SECTION 8 – DISABILITY

INTRODUCTION

Section 8 provides the standards used in determining claimant's entitlement to compensation for disability under the Act. Disability is defined in Section 2(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," except in cases involving awards to retirees with occupational diseases compensated under Section 8(c)(23), in which case it means "permanent impairment." 33 U.S.C. §902(10).

The 1984 Amendments expanded the definition to include permanent impairment and added Section 8(c)(23) in response to Board decisions holding claimants who were voluntarily retired when their occupational diseases became manifest were not entitled to benefits as they had withdrawn from the labor market and had no loss in wage-earning capacity; such employees thus had no disability under the pre-1984 definition of Section 2(10). *See Jones v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 347 (1984); *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984); *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984). The 1984 Amendments overruled these decisions, adding Sections 8(c)(23), 10(d)(2) and 10(i) to provide an average weekly wage and benefits based on permanent impairment to these individuals.

Under the general definition, disability under the Act is an economic concept based on a medical foundation. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The nature of a disability is determined solely by medical evidence, *see, e.g., SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996), while the extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *E. S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). Thus, extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Mach., Inc.*, 525 F. 2d 46, 3 BRBS 78 (9th Cir. 1975). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

An employment injury need not be the sole cause of a disability in order for it to be compensable. Where a work-related injury or condition aggravates, accelerates or combines with a pre-existing condition, the entire resulting disability is compensable. *See, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS

52(CRT) (4th Cir. 1982); *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 13 BRBS 182(CRT) (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The "aggravation rule" is discussed in Section 2(2) of the desk book.

Where claimant sustains a non work-related injury following a work-related injury, employer is relieved of liability for disability due to this intervening cause. *See* Section 2(2) of the desk book. However, employer remains liable for any disability thereafter which is related to the work injury. *See Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981); *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288 (1979). In *Drake*, claimant had a work-related lung impairment resulting in partial disability when he had a non work-related motorcycle accident. Holding that the administrative law judge erred in terminating all compensation during claimant's convalescence from the accident, the Board stated that, as claimant is entitled to compensation "during the continuance of such disability" and there was no evidence that the loss of earning capacity due to his lung condition "magically disappeared" when he had the motorcycle accident, he was entitled to compensation for the extent of his lost earning capacity during convalescence and afterward. *See Bay Ridge Operating Co. v. Lowe*, 14 F.Supp. 280 (S.D.N.Y. 1936) (employer was not entitled to discontinue payments where the employee was committed to an asylum due to conditions arising after his employment.).

Rejecting the argument that an employee with a lung condition who was transferred from a job which involved additional, potentially injurious, exposures to a different, lower rated job where employer continued to pay him the same wages did not have a disability, the First Circuit stated that in order to have a disability under Section 2(10), "an employee need not be in pain, nor is he required, after injury, to continue in employment which is medically contra-indicated until his condition and pain render it impossible for him to work at all." *White*, 584 F.2d at 575, 8 BRBS at 823. *See also Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992) (mere diagnosis of an occupational disease does not establish a disability).

As disability is both an economic and a medical concept, an award of disability benefits may be modified under Section 22 based on a change in either claimant's physical or economic condition. *Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). *See* cases discussed in Section 22. Thus, where claimant's wage-earning capacity increases over time, employer may obtain modification based on evidence that claimant no longer has a loss in earning capacity. *Id. See also* Section 8(c)(21), (h), *De Minimis* Awards, *infra*.

The statute provides that compensation for permanent and temporary total disability under Section 8(a), (b), and for temporary partial and permanent partial disability under Section 8(e), (c)(21), (c)(23) is paid "during the continuance of" such disability. Thus, an award

of benefits continuing beyond the date of the hearing and into the future may be made. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Questions involving the nature and extent of disability are limited to the type of benefits sought by claimant or contested by employer before the hearing. Thus, the Board has held that where employer was making voluntary payments for temporary total disability and the nature and extent of disability were not raised as issues prior to or at the hearing, the administrative law judge erred in deciding that claimant's temporary total disability had ended. Although this issue may have been raised in employer's post-hearing brief, the administrative law judge should not have decided it without giving the parties prior notice and an opportunity to present evidence and argument. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). *See* 20 C.F.R. §702.336.

As workers' compensation proceedings are informal, claimant is allowed "considerable liberality" in amending a claim. *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n. 7 (1982). *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Where claimant amends his claim to one for permanent disability at the hearing, however, employer is entitled to an opportunity to defend this claim. *Dewberry v. S. Stevedoring Corp.*, 9 BRBS 431 (1978). Accordingly, the administrative law judge may not award permanent total disability unless the employer knew it was sought. *Collins v. Todd Shipyards Corp*., 5 BRBS 334 (1977); *Swan v. George Hyman Constr. Co*., 3 BRBS 490 (1976). If only temporary disability was at issue, the administrative law judge may not make an award for permanent disability. *Ferrell v. Jacksonville Shipyards, Inc.*, 12 BRBS 566 (1980). Where the employee only sought permanent partial and temporary total disability before the administrative law judge, and the administrative law judge did not address permanent total disability, the Board declined to consider claimant's arguments on appeal regarding permanent total disability. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

However, an administrative law judge may award permanent total disability where permanent partial disability and temporary total disability are raised. *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983) (no significant difference in employer's burden of proof between permanent total disability and temporary total disability); *Walker v. AAF Exch. Serv.*, 5 BRBS 500 (1977) (if employee asked for temporary total disability but employer was prepared to defend permanent total disability, administrative law judge may award latter; no significant difference in burden of proof). *See also Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509 (1979) (remand where employer knew of temporary total disability claim but not temporary partial disability claim); *Seals v. Ingalls Shipbuilding, Div. of Litton Sys., Inc.*, 8 BRBS 182 (1978) (remand where claimant sought temporary total disability but administrative law judge awarded permanent total disability); *Sams v. D.C. Transit Sys., Inc.*, 9 BRBS 741 (1978) (remand where claimant sought temporary partial disability but administrative law judge awarded temporary total disability).

A claim for total disability implicitly includes a claim for a lesser degree of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985). Hence, an administrative law judge may award permanent partial disability if only permanent total disability was at issue. *Heckstall v. Gen. Port Serv. Corp.*, 12 BRBS 298 (1980).

The employee has the burden of establishing the nature and extent of disability. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). The Section 20(a) presumption does not apply to these issues. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Gacki*, 33 BRBS 127; *Jones v. Midwest Mach. Movers*, 15 BRBS 70 (1982) (Ramsey, dissenting on other grounds); *Carver v. Potomac Elec. Power Co.*, 14 BRBS 824 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, if there is substantial evidence to support the administrative law judge's finding on the issue, his mentioning the presumption is harmless error. *Smith v. Ceres Terminal*, 9 BRBS 121 (1978).

Social Security Administration (SSA) records are not dispositive of disability under the Act, as SSA has different standards. *Jones*, 15 BRBS at 73; *Hunigman*, 8 BRBS at 146. Maryland disability ratings also are not binding. *Cunningham v. Washington Gas Light Co.*, 12 BRBS 177 (1980). The fact that the employee may be receiving compensation from other sources is also irrelevant. *Bostrom v. I.T.O. Corp. of New England*, 11 BRBS 63 (1979).

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The Board held that the administrative law judge was not precluded from addressing disability by the facts that employer was paying temporary total disability benefits at the district director's recommendation and claimant was enrolled in vocational rehabilitation. Although nature and extent were not explicitly raised before or at the hearing, the parties' stipulation regarding date of maximum medical improvement and employer's request for Section 8(f) relief support the administrative law judge's finding that claimant's condition was permanent. Moreover, testimony regarding the availability of light duty work was sufficient to put claimant on notice that extent was at issue, although the Board reversed the administrative law judge's finding that this testimony established suitable alternate employment and thus modified the award to one for permanent total disability. *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

The Board held that where claimant, who had been awarded permanent partial disability benefits for a 1978 injury, was seeking permanent total disability benefits for a second injury in 1981, the issue of claimant's residual wage-earning capacity subsequent to the

1978 injury was implicitly raised at the hearing. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

While the Board affirmed the administrative law judge's finding that a laminectomy performed on claimant was not necessary medical treatment and thus was not compensable, it reversed the finding that the unnecessary surgery severed claimant's entitlement to compensation for his ongoing disability. As a physician's treatment of a work-related injury, even to the point of malpractice, does not break the causal nexus, the Board remanded for the administrative law judge to determine the nature and extent of claimant's disability following the surgery. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Temporary and permanent go to the nature of the disability; total and partial to the degree of disability. Maximum medical improvement is an indication of the permanency of disability and the availability of suitable alternate employment is an indication of the degree of disability. Thus, claimant's entitlement to total disability benefits changes to partial on the date suitable alternate employment is shown rather than on the date of permanency. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991). *Accord Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

It was within the administrative law judge's discretion under Section 702.336 to address claimant's request for permanent total disability, where this issue was raised for the first time at the formal hearing. Employer was not entitled to further notice of the new issue because claimant sought temporary total disability in his pre-hearing statement and there is no significant difference in the burdens of proof required to challenge a claim for permanent rather than temporary total disability. *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Even though claimant did not seek a nominal award before the administrative law judge, the court held that it would consider the propriety of such as a claim for total disability includes any lesser degree of disability. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Despite the existence of some statements by claimant's counsel indicating that claimant may have been seeking benefits only for permanent partial disability, the record contained evidence sufficient to establish that employer had knowledge of a claim for total disability and specifically argued that claimant's injury did not result in total disability. Consequently, as employer defended this case as if the claim was for total disability, the

Board held that employer's argument that claimant waived his claim for permanent total disability benefits lacked merit. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

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

The Board noted that the Section 20(a) presumption is inapplicable in this case as the issue involved the extent of disability. Thus, claimant bore the burden of proving he was disabled. Only after he has established a *prima facie* case of total disability does employer bear the burden of establishing the availability of suitable alternate employment to show that claimant's disability is, at most, partial. Because the administrative law judge used an improper analysis, and because his reason for discrediting several medical experts was irrational, the Board vacated his decision and remanded the case for a proper determination of the extent of claimant's disability. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998).

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

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

In this traumatic injury case, the Board affirmed the administrative law judge's finding that a claimant who becomes totally disabled after voluntary retirement is barred from receiving permanent total disability benefits as the claimant cannot establish that he has suffered a loss in wage-earning capacity. The Board noted that "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. As claimant was compensated for the degree of physical impairment, under the schedule, claimant is on equal footing with voluntary retirees with occupational diseases; neither claimant nor such retirees are entitled to total disability benefits. *Hoffman v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 148 (2001); *see also Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

The Board reversed the administrative law judge's award of temporary total disability for the period claimant recuperated from shoulder surgery shortly after he had voluntarily retired. Claimant was able to perform his usual employment prior to his retirement. Accordingly, claimant did not have a loss of wage-earning capacity "because of injury," and he is not entitled to disability compensation for his work-related shoulder injury. Claimant's retirement already resulted in a complete loss of wage-earning capacity. *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *rev'd*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

The Fourth Circuit reversed the Board's decision that a voluntary retiree with a traumatic work-related injury is not entitled to total disability benefits. The court held that such a claimant is entitled to benefits during the period that his injury caused his "incapacity" to earn wages. Though retired, claimant retained the ability, if not the willingness, to work except for the period during his recovery from surgery for the work-related shoulder injury. Section 2(10) of the Act addresses the loss of wage-earning *capacity*, not the loss of actual earnings. As "voluntary retirement is not a form of total incapacity," a worker is "entitled to disability benefits when an injury is sufficient to preclude the possibility of working." *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, pursuant to Section 2(10), the relevant inquiry is whether claimant's work injury precluded him from performing his usual work or suitable alternate employment at the time of his retirement such that the loss of earning capacity was "because of injury." Claimant's work-related injury did not preclude his continued work for employer and had not resulted in a loss of any wage-earning capacity at the time he stopped working, due to his decision to take early retirement. As claimant had no earning capacity two years later when increased work restrictions were imposed, he was not disabled within the meaning of Section 2(10). Accordingly, the administrative law judge erred in awarding compensation for permanent total disability from the date of the increased restrictions, and the Board reversed the award. *Christie v. Georgia-Pac. Co.*, 51 BRBS 7 (2017), *rev'd*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

The Ninth Circuit reversed the Board's decision and reinstated the award of benefits, adopting the Fourth Circuit's reasoning in *Moody*, 879 F.3d 96, that an employee's retirement status does not preclude an award of benefits if his injury causes lost capacity to earn after retirement, pursuant to Section 2(10). In this case, two years after he retired, claimant's work-related traumatic injury precluded his returning to his usual work and employer did not demonstrate suitable alternate employment. Therefore, the court reinstated the permanent total disability award as of the date

claimant was informed he could not return to work. *Christie v. Georgia-Pac. Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

Pursuant to *Moody* and *Christie*, the Board vacated the denial of total disability benefits. The claimant voluntarily left overseas employment in May 2014 and obtained lower-paying work in the United States. Subsequently, he was diagnosed with PTSD, which he alleged prevented his return to work for employer. The administrative law judge denied the claim for loss of wage-earning capacity from the date of diagnosis because the PTSD had not influenced claimant's decision to pursue lower paying work. The Board held that if claimant is unable to return to his former work for employer due to the PTSD, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" caused by the work injury. In view of *Moody* and *Christie*, the Board overruled *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) is overruled (*Hoffman*, 35 BRBS 148 implicitly overruled by *Moody*). *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

The Board affirmed the administrative law judge's denial of a few days of permanent total disability benefits. The administrative law judge rationally found that claimant's inability to work on those days was not due to his injury, as he had been released to return to his usual work and was attempting to get a job through the hiring board. Rather, claimant's inability to work on those days was solely due to the number of jobs available on the hiring board. The Board also rejected claimant's newly-raised theory that his injury caused him to be placed too far down on the board; that theory was not raised before the administrative law judge. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

The Board affirmed the administrative law judge's finding that employer established the availability of alternate employment which met claimant's physical restrictions related to his work-related upper extremity injury. The Board rejected claimant's assertions that the administrative law judge erred in excluding the physical restrictions related to claimant's heart condition, as the heart condition constituted a subsequent non-covered event and the restrictions related thereto are severable from the work-related restrictions. Moreover, the Board affirmed the administrative law judge's findings that claimant's other limitations, such as his poor spelling and writing skills and his hearing loss, do not prevent his obtaining the alternate employment, as the jobs are compatible with his vocational skills and a hearing aid will remedy any limitation caused by his hearing loss. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

The Board affirmed the administrative law judge's award of temporary total disability benefits for a period in which he found claimant was restricted from any work due to the flare-up of his work-related knee injury notwithstanding that during this period claimant also was totally disabled by cancer, an unrelated condition diagnosed after the initial work injury. With respect to a later period during which claimant was released to return to work with knee-related restrictions, the Board held that the administrative law judge erroneously based his denial of disability benefits on the fact that during this period claimant was medically restricted from working due to his cancer. The Board stated that the fact that claimant was totally disabled by his cancer does not foreclose his entitlement to disability benefits if his knee-related work restrictions, considered alone, rendered

him totally or partially disabled. The Board therefore vacated the administrative law judge's denial of benefits for this period and remanded the case for consideration of the evidence relevant to the issue of any disabling effects of claimant's work-related knee condition. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

Claimant was awarded permanent total disability benefits for 1983 knee injuries. Employer sought modification of the award. The administrative law judge awarded permanent total disability benefits until employer established the availability of suitable alternate employment, and permanent partial disability benefits under the schedule thereafter. The Board rejected employer's assertion that it was erroneous for the administrative law judge to award benefits under the schedule because no party raised the issue. The Board stated that a claim for total disability benefits, as here, implicitly includes a claim for a lesser degree of disability. Moreover, as the schedule is the exclusive remedy for permanent partial disability to claimant's knees, as employer presented evidence of suitable alternate employment, and as employer raised the schedule as the appropriate way to calculate claimant's award, the Board rejected employer's claim that it was unaware the issue would be addressed. Additionally, as the record contained uncontradicted evidence of the extent of impairment to claimant's knees, the Board affirmed the administrative law judge's award of benefits under Section 8(c)(2). *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

The Ninth Circuit addressed an issue of first impression for the courts: whether a permanent partial disability may be recharacterized as temporary total during a period of recovery from surgery, in this case, five years later. The court holds that it may be, as "permanency" is not immutable. If claimant's condition deteriorates and medical intervention leads to a new healing period, the prior point of maximum medical improvement no longer holds. Any award for temporary total disability subsumes the underlying permanent partial disability such that only the former award is payable. Thus, the court affirmed the award of temporary total disability following surgery, and held that employer must make these payments notwithstanding the award of Section 8(f) relief, as the Special Fund cannot be held liable for temporary disability benefits. *Pac. Ship Repair & Fabrication Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

The Fourth Circuit reversed an award of temporary partial disability benefits to a claimant whose knee injury had reached maximum medical improvement and who was receiving scheduled permanent partial disability benefits. The Fourth Circuit gave deference to the Director's position that once claimant's partial disability award is set under the schedule (ppd), he is not entitled to additional temporary partial benefits for the same scheduled injury. Any subsequent temporary partial loss is subsumed by the benefits claimant received under the schedule, as those benefits are presumed to cover actual loss due to any flare-up of his permanent knee condition. The court further agreed with the Director that, in an appropriate case, such a claimant can receive permanent total, temporary total, or increased scheduled permanent partial, disability. *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118, 49 BRBS 33(CRT) (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

Claimant, who the administrative law judge found to be totally disabled by her permanent work-related psychological condition but whose physical work-related conditions remained temporary in nature, was awarded temporary total disability benefits by the administrative law judge. The

Board held that where a claimant has established her inability to perform her usual work due to only one of several work-related conditions, rather than to a combination of work-related injuries, the nature of that disabling condition governs the nature of the award of benefits. The Board therefore modified the administrative law judge's decision to reflect claimant's entitlement to permanent total disability benefits as of the date her totally disabling psychological condition became permanent. The Board observed that this result was consistent with several prior unpublished Board and Circuit decisions, and with the language of Section 8(a), (b) of the Act. The Board discussed and distinguished *Jenkins*, 17 BRBS 183 (1985). *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014).

The Ninth Circuit affirmed the Board's decision affirming the administrative law judge's award of disability benefits. The court concluded that substantial evidence (claimant's credible testimony, the opinion of his treating psychiatrist, and his demonstrated inability to earn his former wages upon his return from Iraq) supports the award, and other evidence, which might support a contrary conclusion, does not negate the substantial evidence supporting the administrative law judge's conclusion. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

Section 8(a) and (b) in General

Under Section 8(a) and (b), an employee found to be permanently or temporarily totally disabled is entitled to 66 2/3 percent of his average weekly wage, as defined in Section 10, during the continuance of his total disability.

The fact that an injury was to a scheduled member does not bar an award of total disability if claimant is unable to work as a result. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-367 n.17 (1980); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). *See* discussion of the schedule in subsection 8(c) and of *PEPCO* in section on Conflicts Between Applicable Sections, *infra*.

The statute states that the loss of both arms, hands, feet, legs, or eyes, or of any two thereof, is presumed to constitute permanent total disability absent conclusive proof to the contrary. In all other cases, a finding of permanent total disability is a factual determination. Total loss of use of body parts is equivalent to actual physical loss and will trigger the Section 8(a) presumption. *Collins v. Todd Shipyards Corp*., 9 BRBS 1015 (1979) (presumption rebutted where claimant retains some use of remaining foot). *See also Walker v. Pac. Architects & Eng'rs, Inc.*, 1 BRBS 145 (1974).

Where the employee is already blind in one eye and loses the sight of the other on the job, he is permanently totally disabled. *Temperance River Co. v. LeGarde*, 65 F. Supp. 161 (D.Minn. 1946).

The standards for determining the extent of disability are the same for temporary and permanent total disability. *Bell v. Volpe/Head Constr. Co*, 11 BRBS 377 (1979).

Temporary total disability is appropriate when the employee is on sick leave due to a work-related illness. *Kerch v. Air Am., Inc*., 8 BRBS 490 (1978), *aff'd in pert. part sub nom. Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir.1979).

An award of temporary total disability is proper where a physician opines that the employee will be able to return to his usual employment full-time in the near future, but not immediately. *Martinez v. St. John Stevedoring Co*., 15 BRBS 436 (1983). Similarly, temporary total disability is the appropriate award when claimant is released for part-time work but no such suitable alternate employment is shown, *Brown v. Potomac Elec. Power Co.*, 15 BRBS 337 (1983) (Ramsey, dissenting on other grounds), or when he is capable of undergoing rehabilitation but cannot yet work and has not yet reached maximum medical improvement. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979).

Section 8(f) relief is unavailable on temporary total disability awards. *See Davenport v. Apex Decorating Co.*, 13 BRBS 1029, 1035 n.4 (1981), *decision following remand*, 18 BRBS 194 (1986).

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

The Board affirmed the administrative law judge's denial of benefits for temporary total disability claimed after voluntary retirement. A claim for temporary total disability requires that claimant establish a loss of wage-earning capacity due to the injury, and the administrative law judge rationally discredited his testimony that he intended to return to work. Claimant was entitled to a scheduled award notwithstanding voluntary retirement. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

In a traumatic injury claim for post-retirement disability compensation the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was "because of injury." In this case, the administrative law judge determined that claimant was capable of performing his usual work when he stopped working and that his retirement, therefore, was voluntary. Accordingly, the administrative law judge erred in awarding claimant compensation for temporary total disability for the post-retirement period claimant recuperated from a work-related shoulder injury, and the Board reversed the award. *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *rev'd*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

The Fourth Circuit reversed the Board's decision that a voluntary retiree with a traumatic work-related injury is not entitled to total disability benefits. The court held that such a claimant is entitled to benefits during the period that his injury caused his "incapacity" to earn wages. Though retired, claimant retained the ability, if not the willingness, to work except for the period during his recovery from surgery for the work-related shoulder injury. Section 2(10) of the Act addresses the loss of wage-earning *capacity*, not the loss of actual earnings. As "voluntary retirement is not a form of total incapacity," a worker is "entitled to disability benefits when an injury is sufficient to preclude the possibility of working." *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, pursuant to Section 2(10), the relevant inquiry is whether claimant's work injury precluded him from performing his usual work or suitable alternate employment at the time of his retirement such that the loss of earning capacity was "because of injury." Claimant's work-related injury did not preclude his continued work for employer and had not resulted in a loss of any wage-earning capacity at the time he stopped working, due to his decision to take early retirement. As claimant had no earning capacity two years later when increased work restrictions were imposed, he was

not disabled within the meaning of Section 2(10). Accordingly, the administrative law judge erred in awarding compensation for permanent total disability from the date of the increased restrictions, and the Board reversed the award. *Christie v. Georgia-Pac. Co.*, 51 BRBS 7 (2017), *rev'd*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

The Ninth Circuit reversed the Board's decision and reinstated the award of benefits, adopting the Fourth Circuit's reasoning in *Moody*, 879 F.3d 96, that an employee's retirement status does not preclude an award of benefits if his injury causes lost capacity to earn after retirement, pursuant to Section 2(10). In this case, two years after he retired, claimant's work-related traumatic injury precluded his returning to his usual work and employer did not demonstrate suitable alternate employment. Therefore, the court reinstated the permanent total disability award as of the date claimant was informed he could not return to work. *Christie v. Georgia-Pac. Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

Pursuant to *Moody* and *Christie*, the Board vacated the denial of total disability benefits. The claimant voluntarily left overseas employment in May 2014 and obtained lower-paying work in the United States. Subsequently, he was diagnosed with PTSD, which he alleged prevented his return to work for employer. The administrative law judge denied the claim for loss of wage-earning capacity from the date of diagnosis because the PTSD had not influenced claimant's decision to pursue lower paying work. The Board held that if claimant is unable to return to his former work for employer due to the PTSD, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" caused by the work injury. In view of *Moody* and *Christie*, the Board overruled *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) is overruled (*Hoffman*, 35 BRBS 148 implicitly overruled by *Moody*). *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

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

The Board modified claimant's compensation rate to accurately reflect two-thirds of his average weekly wage. The administrative law judge found that the rate of pay under claimant's contract with employer is the appropriate basis for calculating his average weekly wage under Section 10(c), however, he did not state this pay rate. Instead, the administrative law judge ordered that employer continue paying claimant compensation at the rate of its voluntary payments of $424.95. As claimant and employer agreed that claimant's average weekly wage is $638.88 under the administrative law judge's methodology, and employer acknowledged its miscalculation of claimant's compensation rate, the Board modified the administrative law judge's decision to reflect claimant's accurate compensation rate of $425.92. *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011).

