17 per hour. D&O at 44-45; EX 21 at 258; TR at 36-38. For the same reason, he also reasonably found the seventy minute commute each way made the Aerotek job unavailable given the \$18 per hour wage. D&O at 45. The ALJ’s conclusion that the identified jobs at Express Personnel and Aerotek are not available is rational, supported by substantial evidence and in accordance with law. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001) (the ALJ’s factual determination that the employer did not meet its burden of establishing SAE was reasonable because the vocational expert failed to “adequately [take] into consideration all of the circumstances that affected [the claimant’s] employability”)); *see Ogawa*, 608 F.3d at 650; *Duhagon*, 169 F.3d at 618; *Cordero*, 580 F.2d at 1335; *Beumer*, 39 BRBS at 101; *Wilson*, 30 BRBS at 203-204. We therefore affirm the ALJ’s finding that these positions do not satisfy employer’s burden of establishing the availability of SAE.

Our dissenting colleague argues that commuting costs initially might have been an acceptable factor in determining the relevant community in which to look for work, they are irrelevant in determining whether a job within that community can be considered SAE. In her view, “age, education, work experience, and physical and mental restrictions” are

²³ The ALJ noted that Ms. Broten, in her discussion of the Acara position in Tigard, Oregon, also agreed driving an hour and fifteen minutes for a minimum wage job in a car that got twenty miles per gallon is not reasonable alternate employment. D&O at 44; TR at 217.

the only factors to consider when subsequently determining SAE, slip op. at 21, because the “standard does not take into consideration the cost of a commute relative to the wages offered.” *Id.* We disagree for at least two fundamental reasons.

First, nothing in the plain language of the statute or regulations mandates such a rigid analytical framework in evaluating SAE. Indeed, the Ninth Circuit, which holds appellate jurisdiction over this matter, has stressed the opposite is true, holding that, in evaluating whether a job is economically available, “the ALJ is expected to consider the *record as a whole*, including all witness testimony and each medical report, before entering findings[.]” *Ogawa*, 608 F.3d at 650 (emphasis added) (citations omitted).

Second, “[d]isability under the LHWCA . . . is in essence an economic concept,” *Metro. Stevedore v. Rambo*, 515 U.S. 291, 297 (1995), that “cannot be measured by medical condition alone.” *Nardella v. Campbell Mach., Inc.* 525 F.2d 46, 49 (9th Cir. 1979). It follows that while physical ability is the starting point for determining SAE, job accessibility as conditioned by economic reality comprises another factor to consider in determining whether a job is reasonably available, as our precedent confirms. *See, e.g., Holloway*, 43 BRBS at 131, n.5.

Holloway (which our colleague does not even attempt to distinguish) is particularly instructive, given its similarities. In both cases, economic factors going beyond physical limitations are relevant to SAE: in *Holloway*, the lack of a car or the means to secure other transportation were relevant considerations, while in this case, the time requirements and costs of commuting are similarly relevant. The ALJ’s decision to accept an expert’s testimony that the costs of commuting would make these jobs not just undesirable but economically unavailable is well-within the ALJ’s wide discretion as a factfinder. *Id.* Following the Ninth-Circuit’s direction in *Ogawa*, the ALJ considered the totality of the relevant circumstances in this case in determining SAE. And because substantial evidence supports his conclusions, we affirm them.²⁴

²⁴ Our dissenting colleague relies on three cases to conclude commuting costs, as a matter of law, can never be part of an ALJ’s consideration of SAE. But none of the three say anything of the sort. While our colleague claims *Turner* and *Rhine* establish an SAE determination “should turn on the answer to two questions,” both cases use broad language to determine whether a job is economically available; they do not, as our colleague seems to suggest, contain an exhaustive list of the only economic factors an ALJ must consider. *Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir. 1981) (for a job to be considered economically available, it must be one the claimant “could realistically and likely secure”); *Rhine*, 596 F.3d at 1166 (SAE turns on the general question of the “economic availability of particular jobs in the market.”). Our colleague’s reliance on *Warren*, 21 BRBS 149, 154

Employer also argues the ALJ erred in rejecting the job at Olympic Security because of Claimant's criminal history²⁵ and because one available job is insufficient to meet its burden. Emp.'s Brief at 13-15; Emp.'s Reply at 5. Claimant asserts the ALJ's findings are supported by substantial evidence. Cl. Response Brief at 8-10.

An ALJ may reject positions identified in a labor market survey if they fail to account for all relevant restrictions the ALJ credits or if it is unclear from the evidence whether a job is suitable. *See Carlisle v. Bunge Corp.*, 33 BRBS 133, 140 (1999), *aff'd*, 227 F.3d 934, 938 (7th Cir. 2000); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). A criminal conviction, like a limitation in education or literacy, which was incurred before a claimant's injury and disqualifies him from obtaining a position, may render the position unavailable. *See Hairston*, 849 F.2d at 1196 (a claimant's criminal record can prevent a bank guard position from being "realistically available" to him, as he could do nothing to overcome the disqualifying effect of his criminal record); *Piunti v. I.T.O. Corp. of Baltimore*, 23 BRBS 367, 370 (1990) (a claimant's prior felony conviction made submitted security guard positions unavailable).

Mr. Katzen was not able to speak with Olympic Security, so consequently he did not know the impact of Claimant's criminal history on this job's availability. TR at 46. Ms. Broten stated in her report that Claimant's criminal history "would not matter" at Olympic Security. EX 22 at 281. The ALJ indicated her statement is "too attenuated and unsupported by testimony or any details about the information she provided to Olympic Security" regarding Claimant's criminal background. D&O at 45-46. Absent any

(1988), is equally misplaced. In *Warren*, the Board simply held an ALJ inappropriately credited a vocational assessment because it did not "constitute an opinion as to whether claimant could engage in alternative employment but rather constitutes a medical and psychological evaluation which is beyond the vocational counselor's expertise." 21 BRBS at 154. In this case, no one suggests the vocational experts testified on matters beyond their ken. And the ALJ thus was free to render a finding on whether the costs of the commute made the jobs economically unavailable, not just undesirable. *Holloway*, 43 BRBS at 131. Other than mistakenly arguing the ALJ did not have the authority to consider commuting costs in the first place, neither Employer nor our colleague point to any fault in the ALJ's determination.

²⁵ Employer does not challenge the ALJ's rejection of the Electronic Assembler job at Opti-Staffing or the Electrical Repair/Assembler and Electronic Assembler jobs at Acara Solutions for the same reason, as the evidence establishes the respective recruiters stated Claimant's criminal convictions would be a "negative factor" and disqualify him or likely rule him out. D&O at 43-44; TR at 42-43.

definitive evidence to the contrary, the ALJ permissibly found Claimant's criminal history is an impediment to his hiring at Olympic Security, and Ms. Broten's statement is insufficient to meet Employer's burden of establishing the job was realistically available to Claimant. D&O at 45-46; *Hairston*, 849 F.2d at 1196; *Piunti*, 23 BRBS at 370; see *Ogawa*, 608 F.3d at 650; *Duhagon*, 169 F.3d at 618; *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991) (an employer must demonstrate realistic job opportunities which the claimant is capable of performing and "could compete for and realistically and likely secure."); *Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981) (same); *Cordero*, 580 F.2d at 1335.

Even had the ALJ concluded Claimant's criminal history would not preclude his securing the job with Olympic Security, he found that one available position is insufficient to satisfy Employer's burden and demonstrate the availability of SAE. D&O at 46 (citing *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988) (finding one job opening is insufficient)); see *Brooks v. Director, OWCP*, 2 F.3d 64, 65 (4th Cir. 1993); *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246, 251-252 (1990). He reasonably concluded that, while the Ninth Circuit has held the showing of one specific job opening coupled with evidence of the general availability of similar jobs supports a finding that an employer has met its burden, in this case there is no credible or persuasive evidence that other jobs similar to the one at Olympic Security were generally available.²⁶ D&O at 46 (citing *Berezin v. Cascade General, Inc.*, 34 BRBS 163, 166 (2000); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179, 181-182 (1998) (the employer offered evidence of only one available position without evidence of "the general availability of jobs which claimant could perform nor evidence of a significant likelihood of claimant's obtaining the specific position identified" and did not meet its burden of establishing the availability of SAE)). In this case, the ALJ also reasonably found that while Claimant likely has the skills to perform the Olympic Security entry-level position, there is insufficient evidence to establish he is highly skilled for this position or that the number of workers with suitable qualifications in the community is small. D&O at 47; see *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991) (an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances such as where the

²⁶ In response to the question from Employer's counsel "is now a good time to be seeking a job in these kinds of fields?," Ms. Broten answered: "Yes, it is. There's a myriad of jobs. There's not enough workers to get those jobs or take those jobs." D&O 46; TR at 202. The ALJ noted Employer's counsel did not specify the "kinds of fields" he was referring to, other than to "all of the jobs [Ms. Broten] identified." D&O at 46. As he found Ms. Broten's testimony to be less credible than Mr. Katzen's because it was vague and cursory, the ALJ did not credit her testimony regarding the availability of a "myriad of jobs." D&O at 46; EX 22 at 281.

employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small); *see also Hinton*, 243 F.3d at 225; *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 905 (5th Cir. 1999). Therefore, we affirm the ALJ's SAE findings as rational and supported by substantial evidence. *Abdelmegeed*, 913 F.3d at 923; *Ogawa*, 608 F.3d at 648; *Duhagon*, 169 F.3d at 618; *see also Carswell*, 999 F.3d at 27; *Mijangos*, 948 F.2d at 944-945.