Nature: Permanent v. Temporary Disability

The date that a claimant's disability reaches permanency is a question of fact determined solely by medical evidence. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57CRT) (5th Cir. 1996); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Two tests have been established for addressing permanency.

In an early case, the Fifth Circuit stated that a permanent disability exists when a "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Under the *Watson* test, a "determination that a disability is temporary rather than permanent need not be reached merely because the medical prognosis is that the employee is likely at some indefinite future date to get better and to be able to return to work. The statute neither requires that a longshoreman be bed-ridden before he is considered totally disabled nor that he be pronounced medically incurable before his condition is permanent." *Id.*

In addition to the *Watson* test, permanency is established as of the date the employee reaches "maximum medical improvement." *See, e.g., Trask*, 17 BRBS 56; *Luce v. Bath Iron Works Corp.*, 12 BRBS 162 (1979); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979); *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Id.*

An irreversible condition is permanent *per se*. *Drake v. Gen. Dynamics Corp., Elec. Boat Div.*, 11 BRBS 288 (1979). However, a disability need not be incurable to be permanent. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Watson*, 400 F.2d at 854; *Steele v. Associated Banning Co.*, 7 BRBS 501 (1978); *Liggett v. Drug Fair, Inc.*, 2 BRBS 252 (1975). Neither need it be everlasting, if it meets the *Watson* definition. *Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), *aff'g in pert. part Kerch v. Air Am., Inc.*, 8 BRBS 490 (1978); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985); *Gray v. Gen. Dynamics Corp., Elec. Boat Div.*, 5 BRBS 279 (1976), *aff'd sub nom. Gen. Dynamics Corp. v. Benefits Review Board*, 565 F. 2d 208, 7 BRBS 831 (2d Cir. 1977).

Permanent does not mean unchanging. Where an employee's condition only deteriorates after a physician rates it as stable, maximum medical improvement may be found. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). Therefore, a prognosis that the employee may improve and his condition stabilize in the future does not establish that his condition is temporary in nature. *Watson*, 400 F.2d at 654; *Trask*, 17 BRBS at 60-61; *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979); *see Seals v. Ingalls Shipbuilding, Div. of Litton Sys., Inc.*, 8 BRBS 182 (1978). Even a prognosis that improvement and future employment are likely does not preclude a finding of permanency; a prognosis stating that chances for improvement are remote is sufficient to support permanency. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442 (1981). Similarly, a physician's opinion that the condition will progress, ultimately requiring surgery, but also giving a percentage

disability rating, allows a finding that maximum medical improvement has been reached, because the disability will be lengthy, indefinite in duration, and lacking a normal healing period. *Morales v. Gen. Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in pert. part sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985).

A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition, *Leech v. Serv. Eng'g Co.*, 15 BRBS 18 (1982), or his condition has stabilized. *Lusby v. Washington Metro. Area Transit Auth.*, 13 BRBS 446 (1981). However, where surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983); *Walker v. Nat'l Steel & Shipbuilding Co.*, 8 BRBS 525 (1978) (permanent only after recovery from surgery); *McCray*, 5 BRBS 537 (where surgery performed but doctor stated claimant would need 18 months to recover, and this period had not elapsed, Board affirmed temporary disability finding); *Edwards v. Zapata Offshore Co.*, 5 BRBS 429 (1977) (not permanent until after surgery and rehabilitation and condition has stabilized). If the employee's recovery or ability to do any work after surgery is uncertain or unknown, his disability may be permanent. *White v. Exxon Co.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980); *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976), *aff'g* 1 BRBS 166 (1974).

The administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); for example, a rating of impairment followed by an opinion that no further improvement is expected is sufficient. *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979). *See also Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307 (1984); *Luna Rivera v. Nat'l Metal & Steel Corp.*, 16 BRES 135 (1984). The administrative law judge may also rely on an employee's opinion as to when he could first perform his tasks, *Stoute v. Shea-Ball*, 13 BRBS 755 (1981), or find that maximum medical improvement was not reached until the employee could work without being totally disabled by pain. *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245 (1979). *But see Brown v. Lykes Bros. Steamship Co.*, 6 BRBS 244 (1977) (disability not permanent until physician so concludes and dismisses employee from treatment, even if no improvement since last surgery).

If a physician believes that further treatment should be undertaken, then a possibility of success presumably exists. Even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). *Accord Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

The administrative law judge must make a specific finding as to the date of maximum medical improvement under the applicable tests; he cannot merely use the date when temporary total disability ceased because it reached the $24,000 maximum under the pre-1972 Act. *Thompson v. Quinton Eng'rs, Ltd.*, 14 BRBS 395 (1981). If there is no relevant evidence, he may reasonably find it to be the date that the claim was filed. *Whyte v. Gen. Dynamics Corp.*, 8 BRBS 706 (1978).

Where the employee suffered both physical and emotional trauma and will need psychological treatment and vocational rehabilitation before he can return to work, he has not yet reached

maximum medical improvement and is still totally disabled from the psychological effect of his injury. *Jenkins v. Kaiser Aluminum & Chem. Sales, Inc.*, 17 BRBS 183 (1985).

The possibility that an employee who has been obese his whole life might alleviate his disability by losing weight is too speculative to foreclose an award for permanent disability. *Vogle*, 17 BRBS at 130 n. 9. Similarly, the Board held that a physician's statement that he "supposed" he could project a disability rating was, standing alone, too speculative to support a conclusion that the employee's condition had stabilized and was permanent. *Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439 (1976).

Where an employee with a permanent partial disability suffers a temporary exacerbation, the permanent partial disability may be subsumed in a period of temporary total disability, but it does not disappear. *Leech*, 15 BRBS at 22.

Where claimant's compensable injury under Section 2(2) consists of disabling symptoms, the Board has held that the disability is temporary in nature and ceases when the symptoms subside. *Crum v. Gen. Adjustment Bureau*, 12 BRBS 458 (1980), *decision following remand*, 16 BRBS 101 (1983), *rev'd in pert. part*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) *See also Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Lindsay v. Owens-Corning Fiberglass Sales*, 13 BRBS 922 (1981). In *Gardner*, the Board and court affirmed the award of temporary disability benefits during periods when claimant was off work due to the aggravation of a leg condition. However, the Board reversed the finding that claimant was permanently disabled after his return to work, stating that the claim was based on an aggravation of symptoms, and these "symptoms were only temporary and once treated, they subsided. There is nothing to indicate that claimant's symptoms had any effect on the natural progression of his preexisting disease or caused any permanent residual impairment." *Gardner*, 11 BRBS at 567. Affirming this conclusion, the court held claimant failed to establish any loss in wage-earning capacity after his return to work.

In *Crum*, 12 BRBS 458, the Board vacated the administrative law judge's finding that claimant's disability was permanent in nature, reasoning that since his angina improved over time, ceasing by the time of the hearing, his condition could not be permanent. The Board rejected the argument that the fact that claimant's return to work would cause his symptoms to recur was sufficient to establish a continuing disability. The Board remanded the case for a determination of the extent of claimant's temporary disability during the time when he experienced the disabling symptoms. Following remand, the Board vacated the administrative law judge's award of temporary partial disability benefits, holding that claimant established he was temporarily totally disabled during the period before his symptoms ceased as he could not return to his usual work and employer did not establish suitable alternate employment. The Board rejected the argument that claimant was entitled to benefits only on the days he actually experienced symptoms. *Crum*, 16 BRBS 101. On appeal, the D.C. Circuit affirmed the Board's conclusions that claimant's angina constituted a compensable injury and that claimant established total disability but it reversed the Board's holding regarding permanency. *Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). The court concluded that substantial evidence supported the administrative law judge's initial finding of permanency under the *Watson* test as it established

that claimant's condition, while improved, was of indefinite duration. Thus, claimant was entitled to permanent total disability benefits. The Board has subsequently followed the court's decision in *Crum*. *E.g., Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1989); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS l (1988).

Since the permanency of disability is not an economic question, the possibility of vocational rehabilitation does not affect this determination. *Trask*, 17 BRBS at 60-61; *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979), *aff'd mem.*, 638 F.2d 1232 (5th Cir. 1981), *overruling Morgan v. Asphalt Constr. Co.*, 6 BRBS 540 (1975). Otherwise, the employee would have the nearly impossible burden of proving that he could not be rehabilitated. *Perry v. Stan Flowers Co.*, 8 BRBS 533 (1978).

A vocational expert's opinion cannot refute a physician's conclusion on permanency. *Lusby*, 13 BRBS at 448. The date upon which the employee was rehired is not a reasonable basis for the date of maximum medical improvement. *Williams*, 10 BRBS at 918. If the employee returns to work before reaching maximum medical improvement, the return does not establish that his disability was then permanent. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). *See also Bonner*, 15 BRBS at 324 (date physician released for work not date of maximum medical improvement when physician testified he did not know date of maximum medical improvement).

The Board initially held that where the employee has reached permanency and suitable alternate employment is established thereafter, it is reasonable to conclude that the onset date of the partial disability is the date of permanency, regardless of when the first evidence establishing the availability of suitable alternate employment was gathered. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 n.5 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). *Cf. Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986) (where employer established suitable alternate employment at a job created in its facility, the Board affirmed a finding that the total disability ended and partial began on the date of the job offer). The United States Courts of Appeals to address the issue, however, rejected the Board's holding that a showing of available alternate employment may be applied retroactively to the date of maximum medical improvement. The courts held that the Board's approach ignored the concept that disability is an economic as well as a medical concept. Thus, partial disability commences on the date that suitable alternate employment is shown. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The Board thereafter acquiesced in these holdings and adopted the rule that the date of permanency does not alter the extent of claimant's disability. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). *See* Extent of Disability, *infra*.

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

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

The Board held that the administrative law judge erred in using the date claimant was fired as the date of maximum medical improvement. Because the uncontradicted medical evidence established that the employee's back condition was continuing to improve at the time of his death, his condition remained temporary. *Dixon v. John J. McMullen & Assocs., Inc.*, 19 BRBS 243 (1986).

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

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

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. The Board held that the administrative law judge erred in addressing the permanency of claimant's disability by relying on the date he returned to work rather than addressing the relevant medical opinions and remanded the case. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

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

The Board reversed an administrative law judge's denial of death benefits under pre-1984 law based on a determination that decedent was not permanently disabled at the time of death, as the undisputed medical evidence established that decedent had a longstanding permanent disability of

his back at the time of his death under the *Watson* test. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988).

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

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

The Board held that claimant is not precluded from receiving permanent disability benefits because she was symptom-free at the time of the hearing, applying *Crum*, 738 F.2d 474, 16 BRBS 115(CRT), in which the D.C. Circuit held that claimant may be entitled to permanent disability benefits if symptoms are of indefinite duration. In addition, unlike *Crum*, the administrative law judge found claimant's underlying condition was work-related, and thus claimant's only compensable injury is not based solely on symptomatology. As the medical evidence indicated that claimant's underlying condition was still present and that it was permanent although her clinical course was unpredictable, that it could worsen if she was exposed to further pollutants, and that she was advised to leave her job, the denial of benefits was vacated and the case remanded. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS l (1988).

Following *Crum*, 738 F.2d 474, 16 BRBS 115(CRT), the Board reversed an administrative law judge's finding that claimant's condition was temporary and held it permanent because it was of indefinite duration based on the opinions of two doctors who stated claimant's chest pains were aggravated whenever he worked, another doctor who found his symptoms would stay the same or get worse, and claimant's continued periodic chest pains after he stopped working. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).

Citing *Crum*, 738 F.2d 474, 16 BRBS 115(CRT), the Board remanded the case for a determination of the nature and extent of claimant's disability, stating that claimant was not limited to an award of temporary disability even if he did not suffer from chest pains continuously. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1989).

The administrative law judge's determination that claimant's condition had stabilized by September 24, 1985, the date his doctor released him from care, is tantamount to a finding that claimant had reached maximum medical improvement on that date. Therefore, his finding of permanency is affirmed. *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403 (1989).

The administrative law judge properly relied on doctors' opinions to find that there was no evidence that claimant's condition had changed in nature or degree since October 25, 1982, the

date on which he determined claimant had a permanent partial disability. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

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

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

The Board held that the administrative law judge erred in finding he could not enter a continuing award of temporary total disability benefits. Contrary to his statement, a finding of maximum medical improvement is not necessary for continuing temporary total disability. In fact, if claimant is disabled and maximum medical improvement has not yet been reached, the appropriate remedy is an award of temporary total or partial disability. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

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

In an occupational disease case, the Board held that the administrative law judge erred in concluding that if a timely claim had been filed against Avondale, claimant would have been entitled to permanent partial disability benefits under Section 8(c)(23) from November 6, 1970, when the administrative law judge found "awareness" of his silicosis until he became totally disabled in February 1980 due to his neck injury. There was no evidence of a permanent impairment on which a Section 8(c)(23) award could be based prior to the onset of total disability due to his neck injury in 1980; thus, claimant was not entitled to additional compensation for his silicosis. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

Where, according to claimant's doctor, claimant's back condition remained on a "plateau" between August 1983 and April 1984, but the doctor did not conclude that nothing further could be done for him until April 1984, the administrative law judge's finding that claimant reached maximum medical improvement in April 1984 was affirmed. The Board distinguished *Trask*, 17 BRBS 56, because here it was the physician, not the administrative law judge, who considered claimant's vocational rehabilitation and training in making the permanency assessment, and the administrative law judge properly based his finding on claimant's physical condition. *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Affirming this decision, the Fifth Circuit stated that where a physician believes that further treatment should be undertaken, then a possibility of success presumably exists. Even if, in retrospect, treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. Although LIGA asserted that the doctor impermissibly considered vocational factors, the court noted that the Board found the administrative law judge's findings adequately supported by medical evidence alone. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

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

The Fifth Circuit rejected employer's argument that the administrative law judge erred in addressing permanency, as employer challenged maximum medical improvement at the hearing. The court affirmed the finding that claimant's condition was permanent under the *Watson* test, as six and one-half years had passed since claimant was injured, claimant was unable to work for almost the entire period following his injury, and claimant's condition had been declining since the date his doctor released him to work. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

The Board affirmed the administrative law judge's finding of maximum medical improvement as of the date in 1994 that claimant's treating doctor stated that claimant's disability had "plateaued" unless he was willing to consider surgery. The Board rejected employer's argument for an earlier date based on the facts that the doctor had previously stated claimant's condition was at maximum medical improvement in 1993 and that claimant's symptoms remained the same from 1992 through 1994. Nonetheless, the doctor's records indicate he tried various treatments during this period to improve claimant's condition and the administrative law judge's conclusion is supported by the doctor's records. *Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997).

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

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

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

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

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

The Board affirmed the administrative law judge's finding that claimant reached maximum medical improvement for his hand injuries on June 13, 1997, based on Dr. McGinty's permanent impairment rating on that date. The administrative law judge determined that the surgery suggested by Dr. Eller was not a viable option and thus did not affect the date of permanency, as it may only improve claimant's symptoms temporarily, it would not alter the underlying condition, and it may only provide claimant with a 50 percent chance of returning to his prior employment. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Affirming this decision, the Seventh Circuit rejected employer's argument that the administrative law judge erred because claimant unreasonably refused to undergo surgery and surgery was required before he could be considered at maximum medical improvement. Citing the *Watson* test, the court stated that while Drs. Eller and McGinty disagreed as to claimant's treatment, both doctors agreed that Carlisle's condition would always affect his ability to engage in activity requiring use of his hands and arms and that if claimant tried to return to his old job, the symptoms of his condition would be likely to recur. Thus, both doctors' testimony suggested the permanence of claimant's condition. Moreover, the administrative law judge did not err in crediting Dr. McGinty's opinion. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000)

Claimant's treating physician opined that claimant had reached maximum medical improvement, but also noted that claimant needed a total knee replacement. Claimant had decided to postpone the surgery indefinitely. Thus, as claimant's treating physician stated that claimant's condition was not improving, and surgery was not anticipated nor its success ensured, the Board reversed

the administrative law judge's finding that claimant had not reached maximum medical improvement and modified the award to reflect claimant's entitlement to permanent total disability benefits. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

Claimant received voluntary payments of temporary total disability benefits for 12 years. When one carrier controverted the claim, claimant raised the issue of permanent disability before the administrative law judge. The administrative law judge awarded claimant permanent total disability benefits but did not address the date of permanency. The Board rejected employer's argument that permanency could not be established as there was no evidence specifically addressing maximum medical improvement, stating that 12 years of an inability to work may establish a lasting condition under the *Watson* test. As the administrative law judge had not discussed this issue, the Board vacated the award of permanent disability benefits and remanded the case. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

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

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

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

The Board affirmed the administrative law judge's award of temporary total disability benefits as the claimant was undergoing treatment with a view toward improvement. Both doctors agreed surgery was necessary, and claimant was to undergo it. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

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

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

The Ninth Circuit agreed that the administrative law judge's determination of the date of maximum medical improvement was not supported by substantial evidence. Despite Dr. Keller's testimony and Dr. Kimata's report, both of which indicated that claimant likely reached a stationary, permanent condition within about a year after the stroke, the administrative law judge set the date two years after the stroke based on the date Dr. Keller first examined claimant. Although the administrative law judge expressed concern that the evidence regarding permanency was speculative and unexplained, the administrative law judge did not take additional evidence on this point. No doctor expressed a view that normal and natural stroke recovery continues to occur more than two years after a stroke and Dr. Keller clearly opined that claimant reached permanency before he saw him. The court remanded the case because the date of permanency affected the calculation of the compensation award and the applicability of Section 8(f). *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

The Ninth Circuit addressed an issue of first impression for the courts: whether a permanent partial disability may be recharacterized as temporary total during a period of recovery from surgery, in this case, five years later. The court holds that it may be, as "permanency" is not immutable. If claimant's condition deteriorates and medical intervention leads to a new healing period, the prior point of maximum medical improvement no longer holds. Any award for temporary total disability subsumes the underlying permanent partial disability such that only the former award is payable. Thus, the court affirmed the award of temporary total disability following surgery, and held that employer must make these payments notwithstanding the award of Section 8(f) relief, as the Special Fund cannot be held liable for temporary disability benefits. *Pac. Ship Repair & Fabrication Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

The Ninth Circuit stated that the crux of the permanent versus temporary nature of a claimant's injury is "whether the disability will resolve after a normal and natural healing period. If the answer is yes, the disability is temporary. If the answer is no, the disability is permanent." In this case claimant had years of constant, debilitating pain; thus, his disability was permanent because

it was not awaiting a normal healing period. The court held that the administrative law judge and the Board erred in relying on the prospect of knee replacement surgery to find that claimant's condition was temporary. The court held that "the appropriate question to ask is not whether a future surgery would ameliorate [claimant's] knee condition, but whether there was actual or expected improvement to his knee after a normal and natural healing period. The impact of a future knee replacement should be assessed after the surgery, not in anticipation of such a contingency." *SSA Terminals v. Carrion,* 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016).

Based on its position that claimant's refusal to undergo a surgical eye procedure precluded a finding that claimant's eye injury had reached maximum medical improvement, employer controverted claimant's entitlement to scheduled permanent partial disability benefits for claimant's eye injury. Citing the Fifth Circuit's decision in *Methe,* 396 F.3d 601, 38 BRBS 99(CRT), in which Section 7(d)(4) was applied to the issue of permanency, the Board upheld the administrative law judge's decision to apply the analysis for determining whether a claimant's refusal to undergo surgery was unreasonable or unjustified under Section 7(d)(4) to the issue of whether claimant's eye injury had reached permanency. The Board held, however, that in this scheduled injury case, the administrative law judge erred in requiring employer to establish that the recommended surgical procedure be of aid in restoring a degree of claimant's lost earning capacity. Although this showing is required in non-scheduled injury cases, it is not applicable to scheduled injury cases, in which loss of wage-earning capacity is not considered in calculating the compensation award. In scheduled injury cases, the reasonableness inquiry is whether the recommended medical procedure is likely to lessen the extent of the claimant's medical impairment, or to relieve his symptoms and the physical effects of his injury, without undue risk to his health or well-being. The case was therefore remanded for the administrative law judge to reconsider whether employer established that claimant's refusal was objectively unreasonable, and if so, whether claimant established that his particular circumstances justified the refusal. *Soliman v. Global Terminal & Container Serv., Inc.*, 47 BRBS 1 (2013).

Claimant's treating psychiatrist's opinion that claimant's psychological condition had reached maximum medical improvement was not undermined by his recommendation that claimant undergo further treatment, as claimant's condition was persisting. The Board affirmed the finding that claimant's disability was permanent as it was supported by substantial evidence. *Misho v. Global Linguist Solutions,* 48 BRBS 13 (2014).

Claimant, who the administrative law judge found to be totally disabled by her permanent work-related psychological condition but whose physical work-related conditions remained temporary in nature, was awarded temporary total disability benefits by the administrative law judge. The Board held that where a claimant has established her inability to perform her usual work due to only one of several work-related conditions, rather than to a combination of work-related injuries, the nature of that disabling condition governs the nature of the award of benefits. The Board therefore modified the administrative law judge's decision to reflect claimant's entitlement to permanent total disability benefits as of the date her totally disabling psychological condition became permanent. The Board observed that this result was consistent with several prior unpublished Board and Circuit decisions, and with the language of Section 8(a), (b) of the Act. The Board discussed and distinguished *Jenkins,* 17 BRBS 183 (1985). *Misho v. Global Linguist Solutions,* 48 BRBS 13 (2014).

The Board affirmed the administrative law judge's finding that claimant's neck condition was not at maximum medical improvement. In the absence of any evidence that claimant scheduled or cancelled the recommended cervical spine surgery, the administrative law judge acted within his discretion in relying on evidence that claimant intended to have surgery and the doctor's opinion that claimant's neck would be not be at maximum medical improvement until a year after surgery. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that claimant's neck injury was not at maximum medical improvement because further treatment was to be undertaken. Two doctors recommended surgery and the record contains evidence claimant intended to follow their recommendation. Employer failed to identify any evidence that claimant's initial delay in having surgery when first advised to do so was unreasonable and there is no authority for employer's contention that claimant has an affirmative duty to immediately undergo every kind of available treatment. *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Extent: Establishing Total Disability

Shifting Burdens

Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). Total disability is demonstrated where the employee is unable to work at his pre-injury job or perform suitable alternate work.

The same standards apply regardless of whether the claim is for temporary total or permanent total disability. *Bell v. Volpe/Head Constr. Co*, 11 BRBS 377 (1979).

The Board and the United States Courts of Appeals have adopted a "shifting burdens" approach to total disability. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. If the employee meets this burden, the employer must establish the availability of realistic job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Examples of cases applying this standard include the following:

First Circuit: *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). *Compare Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979);

Second Circuit: *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976);

Third Circuit: *McCabe v. Sun Shipbuilding & Dry Dock Co*., 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979);

Fourth Circuit: *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979);

Fifth Circuit: *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Odom Constr. Co., Inc. v. U. S. Dep't of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978);

Sixth Circuit: *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998);

Seventh Circuit: *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000);

Eighth Circuit: *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Ridgley v. Ceres, Inc.*, 594 F.2d 1175, 9 BRBS 948 (8th Cir. 1979);

Ninth Circuit: *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980);

Eleventh Circuit: *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009);

D.C. Circuit: *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Crum v. Gen.l Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984);

Board: *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201 (1985); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978).

The First Circuit adopted a somewhat different standard in *Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), *rev'g Kerch v. Air Am., Inc.*, 8 BRBS 490 (1978), holding that the severity of employer's burden must reflect the reality of the situation and that, depending on the situation, employer may not have the heavy burden of establishing actual job opportunities. In *Air Am.*, while working as a pilot in Southeast Asia, claimant contracted tropical sprue, a disease which left him with varying degrees of numbness in his limbs and extremities. As a result, he could no longer work as a pilot, but he possessed a wide range of skills that made him employable in a variety of fields. Based on claimant's physical condition, age, skills and education, as well as his statement that he could handle a desk job, the court held that he was not totally disabled. The court, however, recognized that employer would be required to prove the availability of specific suitable alternate jobs when an employee's inability to perform any work seems probable in light of his physical condition and other circumstances, such as his age, education and work experience.

In *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT), the court distinguished *Air Am.* based on the fact that claimant's disability in that case affected only a specialized skill which did not necessarily indicate an inability to perform other work for which he was qualified and affirmed a finding of total disability based on employer's failure to demonstrate suitable alternate employment, quoting a statement in *Air Am.* indicating that its standards would not apply where "the claimant's medical impairment and job qualifications [are] such that his suitable job prospects would be expected to be very limited, if existent at all." *Air Am.*, 597 F.2d at 780, 10 BRBS at 514. *Accord Dixon v. John J. McMullen & Assocs. Inc.*, 19 BRBS 243 (1986). *See* Suitable Alternate Employment, *infra*.