As Employer has not satisfied its burden of establishing the availability of SAE, we affirm the ALJ's finding that Claimant is entitled to TTD benefits for his back injury from January 22, 2020 onwards, based on an AWW of \$503.48. *Johnson v. Director, OWCP*, 911 F.2d 247, 250 (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 97 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Accordingly, we affirm the ALJ's Amended Decision and Order Granting in Part and Denying in Part Compensation and Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues on the issues of Claimant's credibility, the non-compensability of Claimant's shoulder injury, the award of reasonable and necessary medical treatment for Claimant's lower back injury, the calculation of Claimant's average weekly wage, the appropriate community and commuting distance for assessing suitable alternate employment, the unsuitability of the Opti-Staffing job and the Acara Solutions job, and the suitability of the Express Personnel and Aerotek jobs based on location and on Claimant's age, education, work experience, and physical and mental restrictions. I respectfully dissent from their decision holding the ALJ did not err in rejecting the jobs at

Express Personnel and Aerotek as unsuitable based on the commute time and cost relative to the wages Claimant would earn.

After a claimant establishes a prima facie case of total disability based on an inability to return to usual work, if the employer wants to show the claimant is partially disabled, it bears the burden of identifying available suitable alternate employment. *Castro*, 401 F.3d at 968-969; *Hairston*, 849 F.2d at 1196; *Bumble Bee*, 629 F.2d at 1329. As the majority notes, “[t]o be suitable, alternate employment must be available work within the geographic area where the employee resides, which, by virtue of his age, education, work experience, and physical and mental restrictions, he is capable of performing.” *Edwards*, 999 F.2d at 1375; *Stevens*, 909 F.2d at 1259. The standard does not take into consideration the cost of a commute relative to the wages offered.

In this case, the ALJ rejected jobs he deemed suitable for no reason other than the cost of the commute was not worth Claimant’s efforts when compared to the wages offered, and he awarded Claimant temporary total disability benefits. As Employer correctly argues, there is no support for an ALJ to reject suitable jobs because the pay is purportedly insufficient to justify the commute. Emp’s Brief at 8-9.

First, Claimant’s average weekly wage is \$503.48. D&O at 39. In January 2020, the Express Personnel jobs paid \$15 per hour, and at the time of the hearing they paid \$16 to \$18 per hour; in January 2020, the Aerotek jobs paid \$16 per hour, and at the time of the hearing they paid \$18 per hour.²⁷ EX 21 at 256, 259; TR at 33, 179-180, 188-189. Even based on the lowest hourly wage (\$15), Claimant, working full time in one of these positions, would have earned more than his pre-injury average weekly wage.

More importantly, the purpose of a labor market survey is not to find a job for the claimant. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir.1988); *Turner*, 661 F.2d at 1042–1043; *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 480 (1979). It is to assess whether suitable work is available for which the claimant could compete realistically. *See Edwards*, 999 F.2d at 1375; *Stevens*, 909 F.2d at 1259. When considering suitable alternate employment, the focus is on a claimant’s

²⁷ Temporary partial disability benefits are “two-thirds of the difference between the injured employee’s average weekly wages before the injury and his wage-earning capacity after the injury.” 33 U.S.C. §908(e). The wages offered by suitable alternate employment are factored into the resulting compensation rate the employer must pay.

To be clear, it is not in an employer’s best interest to proffer low paying jobs if a claimant has a high average weekly wage because the employer will still be liable for 2/3 of the difference between the two, but a low paying job may be what the market bears out.

capacity to perform a job, not a job offer, not actual hiring, not pay rate, not opportunity costs, and not commuting costs.²⁸ Rather, once the ALJ determines the relevant community in which to look for work, a suitable alternate employment determination should turn on the answer to two questions:

(1) Considering claimant’s age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?”

Turner, 661 F.2d at 1042–1043; *see also Rhine*, 596 F.3d at 1164-1166 (the availability of suitable alternate employment is determined by two criteria: 1) the claimant’s physical abilities and 2) the economic availability of particular jobs in the relevant market.)