Once employer demonstrates the availability of suitable alternate employment, the burden shifts back to the injured worker; an injured employee can rebut the employer's showing of suitable alternate employment by demonstrating that he was unable to secure such work despite his diligent

efforts. In *Turner*, 661 F.2d at 1043, 14 BRBS at 165, the court stated that a showing of job availability

> brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. This obligation to seek work does not alter the statutory presumption of coverage, nor the employer's initial burden of proving job availability. It merely makes explicit that which has always been implicit--if alternate jobs exist which the claimant could reasonably perform and secure had he diligently tried, the employer, after demonstrating the existence of such jobs has met his burden. Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person genuinely seeking work with his determined capabilities.

Addressing this language, the Fifth Circuit rejected the argument that claimant must show a diligent job search as part of his initial burden, stating that *Turner* makes clear that claimant's burden in this regard does not arises until employer has shown suitable alternate employment. Once it has done so, the employer's burden has been met, and the claimant can then prevail if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). *See, e.g., Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Dove v. Sw. Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985).

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Where it is undisputed that claimant cannot return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Once claimant shows an inability to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. The same standard applies whether the claim is for permanent or temporary total disability. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

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

The Eleventh Circuit adopted the Board's burden-shifting approach, as articulated in *Vasquez*, 23 BRBS 428, on the question of how to define and allocate the burden of proof when a claimant seeks Section 22 modification based on a change in condition. In this case, the Eleventh Circuit held that substantial evidence supported the administrative law judge's finding that claimant met his initial burden to show a change in conditions by establishing that the reduction in his wages and hours in his post-injury suitable employment did not result from any actions on his part. The court thus held that the burden shifted to employer to show a reasonably available suitable alternate job that offered a higher weekly wage than the one he had in order to defeat the claim for increased partial disability benefits. The court held that the administrative law judge's finding that employer did not present any evidence of actually available higher paying suitable alternate employment is supported by substantial evidence. The administrative law judge properly rejected evidence that such jobs may become open in the future, as such does not meet employer's present burden. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

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

The Board affirmed the administrative law judge's finding that claimant's retirement was due, at least in part, to his pulmonary condition. Substantial evidence supported the finding that claimant's condition restricted his ability to work. Thus, claimant was not a "voluntary retiree," in spite of the fact that he applied for "regular" retirement rather than disability retirement. The Board thus affirmed the finding that claimant's established his *prima facie* case, and, as employer did not submit evidence of suitable alternate employment, the award of total disability benefits. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

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

The Board vacated the administrative law judge's denial of disability benefits for a period in which claimant was released to return to work with restrictions associated with his work-related knee injury. The Board held that the administrative law judge erroneously based his denial of disability benefits on the fact that during this period claimant was medically restricted from working by his non-work-related cancer. The Board stated that the fact that claimant was totally disabled by his cancer, a subsequent unrelated condition, does not foreclose his entitlement to disability benefits during the relevant period if his knee-related work restrictions, considered alone, rendered him totally or partially disabled. The Board remanded the case for the administrative law judge to determine whether claimant established a *prima facie* case of total disability during this period by establishing that he was unable to perform his usual work due to his knee restrictions. If the administrative law judge finds that claimant established his *prima facie* case, he must determine whether employer established the availability of suitable alternate employment which claimant could perform given his knee-related work restrictions. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

In a traumatic injury claim for post-retirement disability compensation the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was "because of injury." In this case, the administrative law judge determined that claimant was capable of performing his usual work when he stopped working and that his retirement, therefore, was voluntary. Accordingly, the administrative law judge erred in awarding claimant compensation for temporary total disability for the post-retirement period claimant recuperated from a work-related shoulder injury, and the Board reversed the award. *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *rev'd*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

The Fourth Circuit reversed the Board's decision that a voluntary retiree with a traumatic work-related injury is not entitled to total disability benefits. The court held that such a claimant is entitled to benefits during the period that his injury caused his "incapacity" to earn wages. Though retired, claimant retained the ability, if not the willingness, to work except for the period during his recovery from surgery for the work-related shoulder injury. Section 2(10) of the Act addresses the loss of wage-earning capacity, not the loss of actual earnings. As "voluntary retirement is not a form of total incapacity," a worker is "entitled to disability benefits when an injury is sufficient to preclude the possibility of working." *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, pursuant to Section 2(10), the only relevant inquiry is whether claimant's work injury precluded him from performing his usual work or suitable alternate employment at the time of his retirement such that the loss of earning capacity was "because of injury." Claimant's work-related injury did not preclude his continued work for employer and had not resulted in a loss of any wage-earning capacity at the time he stopped working, due to his decision to take early retirement. As claimant had no earning capacity two years later when increased work restrictions were imposed, he was not disabled within the meaning of Section 2(10). Accordingly, the administrative law judge erred in awarding compensation for permanent total disability from the date of the increased restrictions, and the Board reversed the award. *Christie v. Georgia-Pac. Co.*, 51 BRBS 7 (2017), *rev'd*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

The Ninth Circuit reversed the Board's decision and reinstated the award of benefits, adopting the Fourth Circuit's reasoning in *Moody*, 879 F.3d 96, that an employee's retirement status does not preclude an award of benefits if his injury causes lost capacity to earn after retirement, pursuant to Section 2(10). In this case, two years after he retired, claimant's work-related traumatic injury precluded his returning to his usual work and employer did not demonstrate suitable alternate employment. Therefore, the court reinstated the permanent total disability award as of the date claimant was informed he could not return to work. *Christie v. Georgia-Pac. Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

Pursuant to *Moody* and *Christie*, the Board vacated the denial of total disability benefits. The claimant voluntarily left overseas employment in May 2014 and obtained lower-paying work in the United States. Subsequently, he was diagnosed with PTSD, which he alleged prevented his return to work for employer. The administrative law judge denied the claim for loss of wage-earning capacity from the date of diagnosis because the PTSD had not influenced claimant's decision to pursue lower paying work. The Board held that if claimant is unable to return to his former work for employer due to the PTSD, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" caused by the work injury. In view of *Moody* and *Christie*, the Board overruled *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) is overruled (*Hoffman*, 35 BRBS 148 implicitly overruled by *Moody*). *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

Usual Employment

The employee must establish a *prima facie* case by demonstrating an inability to perform his usual employment. The employee is not required to establish that she cannot return to *any* employment. *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984).

Even a minor physical impairment can establish total disability if it prevents the employee from performing her usual employment, *Elliott*, 16 BRBS at 92 n.4, or from performing the only kind of employment for which he is qualified, *Equitable Equip. Co. v. Hardy*, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); *Nardella v. Campbell Mach., Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Tezeno v. Consol. Aluminum Corp.*, 13 BRBS 778 (1981); *Pilkington*, 9 BRBS at 476; *Ridgely v. Great Lakes Storage Contracting Co.*, 7 BRBS 297 (1977), *aff'd sub nom. Ridgely v. Ceres, Inc.*, 594 F.2d 1175, 9 BRBS 948 (8th Cir. 1979). It is irrelevant that a physician terms such an impairment "partial." *Employers Liab. Assurance Corp. v. Hughes*, 188 F.Supp. 623 (S.D.N.Y. 1959). However, the mere diagnosis of an occupational disease does not establish a disability. *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992).

A psychiatrist's opinion that the employee's medication would limit him to part-time work with limited responsibilities establishes that he cannot perform his usual employment. *Brown v. Potomac Elec. Power Co.*, 15 BRBS 337 (1983) (Ramsey, dissenting on other grounds). Along the same lines, a physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257 (1978). *Cf. Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978) (not total merely because continued employment would be hazardous to employee's health). *See also Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984) (evidence that claimant with chest pains could return to former job only if working conditions were improved establishes *prima facie* case); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978) (transfer to new job where employee with lung condition will not be exposed to injurious stimuli establishes disability).

Where claimant returned to work for a short period after injury and was laid off, the Board affirmed a finding that claimant met his burden where the physicians recommended surgery and light-duty work and claimant's testimony repeatedly referenced his experiencing pain while performing many activities. *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981); *see Offshore Food Serv., Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv., Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). Similarly, where claimant worked as a longshoreman for 9 months but was unable to continue longshore work due to pain, the Board affirmed a total disability award, rejecting the argument claimant withdrew from the labor market by filing for retirement as he did not voluntarily retire. *Williams v. Marine Terminals Corp.*, 8 BRBS 201, 203 (1978), *aff'd mem. sub nom. Marine Terminals Corp. v. Director, OWCP*, 624 F.2d 192 (9th Cir. 1980). The Board stated that claimant was able to work post-injury period only because he was able to select lighter work or was assisted by his co-workers. The Board also stated

that claimant is not required to be bed-ridden before he can be considered totally disabled, citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Claimant's credible complaints of pain alone may be enough to meet the employee's burden. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). If the employee's physical injury leads to psychological injuries, including alcoholism, the administrative law judge may find him permanently totally disabled. *Parent v. Duluth, Missabe & Iron Range Ry. Co.*, 7 BRBS 41 (1977); *Mitchell v. Lake Charles Stevedores, Inc.*, 5 BRBS 777 (1977); *Carpenter v. Potomac Iron Works, Inc.*, 1 BRBS 332 (1975), *aff'd mem.*, 535 F.2d 1325 (D.C. Cir. 1976) (compensation neurosis secondary to compensable injury may establish permanent total disability). *Cf. Johnson v. Toledo Overseas Terminal Co.*, 10 BRBS 478 (1979), *aff'd mem.*, 647 F.2d 165 (6th Cir. 1981) (no evidence of conversion neurosis; having trouble coping does not establish disability). If a physician finds the employee physically capable of performing routine repetitive tasks but emotionally unable to perform the tasks, the administrative law judge may find total disability. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968).

"Usual" employment involves the employee's regular duties at the time that he was injured. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Hence, even if he only performed a job for four months, his duties in that job and not his prior job, define his "usual" employment. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Similarly, if he was promoted to foreman before his injury, that is his usual employment. *Moore McCormack Lines, Inc. v. Quigley*, 178 F.Supp. 837 (S.D.N.Y. 1959). However, an employee on the night shift who was a full-time student during the day at the time of the injury and thereafter may receive compensation if unable to return to his former employment as a laborer. *Lewis v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 613 (1978); *see Kilson v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 172 (1975).

In order to determine whether claimant has shown total disability, the administrative law judge must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

An administrative law judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981).

Digests

Where claimant was physically able to perform his usual work but the job was no longer available, the D.C. Circuit held that in determining whether claimant can perform his pre-injury job, the administrative law judge erred in failing to consider the unavailability of claimant's former job. The court stated that because the fact that claimant's pre-injury job was not available was related to his work injury, the injury had resulted in claimant's "inability to return to his usual employment." The court therefore reversed the Board's holding that claimant did not meet his burden and remanded the case for the administrative law judge to consider the evidence bearing on suitable alternate employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988).

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

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

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

The Board affirmed the administrative law judge's finding that claimant was unable to perform his usual employment, even if he did so for several months after his injury, because he must either wear ear protection, impairing his ability to hear warnings, or suffer pain due to the effect of ambient noise on his injured ear. *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986).

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

The Board held that the administrative law judge applied an inappropriate standard in finding claimant entitled to permanent total disability benefits based on the belief that claimant was unemployable because no cautious employer would hire or retain him. On remand, the administrative law judge must determine whether claimant is able to perform his usual work. If claimant is unable to perform his usual work, claimant is entitled to total disability benefits since

employer has offered no evidence of suitable alternate employment. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

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

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

Inasmuch as the evidence is uncontradicted that claimant, who had asbestosis and whose doctor restricted him from additional exposure cannot return to his usual work as it would expose him to asbestos, the burden shifted to employer to establish suitable alternate employment. *Armand v. Am. Marine Corp.*, 21 BRBS 305 (1988).

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

The Board affirmed the administrative law judge's finding that claimant could not return to his usual work based on a credited doctor's opinion that claimant is disabled from seeking gainful employment and manual labor in particular. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

The administrative law judge's finding that claimant could not return to his usual work as a pump operator was supported by doctor's opinion that claimant should seek vocational rehabilitation rather than return to any type of manual labor and by another doctor's opinion that claimant should not be advised to attempt to work. A third opinion that claimant avoid a return to vigorous physical labor also supported the administrative law judge's finding. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

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

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

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

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

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

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

The Board vacated the denial of benefits and remanded this care pursuant to the APA. Specific to disability, the Board held that the administrative law judge erred in failing to address all of the evidence, including an x-ray taken after employer discontinued payments in 1977 diagnosing a fractured sternum and a doctor's recommendation that claimant not return to her usual employment. The administrative law judge credited a doctor's opinion of no physical impairment due to the work accident; however, this doctor did not examine claimant until 1985, 8 years after work accident and cessation of payments. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

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

The administrative law judge acted within his discretion in crediting claimant's subjective complaints of pain, despite the absence of objective evidence that he was disabled. Claimant's

subjective symptomatology was supported by four physicians who either suggested continuing treatment or did not conclude that he was exaggerating his subjective complaints of pain. Accordingly, the administrative law judge rationally found that this evidence, claimant's demeanor at the formal hearing and claimant's behavior since the work injury, when weighed in relation to evidence that claimant was capable of returning to his usual employment, created true doubt as to the extent of his disability, and the administrative law judge properly resolved his doubt in claimant's favor. *Thompson v. Nw. Enviro Services, Inc.*, 26 BRBS 53 (1992) (note: true doubt rule rejected by the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994)).

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

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

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

The Fourth Circuit rejected employer's challenge to the substantiality of the evidence supporting the conclusion that Moore was incapable of returning to his prior job as a container repairman, stating that while the administrative law judge may have relied in part on claimant's back pain, which might not be work-related, substantial evidence supported the finding that as a result of his work-related knee condition claimant was incapable of performing the bending and climbing required by his former work. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In a traumatic injury case where claimant met employer's age and time requirements for retirement, the Board held that he need not establish that his retirement was due to his work injury in order to meet his burden of proving disability. The administrative law judge improperly considered claimant's longevity retirement as evidence of no loss of wage-earning capacity after the date of retirement. The Board stated that the sole relevant inquiry in a traumatic injury case is whether the work injury precluded a return to claimant's usual work, and thus, whether claimant satisfied his burden of establishing a *prima facie* case of total disability. As it is undisputed in this

case that claimant cannot return to his usual work because of the work injury, the Board reversed the denial of benefits after the date of retirement, and it awarded permanent total and partial disability benefits in accordance with the administrative law judge's alternate findings. *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997).

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

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

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

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

The Fourth Circuit affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant established a *prima facie* case of total disability by showing that employer expected her to perform job duties that are incompatible with her medical restrictions and that she could not perform the duties of her usual employment without substantial help from her co-workers, because of her work-related wrist injury. *Newport*

News Shipbuilding & Dry Dock Co. v. Riley, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

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

In a case where the administrative law judge did not address all the evidence documenting claimant's post-injury restrictions and ability to work, the Board vacated the administrative law judge's determination regarding total disability and remanded the case for reconsideration. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

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

The Board affirmed the administrative law judge's finding that claimant was incapable of performing any work based on claimant's testimony and a doctor's opinion and the consequent award of temporary total disability benefits. The Board noted that the finding that claimant was incapable of performing any employment rendered employer's vocational evidence moot but addressed employer's contentions nonetheless. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

The Board affirmed the administrative law judge's finding that during the relevant period claimant was fully restricted from performing any work due to the flare-up of work-related knee injury. That during this period claimant also was totally disabled by his non-work-related cancer, diagnosed after the initial work injury, is of no legal consequence. The Board thus affirmed the administrative law judge's award of temporary total disability benefits for this period. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

The Board affirmed the administrative law judge's finding that claimant's retirement was due, at least in part, to his pulmonary condition. Substantial evidence supported the finding that claimant's condition restricted his ability to work. Thus, claimant was not a "voluntary retiree,"

in spite of the fact that he applied for "regular" retirement rather than disability retirement. The Board thus affirmed the finding that claimant's established his *prima facie* case, and, as employer did not submit evidence of suitable alternate employment, the award of total disability benefits. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

The Fifth Circuit affirmed the Board's decision, holding that substantial evidence supported the administrative law judge's finding that claimant's retirement was "involuntary." Claimant testified that asbestosis contributed to his decision to retire, and two doctors described claimant as suffering from "significant impairment." Therefore, claimant established that he was unable to perform his usual employment. As employer did not submit evidence of suitable alternate employment, the court held that employer failed to show that claimant was not totally disabled. *Louisiana Ins. Guar. Assoc. v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

The Second Circuit stated that a claimant establishes an inability to perform his usual employment if his job is no longer available to him after his injury. In this case, employer did not allow claimant to continue driving on the basis that his eye condition jeopardized the safety of co-workers. It denied claimant's request for eye surgery in Kuwait, or to work light-duty until his next scheduled leave home. Employer instead characterized claimant's eye condition as non-work-related, sent claimant home to receive treatment on leave-without-pay status, and discharged him when he did not obtain treatment at his own expense. Accordingly, claimant established his inability to return to his usual employment due to his eye condition notwithstanding the absence of medical evidence that his work was entirely precluded. *Serv. Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010).

The Board reversed the administrative law judge's finding that the claimant did not establish a *prima facie* case of total disability. Both psychologists of record stated that claimant should not return to work in the war zone. Claimant's job was unavailable without a medical release, which the psychologists would not provide. In addition, both psychologists stated that a return to work in the war zone was contraindicated due to the likely recurrence of work-related symptoms of claimant's underlying condition. The Board implemented the administrative law judge's alternative findings that claimant was partially disabled as employer identified suitable alternate employment and that employer is entitled to Section 8(f) relief. *Rice v. Serv. Employees Int'l, Inc.*, 44 BRBS 63 (2010).

In this case where claimant injured his back at work as a mechanic in Kuwait and then returned to light-duty work in Kuwait after a brief period of treatment, the Board affirmed the administrative law judge's finding that claimant established his inability to return to either his mechanic work or his light-duty work. Claimant's light-duty work constitutes his "usual work," as that is the work he was performing at the time of the aggravation. The administrative law judge's finding is supported by substantial evidence including his comparison between claimant's work restrictions and the light-duty job requirements, as well as a doctor's report. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

The Board affirmed the administrative law judge's finding that claimant is totally disabled due to the work-related aggravation of his symptoms as it is supported by substantial evidence and in accordance with law. Noting that medical opinions that a claimant's return to work is contraindicated due to the likely exacerbation of an underlying condition will support a *prima facie* case of total disability, even if the underlying disease is not permanently worsened by the exposures, the Board affirmed the finding that the credible opinions of Drs. Tudor and Gerardi, who both stated that claimant should not return to work for employer because exposure to welding fumes would increase the risk of aggravating his symptoms, demonstrates claimant's inability to return to his usual work due to his work injury. As claimant is incapable of performing his usual employment because of his work injury, and employer did not present any evidence of suitable alternate employment, the award of temporary total disability compensation is affirmed. *Lamon v. A-Z Corp.*, 45 BRBS 73 (2011), *vacated on recon.*, 46 BRBS 27 (2012).

On reconsideration, the Board held that although the administrative law judge properly found that claimant sustained work-related aggravations of his COPD, the administrative law judge did not adequately address the cause of claimant's total disability. Specifically, the Board stated that the administrative law judge did not address: that claimant last worked in non-covered employment; his finding that claimant had voluntarily removed himself from the workforce for reasons unrelated to his medical condition; or the medical evidence as to the cause of claimant's COPD at the time he became totally disabled. The Board remanded the case for the administrative law judge to determine, based on the evidence, whether claimant's total disability is due, even in part, to the work exacerbations or is it due solely to the natural progression of his non-work-related COPD. The Board thus vacated the award of total disability benefits and remanded the case. *Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011).

The Sixth Circuit affirmed the Board's decision holding that substantial evidence supported the administrative law judge's finding that claimant established a prima facie case of total disability. The administrative law judge rationally credited claimant's treating physician and claimant's testimony to find that claimant's thoracic nerve/shoulder injury prevented him from returning to his usual work as a senior barge welder. The administrative law judge rationally gave less weight to the opinion of employer's examining physician that claimant could return to modified work. *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).

The Board held that claimant's usual work is the work with the last covered employer to expose claimant to the hazardous conditions that caused his PTSD and that any loss of wage-earning capacity due to PTSD is based on the earnings with this employer. The Board rejected the contention that claimant's usual employment was the subsequent employment for whom the claimant worked when his PTSD became manifest. *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

The Board affirmed the administrative law judge's denial of a few days of permanent total disability benefits. The administrative law judge rationally found that claimant's inability to work on those days was not due to his injury, as he had been released to return to his usual work and was attempting to get a job through the hiring board. Rather, claimant's inability to work on those days was solely due to the number of jobs available on the hiring board. The Board also rejected claimant's newly-raised theory that his injury caused him to be placed too far down on the board;

that theory was not raised before the administrative law judge. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

In a case where the administrative law judge framed the issue of whether claimant's pain prohibited his returning to his usual employment, the Ninth Circuit held he applied too strict a standard. Claimant need not establish it is "impossible" to work with the pain he suffers. To the contrary, the court held, as a matter of first impression, that credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his past work. Thus, a claimant need not experience excruciating pain to be considered disabled and, moreover, whatever the level of pain, the employee need not make an "extraordinary effort" to overcome it and should not be penalized if he does so. Recognizing there is "a vast middle ground between occasional discomfort and torture," the court stated it is for administrative law judges "to determine, based on consideration of all the facts and circumstances of a particular case, whether a claimant's complaints of pain are (1) credible and (2) if so, whether the level of pain described is so severe, persistent, and prolonged that it significantly interferes with the claimant's ability to do his or her past work." The court remanded the case for the administrative law judge to address the credibility of claimant's complaints of pain in view of the entire record, and if credible, to assess his ability to work. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020).

Suitable Alternate Employment

In General

Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. In demonstrating the availability of suitable alternate employment, the employer need not obtain a job for claimant, but must establish the availability of realistic job opportunities which claimant could secure if he diligently tried. *See, e.g., Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If employer meets its burden, the employee's disability is partial, not total. *See* 33 U.S.C. §908(c),(e); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

If the administrative law judge finds, based on medical opinions or other evidence, that claimant cannot perform any employment, employer has not established his ability to perform alternative employment and claimant is totally disabled. *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in pert. part* 19 BRBS 15 (1986); *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); *Lostaunau v. Campbell Indus., Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Where claimant is no longer able to work due to pain, he may be entitled to total disability and the fact that he also filed for retirement is irrelevant. *Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd mem. sub nom. Marine Terminals Corp. v. Director, OWCP*, 624 F.2d 192 (9th Cir. 1980).

The employee does not have the burden of showing that no conceivable suitable alternate employment is available; rather, employer must show that employment which is suitable for claimant is available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979); *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Smith v. Terminal Stevedores, Inc.*, 11 BRBS 635 (1979).

The United States Courts of Appeals generally agree with the above standards, i.e., that employer is not required to act as an employment agency for its employee, but must demonstrate the availability of actual, not theoretical, employment opportunities by identifying realistic job opportunities available to him within the local community. The precise language used and specific application, however, may differ depending on the jurisdiction in which the case arises.

In *Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 10 BROS 505 (1st Cir. 1979), *rev'g Kerch v. Air Am., Inc.*, 8 BRBS 490 (1978), the First Circuit stated that it would not put on the employer the burden of proving that actual available jobs exist when it is "obvious" that there are available jobs that someone of claimant's age, education, and experience could do. The court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden should be lowered to meet the reality of the situation. The court therefore held that the testimony of an educated pilot, who could no longer fly, that he could perform a desk job and had received vague job offers, established that he was not permanently disabled. *Air Am.*, 597 F.2d at 778, 780, 10 BRBS at 511-512, 514. *See also Argonaut Ins. Co. v. Director, OWCP*, 646 F. 2d 710, 13 BRBS 297 (1st Cir. 1981) (young intelligent man not unemployable).

The Board declined to follow *Air Am*. in this regard. *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Lunsford v. Marathon Oil Co.*, 15 BRBS 204 (1982), *aff'd*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Dantes v. W. Found. Corp. Ass'n*, 10 BRBS 541 (1979), *pet. dismissed*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980). The Board stated that it is appropriate to place the burden of demonstrating suitable alternate employment on the employer in every case, as the *Air Am*. rule would require individual review of every case to determine what the appropriate burden of proof is, causing unnecessary litigation and delay. Furthermore, the Board stated its preference for the traditional analysis because it is an impossible burden to prove oneself unfit for all employment, and the employer can usually better bear the cost of proof that some suitable alternate employment exists. *Dantes*, 10 BRBS at 548-549. *See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 764-765, 10 BRBS 81, 85-86 (4th Cir. 1979) (Administrative Procedure Act mandates proponent bear burden of proof; moreover, employee should not have to prove negative).

In *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991), the court cited the standard stated by the Fifth Circuit in *Turner*, 661 F.2d 1031, 14 BRBS 156 and rejected the argument that under *Air Am.*, "the well-established burden of showing suitable employment should not apply to this case." The court distinguished *Air Am*. based on the fact that claimant's disability in that case affected only a specialized skill which did not necessarily indicate an inability to perform other work for which he was qualified, whereas in this case claimant had previously performed heavy labor and was able post-injury to

perform office work only because it was sheltered. The court thus affirmed the finding of total disability based on employer's failure to demonstrate suitable alternate employment, quoting a statement in *Air Am*. indicating that its standards would not apply where "the claimant's medical impairment and job qualifications [are] such that his suitable job prospects would be expected to be very limited, if existent at all." *Air Am*., 597 F.2d at 780, 10 BRBS at 514.

The Second Circuit in *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), affirmed a Board decision which had reversed the administrative law judge's finding that claimant was only partially disabled based on a doctor's opinion that claimant could work. The court quoted the Board's statement that under the Act, "'disability' is an economic and not a medical concept. 33 U.S.C. §902(10). Thus, an employee who is only partially disabled in a medical sense may well be permanently and totally disabled under the Act when the claimant's age, education, work experience and the availability of suitable employment are considered." *Salzano v. Am. Stevedores, Inc.*, 2 BRBS 178, 182 (1975). As employer had the burden of showing opportunity for work and both doctors were in agreement that claimant suffered at least some disability due to his injury, the court held claimant was totally disabled as employer had not shown that light or sedentary work was available for him to perform.

In *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991), the Second Circuit began by noting that the burden of establishing suitable alternative employment is placed on the employer to avoid placing on the injured employee "the difficult burden of proving a negative, requiring him to canvass the entire job market," quoting *Bumble Bee*, 629 F.2d at 1329, 12 BRBS at 661. The court then cited *Salzano*, as well as the Fifth Circuit's decision in *Turner*, in stating that "to satisfy its burden the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT). The court noted that this showing is often made by vocational experts who prepare surveys of job openings, but the expert is not required to actually contact potential employers to inquire as to whether they would hire someone of the claimant's general age, background, and disability or to communicate information about job openings to claimant, citing *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). The court followed *Palombo* in *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The Fourth Circuit issued several significant decisions, beginning with *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979), in which it rejected employer's argument that the shifting burdens approach in establishing total disability violated the Administrative Procedure Act, 5 U.S.C. §556(d), providing that "the proponent of a rule or order has the burden of proof," as it is the employee who is the "proponent" of a disability finding. The court determined that shifting the burden does not violate the APA, as a claimant must initially prove he is disabled from

performing his regular employment due to a work injury; he is then entitled to an award unless employer shows he is substantially and gainfully employable, and the burden shifts to employer who becomes the proponent of a finding of less than total disability. Defining the scope of employer's burden, the court stated that employer must demonstrate that jobs are available in the local economy which the claimant, considering his age, past experience and disability, is capable of performing.

In *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT), the court reversed a Board opinion, *Tarner v. Trans-State Dredging*, 13 BRBS 53 (1980), which held that the testimony of a vocational expert, who relied on state employment listings posted six months prior to the hearing or earlier and did not contact any prospective employers, was insufficient to show actual opportunities which were presently available. The court rejected the notion that in order to prove job availability employer must at least call a prospective employer to see if the employer would hire someone with the same background, age and disabilities as the injured employee, stating that no other court had adopted such a rule and it would place too heavy a burden upon the employer. The court stated that employer need not rehire a claimant, assist him in finding other employment or show that an actual job offer has been made to him, citing with approval the Fifth Circuit's standard in *Turner*. The court also rejected the Board's holding regarding the timing of the openings, holding that employer must only show jobs were available at "critical times," again citing *Turner*, and it would be unreasonably burdensome and restrictive to define "critical times" with regard to the period immediately prior to the administrative hearing.

Following *Trans-State Dredging*, the court held that the Board erred in applying its "present availability" test to hold that jobs must be available at the time a labor market survey is performed. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). The court held that employer may meet its burden of showing available alternative employment by presenting evidence of jobs which, although no longer open when located, were available during the "critical period" when the claimant was able to seek work. In *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), the court held that evidence of a single job opening is insufficient, citing *Turner* for the proposition that employer must show a range of suitable jobs. In *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), the court addressed whether the prospective employers in a labor market survey must be contacted in order to obtain their specific job requirements and to determine whether the claimant would be qualified for such work. The court held that such contact was not required in order for employer to have a valid survey, as employer may meet its burden by relying on standard occupational descriptions, such as those in the Dictionary of Occupational Titles, to fill out the requirements of prospective jobs.

The standard set by the leading case in the Fifth Circuit is often cited by other courts and is controlling precedent in the Eleventh Circuit, as it was decided prior to September 1981. The court in *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165, rejected a standard requiring job "offers" or "specific jobs claimant can perform and secure," and stated that 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?" The court rejected the "stringent standard" of *Bumble Bee, infra,* regarding "specific job opportunities," stating it "would make the employer, in effect, an employment agency, required to secure specific positions for a claimant to satisfy the millstone of proof." The court also stated that once job availability is shown, claimant bears a complementary burden of demonstrating that he was not able to secure such employment although he diligently tried. The court thus vacated the finding that suitable alternate employment was not established as it was based on an incorrect legal standard and remanded the case for new findings by the administrative law judge.

The Fifth Circuit rejected the argument that claimant must show a diligent job search as part of his initial burden, stating that *Turner* makes clear that claimant's burden in this regard does not arises until employer has shown suitable alternate employment. Once it has done so, the employer's burden has been met, and the claimant can then prevail if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The court further discussed the *Turner* standard in *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT). Rejecting the holding of the Fourth Circuit in *Lentz,* the court stated that under *Turner*, an employer may meet its burden by demonstrating the availability of general job openings in certain fields in the surrounding community; it need not show a "range of jobs," as an employee may have a reasonable likelihood of obtaining a single employment opportunity under appropriate circumstances. *See also Diosdado v. John Bludworth Marine, Inc.*, 37 F.3d 629, 29 BRBS 125(CRT) (5th Cir. 1994)(unpublished), and cases discussed, *infra,* regarding a single job opportunity.

In *Bumble Bee*, 629 F.2d 1327, 12 BRBS 660, the Ninth Circuit stated that employer cannot meet its burden by simply showing that claimant can perform general sedentary work; employer must point to specific jobs that the claimant can perform. The claimant in *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988), had a work-related injury after which he worked in a job in a bank for several weeks, but was fired due to a previous conviction for shoplifting. Stating that employer's burden was to prove that suitable alternate work was available in the community, which requires a showing of specific jobs, the court held the burden was not met because claimant's prior criminal conviction prevented the job at the bank from being realistically available to him. The court analogized a prior criminal conviction to other pre-existing impediments to employment like literacy or education. In *Edwards,* 999 F.2d 1374, 27 BRBS 81(CRT), the court reached a similar result, holding suitable alternate work must be "realistically and

regularly available" to claimant on the open market and that a short term job claimant held does not meet this standard.

The Seventh Circuit adopted the standard of the First, Fourth and Fifth Circuits, rejecting that of the Ninth, and holding that while employer need not identify specific employers ready and willing to hire the claimant, it must provide enough information for the administrative law judge to determine if the jobs are within claimant's capabilities. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). The Eighth Circuit also adopted similar standards, stating that an employer establishes suitable alternate employment "by proving that the injured employee retains the capacity to earn wages in regular, continuous employment," and does so by showing that, considering claimant's age, background, employment history, experience, and intellectual and physical capabilities, jobs are reasonably available "in the community for which the claimant is able to compete and which he could realistically and likely secure." *Meehan Seaway Serv., Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 1170, 31 BRBS 114, 118(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). *Accord DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

The Board initially held that employer must show that work within the claimant's capabilities was actually available to him. *Turner v. New Orleans (Gulfwide) Stevedores*, 5 BRBS 418 (1977), *rev'd*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). However, in *Pilkington*, 9 BRBS 473, the Board stated that employer can meet its burden by showing "the general availability of realistic job opportunities within the geographical area where claimant resides, which the claimant by virtue of his age, education and work experience has the capability to perform, or for which he could be trained within a reasonable period of time." The Board further stated that employer is not required to actually find another job for claimant but must only present evidence of "actual" and not "theoretical" opportunities, which it did in *Pilkington* through vocational evidence. *See Royce v. Elrich Constr. Co*., 17 BRBS 157 (1985) (administrative law judge's finding that jobs identified by expert did not meet claimant's restrictions supported by substantial evidence; Board rejected employer's argument regarding evidence of general jobs as employer must show actual and not theoretical opportunities by identifying specific jobs).

Accordingly, the employer need not rehire the employee, *Turner*, 661 F. 2d at 1043, 14 BRBS at 165; *Ferrell v. Jacksonville Shipyards, Inc.*, 12 BRBS 566 (1980), place the employee in suitable alternate employment, *Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 75(CRT); *Turner*, 661 F.2d at 1043, 14 BRBS at 165; *Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Feezor v. Paducah Marine Ways*, 13 BRBS 509 (1981), or establish that claimant was offered a specific job. *Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 75(CRT). An employer thus need not present information concerning job openings directly to its employee, or contact potential employers to see if

someone with the same background, age and disabilities as the injured employee would be hired. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

However, where the record is devoid of evidence of suitable alternate employment, claimant is totally disabled. The mere allegation that such work is available will not meet employer's burden. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981)**;** *Bostrom v. I.T.O. Corp. of New England*, 11 BRBS 63 (1979); *Perry v. Stan Flowers Co.*, 8 BRBS 533 (1978). An employer cannot meet its burden simply by illustrating that the claimant can perform particular physical tasks. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT). *See Odom Constr. Co., Inc. v. U. S. Dep't of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981. Moreover, claimant's willingness to obtain work has no bearing on the employer's ability to meet its burden of establishing alternate employment opportunities, as employer need only show jobs are available. *Crum v. Gen. Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part* 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984).

Notwithstanding medical evidence and testimony that claimant is capable of some employment, the administrative law judge, as finder-of-fact, may rationally credit testimony that claimant is unable to perform any alternate work, based on his subjective complaints of constant pain, and is therefore totally disabled. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in pert. part* 19 BRBS 15 (1986); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). The Ninth Circuit affirmed the finding that suitable alternate employment was not established where none of the potential employers stated they would consider employing a person with claimant's deficiencies and a counselor stated that there was no job in the competitive labor market that claimant could perform. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

The physical ability to perform a job is not the exclusive determinant as to whether the job is suitable; an administrative law judge must also consider whether claimant has the mental ability or skills to work successfully in a potential job. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). Thus, psychological conditions and pre-existing conditions must also be considered in evaluating whether jobs are suitable. *See Fox v. W. State, Inc.*, 31 BRBS 118 (1997); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

The Board initially held that in order for job opportunities to be realistic, employer must establish their precise nature and terms. *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272

(1984); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980). However, in *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT), the court held that employer need not establish the precise nature and terms of specific job openings in order to show that suitable alternate employment is available. Moreover, in *Universal Mar.*, 126 F.3d 256, 31 BRBS 119(CRT), the Fourth Circuit held that employer or its expert is not required to contact employers to obtain specific job requirements in order to show a job is suitable but may rely on standard occupational definitions. However, even if employer need not show specific jobs in order to establish job availability, it must present sufficient evidence for the administrative law judge to determine that the job duties are compatible with claimant's restrictions and thus that the work is suitable for claimant. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT).

Employer must establish claimant's earning capacity by at least establishing the pay scale for alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978); *DuPuis v. Teledyne Sewart Seacraft*, 5 BRBS 628 (1977).

A part-time job may be suitable alternate employment, *Royce*, 17 BRBS at 159; if the employee is performing it satisfactorily and for pay, barring other signs of beneficence or extraordinary effort, it precludes an award of permanent total disability. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980). Claimant's self-employment may also be sufficient. *Sledge v. Sealand Terminal*, 14 BRBS 334 (1981), *decision following remand*, 16 BRBS 178 (1984).

The above cases incorporate in the standard the requirement that suitable alternate employment be available in the community. The mere allegation that jobs which the employee could perform exist within the geographic area will not carry employer's burden. *Burke*, 14 BRBS at 202. Jobs 65 and 200 miles away are not within the geographic area, even if the employee took such jobs before his injury. *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). The relevant area where a claimant moves after an injury is discussed *infra*.

Digests

The Board rejected employer's argument that claimant bore the burden of demonstrating that no suitable alternate employment was available based upon *Air Am.*, 597 F.2d 773, 10 BRBS 505, in this case arising in the Fifth Circuit. The Board stated it would follow *Turner* in every circuit except the First. *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986).

The Board affirmed the administrative law judge's determination that employer had the burden to establish suitable alternate employment pursuant to *Air Am.*, 597 F.2d 773, 10 BRBS 505, because the employee's work history qualified him only for a position in shipbuilding, he was unqualified for a job without physical labor, and his education was

insufficient to enable him to find a desk job that would allow him to sit all day. The Board thus affirmed the administrative law judge's determination that claimant is entitled to total disability benefits because employer failed to establish the existence of any jobs in Maine, where he was injured. *Dixon v. John J. McMullen & Assocs. Inc.*, 19 BRBS 243 (1986).

The Board affirmed the administrative law judge's finding that claimant was totally disabled as substantial evidence supported the finding that claimant could not return to his usual work and employer produced no evidence of suitable alternate employment. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

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

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

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

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

The Board affirmed a finding that the computer operator and industrial engineering jobs credited by the administrative law judge were both suitable for claimant and available. The administrative law judge found that the job of computer operator was within claimant's physical restrictions and reasonably inferred from college courses claimant took and from his previous work that claimant was qualified for this job. The administrative law judge's determination that these jobs were available to claimant was supported by job surveys prepared by vocational consultant. The credited evidence thus established the availability of jobs which claimant could reasonably perform and which he could realistically and likely secure if he diligently tried, consistent with the holding of the Fifth Circuit, in which this case arises, in *Turner*, 661 F. 2d 1031, 14 BRBS 156. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting).

The Board rejected employer's contention that claimant's testimony regarding his ability to drive, garden, and clean his home satisfied its burden of proof. The Board also held that employer did not meet its burden of demonstrating the availability of suitable alternate employment by introducing classified ads on cross-examination of the vocational expert, as he testified that there were no jobs claimant could perform and employer produced no evidence of the precise nature, terms and availability of the positions listed. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

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

The Board applied *Tann*, 841 F.2d 540, 21 BRBS 10(CRT), in this case arising in the Second Circuit. The Board therefore vacated the administrative law judge's finding that positions which were filled at the time claimant was notified of them could not establish suitable alternate employment and remanded the case for consideration of whether they were within claimant's capabilities. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

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

Although an employee has died, the employer cannot escape liability for the work-related total disability he experienced prior to his death unless it establishes that suitable alternate employment was available during the period of the employee's life subsequent to his work injury. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994). On reconsideration, the Board rejected employer's contention that *Eckley*, 21 BRBS 120, constituted a change in the law warranting remand for evidence of suitable alternate employment. In *Eckley*, it was not clear whether the claimant's back condition was permanent at the time of his death, and the administrative law judge found that posthumous evidence of suitable alternate employment was unreliable *per se*. The Board held that claimant's condition was permanent and remanded for suitable alternate employment, stating that such evidence was not unreliable *per se*. By contrast, in this case, decedent clearly was permanently disabled and limited to sedentary work thereby giving rise to

employer's duty to establish suitable alternate employment during decedent's lifetime. The Board thus reaffirmed the award of permanent total disability, as the administrative law judge rationally found no evidence of suitable alternate employment. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32 (1992), *aff'g on recon.* 24 BRBS 100 (1990), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

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

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

The Fifth Circuit held that an employer may meet its burden of establishing the availability of suitable alternate employment by demonstrating the availability of general job openings in the local community that are within claimant's physical and mental capacities and which claimant has a reasonable opportunity to secure. Employer need not establish the precise nature and terms of specific job openings. Moreover, the court disagreed with the holding of the Fourth Circuit in *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), that an employer's demonstration of only one specific job opening is automatically insufficient to satisfy its burden of proof. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991).

The Fifth Circuit in the context of a post-injury wage-earning capacity case reaffirmed *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT), and *Turner*, 661 F.2d 1031, 14 BRBS 156, stating that in order to establish suitable alternate employment an employer does not need to "provide evidence of . . . specific job openings ... [A]n employer simply may demonstrate the availability of general job openings in certain fields in the surrounding areas." *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

The Board held that employer established the availability of suitable alternate employment in a case in which claimant returned to work with a different employer following a work-related injury in a position which suited his physical restrictions, for which he had been

trained and in which he performed successfully for approximately 3.5 months before being laid off due to a reduction in the work force and not for any reason associated with his work injury. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

In reversing the Board's decision, the Ninth Circuit deferred to the Director's position that claimant's short-lived 11 weeks of post-injury employment was insufficient to establish that suitable alternate work was "realistically and regularly available to claimant on the open market." In addition, the court found that there was substantial evidence to support the administrative law judge's award of permanent total disability based on a finding that employer did not establish the availability of suitable alternate employment where half of the jobs listed in employer's labor market surveys required experience which claimant did not have and claimant had contacted the remaining employers and other firms not listed in employer's surveys without success. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

The Board rejected employer's argument that the administrative law judge used an incorrect standard in determining the availability of suitable alternate employment, as the Board had previously affirmed his rejection of vocational evidence based on the failure to consider claimant's psychological condition as well as her physical condition. *Armfield v. Shell Offshore*, 25 BRBS 303 (1992) (Smith, dissenting). In that decision, the Board remanded for the administrative law judge to determine whether a secretarial job claimant held for 8 months was suitable alternate employment, and following remand, the Board affirmed the administrative law judge's award of permanent total disability benefits as substantial evidence supported the decision that the secretarial position claimant held for 8 months following her injury was not within her psychological capabilities. *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

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

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

The Fifth Circuit held that the Board erred in vacating the administrative law judge's initial award of permanent total disability benefits. While there was medical evidence and

testimony sufficient to establish that claimant was capable of some employment, the administrative law judge chose to credit evidence that claimant would be in constant pain in any of those jobs and found that the doctors who opined he could work did not adequately account for his pain. As the administrative law judge's findings were supported by substantial evidence, the Board was required to affirm them. The court therefore reinstated the administrative law judge's original award. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in pert. part* 19 BRBS 15 (1986).

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

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

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

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

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

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

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

The Seventh Circuit adopted the suitable alternate employment standard used by the First, Fourth and Fifth Circuits, rejecting the more stringent standard of *Bumble Bee*. Employer must prove that there were jobs in the community which claimant could perform and for which he would be able to compete and realistically secure. Employer need not identify specific employers ready and willing to hire the claimant, but it must provide enough information for the administrative law judge to determine if the jobs are within claimant's capabilities. In this regard, the administrative law judge found the jobs presented by

employer's expert lacked information regarding the job duties. Comparing the job descriptions in the Dictionary of Occupational Titles with claimant's limitations, the administrative law judge found that employer did not show suitable alternate employment for claimant. Affirming this finding, the court rejected the argument that the administrative law judge applied too stringent a test in requiring more specific information from the vocational expert, stating that the problem with the expert testimony was not that it failed to be specific in naming actual employers who would hire claimant, but that it failed to be specific in addressing claimant's capabilities. While employer need not show that there were specific, prospective employers in the area ready and willing to hire claimant, a report simply matching general statements of his job skills with general descriptions of jobs fitting those skills is not enough. Thus, the administrative law judge's decision not to credit the vocational expert's testimony was affirmed. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000), *aff'g* 33 BRBS 133 (1999).

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

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

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

The Board rejected employer's argument that the administrative law judge did not apply the applicable legal standard of *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT), holding that while he did not cite the case, his analysis of the potential suitable job comported with that decision. The Board also affirmed the administrative law judge's specific findings rejecting the customer service and cashier jobs, based on evidence they were not compatible with claimant's restrictions, and his determination that the security positions are suitable for claimant, as these findings are supported by substantial evidence. *Fortier v. Elec. Boat Corp.*, 38 BRBS 75 (2004).

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

Where claimant worked only part-time prior to injury, and it was uncontested that claimant was physically capable of full-time work and that employer identified two jobs within claimant's restrictions, the Board held that the administrative law judge erred in finding that employer did not establish suitable alternate employment due to the fact the claimant chose to work part-time prior to his injury. This factor does not affect the suitability or availability of work, and thus the two positions establish the availability of suitable alternate employment. The Board thus reversed the total disability award as claimant has retained some wage-earning capacity and is at most partially disabled. The fact that claimant worked only part-time pre-injury is properly addressed in calculating wage-earning capacity which must be based on similar part-time earnings either extrapolated from the suitable jobs or based on other evidence. *Neff v. Foss Mar. Co.*, 41 BRBS 46 (2007).

The Board affirmed the administrative law judge's finding that employer established suitable alternate employment as his finding that the employee's alcohol abuse and emotional state would not have precluded him from performing the identified jobs is supported by substantial evidence. *V. M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010).

The Board affirmed the administrative law judge's finding that claimant is incapable of performing any work based on claimant's testimony and a doctor's opinion and the consequent award of temporary total disability benefits. The Board noted that the finding that claimant is incapable of performing any employment renders employer's vocational evidence moot but addressed

employer's contentions nonetheless. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP,* 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

The Board, on the facts of this case, reversed the administrative law judge's finding that employer established suitable alternate employment with positions identified in its labor market survey. Claimant, who had performed modified work in employer's facility whenever such work was available, was on leave of absence status during a period in which no such work was available. A provision of the collective bargaining agreement (CBA) between employer and claimant's union provided that an employee on leave of absence due to a work-related injury would be subject to termination if she engaged in employment for another employer. Reasoning that employer must bear responsibility for a contractual agreement into which it entered, the Board held that employer is not entitled to use evidence of jobs with other employers to demonstrate to availability of suitable alternate employment for a claimant on leave of absence status pursuant to the CBA where the potential exists for her to resume suitable work for employer when such work is available. *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

The Board affirmed the administrative law judge's finding that employer established the availability of alternate employment which met claimant's physical restrictions related to his work-related upper extremity injury. The Board rejected claimant's assertions that the administrative law judge erred in excluding the physical restrictions related to claimant's heart condition, as the heart condition constituted a subsequent non-covered event and the restrictions related thereto are severable from the work-related restrictions. Moreover, the Board affirmed the administrative law judge's findings that claimant's other limitations, such as his poor spelling and writing skills and his hearing loss, do not prevent him from obtaining the alternate employment, as the jobs are compatible with his vocational skills and a hearing aid will remedy any limitation caused by his hearing loss. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy,* 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied,* 570 U.S. 904 (2013).