Furthermore, in *Warren*, the Board remanded the case to the ALJ to reconsider the issue of suitable alternate employment in part because

[t]he [ALJ] also erred in crediting claimant’s vocational counselor’s report which stated that until claimant’s basic needs such as survival and physical and emotional well-being were met and her physical pain alleviated discussion of vocational possibilities must be postponed, as the counselor

²⁸ The majority relies on a string of cases for the proposition that the vocational expert must take into consideration “all” of the circumstances that affect a claimant’s employability, but lest one think that all means “all,” it clearly would not include considerations such as “basic needs such as survival and physical and emotional well-being,” *Warren v. Nat’l Steel & Shipbuilding Co.*, 21 BRBS 149, 154 (1988), the cost of childcare relative to the wages offered, a preference to care for an elderly parent rather than work, etc. In fact,

Congress intended that injured workers return to productive enterprises as soon as possible following an injury, even if low paying or part-time, as part of their rehabilitation program...Any proven ability to perform such [work] establishes the absence of total disability, since disability is defined by the Act in terms of inability to earn wages.

Dove v. Southwest Marine of San Francisco, Inc., 18 BRBS 139, 141 n.1 (1986) (citing 33 U.S.C. §§902(10), 908) (emphasis added).

failed to provide a vocational assessment and instead rendered an opinion beyond her expertise.

Warren, 21 BRBS at 154.

In this case, the ALJ specifically credited both vocational counselors' opinions that jobs within forty to fifty miles of Claimant's residence are "within a reasonable distance to be considered the same 'local community' for purposes of establishing a relevant job market."²⁹ D&O at 42. He also accepted that Express Personnel had multiple available positions within forty to fifty miles of Claimant's residence. *Id.* at 44; TR at 43-44. Thus, he found the Express Personnel jobs fell within his reasonable commuting distance. D&O at 42. In fact, the ALJ specifically found the jobs at Express Personnel were suitable but for the cost of the commute. *Id.* at 45.

Following the reasoning in *Warren* and reiterating that an actual job offer is not required to satisfy Employer's burden, Mr. Katzen and Ms. Broten exceeded their area of vocational expertise by ruling out job opportunities within Claimant's age, education, work experience, and physical and mental restrictions as well as a reasonable commuting distance because it would cost too much to make that commute. As such, the ALJ's reliance on that testimony is not supported by substantial evidence or in accordance with applicable law. Therefore, I would reverse the ALJ's finding that the commute cost renders the Express Personnel jobs unsuitable.

Because the Express Personnel jobs satisfy Employer's burden, and the ALJ stated that Claimant did not conduct a diligent job search,³⁰ Claimant is entitled to, at most, temporary partial disability benefits based on the wages associated with the available suitable alternate employment.³¹ By eliminating suitable jobs because the wages they paid

²⁹ The ALJ found Claimant has no driving restrictions and no doctor limited Claimant's ability to sit in a car for a particular length of time. D&O p. 42. Those findings are not on appeal.

³⁰ The ALJ stated, "if Employer had shown suitable alternate employment, I would have found that Claimant has not engaged in a diligent search." D&O at 47 n.52.

³¹ Indeed, a claimant could refuse to work at all and still receive temporary partial disability benefits based on the wages of suitable alternate employment. Therefore, the suitable alternate employment wage evidence can be a proxy for determining the claimant's post-injury wage-earning capacity. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149, 154 (2003).

purportedly were insufficient when compared to the cost of the commute, the ALJ removed Claimant's obligations under the law and erroneously awarded him temporary total disability benefits.

Finally, with respect to the Aerotek positions, the ALJ clearly found they were within Claimant's restrictions and limitations as well:

If the assembly production job with Aerotek Assembly and the assembly positions with Express Personnel were within a reasonable commuting distance, I would have found these jobs within Claimant's abilities and available to Claimant as of the date of Ms. Broten's report, April 18, 2022.

D&O at 47 n.52.

However, he rejected the Aerotek jobs because "the commuting distance of an hour and ten minutes is again unreasonable given the level of compensation." D&O at 45. As commuting cost when compared to the level of compensation offered is not a proper consideration, I would reverse the ALJ's finding that the Aerotek positions do not qualify as suitable alternate employment. Consequently, based on the ALJ's calculations in footnote 52 of his Amended Decision and Order, Claimant is not entitled to wage loss benefits as of April 18, 2022.

Because I would reverse the ALJ's finding that the Express Personnel positions and the Aerotek positions do not qualify as suitable alternate employment, the question of whether a single suitable job is sufficient would be moot.

MELISSA LIN JONES
Administrative Appeals Judge