The Board affirmed the administrative law judge's finding that claimant's lack of a car, due to Hurricane Katrina, did not preclude employer from establishing suitable alternate employment in this case. Claimant is physically able to drive and the administrative law judge credited her testimony that she had access to transportation. The Board nonetheless vacated the administrative law judge's finding that a position, which was located approximately 58 miles, one way, from claimant's residence, constituted suitable alternate employment because the administrative law judge did not explicitly consider whether this extended commuting distance rendered that job unavailable to claimant in view of her lack of a car. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

The Ninth Circuit held that under the Act and relevant case law, a claimant's preferences, or the possible employment consequences of taking a suitable, available job, are not relevant to the determination as to whether employer has established the availability of suitable alternate employment. The Ninth Circuit reiterated that the availability of suitable alternate employment is determined by two criteria: the claimant's physical abilities and the economic availability of particular jobs in the relevant market. The court therefore rejected claimant's assertion that the

possibility that his taking post-injury work as a parking-lot cashier and security guard might jeopardize his longshoreman status renders otherwise suitable alternate employment inadequate. The finding of suitable alternate employment was affirmed. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

The Ninth Circuit rejected employer's argument that the administrative law judge erred in determining that claimant was restricted to employment that allowed for frequent breaks. While Dr. Palozzi's opinion as to the need for breaks was not labeled a "work restriction," it was labeled a "recommendation" that would help claimant avoid more pronounced cognitive difficulties. The administrative law judge did not err in taking this recommendation into consideration and in finding that none of the jobs identified by employer accommodated all of the identified restrictions. Therefore, claimant is totally disabled. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

The Board affirmed the administrative law judge's finding that claimant's illegal activities, his maintenance job in prison, and his post-incarceration jobs singing in churches, were not sufficient to constitute suitable alternate employment. Specifically, the Board affirmed the findings that the illegal activities were not available on the open market, citing *Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989), the job in prison consisted of limited duties, was available only because claimant was in prison, and was not available on the open market, and the singing "jobs" were not regular and continuous and could not establish a wage-earning capacity, as he did not always get paid. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

The Board affirmed the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Claimant was injured in Kuwait, was born in Nigeria, is a German citizen, and lives in the Netherlands. The administrative law judge credited claimant's expert who opined that the jobs identified by employer's vocational expert were unsuitable for claimant because they required skills he does not have, including communication in English, which is possible but difficult, and they were not sedentary as required by claimant's doctor. As employer failed to establish the availability of suitable alternate employment, it was unnecessary to address employer's assertion that claimant failed to diligently seek alternate employment. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this claim for total disability benefits for a work-related knee injury, the Board held that the administrative law judge correctly found that claimant's hearing loss is a pre-existing physical impairment that may be properly considered in addressing the suitability of alternate jobs identified in employer's labor market survey. Thus, the Board upheld the administrative law judge's decision to allow claimant to testify about his hearing loss over employer's objection. As employer had previously paid claimant scheduled and medical benefits for his work-related hearing loss, employer had actual or constructive notice of his hearing impairment. Moreover, employer had the opportunity during discovery to inquire about any medical conditions that might affect claimant's ability to perform alternate work. The Board rejected employer's attempt to distinguish a pre-existing work-related impairment for which a claimant previously received compensation under the Act from other pre-existing physical or vocational conditions affecting the claimant's ability to perform alternate employment, stating that in both cases, the claimant's impairment or

other condition affecting his employability is a relevant consideration in evaluating the suitability of alternate work relied upon by the employer to establish suitable alternate employment. *Collins v. Elec. Boat Corp.*, 45 BRBS 79 (2011).

The Fourth Circuit held that the Board erred in affirming the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. The administrative law judge erred in concluding that claimant needed frequent rest breaks and was unable to stand for long periods because there was no evidence to support the findings, and there was some evidence to the contrary. Similarly, there was no evidence that claimant's medications would cause him to fail a drug test for security guard positions or interfere with his ability to work. Employer relied on the physical restrictions of which it was aware to present a range of job opportunities, and it cannot be faulted for "failing to account for restrictions which were unannounced prior to the hearing." Employer also appropriately relied on the DOT's occupational descriptions, pursuant to *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The court held that employer met its burden of establishing suitable alternate employment by identifying at least four positions that would accommodate claimant's restrictions. The court remanded the case for the administrative law judge to address whether claimant was unable to obtain employment paying more than his job at his family's restaurant, after a diligent job search. *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013).

The Sixth Circuit affirmed the Board's decision holding that substantial evidence supported the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. The court stated that, as the labor market survey identified jobs based on employer's expert's opinion of claimant's abilities, and not on the restrictions set by claimant's physician and credited by the administrative law judge, the administrative law judge rationally found that the jobs identified were not suitable for claimant. Accordingly, the court affirmed the award of benefits. *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).

The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment that met claimant's physical restrictions related to her work-related back injury and that work as a parking lot attendant was within her vocational capabilities. Moreover, none of the credited physicians imposed any work restrictions related to alleged side effects from claimant's pain medication. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Onset Date of Partial Disability

The Board initially held that where the employee has reached permanency and suitable alternate employment is established thereafter, it is reasonable to conclude that the onset date of the partial disability is the date of permanency, regardless of when the first evidence establishing the availability of suitable alternate employment was gathered. *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 236 n.5 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). *Cf. Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986) (where employer established suitable alternate employment at a job created in its facility, the Board affirmed a finding that the total disability ended and partial began on the date of the job offer); *Stoute v. Shea-Ball*, 13 BRBS 755 (1981) (administrative law judge should consider when the suitable alternate employment was first available or demonstrated to be available).

The United States Courts of Appeals to address the issue, however, rejected the Board's holding that a showing of available alternate employment may be applied retroactively to the date of maximum medical improvement. The courts held that the Board's approach ignored the concept that disability is an economic as well as a medical concept. Thus, partial disability commences on the date that suitable alternate employment is shown. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The Board thereafter acquiesced in these holdings and adopted the rule that the date of permanency does not alter the extent of claimant's disability. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

Employer can meet its burden through retrospective evidence of jobs available at an earlier date, including at the date of maximum medical improvement. *Palombo v. Director, OWCP*, 937 F.2d at 77, 25 BRBS at 12(CRT) (holding "does not mean that an employer cannot satisfy its burden by showing the existence of jobs at an earlier point in time, even if they no longer exist"); *Stevens v. Director, OWCP*, 909 F.2d at 1260, 23 BRBS at 95(CRT) (employer can show "there was suitable alternative available work at the time of maximum medical improvement, even several years after that point. The employer merely needs to overcome the inherent limitations of credible and trustworthy evidence"). *See Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (administrative law judge's determination that suitable alternate employment was "undoubtedly" available at the date of maximum medical improvement was not supported by substantial evidence).

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

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

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

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

The Board held that a showing of available suitable alternate employment may not be applied retroactively to the date an injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. The Board

decided to apply this holding in all circuits, as it follows the rationale of recent decisions in the Second, Ninth, and D.C. Circuits. The Board acknowledged that this holding gives effect to the concept that a disability under the Act consists of both an economic and a medical concept, and it would not prevent an employer from attempting to establish the existence of suitable alternate employment as of the date an injured employee reached maximum medical improvement or from retroactively establishing that suitable alternate employment existed on the date of maximum medical improvement. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

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

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

The Board rejected claimant's contention that employment positions identified by employer after the issuance of the administrative law judge's initial decision cannot be relied upon to modify the prior decision merely because those positions existed at the time of the initial hearing. The Board overruled *Lombardi*, 32 BRBS 83, and *Feld*, 34 BRBS 131. The administrative law judge's finding that employer established the availability of suitable alternate employment as of the date of its labor market survey was supported by substantial evidence. Thus, claimant's scheduled permanent partial disability commenced on that date. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

The Board vacated the administrative law judge's finding that employer established partial disability on the day after employer's labor market survey and remanded for the administrative law judge to consider evidence that suitable alternate employment was available on an earlier date when a physician stated that claimant was capable of working with restrictions. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Single Job Opportunity Identified

The issue of whether, and under what circumstances, a single job opportunity may suffice arose following the Fourth Circuit's holding in *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), that a showing by employer of a single job opening is insufficient to satisfy its burden of suitable alternate employment. Relying on references in *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165, to "types of jobs" claimant is capable of performing and whether jobs are realistically available "within this category of jobs," the court held that employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform.

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The Board reversed the administrative law judge's holding that employer met its burden where the only job identified was as an insurance agent which paid on a commission basis and required unpaid training claimant had not completed. The Board held that under the circumstances, claimant's ability to earn income as an insurance agent is entirely speculative. The Board noted that even if this job were suitable alternate employment, it would not satisfy the holding in *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT) that one job opportunity is not enough. *Hoard v. Willamette Iron & Steel Co.*, 23 BRBS 38 (1989).

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

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

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

Reversing *Green* and *Hayes*, the Fifth Circuit held that an employer may establish the availability of suitable alternate employment by demonstrating the availability of general job openings in the local community that are within claimant's physical and mental capacities and which claimant has a reasonable opportunity to secure. Employer need not establish the precise nature and terms of specific job openings. Moreover, the court disagreed with the holding of the Fourth Circuit in *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), that an employer's demonstration of only one specific job opening is automatically insufficient to satisfy its burden of proof. The court stated that under *Turner*, it is possible for an employee to have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances, such as where the 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. Whether a single job opening is reasonably available is a factual determination. The Fifth Circuit also stated that the facts here are not similar to those in *Lentz*, as both employers here appear to have described a number of other general employment opportunities available in the local communities. Thus, the cases were remanded for a determination as to whether each employer showed that the specific and general jobs identified were within claimants' physical and mental capacities and whether those jobs are realistically available to each claimant in his local community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991).

In a decision designated not published, the Fifth Circuit reversed a Board decision holding a single job sufficient under *P & M Crane*. The Fifth Circuit held that the determination of whether a job is sufficient is case specific, and while the hypothetical given in *P & M Crane* is only an example, that hypothetical establishes that more must be shown than the mere existence of a job the claimant can perform. The court distinguished the single opportunity in this case from the example offered in *P & M Crane*, as the job here involved an entry-level job, as opposed to one which requires a skilled employee performing specialized work, and the number of workers in the local community qualified to perform such an entry-level job is likely very high. Without evidence of a reasonable likelihood that claimant could obtain the single job identified, the court found it significant that employer did not produce evidence regarding the general availability of jobs claimant could perform. Thus, where one specific job is identified and no general employment opportunities that were suitable alternatives for claimant are proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified. Since employer did not do so, the court reversed the Board's decision. *Diosdado v. John Bludworth Marine, Inc.*, 37 F.3d 629, 29 BRBS 125(CRT) (5th Cir. 1994)(unpublished) (under rules of the Fifth Circuit, unpublished opinions issued prior to January 1, 1996, are precedent. U.S. Ct. of App. 5th Circuit Rule 47.5.3).

The Board held that where employer secures a single job offer for claimant, either within its own facility or with another employer, it satisfies its burden of establishing the availability of suitable alternate employment. The Board distinguished this case from *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), wherein the court held that a single job opening was insufficient to satisfy employer's burden of demonstrating "types" of jobs; employer here identified a specific, actual job as a cone inspector which claimant was capable of performing and offered it directly to him through its attorney. The Board concluded that such an offer overcomes the concern expressed by the court

in *Lentz* that a disabled employee might have difficulty obtaining the one job opening identified as suitable. *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990).

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

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

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

The Board affirmed the administrative law judge's finding that one suitable position does not establish the availability of alternate employment as there were no special circumstances that would suggest claimant could have obtained the single available job. *Ryan v. Navy Exch. Serv. Command*, 41 BRBS 17 (2007).

Effect of Claimant's Relocation

The Board initially held that where the employee relocates for personal reasons, the employer meets its burden if it shows that jobs are available within the geographic area in which she resided at the time of the injury. *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984); *see Hicks v. Pac. Marine & Supply Co.*, 14 BRBS 549 (1981) (where employer failed to show available jobs in Hawaii, claimant's desire to return to the mainland is not relevant); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Jameson v. Marine Terminals, Inc.*, 10 BRBS 194 (1979) (job available if within area where lived or worked). However, the Courts of Appeals for the First and Fourth Circuits rejected the Board's approach. *Wood v. U. S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The Fourth Circuit in *See* held that a variety of factors should be considered in determining the relevant labor market, noting that claimant lived in the new community for two years at the time employer terminated benefits and there is substantial evidence that he had moved there to lower his cost of living. In *Wood*, the court held that an employee's chosen community is presumptively the proper choice for determining earning capacity. The Board has followed these decisions, overruling its prior decisions to the contrary. *Holder v. Texas E. Products Pipeline, Inc.*, 35 BRBS 23 (2001). *See Wilson v. Crowley Mar.*, 30 BRBS 199, 203-204 (1996).

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

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

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

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

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

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

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

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

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

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

Relevant Factors: Criminal Record, Incarceration, Illegal Alien

In determining whether employer has met its burden of demonstrating suitable alternate employment, the administrative law judge must address whether there is a reasonable likelihood given the claimant's age, education, and background, he would be hired if he diligently sought the job. In making this determination, pre-existing limitations must necessarily be addressed in determining whether the job is realistically available. *See Fox v. W. State, Inc.*, 31 BRBS 118 (1997). Other factors may affect claimant's employability as well. *See Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001) (affirming finding that employer failed to establish suitable alternate employment, the court found no error in the administrative law judge's discussing SSA regulations for the valid proposition that a variety of factors are relevant in assessing the vocational potential of an individual and held that while jobs existed within claimant's physical abilities for which an illiterate person would be considered, the administrative law judge rationally concluded that these jobs are unsuitable for claimant given his lack of mathematical skills, his age and the fact that his entire employment history is limited to unskilled, heavy, manual labor).

Where claimant has been incarcerated, the Board held that his incarceration will not preclude total disability if there was no suitable a1ternate employment available during the period of incarceration. *Allen v. Metro. Stevedores*, 8 BRBS 366 (1978). Where claimant's prior prison record makes the only job relied on by employer unavailable, employer has not met its burden. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). *Cf. Vecchiarello v. W & J Sloane*, 5 BRBS 78 (1976) (where claimant's criminal record may have caused him some problems in obtaining a job, he was nonetheless not totally disabled).

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

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

The Ninth Circuit reversed the Board's holding that claimant's post-injury job as a maintenance worker in a bank, which was terminated when the bank discovered the

existence of claimant's criminal record, established the availability of suitable alternate employment. The Ninth Circuit held that because the claimant's criminal record kept him from ever "realistically" being able to obtain a job in a bank, it was in fact relevant to the suitable alternate employment determination. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

The Board applied the Ninth Circuit's holding in *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT), in a case arising in Fourth Circuit and affirmed the administrative law judge's finding based on uncontradicted evidence that claimant's felony convictions would preclude suitable alternate employment as a security guard. *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990).

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

The Board affirmed the administrative law judge's finding that claimant's illegal activities, his maintenance job in prison, and his post-incarceration jobs singing in churches, were not sufficient to constitute suitable alternate employment. Specifically, the Board affirmed the findings that the illegal activities were not available on the open market, citing *Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989), the job in prison consisted of limited duties, was available only because claimant was in prison, and was not available on the open market, and the singing "jobs" were not regular and continuous and could not establish a wage-earning capacity, as he did not always get paid. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

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

The Board held that while some aspects of an employee's background must be considered in determining the availability of suitable alternate employment, in this case claimant's status as an undocumented worker, i.e., illegal alien, is not a relevant factor as it has no bearing on claimant's ability to work. Claimant's illegal status will prevent him from

obtaining any job legally. Moreover, unlike factors such as a criminal record, claimant can take action to remove this impediment to his employability. Furthermore, claimant's status should not enable him to obtain a benefit unavailable to legal injured workers with similar educational and vocational backgrounds. As employer introduced evidence of suitable alternate employment within claimant's physical and educational restrictions, claimant is limited to an award of partial disability benefits. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991).

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

The Board rejected employer's argument that claimant's status as an illegal alien precluded him from receiving benefits under the Act, holding that the Act does not differentiate between the disability compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States. 33 U.S.C. §§902(3), 909(g). Specifically, the Board observed that absent a statutory exclusion, which Congress provided for specified types of employees, claimant must be treated as other injured workers for purposes of the Act. Thus, the Board also rejected employer's assertion that claimant's status as an illegal alien precluded him from having any legal wage-earning capacity, since it was undisputed that claimant was working for employer and earning wages when he was injured in that employment. The Board noted that if claimant were able to work, employer's vocational evidence would be considered without regard to claimant's illegal status. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

The Fifth Circuit affirmed the award of temporary total disability benefits to an illegal alien, rejecting employer's contention that the claimant suffered no loss in *legal* wage-earning capacity as he was an illegal undocumented worker and did not have a legal wage-earning capacity prior to his injury. The Act applies to "*any person* engaged in maritime employment" and specifically states that "aliens not residents" are entitled to the same compensation as residents. 33 U.S.C. §§902(3), 909(g). The court's decision in *Hernandez*, 848 F.2d 498 (Section 5(b) tort case) supports this result. The Fifth Circuit held that awarding workers' compensation benefits under the Act is a non-discretionary, statutory remedy and that the remedy provided by the Act is a substitute for the negligence claim that an employee could otherwise bring against his employer in tort. This result does not conflict with the Immigration Reform and Control Act of 1986. *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010), *aff'g J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008).

Vocational Evidence and Rehabilitation

The employer's burden to show suitable alternative employment is a limited, evidentiary one. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Thus, an administrative law judge may rely on the testimony of a vocational counselor regarding the availability of suitable job openings to establish the availability of suitable alternate employment. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). *See also Campbell v. Lykes Bros. Steamship Co*., 15 BRBS 380 (1983) (a finding that suitable alternate employment was not established was vacated and the case remanded where uncontradicted testimony of vocational expert established that positions were available with an employer willing to interview the employee and who had hired someone with similar disabilities in the past; employer not required to show an offer of a specific job); *Kimmel v. Sun Shipbuilding & Dry Dock Co*., 14 BRBS 412 (1981) (rejecting vocational evidence where only one of three vocational rehabilitation experts who testified attempted to support statements regarding the availability of employment by stating that he knew that jobs were available based upon market surveys and advertisements and an updated report presented by this expert contained no evidence of availability).

The administrative law judge should determine the employee's physical and psychological restrictions based on the credited medical opinions and apply them to the available jobs identified by the vocational expert. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). In *Brown v. Maryland Shipbuilding & Drydock Co*., 18 BRBS 104 (1986), the Board held that the administrative law judge's finding of suitable alternate employment could not be affirmed as he did not explain how claimant's medical restrictions are compatible with the jobs located by the rehabilitation service and he ignored claimant's testimony that he is required to periodically use a therapeutic device. Moreover, the administrative law judge also did not consider claimant's diligence in seeking work and his lack of success in obtaining any positions. If the vocational expert is uncertain whether the positions which he identified are compatible with the employee's physical and mental capabilities, his opinion cannot meet employer's burden. *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984).

If a vocational rehabilitation counselor's evaluation relies on physicians whose opinions are discredited by the administrative law judge, and the counselor admits that the credited physician's opinions would preclude the employee from working, employer has not demonstrated suitable alternate employment. *Dygert v. Mfr.'s Packaging Co.*, 10 BRBS 1036 (1979). If the vocational expert states that no jobs exist which the employee could reasonably obtain, he is permanently totally disabled. *Brandt v. Stidham Tire Co*., 16 BRBS 277 (1984). If the only suggested job would require six months of unpaid training, it is arguably unavailable. *Sutton v. Genco, Inc.*, 15 BRBS 25 (1982).

Claimant's refusal to undergo vocational rehabilitation training is not a factor to be considered in determining the nature or extent of disability, as neither the Act nor regulations require that claimant undergo vocational rehabilitation training. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979) (Kalaris, concurring) (S. Smith, dissenting), *aff'd mem*., 638 F.2d 1232 (5th Cir. 1981). *See also Perry v. Stan Flowers Co.*, 8 BRBS 533 (1978); *Berkman v. Todd Shipyards Corp.*, 7 BRBS 933 (1978); *Morgan v. Asphalt Constr. Co.*, 6 BRBS 540 (1977). Placing the employee in a vocational rehabilitation program is not sufficient to establish suitable alternate employment; on-the-job training, however, might qualify. *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592 (1980). *See also Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979); *Love v. W. M. Schlosser Co.*, 9 BRBS 749 (1978); *see generally Dugger v. Jacksonville Shipyards, Inc.*, 8 BRBS 552 (1978), *aff'd*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979).

However, where claimant is enrolled in a full-time Department of Labor (DOL) sponsored vocational rehabilitation program, he may be entitled to total disability benefits during the duration of the program notwithstanding the availability of other employment opportunities. *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). *See* additional cases cited, *infra*.

In *Mendez*, the Board discussed the distinction between vocational rehabilitation *training* and a vocational *evaluation* in finding that the latter was not at issue before it. Subsequently, the Board reiterated that participating in a vocational evaluation for purposes of determining whether suitable alternate employment is available is distinct from undergoing rehabilitation training and held that the employee must reasonably cooperate with his employer's rehabilitation specialist and submit to rehabilitation evaluations. *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). The Board has found this requirement to be consistent with the *Turner* holding that where suitable alternate employment is available, claimant must demonstrate due diligence in seeking work, discussed *infra*. *Villasenor*, 17 BRBS 99. As part of his general power to direct and authorize discovery, an administrative law judge may compel such an evaluation. 20 C.F.R. §702.341; *Villasenor*, 17 BRBS at 102 n. 5; *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983).

In *Villasenor*, the Board held that where claimant refuses to cooperate with employer's expert and participate in a vocational evaluation, that fact should be taken into consideration by the administrative law judge. *See Vogle*, 17 BRBS at 129; *Pernell*, 11 BRBS at 538 (administrative law judge may excuse a vocational rehabilitation counselor's lack of specificity regarding suitable alternate employment if the employee was uncooperative). The administrative law judge may credit a vocational expert's opinion even if the expert did not interview the employee, as long as the expert was aware of the employee's age, education, industrial history, and physical limitations when exploring the local opportunities. *Southern*, 17 BRBS at 66-67. In *Southern*, the expert reviewed claimant's deposition, doctors' reports and hospital records.

The administrative law judge may not rely on a psychologist unfamiliar with the local job market as a vocational expert. *Villasenor*, 17 BRBS at 103. *Cf. Feezor v. Paducah Marine Ways*, 13 BRBS 509 (1981) (report of clinical psychiatrist who works at rehabilitative service is relevant, if not necessarily sufficient, as to whether the employee could perform certain jobs and their availability). The testimony of a paramedic with no vocational expertise is also insufficient. *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). Similarly, a physician's testimony on vocational disability may be discredited as beyond his expertise. *Sutton*, 15 BRBS at 27; *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212 (1976). *See also McDuffie v. Eller & Co.*, 10 BRBS 685 (1979) (merely asking the employee and his physician whether he can do another job does not meet employer's burden). Testimony by a non-expert should not be sufficient to show unemployability unless he knows the specific requirements of each job possibility. *Villasenor*, 17 BRBS at 103. The Board upheld a finding that suitable alternate employment was available to the employee based on the testimony of a vocational expert and two longshoremen, all of whom were familiar with longshoring activities in the port, that ample work as a longshoreman was available considering the claimant's physical condition, age, and seniority level. *Moore v. Strachan Shipping Co.*, 13 BRBS 209 (1980).

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Vocational Evidence

The Board affirmed the administrative law judge's finding that employer's expert had provided only a "theoretical showing" of suitable alternate employment, where he did not identify specific job openings with specific employers but rather described general categories of jobs which he believed claimant could perform and the salary which he "anticipated" claimant could earn, and stated without discussion that the described jobs were available where claimant lived. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

The Board reversed a finding of partial disability, holding that an expert's testimony that jobs were available which was based only on statewide statistics, rather than her own investigation into suitable positions, was insufficient to establish suitable alternate employment. *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

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

Affirming a partial disability award based on wages in jobs identified by one expert, the Board affirmed the administrative law judge's rejection of additional jobs identified by another vocational counselor because the precise nature, terms and actual availability of the positions were not elicited. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment as it was supported by a vocational expert's opinion that claimant was capable of performing the functions of a Fotomat attendant, a position which was available to him, and medical evidence that the job was within his restrictions. *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

The Board held that an administrative law judge erred in rejecting a doctor's opinion that claimant could physically perform alternate employment on the basis that the doctor was unaware that the vocational counselors only considered full-time employment and stated that claimant would need pre-job search training and work hardening. The Board reasoned that the doctor's lack of awareness of the counselor's method for identifying suitable alternate employment did not detract from his medical opinion regarding whether claimant could physically perform these jobs. The administrative law judge 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 failed to provide a vocational assessment and instead rendered an opinion beyond her expertise. *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

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

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

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

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

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

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

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

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

The Board affirmed the administrative law judge's finding that claimant's failure to cooperate with employer's vocational rehabilitation specialist was immaterial, since employer's evidence as to the availability of suitable alternate employment was otherwise flawed as it lacked the necessary information for the administrative law judge to address

the jobs' suitability. Moreover, the administrative law judge found the lack of cooperation did not hinder the expert's job search. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

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

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

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

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

The Ninth Circuit affirmed the finding that suitable alternate employment was not established as none of the potential employers stated they would consider employing a person with claimant's deficiencies, and a counselor stated that there was no job in the competitive labor market that claimant could perform. The administrative law judge rationally discredited the testimony of employer's witness who stated claimant did not want

to work. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991).

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

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

The Ninth Circuit held that there is substantial evidence to support the administrative law judge's award of permanent total disability based on a finding that employer did not establish the availability of suitable alternate employment where half of the jobs listed in employer's labor market surveys required experience which claimant did not have and claimant had contacted the remaining employers and other firms not listed in employer's surveys without success. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *cert. denied*, 511 U.S. 1031 (1994).

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

The Board remanded the case for reevaluation of suitable alternate employment. The administrative law judge erred by rejecting evidence of general job availability in this Fifth Circuit case on the grounds that employer's expert identified only eight specific job openings and that two of the identified jobs were filled when claimant inquired about them. The jobs need only have been available during the "critical period" when claimant was able to work. Moreover, the administrative law judge erred in questioning the reliability of the survey based on employer's failure to determine claimant's spelling ability without

determining whether this would preclude claimant from performing the identified jobs. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

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

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

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

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

The Eighth Circuit affirmed the administrative law judge's finding that employer did not establish suitable alternate employment where the administrative law judge credited the opinion of claimant's vocational expert that there was no work in the local economy that claimant could perform. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

The Second Circuit held that the administrative law judge erred in finding claimant was only partially disabled despite finding that the labor market survey was insufficient to establish suitable alternate employment because the consultant failed to account for claimant's psychiatric condition, medication, and inability to read. As a matter of law,

claimant is entitled to total disability benefits. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

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

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

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

Affirming this conclusion, the Seventh Circuit stated that employer need not identify specific employers ready and willing to hire the claimant, but it must provide enough information for the administrative law judge to determine if the jobs are within claimant's capabilities. In this regard, the court rejected the argument that the administrative law judge applied too stringent a test in requiring more specific information from the vocational expert about the job requirements, stating that the problem with the expert testimony was not that it failed to be specific in naming actual employers who would hire claimant, but

that it failed to be specific in addressing claimant's capabilities. While employer need not show that there were specific, prospective employers in the area ready and willing to hire claimant, a report simply matching general statements of his job skills with general descriptions of jobs fitting those skills is not enough. Thus, the administrative law judge's decision not to credit the vocational expert's testimony was affirmed. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

The Board vacated the administrative law judge's finding that employer did not establish the availability of suitable alternate employment as he discredited the vocational evidence for invalid reasons. Contrary to the administrative law judge's conclusion, the vocational specialist identified jobs that provided on-the-job training and that required no reading ability. Moreover, the administrative law judge incorrectly assumed that further surgery was imminent. The case was remanded for the administrative law judge to specifically state claimant's residual physical limitations, and then to determine the suitability of the jobs identified in light of this finding. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

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

The Board vacated the administrative law judge's finding that employer's labor market survey was insufficient to meet its burden of showing the availability of suitable alternate employment and remanded for reconsideration of this alternate work as, in contrast to the administrative law judge's findings, a number of the listed positions provide a sufficient description to enable the administrative law judge to make a comparison between the job requirements and the physical limitations imposed by the credited physician. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The Board, on the facts of this case, reversed the administrative law judge's finding that employer established suitable alternate employment with positions identified in its labor market survey. Claimant, who had performed modified work in employer's facility whenever such work was available, was on leave of absence status during a period in which no such work was available. A provision of the collective bargaining agreement (CBA) between employer and claimant's union provided that an employee on leave of absence due to a work-related injury would be subject to termination if she engaged in employment for another employer. Reasoning that employer must bear responsibility for a contractual agreement into which it entered, the Board held that employer is not entitled to use evidence

of jobs with other employers to demonstrate to availability of suitable alternate employment for a claimant on leave of absence status pursuant to the CBA where the potential exists for her to resume suitable work for employer when such work is available. *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

The Fourth Circuit held that the Board erred in affirming the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. The administrative law judge erred in concluding that claimant needed frequent rest breaks and was unable to stand for long periods because there was no evidence to support the findings, and there was some evidence to the contrary. Similarly, there was no evidence that claimant's medications would cause him to fail a drug test for security guard positions or interfere with his ability to work. Employer relied on the physical restrictions of which it was aware to present a range of job opportunities, and it cannot be faulted for "failing to account for restrictions which were unannounced prior to the hearing." Employer also appropriately relied on the DOT's occupational descriptions, pursuant to *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The court held that employer met its burden of establishing suitable alternate employment by identifying at least four positions that would accommodate claimant's restrictions. The court remanded the case for the administrative law judge to address whether claimant was unable to obtain employment paying more than his job at his family's restaurant, after a diligent job search. *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013).

The Sixth Circuit affirmed the Board's decision holding that substantial evidence supported the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. The court stated that, as the labor market survey identified jobs based on employer's expert's opinion of claimant's abilities, and not on the restrictions set by claimant's physician and credited by the administrative law judge, the administrative law judge rationally found that the jobs identified were not suitable for claimant. Accordingly, the court affirmed the award of benefits. *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).

The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment that met claimant's physical restrictions related to her work-related back injury and that work as a parking lot attendant was within her vocational capabilities. Moreover, none of the credited physicians imposed any work restrictions related to alleged side effects from claimant's pain medication. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Enrollment in a Vocational Rehabilitation Program

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

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

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

In a case arising within the jurisdiction of the Fifth Circuit, the Board held *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT), applicable even though the case differed from *Abbott* in that claimant had a bachelor's degree as many of the policy concerns underlying *Abbott* were applicable here. Thus, the Board reversed the administrative law judge's finding that *Abbott* was distinguishable and remanded for him to award claimant permanent total disability compensation for those periods in which he was precluded from working because of his participation in the DOL-sponsored rehabilitation program. *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998).

The Board affirmed the administrative law judge's finding that claimant was not entitled to total disability benefits while enrolled in a full-time course of study under the auspices of the DOL, distinguishing *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). In this case, claimant stipulated on remand that while still in school she obtained a part-time job. Thus, the administrative law judge rationally inferred that claimant's rehabilitation plan did not preclude her from working, and thus that claimant could have performed this or other entry level jobs. Claimant therefore was limited to an award under the schedule for her arm impairment following maximum medical improvement. *Gregory v. Norkfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

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

The Board held that claimant, pursuant to *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT), may establish that identified suitable alternate employment is not reasonably available due to his participation in a state-sponsored, and subsequently DOL-approved, vocational rehabilitation program. Although the claim involved a scheduled injury, application of *Abbott* advances the humanitarian purpose of the Act and furthers the interests of both claimant and employer. The Board affirmed the administrative law judge's finding that claimant was precluded from working at a part-time job during his participation in a vocational rehabilitation program as it was supported by substantial evidence. *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The Fourth Circuit held that where claimant is offered a job while he is enrolled in a DOL-approved vocational rehabilitation program, claimant may, in appropriate circumstances, demonstrate that suitable alternate employment is unavailable. While the administrative law judge should consider whether participation in the rehabilitation program will increase a claimant's wage-earning capacity, this factor, standing alone, is not dispositive, as the Act seeks to ensure that covered employees have long-term economic security and emphasizes the importance of vocational rehabilitation. The Fourth Circuit held that substantial evidence supported the administrative law judge's finding that alternate employment which employer offered claimant was unavailable to him during his enrollment in the program where the administrative law judge found that claimant could not have accepted the employment offer and still completed the program and claimant was only one semester from obtaining his degree and completing the program. *Newport News*

Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse], 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

The Board rejected employer's assertion that it should not apply the Fifth Circuit's decision in *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT), to this case arising in the Ninth Circuit. The Board rejected the contention that because Congress considered and declined to enact a provision providing for awards of total disability during rehabilitation, *Abbott* and its progeny create an extra-statutory type of benefit. The Board held that the *Abbott* inquiry fits within the traditional suitable alternate employment analysis regarding the availability of such employment In assessing claimant's entitlement to total disability benefits pursuant to *Abbott*, the Board affirmed the administrative law judge's determination that claimant was not able to work during his rehabilitation program, as the administrative law judge rationally found that claimant's giving up a paid internship was evidence of claimant's inability to work while he went to school given his classes, commute and study time. The administrative law judge also rationally found that claimant's long-term earning potential was best served by claimant's completion of the program notwithstanding that his immediate wage-earning capacity would be less than that paid by the jobs employer identified. *Castro v. Gen. Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Ninth Circuit relied on *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT), and *Brickhouse*, 315 F.3d 286, 36 BRBS 85(CRT), and held that the Board did not err in affirming the administrative law judge's award of total disability benefits during the period claimant was enrolled in an OWCP-approved rehabilitation program, as suitable alternate employment was unavailable during that time. The Ninth Circuit agreed that the *Abbott* rule is consistent with the language and policy of the Act to encourage vocational rehabilitation. Further, the Ninth Circuit agreed with the other circuits that the rule is not rigid and that a number of factors should be considered in determining whether a claimant may receive benefits while enrolled in a program. The administrative law judge here addressed relevant factors and his findings are supported by substantial evidence. The court rejected employer's contention that the scheduled nature of claimant's injury precludes total disability. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

In addressing employer's appeal of a district director's approval of a rehabilitation plan, the Board declined to address employer's contentions regarding its potential liability for disability benefits during claimant's retraining period, as that issue is properly presented to an administrative law judge in the first instance, and employer may appeal any adverse findings. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The Board held that employer's having fully paid permanent partial disability benefits under the schedule prior to claimant's beginning an OWCP-approved rehabilitation program is not determinative of claimant's entitlement to total disability benefits. The

Board reasoned that the same standards apply to the issue of total disability in all cases: a claimant is not limited to an award under the schedule when an injury to a scheduled member results in total disability, *PEPCO*, 449 U.S. 268, 14 BRBS 363, and situations exist which require an employer's payment of total disability benefits even after a scheduled award has been paid. Thus, the Board affirmed the administrative law judge's grant of summary decision to claimant and award of total disability benefits during claimant's enrollment in the approved vocational program during which suitable alternate employment was not reasonably available to him due to the requirements of the program. *Walker v. Todd Pac. Shipyards*, 46 BRBS 57 (2012), *vacated in pert. Part on recon*., 47 BRBS 11 (2013).

On reconsideration, the Board held that the administrative law judge inappropriately issued a summary decision because he weighed evidence in favor of claimant, the moving party, to find that claimant was totally disabled during his enrollment in the DOL-approved rehabilitation program. In opposing claimant's motion, employer submitted to the administrative law judge evidence raising a material issue of fact concerning whether the rehabilitation program would increase claimant's wage-earning capacity. In issuing a summary decision, the administrative law judge erred in relying on claimant's evidence to find that the program would increase claimant's wage-earning capacity. The Board noted that in addressing a motion for summary decision, the administrative law judge must determine if there is an absence of a genuine factual dispute and construe all inferences in favor of the non-moving party. The Board further noted that if it is necessary to weigh evidence and/or to make credibility determinations, the administrative law judge cannot grant summary decision. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

Jobs in Employer's Facility

The employer can meet its burden by offering the employee a suitable job in its facility, *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984), including a light-duty job. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). The administrative law judge need not examine job opportunities on the open market where employer offers suitable work which is not sheltered employment. *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). Thus, employer's offer of two light-duty clerical jobs, which was found not due to mere beneficence but rather part of the employer's rehabilitation program, allowing the employee to work back up to his regular job while earning his pre-injury wages, carried its burden of proving suitable alternate employment. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). *Accord Cason v. Norfolk Shipbuilding & Dry Dock Co.*, 11 BRBS 50 (1979); *Caldwell v. George Hyman Constr. Co.*, 10 BRBS 112 (1979).

The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). *Cf. Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980) (no suitable alternate employment where claimant was turned down by employer for alternative positions).

The employer's offer of a job which is too physically demanding for the employee to perform is not suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307 (1984). Neither is a job "available" when it is within the employer's exclusive control but employer refuses to offer it to claimant, *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990), or when it refuses to alter working conditions in the manner required by all physicians of record to avoid recurrence of the disabling symptoms. *Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). *See Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390 (1979) (job meeting only one restriction not suitable alternate employment); *Jameson v. Marine Terminals, Inc.*, 10 BRBS 194 (1979) (offering to try employee in job not meeting medical restrictions not suitable alternate employment).

Similarly, where the employer fires the employee because of her medical problems, *Base Billeting Fund, Laughlin Air Force Base v. Hernandez*, 588 F.2d 173, 9 BRBS 634 (5th Cir. 1979), or refuses to rehire an employee who had quit on his physician's order, *E. S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940), it has not shown suitable alternate employment. A proffered job which is inaccessible to the employee because he cannot physically handle a long commute is also unavailable. *Diamond M Drilling Co. v.*

Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978); *Sampson v. FMC Corp., Marine & Rail Equip. Div.*, 10 BRBS 929 (1979).

Employer can meet its burden even if it first introduces evidence of suitable alternate employment at the hearing. *Turney*, 17 BRBS at 236-237 n.7. However, such a late offer is dubious. *Diamond M Drilling*, 577 F. 2d at 1007 n.5, 8 BRBS at 661 n.5; *Jameson*, 10 BRBS at 203. The administrative law judge need not credit an offer of light-duty work first made at the hearing, especially if it is a general offer not mentioning any specific, available job within the employee's capability. *Letendre v. Braswell Shipyards, Inc.*, 11 BRSS 56 (1979).

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

The Board affirmed the finding that the shore-side welding position held by claimant until his discharge for violating a company rule was suitable alternate employment. While these jobs may be light-duty work, they do not constitute sheltered employment where claimant was successfully performing the work and at least 2 shifts involving approximately 350 out of employer's 950 welders performed the same work. Claimant was thus partially disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

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

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

Reversing the Board's decision after remand affirming a decision that suitable alternate employment was established, the Fifth Circuit held the Board exceeded its scope of review. Notwithstanding medical evidence and testimony that claimant is capable of some employment, the administrative law judge, as finder-of-fact, may rationally credit testimony that claimant is unable to perform any alternate work, based on his subjective complaints of constant pain, and is therefore totally disabled. The Board therefore erred in vacating the administrative law judge's initial decision. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

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

The Board affirmed the administrative law judge's finding that employer failed to establish suitable alternate employment because although claimant failed to return to work on July 25, 1983, which employer alleged was attributable to his arrest on the preceding day, employer made no effort to determine whether it had suitable alternate employment actually available for claimant on that date. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

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

The Board affirmed the administrative law judge's finding that claimant's post-injury job for employer did not constitute suitable alternate employment where he returned to work part-time for the company he owned, he received no wages for the work he performed and no one like him, i.e., able only to perform office work but unable to do any field work, would be hired. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

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

The Fifth Circuit affirmed the Board's holding that claimant's post-injury assignment to a modified joiner position within employer's facility, which claimant satisfactorily performed for one year prior to the hearing, satisfied employer's burden of showing the availability of suitable alternate employment. Noting that its decision in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), cited with approval the Board's holding in *Darden*, 18 BRBS 224, the court held, consistent with *Darden*, that an employer's offer of a suitable job within its own facility is sufficient to establish suitable alternate employment; the employer need not show that the claimant can earn wages in the open market. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The Board remanded the case for further consideration of suitable alternate employment where the administrative law judge did not specifically consider whether the post-injury position claimant held with employer in its tool room was necessary and whether claimant was capable of performing it. Additionally, the Board held that the administrative law judge did not discuss the labor market survey submitted by employer in this case which contained several positions which may be

sufficient to establish the availability of suitable alternate employment. *Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997).

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

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

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

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

Employer offered claimant a light-duty job after her injury, but the administrative law judge credited claimant's testimony that she could not perform the work due to constant pain. Although the positions identified were within claimant's restrictions and claimant testified that the work itself does not cause increased pain, the Board affirmed the administrative law judge's finding that claimant was not capable of any work at the time

of the hearing due to the persistent pain as it was rational and supported by the evidence. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

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

Short Term Employment; Effect of Discharge and Layoff

The fact that the employee had a short-term job post-injury does not necessarily establish that he is not totally disabled; such jobs must remain suitable and available. *See Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734 (1978). In *Carter*, claimant worked post-injury for three and one-half months as a foreman, and was laid off from this job. The Board held that it did not meet employer's burden of showing suitable alternate employment absent a showing that such work continued to be available. The Board also held that claimant's failure to seek full-time employment after being laid off was immaterial as employer is the party bearing the burden of showing alternative employment opportunities. *Accord Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In *Jarrell*, the Board rejected the argument that claimant's unpaid and limited work for a short time at a tavern was suitable alternate employment. As there was no evidence a job at the tavern within claimant's restrictions was available, the Board held the administrative law judge's finding suitable work was available was not supported by substantial evidence and modified the award to permanent total disability.

Sporadic post-injury work also may not establish suitable alternate employment; thus, the Board affirmed a finding of permanent total disability after such jobs ended but remanded the case for findings regarding partial disability during the periods when claimant was employed. S*eals v. Ingalls Shipbuilding, Div. of Litton Sys., Inc.*, 8 BRBS 182 (1978). The Board held that an administrative law judge erred in relying on claimant's work as a waterman to find he was not totally disabled where he fished to support his family; the job was seasonal, his ex-employer did not establish the pay scale for it, and he worked only out of necessity. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). *See also* cases on Total Disability While Working, *infra.*

However, where employer provides claimant a suitable job in its facility which claimant loses due to his own misconduct, employer does not bear a renewed burden of showing suitable alternate employment and claimant is at most partially disabled. In *Walker v. Sun Shipbuilding & Dry Dock Co*.**,** 12 BR5S 133 (1980) (Miller, J., dissenting), *vac. and rem.*

mem., 642 F.2d 445 (3d Cir. 1981), the Board initially affirmed a finding that employer met its burden where it provided a light-duty job for claimant which was necessary and which claimant was capable of performing although claimant worked only one month. On appeal, the Third Circuit found the evidence that claimant's discharge was unrelated to his disability unconvincing and remanded the case for reconsideration. Following remand to an administrative law judge for further findings, the Board again affirmed the denial of total disability, finding substantial evidence to support the conclusion that the discharge was due solely to claimant's violation of a company rule. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). The Board rejected the argument that the welding position claimant held was sheltered work, as claimant was capable of performing it, it was necessary to employer's business, and several shifts performed the same work. As claimant's discharge for violating a company rule was the sole reason for his discharge, the administrative law judge correctly found that claimant's disability was partial, not total. *Accord Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980) (where claimant was successfully performing light duty work for employer and was discharged due to his own misconduct, Board affirmed finding he was not totally disabled; case remanded for findings regarding partial disability as earnings in this job may be establish wage-earning capacity).

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The Board held that where claimant worked for a period of time in employer's facility at a light duty job but was subsequently laid off due to lack of suitable work, this job cannot establish the availability of suitable alternate employment after the lay-off. The Board distinguished this case from those in which employees were discharged from light duty jobs due to their own misconduct, as here employer withdrew the suitable job from claimant by laying him off. In the absence of other evidence of suitable alternate employment, claimant was totally disabled. *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

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

The Board held that the administrative law judge erred in relying on claimant's light duty job for employer as establishing suitable alternate employment where employer laid claimant off from this job. Since employer withdrew the job, it was no longer available. The error was harmless as employer produced other evidence of suitable alternate employment. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence J., dissenting on other grounds).

The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. Thus, where claimant demonstrated he was laid off from a job which previously was found to constitute suitable alternate employment and he remained unable to perform his pre-injury work, the burden shifted to employer to establish the availability

of suitable alternate employment. The Board reversed the administrative law judge, holding that claimant was entitled to Section 22 modification based on the change in circumstances due to the layoff. *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990).

In a case involving modification to obtain an increased permanent partial disability, the Eleventh Circuit adopted the approach in *Vasquez*, 23 BRBS 428, on the question of how to define and allocate the burden of proof when a claimant seeks Section 22 modification regarding disability. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

After affirming the Board's decision that clerical work was sheltered employment and did not constitute suitable alternate employment, the First Circuit also found the evidence regarding claimant's brief stint as a security guard was not sufficient to establish suitable alternate employment where employer failed to provide any evidence regarding the precise nature, terms and availability of the job or even identify the employer and did not indicate why claimant did not continue in the job. Claimant, therefore, was entitled to permanent total disability benefits. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

The Board held that employer established the availability of suitable alternate employment where claimant returned to work with a different employer following a work-related injury in a position which suited his physical restrictions, for which he had been trained and in which he performed successfully for approximately 3.5 months before being laid off due to a reduction in the work force and not for any reason associated with his work injury. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

In reversing the Board's decision, the Ninth Circuit deferred to the Director's position that claimant's short-lived 11 weeks of post-injury employment was insufficient to establish that suitable alternate work was "realistically and regularly available to claimant on the open market." In addition, the court found that there was substantial evidence to support the administrative law judge's award of permanent total disability based on a finding that employer did not establish the availability of suitable alternate employment where half of the jobs listed in employer's labor market surveys required experience which claimant did not have and claimant had contacted the remaining employers and other firms not listed in employer's surveys without success. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

The Board vacated the administrative law judge's finding that employer failed to establish suitable alternate employment and remanded for reconsideration of whether a secretarial position which claimant held for eight months following her work injury was terminated due to her psychological condition or her other injury-related conditions, or whether she was discharged for reasons unrelated to her disability. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., concurring in part and dissenting in part). Following remand, the Board affirmed the award of permanent total disability benefits as substantial evidence supported the conclusion that the secretarial position not within her psychological capabilities. *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

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

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

The Board affirmed the administrative law judge's award of permanent partial disability where employer provided claimant with suitable light duty work from which he was discharged due to his own misconduct. The Board rejected employer's argument that this award was improper under *Walker*, 19 BRBS 171, in view of claimant's discharge, as *Walker* held only that suitable alternate employment was established by the job in employer's facility and did not disturb the partial disability award. The Board also found the administrative law judge's analysis supported by *Edwards*, 999 F.2d 1347, 27 BRBS 81(CRT). The case was remanded for further consideration of claimant's wage-earning capacity either in the suitable job employer provided or on the open market. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

Employer terminated claimant's job after his injury and before he returned to work on the basis that he fabricated the injury, but the administrative law judge found the termination was not legitimate and that claimant suffered work related physical and psychological injuries. The Board affirmed the finding that the termination was not due to misfeasance but was a result of claimant's injury and held the administrative law judge properly shifted the burden to employer to establish suitable alternate employment subsequent to the date claimant's doctor stated that claimant would be able to return to his usual employment. As employer failed to meet its burden, the Board affirmed the administrative law judge's finding that employer was liable for compensation subsequent to the date claimant would have been able to return to work from a psychological standpoint. In so holding, the Board distinguished this case from *Brooks*, 26 BRBS 1. *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996).

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

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

The Board rejected the contention that claimant was not entitled to benefits where he was debarred by military authorities from the Johnston Atoll where he was working due to engaging in unauthorized behavior and therefore could no longer work for employer. It was uncontested that claimant was unable to work at the time he was expelled. Thus, this case is distinguishable from *Brooks*, 26 BRBS 1, in that claimant was not performing suitable alternate employment at the time of the discharge, nor was there any evidence that suitable work would have been available to claimant on the atoll but for his expulsion. *IIaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004).

The Ninth Circuit affirmed the Board's rejection of employer's argument that claimant was not entitled to compensation for an injury he sustained after hours during horseplay in a social club on Johnston Atoll. The court distinguished this case from *Brooks*, 26 BRBS 1, on the basis that *Brooks* stands for the narrow proposition that a claimant's post-injury job from which he is later fired for cause may satisfy an employer's burden of showing suitable alternate employment, while in this case claimant was not performing suitable alternate employment at the time of discharge. *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004).

The Board vacated the administrative law judge's finding that claimant voluntarily withdrew from the workforce on September 23, 2006, when she left alternate employment. The administrative law judge did not address a letter claimant received from employer stating it had a job for her and that she was "required to report back to work by October 2, 2006." The job did not materialize. The Board instructed the administrative law judge to address whether the letter constituted an actual offer of employment that reasonably prompted claimant to leave her existing job. The Board observed that the letter had the appearance of an actual offer of employment by employer in light of a subsequent identical letter claimant received which resulted in re-employment. The administrative law judge was to address claimant's entitlement to total disability benefits for the period following her receipt of this letter. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

Claimant's employment as a fire watcher with employer constituted suitable alternate employment. However, employer laid claimant off from this position for economic reasons. Pursuant to *Hord*, 193 F.3d 836, 33 BRBS 170(CRT), the Board held that employer bore a renewed burden of establishing the availability of suitable alternate employment in order to avoid liability for total disability benefits. As the administrative law judge erred in finding that the fire watcher continued to constitute suitable alternate employment after the layoff, the case was remanded for further findings. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

Diligence in Seeking Work

Where employer demonstrates the availability of suitable alternate employment, an injured employee may nonetheless be entitled to total disability if he demonstrates that he was unable to secure such work despite his diligent efforts. In *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), the court stated that a showing of job availability

> brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. This obligation to seek work does not alter the statutory presumption of coverage, nor the employer's initial burden of proving job availability. It merely makes explicit that which has always been implicit--if alternate jobs exist which the claimant could reasonably perform and secure had he diligently tried, the employer, after demonstrating the existence of such jobs has met his burden. Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person genuinely seeking work with his determined capabilities.

Based on this language, the Fifth Circuit rejected the argument that claimant must show a diligent job search as part of his initial burden, stating that *Turner* makes clear that claimant's burden in this regard does not arise until employer has shown suitable alternate employment. Once it has done so, the employer's burden has been met, and the claimant can then prevail if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The Board and other courts of appeal have followed this holding. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Dove v. Sw. Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); *Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985); *Royce v. Elrich Constr. Co*., 17 BRBS 157 (1985).

Thus, the Board affirmed a finding that claimant was not totally disabled where employer established that suitable jobs were available and claimant showed a lack of due diligence in seeking work as he imposed an artificial barrier to employment by rejecting jobs paying less than $25,000 a year. *Dove*, 18 BRBS 139. While claimant's duty to seek work does not displace employer's initial burden of establishing suitable alternate employment, *Roger's Terminal*, 784 F.2d at 691, 18 3RBS at 83(CRT), it is not an abuse of discretion for the administrative law judge to note an employee's lack of diligence in his discussion. *Turney*, 17 BRBS at 236-237 n.7.

Where the employee is physically incapable of performing the suggested suitable alternate employment, the issue of his willingness to seek work is not reached, as employer has not met its burden. *Royce*, 17 BRBS at 159. Similarly, an employee's testimony that he could perform certain jobs, but that his efforts to obtain one have been futile, does not meet employer's burden of demonstrating suitable alternate employment. *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984).

Where claimant demonstrates he diligently tried and was unable to obtain a job identified by employer, he may prevail in his total disability claim. *Roger's Terminal*, 784 F.2d at 691, 18 BRBS at 83(CRT). Where the employee met with the vocational expert's identified potential employers and was not hired, and the administrative law judge took judicial notice that the local unskilled labor market was especially competitive in light of recent immigration of young, able-bodied men from Cuba and Haiti, the Board upheld his finding of permanent total disability. *Parris v. Eller & Co.*, 16 BRBS 252 (1984). *See Army & Air Force Exch. Serv. v. Neuman*, 278 F. Supp. 865 (W.D.La. 1967) (trier-of-fact may consider economic conditions in employee's area).

The employee must reasonably cooperate with his employer's rehabilitation specialist and submit to rehabilitation evaluations. *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). The Board has found this requirement to be consistent with the *Turner* requirement of demonstrating willingness to work. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). *See* Vocational Evidence, *supra*.

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The Board vacated an award of total disability benefits and remanded the case for reconsideration, directing the administrative law judge to consider claimant's willingness to work if, on remand, he found employer established suitable alternate employment. In this regard, the Board stated that the doctors agreed claimant could work and employer did not have a proper opportunity to demonstrate claimant's work capabilities because claimant refused to cooperate with employer's rehabilitation efforts. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In reversing the Board's subsequent decision affirming a finding of partial disability on remand, the court held that the Board exceeded its authority by remanding the case as the administrative law judge's initial decision was supported by substantial evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991)

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

Citing the Fifth Circuit's holding in *Roger's Terminal*, 784 F.2d 681, 18 BRBS 79(CRT), the Board affirmed a finding of suitable alternate employment, but remanded this case to the administrative law judge to determine whether claimant diligently tried but failed to secure employment, including the position the administrative law judge found constituted suitable alternate employment as well as other positions in claimant's job search records. *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

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

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

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

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

Adopting the view of other circuits, the Second Circuit held that once employer meets its burden of establishing the availability of suitable alternate employment, claimant may rebut this showing by demonstrating that he diligently tried, without success, to find another job. If claimant so demonstrates, he is entitled to total disability benefits. In this case, the court found it was unclear whether claimant diligently tried to find suitable alternative employment of the type employer established was reasonably available in his community, as his testimony indicated only that he tried to find "other employment" and was unsuccessful. The court rejected claimant's argument that because employer did not disclose the jobs it located until the hearing, such opportunities were not reasonably available, following precedent holding employer is not required to communicate jobs to claimant. However, given the limited burden on the employer, in proving diligence

claimant "is not required to show that he tried to get the identical jobs the employer showed were available. The claimant merely must establish that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available,'" citing *Turner*, 661 F.2d at 1043, 14 BRBS at 165. Here, claimant could carry his burden by showing that he diligently tried to obtain employment similar to the sedentary bench-work jobs employer relied upon. The only relevant evidence was claimant's testimony, and the administrative law judge referred to it but did not state whether he believed claimant or render findings on his job search. The court held that where claimant offers evidence that he diligently tried to find a suitable job, the administrative law judge must address it and make specific findings regarding the nature and sufficiency of claimant's alleged efforts. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). *See also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991).

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

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

Once employer meets its burden of demonstrating that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. If, in fact, employers will not hire applicants with claimant's non-work-related history of stroke and cardiac problems, it will be apparent when claimant demonstrates that his diligent job search was unsuccessful. *Fox v. W. State, Inc.*, 31 BRBS 118 (1997).

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

The Eighth Circuit affirmed the finding that employer did not establish suitable alternate employment, but added that, assuming, *arguendo*, employer met its burden, claimant rebutted employer's showing by demonstrating a diligent yet unsuccessful job search through evidence including a job application log containing more than 200 entries and expert testimony that claimant had made diligent efforts to secure a position. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

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

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

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

Where employer presented evidence of suitable alternate employment, and claimant testified that he would probably turn down a job offer because of low pay or because of his many doctors' appointments, and where claimant emphasized his limitations to interviewers, and he did not

perform his own job search, the Board affirmed the administrative law judge's determination that claimant's attempts to obtain post-injury work were not diligent. Accordingly, the Board affirmed the administrative law judge's finding that claimant is partially disabled. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy,* 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied,* 570 U.S. 904 (2013).

The Board rejected employer's contention that the administrative law judge erred in failing to compare claimant's efforts in seeking work prior to the original award with those prior to the award on modification. The Board stated that the original award of permanent total disability benefits was based on employer's failure to establish the availability of suitable alternate employment and that the administrative law judge's discussion of claimant's diligence in seeking work was *dicta*, as it was unnecessary to the award. Therefore, the administrative law judge did not need to reconcile claimant's more recent vocational efforts with those prior to the original award. As the Board affirmed the administrative law judge's finding that employer presented evidence of suitable alternate employment no earlier than July 2007, and as claimant's diligence prior to that date is irrelevant, the Board affirmed the award of permanent total disability benefits until July 2007, affirming as unchallenged on appeal the finding that claimant did not diligently seek work after July 2007. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

The administrative law judge permissibly found that claimant diligently sought suitable work and that he and his wife credibly testified that he applied for all of the positions in employer's labor market surveys, that they were unable to document all of the positions he applied for through an employer's website, and that claimant also applied for positions in-person. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP,* 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that claimant diligently sought suitable work. Claimant applied for jobs employer identified as suitable as well as several other positions. Employer's reliance on inconsistencies in claimant's testimony does not overcome the job search testimony and evidence the administrative law judge permissibly found credible, and the court is not empowered to reweigh the evidence. *International-Matex Tank Terminals v. Director, OWCP [Victorian],* 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Total Disability While Working

No requirement exists that a claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The fact that claimant works after his injury does not preclude a finding of total disability where claimant demonstrates he was working solely due to the beneficence of employer or due to extraordinary effort and in spite of excruciating pain. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F. 2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Walker v. Pac. Architects & Eng'rs, Inc.*, 1 BRBS 145 (1974); *Offshore Food Serv., Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv., Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). Similarly, where claimant works for a period and is unable to continue due to pain, he is totally disabled; the fact that he also filed for retirement does not alter this result. *Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd mem. sub nom. Marine Terminals Corp. v. Director, OWCP*, 624 F.2d 192 (9th Cir. 1980).

The Board has cautioned against a broad application of these holdings, emphasizing that circumstances which warrant an award of total disability concurrent with a period where claimant is working are the exception and not the rule. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980); *Chase v. Bethlehem Steel Corp.*, 9 BRBS 143 (1978); *Ford v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978).

An award of total disability concurrent with continued employment is limited to two situations. The first involves a "beneficent employer." Claimant may be entitled to total disability benefits while working where his post-injury employment is due solely to the beneficence of his employer. *Walker*, 1 BRBS at 147-148. *See also Proffitt v. E. J. Bartells Co.*, 10 BRBS 435 (1979).

The Board affirmed an administrative law judge's award of permanent total disability where he found that an employee was working solely because of his employer's beneficence based on testimony that he would not necessarily be replaced if his job were terminated and that he was being treated with "kid gloves," implying that his work was of little benefit to his employer and his wages not justified by his service. *Patterson v. Savannah Shipyard & Mach.*, 15 BRBS 38 (1982) (Ramsey, dissenting), *aff'd sub nom. Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). In affirming the Board, the Eleventh Circuit held that the administrative law judge properly looked to whether claimant's actual earnings represented his wage-earning capacity and that the finding that they did not was supported by substantial evidence.

Employment due to an employer's beneficence may also be referred to as sheltered employment. Sheltered employment has been held insufficient to demonstrate suitable alternate employment. The Board has defined it as a job for which the employee is paid

even if he cannot do the work and which is unnecessary. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). The Board has not found sheltered employment or beneficence where the work is necessary to the employer, the employee is capable of performing the job, he is protected by collective bargaining, and he would be replaced if he left. *See Kimmel v. Sun Shipbuilding & Dry Dock Co*., 14 BRBS 412 (1981). The fact that the same job exists on other shifts shows that it is not makeshift and is necessary. *Id.*; *Harrod*, 12 BRBS at 13-14; *see Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). Moreover, a job specifically tailored to claimant's restrictions is sufficient so long as it involves necessary work. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). For a discussion of wage-earning capacity where a job is not sheltered, *see* discussion of Sheltered Employment in Section 8(h).

The other facts supporting total disability for a working employee involve "extraordinary effort," i.e., where claimant continues his employment due to an extraordinary effort and in spite of excruciating pain and diminished strength. *Lewis*, 572 F.2d at 451, 7 BRBS at 850. *See also Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). A job held for only eight days during which the employee worked only part-time, through extraordinary effort and considerable pain, but for which he was paid full-time wages, did not bar a finding of permanent total disability. *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979). *See also Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978); *Steele v. Associated Banning Co.*, 7 BRBS 501 (1978).

The Board has reversed an administrative law judge's determination that a claimant was totally disabled where the claimant earned more after his disabling injury than before and was not working through "extraordinary effort." *Sams v. D.C. Transit Sys., Inc.*, 9 BRBS 741 (1978).

Cases where pain, sometimes in conjunction with reduced duties, was found insufficient to establish total disability for an employed claimant include *Adam v. Nicholson Terminal & Dry Dock Corp*., 14 BRBS 735 (1981); *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981); *Feezor v. Paducah Marine Ways*, 13 BRBS 509 (1981); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979); *Ford*, 8 BRBS at 691; *Allen v. Waterman Corp. of California*, 7 BRBS 221 (1977). *See also Collins v. Todd Shipyards Corp*., 9 BRBS 1015 (1979) (considerable pain walking to work area, but none while working, not enough).

In *Burch v. Superior Oil*, 15 BRBS 423 (1983), the Board rejected claimant's argument that he was entitled to total disability while working where the record established that claimant worked in pain or while taking pain medication and was employed by an old friend who sometimes arranged circumstances to accommodate him. The Board held that neither situation rises to the level required to support a finding of total disability under *Lewis*, 572 F. 2d 447, 7 BRBS 838, and *Walker*, 1 BRBS 145. The Board thus affirmed the administrative law judge's finding that claimant was only partially disabled.

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

The Eleventh Circuit affirmed the Board's affirmance of an administrative law judge's decision finding claimant totally disabled as of the date he was assigned to light duty work involving picking up trash in the shipyard based on evidence that claimant had been "treated with kid gloves" and that if he left the job the employer would "not necessarily" replace him. The court stated that the extent of a claimant's disability is measured by his loss of wage-earning capacity rather than by his actual reduction in earnings, and it upheld the determination that claimant was entitled to total disability benefits despite the fact that he was earning wages during the relevant period, since these wages were earned only by virtue of employer's benevolence. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *aff'g in pert. part Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

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

The Board affirmed the administrative law judge's finding that claimant's post-injury job for employer did not constitute suitable alternate employment where he returned to work part-time for the company he owned, he received no wages for the work he performed and no one like him, i.e., able only to perform office work but unable to do any field work, would be hired. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

The First Circuit affirmed the Board's decision that clerical work was sheltered employment and did not constitute suitable alternate employment where claimant worked for employer on a part-time as needed basis and had a mattress in his office so that he could lie down during the day. The court also found that claimant's brief stint as a security guard was not sufficient to establish suitable alternate employment where employer failed to provide any evidence regarding the precise nature, terms and availability of the job or even identify the employer and did not indicate why claimant did not continue in the job.

Claimant, therefore, was entitled to permanent total disability benefits. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

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

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

The administrative law judge found claimant was totally disabled despite his continued employment, as he found that claimant returned to work out of financial necessity and despite physical pain and psychological fear. The administrative law judge also noted that claimant was working beyond the restrictions imposed by his doctors. The Board vacated this finding as the record did not support a conclusion that claimant raised entitlement to total disability at any time. In remanding the case, the Board reiterated that an employee may be found to be totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. Factors such as claimant's pain and the physical or emotional limitations which cause him to avoid certain jobs offered by the hiring hall are relevant in determining post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21), based on reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

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

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

Section 8(c) - Permanent Partial Disability

Introduction

Section 8(c), 33 U.S.C. §908(c), provides for the payment of compensation for permanent partial disability. Subsections (c)(l) - (19), known as the schedule, provide compensation for a set number of weeks for the loss or loss of use of specified body parts, including the extremities, hearing loss and vision loss. Awards under the schedule are based on the medical ratings of the degree of impairment. Section 8(c)(20) provides compensation for disfigurement. Awards for permanent partial disability for parts of the body which are not covered in the schedule are governed by Section 8(c)(21), which provides for compensation based on a loss of wage-earning capacity. Section 8(c)(23), added by the 1984 Amendments, provides for an ongoing award based on the degree of physical impairment for employees who have voluntarily retired and whose occupational disease becomes manifest after retirement.

The schedule is the exclusive remedy for the permanent partial disability for parts of the body enumerated therein. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). *See* Conflicts Between Applicable Sections, *infra.*

The Schedule—Section 8(c)(1) – (19)

In General - Substantial Evidence/Calculation

In cases falling under the schedule in Section 8(c)(1)- (19), the compensation is 66 2/3 percent of claimant's average weekly wage for the number of weeks for the body part enumerated in the applicable subsection. The schedule assigns a set number of weeks of compensation for the loss of a specified member. Section 8(c)(19) provides that where a claimant has a partial loss or loss of use, claimant is entitled to benefits for a number of weeks proportionate to the impairment rating provided by a medical expert.

The schedule defines the level of compensation to which the injured worker is automatically entitled by virtue of impairment to the enumerated body part. No proof of loss of wage-earning capacity is required in order to receive the amount specified in the schedule; the schedule presumes a loss in wage-earning capacity. *Henry v. George Hvman Constr. Co.*, 749 F. 2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984), *rev'g on other grounds* 15 BRBS 475 (1983); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*. 350 U.S. 913 (1955); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979).

Where claimant sustains successive injuries compensable under the schedule, his average weekly wage is to be calculated at the time of each injury. *See, e.g., Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd*

on recon., 20 BRBS 26 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1988).

The minimum benefit provision of Section 6(b)(2) is inapplicable to scheduled awards, as that section explicitly applies only to total disability. *Smith v. Paul Bros. Oldsmobile Co.*, 16 BRBS 57 (1983).

Case precedent establishes that claimant cannot receive a scheduled permanent partial disability award concurrently with total disability, either temporary or permanent, for a different injury. *See* Concurrent Awards, *infra.*

Scheduled awards for an injury commence where a claimant with a rated physical impairment reaches maximum medical improvement or permanency under the *Watson* test and suitable alternate employment is available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). A partial award commences on the date employer establishes the availability of suitable alternate employment; thus, if claimant has reached permanency prior to that date, his disability remains total until the date suitable alternate employment is available. *Id.*

Compensation for partial loss or loss of use of a member is based on a medical evaluation of the degree of loss, generally referred to as an impairment rating. This degree of loss is proportionately applied to the number of weeks in the schedule, not the compensation rate. Thus, for a partial loss or loss of use, the claimant should receive the full two-thirds of his average weekly wage for the proportionate number of weeks. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd in relevant part*, 751 F.2d 1460, 1464 n.5, 17 BRBS 29, 32 n.5(CRT) (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). *See also Wright v. Superior Boat Works*, 16 BRBS 17 (1983); *DeNoble v. Mar. Transp. Mgmt., Inc.*, 12 BRBS 29 (1980).

The aggravation rule, which provides that where a work-related injury combines with a previous disability, the entire resulting disability is compensable, *see Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), applies to injuries covered by the schedule. *See, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). Where claimant sustains an aggravating injury to the same scheduled body part for which he received a previous award, employer is entitled to a credit for the prior award. *See* Credit Doctrine, *infra.*

The administrative law judge may evaluate a variety of medical opinions and observations plus claimant's description of his symptoms and the physical effects of his injury in determining the extent of his disability under the schedule. *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978); *Tangorra v. Nat'l Steel & Shipbuilding Co.*, 6 BRBS 427 (1977), *aff'd in part and vac. in part on other grounds*, 607 F.2d 1009 (9th Cir. 1979). He may base his finding regarding the percentage of impairment on one medical opinion where he considers all of the relevant medical evidence. *Wright*, 16 BRBS at 19. Moreover, the administrative law judge has the discretion to find a degree of disability other than the specific ratings given by physicians if that degree of disability is reasonable. *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978).

The administrative law judge thus is not bound by any particular standard or formula and may base his determination of the extent of disability under the schedule on credible medical opinions and observations as well as claimant's testimony regarding his symptoms and the physical effects of his injury. *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154 (1993). The Act does not require impairment ratings based on medical opinions using the criteria of the AMA *Guides* except in compensating hearing loss and voluntary retirees. 33 U.S.C. §§908(c)(13), 908(c)(23), 902(10). *Id.* In *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979), the Board affirmed the administrative law judge's application of a doctor's objective findings to the AMA *Guides*, and his rejection of the doctor's impairment rating. The Board stated that the administrative law judge had properly used the AMA *Guides* as an interpretative device. That the *Guides* was not admitted into evidence was not problematic as it is "a standard reference widely used by physicians in testimony before administrative law judges."

Compensation under the schedule is limited to the impairment for the particular loss or loss of use; it is error for the administrative law judge to augment the award to include benefits for pain and suffering. *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201 (1985). In *Young*, the Board vacated and remanded the administrative law judge's award of benefits for a 70 percent loss based on a 56 percent medical rating and an additional 10-15 percent for pain and suffering. The Board distinguished *Young* in *Pimpinella*, 27 BRBS 154, stating that *Young* did not hold that pain and its symptoms may never be considered by a doctor in rating the loss of use of a member; the decision held only that a doctor's impairment rating should not be amplified so as to separately compensate claimant for "pain and suffering" as in a tort context. As the doctor's report here did not involve an augmentation but rather was based on appropriate factors, the Board held that the administrative law judge erred in rejecting it based on *Young*.

Since loss of wage-earning capacity is presumed in cases arising under the schedule, in determining the degree of loss, economic factors, such as the claimant's age, education, the availability of job opportunities and the possibility of future loss of wage-earning capacity, are not taken into consideration. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Dedeaux v. Noble Drilling Corp.*, 9

BRBS 1065 (1978); *Bachich*, 9 BRBS at 187; *Conteh v. Greyhound Lines, Inc.*, 8 BRBS 874 (1978). The administrative law judge also need not take claimant's full-time work at an increased salary after the accident into account in a case compensated under the schedule. *Wright*, 16 BRBS at 19. However, claimant's ability to work can be considered as a measure of claimant's physical injury. *Mazze*, 9 BRBS at 1055; *Davis v. Ceres Terminals*, 8 BRBS 843 (1978).

Section 8(c)(5) provides for an award of 160 weeks of compensation for loss of an eye, and Section 8(c)(16) provides that compensation for loss of binocular vision or for 80 percent of the vision of an eye shall be the same as for loss of the eye. An award for loss of vision under the schedule is based on uncorrected vision. *McGregor v. Nat'l Steel & Shipbuilding Co.*, 8 BRBS 48 (1978), *aff'd sub nom. Nat'l Steel & Shipbuilding Co. v. Director, OWCP*, 703 F.2d 417, 15 BRBS 146(CRT) (9th Cir. 1983). After a work injury to his eye where claimant had no loss of visual acuity, i.e., his vision was 20/20, the Board held in *Banks v. Moses-Ecco Co.*, 8 BRBS 117 (1978), that claimant was not entitled to benefits under Section 8(c)(16) but remanded the case for reconsideration under Section 8(c)(5) and (19), as claimant had epiphora, which is recognized as an "ocular disturbance" under the AMA *Guides*. The administrative law judge erred in relying on claimant's return to work to deny benefits, as loss in wage-earning capacity is presumed under the schedule.

Scheduled awards for hearing loss are provided in Section 8(c)(13) and are discussed, *infra*. While hearing loss is an occupational disease, *see Cardillo*, 225 F.2d 137, it is not one which "does not immediately result in ... disability." Thus, as a hearing loss injury is complete when exposure ends, the 1984 Amendment provisions applicable to voluntary retirees do not apply and hearing loss is compensated under the schedule even if claimant is retired at the time of manifestation. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Section 8(c)(17) provides that if an injury occurs to two or more digits or one or more phalanges of two or more digits of a hand or foot, a proportionate loss of the hand or foot may be found. In *Luckenbach S.S. Co. v. Norton*, 23 F.Supp. 829 (E.D. Pa. 1938), the claimant injured his middle and ring fingers, resulting in an almost complete loss of flexion. Employer contended claimant was limited to compensation for partial loss of use of each finger. The court disagreed, holding that the award for partial loss of the hand was proper because Section 8(c)(17)-(19) permits an award under Section 8(c)(3) for loss of use of phalanges and digits. However, this provision is not the exclusive means of receiving compensation for loss of the greater member. For example, the Board has affirmed an award for loss of use of the hand where the injury was to "the fleshy area between palm and thumb," and the injury and resultant surgery resulted in pain and a loss of strength in the hand. *Cross v. Lavino Shipping Co.*, 6 BRBS 579 (1977). Similarly, a claimant with an injury to the hand and wrist is not limited to a scheduled recovery for the hand under Section 8(c)(3), but may receive a Section 8(c)(l) award for loss of use of the arm if the evidence supports such a loss. *Young*, 17 BRBS at 204. On the other hand, an

administrative law judge could properly deny claimant compensation for partial loss of use of his foot where claimant lost the distal phalange of his right great toe by crediting medical opinions that disability was limited to claimant's toe over an opinion that he suffered a residual disability to the foot. *Vanison v. Greyhound Lines, Inc.*, 17 BRBS 179 (1985). *Cf. McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981)(award for 30 percent loss of use of foot allowed where claimant's toe was amputated as employer conceded loss of foot).

Section 8(c)(14) specifies that compensation for loss of the first phalange of a digit is limited to one-half of the compensation for the entire digit. Thus, where the claimant lost only the first phalange of his great toe, the administrative law judge properly limited compensation to 50 percent loss of the toe, despite two medical opinions that claimant's toe disability was 75 percent and 100 percent, respectively. *Vanison*, 17 BRBS at 181. In *Vanison*, the Board also noted that Section 8(c)(17) applies only to the loss of two or more digits.

In *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985), the court affirmed the Board's holding that claimant could not receive a scheduled award for partial loss of use of a scheduled member (leg) where the actual site of injury was not the scheduled member, but rather was his back, an unscheduled area. This holding was notwithstanding the fact that, as a direct result of the back injury, use of the leg had been impaired. The administrative law judge found claimant was 10 percent disabled under Section 8(c)(21), and claimant's leg pain was encompassed in the 10 percent disability finding. *See also Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982) (injury to neck and shoulder, with a 25 percent loss of function in each arm, compensated under Section 8(c)(21)); *Hole v. Miami Shipyards Corp*., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981)(injury to back resulting in neck pain); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981) (shoulder injury resulting in loss of use of arm compensated under Section 8(c)(21) rather than schedule).

A claimant who had lost a testicle challenged the constitutionality of the Section 8(c) schedule, arguing that the Act's failure to provide private sector maritime employees with scheduled compensation for organ losses offends due process and equal protection because such organ losses are scheduled injuries under the Federal Employee Compensation Act (FECA). *Herrington v. Savannah Mach. & Shipyard Co.*, 17 BRBS 194 (1985). The Board rejected claimant's argument, affirming the administrative law judge's finding that the two groups of employees covered by FECA and the Act are not similarly situated. The Board also rejected claimant's assertion that Congress amended the Section 8(c) schedule by implication when it amended the FECA schedule to cover a general organ loss.

For examples of cases involving schedule awards, *see Winston*, 16 BRBS at 171-172 (administrative law judge's finding of 17 1/2 percent disability to each hand is supported by substantial evidence); *Sankey v. Sun Shipbuilding & Dry Dock Co*., 14 BRBS 272 (1981) (substantial evidence supports award of 25 percent loss of use of arm rather than hand); *Griffin v. Gates & Fox Constr. Co.*, 13 BRBS 384 (1981) (Board rejected contention that, as a matter of law, percentage of impairment to the knee must equal percentage of impairment to the leg). *See also Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980);

Collington v. Ira S. Bushey & Sons, 13 BRBS 768 (1981); *Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981).

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

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

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

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

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

A below-the-knee amputation renders the employer liable for 205 weeks of compensation under Section 8(c)(4), pursuant to Section 8(c)(15), because the latter provision explicitly states that such an amputation shall be compensated the same as the loss of a foot. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

The Board held that where a schedule injury to a greater member results in impairment to a smaller, connected member, claimant may not receive separate awards for the impairment

to each member. The schedule accounts for impairments necessarily caused to smaller members as a result of injuries to larger, connected members. The Board therefore reversed the administrative law judge's dual awards where claimant injured his forearm which necessarily affected his ability to use his hand. Where claimant suffered a direct injury to his forearm resulting in a 50 percent loss of use of the arm, the Board held that he was entitled to an award under Section 8(c)(1). The Board rejected employer's position that Section 8(c)(15), which provides that where the arm is amputated below the elbow, the claimant shall be compensated for loss of use of the hand rather than the arm, limited claimant to an award for impairment to the hand because his injury occurred below the elbow. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Where claimant did not establish a loss of 50 percent of each of his two injured fingers, the Ninth Circuit rejected the argument that claimant was entitled to an award based on loss of use of the hand under Section 8(c)(3), (17), and (19). As the administrative law judge's findings that claimant suffered a 50 percent impairment of his middle finger and a 20 percent impairment of his ring finger were supported by substantial evidence, the court affirmed the awards for loss of the fingers under Section 8(c)(9), (19). *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990).

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

The Board held that an administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability under the schedule. The Act does not require impairment ratings based on medical opinions using the criteria of the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10). The Board also held that the administrative law judge erred in rejecting a doctor's disability assessment/impairment rating based on *Young*, 17 BRBS 201, stating that *Young* did not hold that pain and symptoms may not be considered by a doctor rating the loss of use of a member. Moreover, unlike *Young* the rating in this case did not involve an augmentation of claimant's disability to reflect pain and suffering but rather was based on neuropathy and tenderness of the elbow and sensory loss and weakness of the fingers. The Board stated that these medical factors establish a loss of use which may be compensable

under the schedule and remanded for reconsideration on this issue. *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154 (1993).

The Board affirmed the administrative law judge's award under the schedule. Contrary to employer's contention, the case did not present an issue of first impression regarding reliance on testimony of pain to support a scheduled award. Rather, the administrative law judge's finding was based on a medical report which was based on subjective factors, such as weakness due to pain, and was not, as employer alleged, based on claimant's testimony of pain alone. The Board also affirmed the administrative law judge's award notwithstanding that it was based on a medical report which used the California rating system as a guide in rating claimant's subjective complaints of pain, as the physician stated the AMA *Guides* do not provide for a rating absent objective abnormalities. The Act does not require impairment ratings based on medical opinions using the criteria of the AMA *Guides* except in cases involving compensation for hearing loss and voluntary retirees. *Cotton v. Army & Air Force Exch. Services,* 34 BRBS 88 (2000).

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

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

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

Where the administrative law judge's findings that claimant did not injure his hand and that his hand impairment may be due to an injury to his back and shoulder were supported by substantial evidence, the Board affirmed the administrative law judge's denial of compensation under Section 8(c)(3), as the schedule is not applicable where the actual site of the injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. Claimant's compensation remedy lies under Section 8(c)(21) of the Act. *Ward v. Cascade Gen., Inc.*, 31 BRBS 65 (1995). Agreeing with the Board and the Ninth Circuit in *Long*, 767 F.2d 1578, 17 BRBS 149(CRT), the First Circuit held that pain or loss of function in a scheduled body part that

derives from an injury to an unscheduled body part is not separately compensable under the schedule. *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998).

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

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

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

The Fourth Circuit, citing *PEPCO*, 449 U.S. 268, 14 BRBS 363, and *Gilchrist*, 135 F.3d 915, 32 BRBS 15(CRT), held that where claimant is entitled to a scheduled permanent partial disability award, he may not seek to increase his compensation benefits based on economic factors; loss in wage-earning capacity is not considered in awarding benefits for scheduled injuries. *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999).

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

While remanding the case for further consideration as to whether employer established suitable alternate employment on modification, the Board held if claimant was partially disabled, the administrative law judge erred in awarding claimant permanent partial disability benefits based on a loss in wage-earning capacity, inasmuch as claimant's injury is to his leg. Pursuant to *PEPCO*, 449 U.S. 268, 14 BRBS 363, claimant's recovery for permanent partial disability is limited to that provided in the schedule at Section 8(c)(2) based on the percentage of claimant's physical impairment. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000), *decision after remand*, 35 BRBS 174 (2001), *aff'd*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

Claimant was awarded permanent total disability benefits for 1983 knee injuries. Employer sought modification of the award. The administrative law judge awarded permanent total disability benefits until employer established the availability of suitable alternate employment, and permanent partial disability benefits under the schedule thereafter. The Board rejected employer's assertion that it was erroneous for the administrative law judge to award benefits under the schedule because no party raised the issue. The Board stated that a claim for total disability benefits, as here, implicitly includes a claim for a lesser degree of disability. Moreover, as the schedule is the exclusive remedy for permanent partial disability to claimant's knees, as employer presented evidence of suitable alternate employment, and as employer raised the schedule as the appropriate way to calculate claimant's award, the Board rejected employer's claim that it was unaware the issue would be addressed. Additionally, as the record contained uncontradicted evidence of the extent of impairment to claimant's knees, the Board affirmed the administrative law judge's award of benefits under Section 8(c)(2). *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

The Fourth Circuit held that when an administrative law judge finds impairment ratings equally probative and intends to average them, and one of those ratings represents a zero percent impairment, then claimant has not met his burden of proving he is disabled pursuant to *Greenwich Collieries*. In this case, the administrative law judge found credible and equally probative audiograms indicating a 3.75 percent loss and 0 percent binaural loss, and he averaged them. The Fourth Circuit reversed the award of benefits for a 1.875 percent impairment. The court specifically noted that it was not holding that an administrative law judge could not average ratings, only that he cannot find the claimant disabled if he finds the ratings equally probative and one of the ratings is zero. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011), *rev'g* 43 BRBS 173 (2010). *See also Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017), *rev'd on other grounds on recon.*, 55 BRBS 1 (2021) (Boggs, C.J., dissenting), *appeal pending*.

An award for a permanent eye impairment is based on the claimant's uncorrected vision, even if the impairment is correctable. As claimant sustained an uncorrected loss of 95 percent in one eye, he was entitled to benefits for the loss of an eye pursuant to Section 8(c)(5), (16). *Gulf Stevedore Corp. v. Hollis*, 298 F.Supp. 426 (S.D. Tex. 1969), *aff'd*, 427 F.2d 160 (5th Cir. 1970).

Where claimant's work-related injury resulted in damage to one eye, the scheduled award is properly based on the extent of impairment to the injured eye; thus, the administrative law judge erred by basing claimant's scheduled award on the extent of impairment to claimant's binocular vision rather than on the loss of vision in claimant's injured left eye. Moreover, under Section

8(c)(16), compensation for loss of 80 percent or more of the vision of an eye is the same as for the total loss of an eye under Section 8(c)(5). As both examining physicians assessed the loss of visual acuity in claimant's injured left eye as greater than 80 percent, this loss represents the legal equivalent of the total loss of that eye. The Board therefore held that if, on remand, the administrative law judge finds that claimant's eye condition has reached permanency, claimant is entitled to the 160 weeks of compensation provided for the total loss of an eye. *Soliman v. Global Terminal & Container Serv., Inc.*, 47 BRBS 1 (2013).

Where the work-related injury to claimant's left eye resulted in diplopia, or double vision, his claim for scheduled permanent partial disability benefits was properly found to be compensable under Section 8(c)(5), in conjunction with Section 8(c)(19). As the injury to claimant's left eye impaired only the ability of that eye to work in tandem with the other eye, it is appropriate to compensate the impairment to his visual system as the injury to the left eye. As this case involves an eye injury, the administrative law judge is not bound by the AMA *Guides* or by any particular standard in assessing the extent of claimant's disability. The Board upheld the administrative law judge's reliance on the opinion of employer's medical expert over that of claimant's treating physician regarding the extent of claimant's impairment on the ground that the treating physician failed to sufficiently explain the basis for his impairment rating. However, the Board held that the administrative law judge impermissibly substituted his own judgment for that of employer's medical expert by devising a "conversion factor" to adjust the doctor's impairment rating in order to reconcile an incongruity found by the alj to exist between the AMA *Guides*, on which the doctor's impairment rating was based, and the Act. The Board therefore modified the administrative law judge's scheduled award to reflect the impairment rating assessed by the credited doctor. *Pisaturo v. Logistec, Inc*., 49 BRBS 77 (2015).

In 1999, claimant settled a claim under the Act for scheduled permanent partial disability benefits for injuries to his hands sustained in the course of his employment with a previous employer. In his subsequent employment with another longshore employer, claimant sustained further injuries to his right hand in 2011, for which he underwent surgery. The administrative law judge denied the claim for scheduled benefits for right carpal tunnel syndrome, having found that claimant did not make out his prima facie case under Section 20(a) because claimant has a lower impairment rating after his recovery from carpal tunnel surgery in 2012 than the rating assigned by a physician in 1999. AS the administrative law judge applied an incorrect analysis, the Board remanded the case for the administrative law judge to address, consistent with the Section 20(a) presumption and the aggravation rule, whether claimant has a right hand condition that is causally related to his employment with employer and which permanently disables him. That claimant may have a lower impairment rating does not preclude an award of benefits, subject to employer's entitlement to a credit under *Nash* for the prior scheduled payments. *Myshka v. Elec. Boat Corp*., 48 BRBS 79 (2015).

The Fourth Circuit reversed an award of temporary partial disability benefits to a claimant whose knee injury had reached maximum medical improvement and who was receiving scheduled permanent partial disability benefits. Claimant had returned to his usual work following his injury. Partially overlapping a period when claimant was receiving scheduled permanent partial disability benefits for his knee injury, claimant was placed on light-duty restrictions which prevented him from returning to his usual work for nearly 3 months. In a decision after remand from the Board,

the administrative law judge found claimant entitled to temporary partial disability benefits during this period because employer established the availability of suitable alternate employment. The Fourth Circuit gave deference to the Director's position that once claimant's partial disability award is set under the schedule (ppd), he is not entitled to additional temporary partial benefits for the same scheduled injury. Any subsequent temporary partial loss is subsumed by the benefits claimant received under the schedule, as those benefits are presumed to cover actual loss due to any flare-up of his permanent knee condition. *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118, 49 BRBS 33(CRT) (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

The Credit Doctrine

The "credit doctrine" was developed to preclude double recovery under the schedule where a claimant has had prior injuries to the same part of the body which were already compensated. In early cases, the Board remanded so that prior impairments already compensated could be subtracted from the compensable disability. *See Bracey v. John T. Clark & Son of Maryland*, 12 BRBS 110 (1980); *Scurlock v. Parr-Richmond Terminal Co.*, 6 BRBS 634 (1977). *See also DiSantillo v. Pittston Stevedoring Co.*, 8 BRBS 767 (1978).

In *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd in part and rev'd in part*, 751 F.2d 1460, 17 BRBS 29(CRT) (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986), the Board addressed the aggravation rule and employer's entitlement to a credit for a prior recovery where a claimant sustained serial injuries covered under the schedule and received separate recoveries. In *Nash*, following claimant's most recent injury, he received an impairment rating of a 34 percent loss of use of the leg. Claimant had two prior injuries, the first before he began employment which resulted in a 20 percent impairment, and the second a work-related injury which resulted in an additional 10 percent impairment. Following this injury, claimant agreed to a settlement based on a 10 percent loss. The Board initially acknowledged that the aggravation rule applied, and thus, claimant was entitled to compensation for a 34 percent disability. The Board held that employer was entitled to a credit for the prior recovery but only for the 10 percent claimant actually received. On appeal, a panel of the Fifth Circuit initially agreed that the aggravation rule applied but held that the prior settlement terminated claimant's right to receive compensation for the full 30 percent impairment he had at that time; thus, employer was entitled to a credit for the full 30 percent disability at the time of the second injury. *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 1468, 17 BRBS 29, 35(CRT) (5th Cir. 1985). On reconsideration en banc, however, after a comprehensive discussion of the aggravation rule and credit doctrine, the court affirmed the Board's decision, holding that employer was entitled to a credit only for compensation actually received by the injured worker for a prior injury to the same scheduled body part. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 522, 18 BRBS 45, 55(CRT) (5th Cir. 1986)(en banc). The Fifth Circuit subsequently held that employer's credit is for the dollar amount paid for the prior injury. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1988).

The courts have generally rejected attempts to extend the "credit doctrine" to cases which do not involve aggravations or injuries under the schedule. *See New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989).

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

The Fifth Circuit affirmed the Board's holding that credit for a prior knee injury should be on a dollar for dollar basis, rather than on a percentage basis. The court stated that this method is consistent with the Section 3(e) credit scheme, is easier to calculate, and accords with the reality of informal settlement negotiations. *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1988). *See also Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990), *aff'g Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989); *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990) (Brown, J., dissenting).

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

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

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

The Board held that the general credit doctrine applied to provide the responsible employer an offset for amounts paid to claimant by other potentially liable longshore employers in

settlement of his occupational disease claim against them. The Board applied the rationale of *Nash*, 782 F.2d 513, 18 BRBS 45(CRT), to facts involving one occupational disease claim against multiple employers for the same injury. The Board found this situation similar to that in *Nash*, which involved the liability of successive employers for claimant's traumatic injuries, since as in *Nash*, in an occupational disease case, one employer is liable for the totality of the same injury, albeit by virtue of the responsible employer rule. *Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1998), *rev'd sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

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

Citing its decision in *Alexander*, 32 BRBS 40, the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples*, 883 F.2d 422, 22 BRBS 126(CRT), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* did not involve a double recovery and involved multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S.1141 (2004).

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

The Board vacated the administrative law judge's approval of the parties' settlement agreement which contained a "credit provision" stating that if claimant returned to

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

The Board vacated the administrative law judge's denial of a scheduled award for claimant's right carpal tunnel syndrome, and remanded the case for the administrative law judge to determine whether claimant has a permanent right hand impairment that was caused or aggravated by his employment with employer. The Board stated that if the administrative law judge enters a scheduled award on remand, he must determine whether employer is entitled to a credit for the payment made to claimant by a previous longshore employer pursuant to a Section 8(i) settlement of an earlier claim for scheduled benefits for injuries to claimant's hands, and, if employer is so entitled, he must calculate such credit on a dollar-for-dollar basis. *Myshka v. Elec. Boat Corp.*, 48 BRBS 79 (2015).

The party claiming a credit for the claimant's proceeds from a British tort suit, AG Jersey here, has the burden of proving the allocation of the settlement proceeds to show that it is deserving of a credit for benefits due under the Act. In this case, AG Jersey has not established the applicability of any of the Act's credit doctrines as: it did not show there were payments made under another workers' compensation act or the Jones Act (Section 3(e)); it did not show there was a reduction of benefits due to a modification of a prior award (Section 22); it did not show there was a third-party payment (Section 33(f)); and it did not show there was an injury under the schedule for which prior payments had been made (*Nash*). AG Jersey also did not show that the settlement payment was an advanced payment of compensation (Section 14(j)), as the details of the settlement have not been divulged. The Board also rejected the suggestion that it create another extra-statutory credit provision; double recoveries are not absolutely prohibited under *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). The Board also rejected AG Jersey's argument that allowing double recovery would give non-U.S. citizens greater rights, stating that the rights of U.S. citizens and foreign nationals are not always equal under the Act. Therefore, the Board held that AG Jersey is not entitled to a credit for payments made to claimant pursuant to the tort settlement. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

Hearing Loss—Section 8(c)(13)

In General

Section 8(c)(13) was significantly amended in 1984. Prior to 1984, it stated only the number of weeks of compensation for loss of hearing in one ear and in both ears. The amended provision contains five subsections under loss of hearing. Subsections (c)(13)(A) and (B) contain the same language as the pre-amendment provision, stating that claimant may receive compensation for fifty-two weeks for a loss of hearing in one ear or two hundred weeks for a loss of hearing in both ears.

Section 8(c)(13(C) states that an audiogram is presumptive evidence of the extent of claimant's hearing loss if the following conditions are met: (1) The audiogram was administered by a licensed or certified audiologist or a physician certified in otolaryngology; (2) the employee was provided with a copy of the audiogram and accompanying report at the time it was administered; and (3) no contrary audiogram made at that time is produced. The applicable regulation at 20 C.F.R. §702.441(b) addresses these requirements, notably providing that the report must be received at the time of the audiogram or within 30 days and that the requirement for no contrary audiogram at the "same time" means within thirty days where noise exposure continues or within six months where it does not continue. In addition, subsection (b)(3) of the regulation states that audiometric tests performed prior to enactment of the 1984 Amendments will be considered presumptively valid if employer complied with the requirements in the section for administering the test.

Section 8(c)(13)(D) addresses requirements for timely filing pursuant to Sections 12 and 13 of the Act. This provision is discussed, *infra*, and timely filing in general is addressed in Sections 12 and 13 of this desk book.

Section 8(c)(13)(E) provides that determinations of the extent of hearing loss must be made "in accordance with guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association." 33 U.S.C. §908(c)(13)(E). Section 702.441(d) repeats this provision, specifying that the most currently revised edition of the AMA *Guides* must be used. In addition, that section states that the audiometer used must be calibrated according to current American National Standard Specifications and that audiometer testing procedures required under the Occupational Safety and Health Act of 1970 should be followed as described at 29 C.F.R. 1910.95. *See Pierce v. Elec. Boat Corp*., 54 BRBS 27 (2020) (Board upholds similar regulation, 20 C.F.R. §702.601, in Section 8(c)(23) case, requiring use of most recent version of AMA *Guides*).

In addition, Section 702.441(a) states that claims for hearing loss pending on or filed after the enactment date of the 1984 Amendments shall be decided in accordance with these regulations. Subsection (c) addresses audiograms documenting pre-employment hearing loss. It also states that audiograms performed after December 27, 1984, must comply with the requirements in subsection (d).

The Supreme Court has held that hearing loss is not "an occupational disease which does not immediately result in death or disability." Thus, while hearing loss is an occupational disease for purposes of the responsible employer rule, *see, e.g., Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), since a hearing loss injury is complete when exposure ends, the provisions of the Act extending the statute of limitations and providing benefits to retirees for occupational diseases with long latency periods to not apply in hearing loss cases. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). The time of injury in a hearing loss case is thus the date of last exposure, and benefits are awarded under Section 8(c)(13) rather and (c)(23). *See* Determining Extent of Loss, *infra*.

Under the aggravation rule, claimant is entitled to compensation for his entire hearing loss when work-related acoustic trauma aggravates or combines with a prior hearing impairment. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982), *aff'g* 14 BRBS 520 (1981); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986) (employer liable for binaural loss where left ear loss due to noise, right ear loss to birth defect); *Morgan v. Gen. Dynamics Corp.*, 15 BRBS 107 (1982) (claimant entitled to compensation for entire resultant disability where claimant had a pre-existing non-work-re1ated loss of hearing in his right ear due to Meniere's disease which was aggravated by work-related acoustic trauma and an immeasurable noise-induced defect in his left ear); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980) (claimant with a 100 percent loss in one ear prior to employment entitled to compensation for his entire binaural impairment) *Robinson v. Bethlehem Steel Corp.*, 3 BRBS 495 (1976) (administrative law judge erred in apportioning hearing loss to discount effects of aging).

In early cases involving determining the responsible employer for hearing loss under the *Cardillo* rule, the Board suggested that if a pre-employment audiogram with a second employer indicated a hearing loss, claimant should recover compensation for the initial hearing loss from the first employer and could obtain compensation for the subsequent increase in loss due to employment from the second employer. *See Whitlock v. Lockheed Shipbuilding & Constr. Co.*, 12 BRBS 91 (1980); *Sicker v. Muni Marine Co.*, 8 BRBS 268 (1978). *See also Noack v. Zidell Explorations*, 17 BRBS 36 (1985) (where claimant sought benefits for noise exposure from 1962 to 1976, and administrative law judge separated claim for period prior to July 1969 from his claim for the subsequent period based on claimant's receipt of an audiogram on that date and evidence he wore hearing protection thereafter, the Board affirmed the administrative law judge's findings that claimant

suffered no work-related hearing loss after July 1969 based on evidence of no aggravation and that the claim for benefits prior to 1969 was barred by Section 12). Based on the aggravation rule, the Board held that claimant is entitled to an award from the liable employer for his entire hearing loss and stated that the statements in *Sicker* and *Whitlock* were no longer valid precedent. *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986) (Brown, J., concurring). Thereafter, the Board held that successive claims based on multiple audiograms could be merged for adjudication. *Spear v. Gen. Dynamics Corp.*, 25 BRBS 254 (1991). However, in *Stevedoring Services of Am. v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRB 28(CRT) (9th Cir. 2002), the Ninth Circuit held that where claimant files two separate claims against consecutive employers, each claim should be adjudicated separately, with each employer liable for its share of the loss. The Board subsequently followed *Benjamin* in *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003), holding that there should be separate adjudications of each claim with each employer liable accordingly; claimant is entitled to, and the last employer is liable for, compensation for the full aggravation, with credit for any prior recovery pursuant to the credit doctrine, *supra*. However, where claimant files only one claim or has only one employer but has had multiple audiograms, the administrative law judge may weigh them in entering one hearing loss award. *See Downey v. Gen. Dynamics Corp.*, 22 BRBS 203 (1989).

The 1984 Amendments made a specific change relevant to aggravation of hearing loss in Section 8(f), 33 U.S.C.§908(f), which permits the transfer of a part of employer's liability for permanent disability to a second injury fund where a pre-existing permanent partial disability combines with a work injury to result in claimant's ultimate disability. Prior to the Amendments, the Board recognized that there was a gap in the statutory scheme in that employer was liable for claimant's entire hearing loss, including loss due to other causes or which pre-existed the employment, by virtue of the aggravation rule, but Section 8(f) relief was generally unavailable. *See Primc*, 12 BRBS at 195. *See also Fishel*, 694 F.2d 327, 15 BRBS 52(CRT). Prior to the 1984 Amendments, if an employee's pre-existing permanent partial disability was aggravated, resulting in a subsequently greater degree of permanent partial disability compensable under Section 8(c)(l)-(20), the employer was required to provide compensation for the *greater* of the scheduled number of weeks attributable to the subsequent injury or 104 weeks before liability would transfer to the Special Fund. Thus, since most hearing loss awards do not exceed 104 weeks, which is equal to a 52 percent loss, Section 8(f) relief was usually precluded. *See generally Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT)(5th Cir. 1985), *on reconsideration en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). The Act as amended distinguishes hearing loss cases from other scheduled claims and limits employer's Section 8(f) liability to the *lesser* of 104 weeks or the extent of hearing loss directly attributable to the employment. Thus, following the 1984 Amendments, in *Reggiannini v. Gen. Dynamics Corp.*, 17 BRBS 254 (1985), the Board remanded for reconsideration of employer's entitlement to Section 8(f) relief on a hearing loss award.

While Section 8(f) relief is not limited to cases where claimant had a pre-employment loss, e.g., employer may obtain Section 8(f) relief based on aggravation of a work-related loss, the existence of a pre-employment loss may affect the allocation of any credit for voluntary payments under the credit doctrine. Where claimant has a pre-employment disability and employer has made voluntary payments for claimant's hearing loss, employer is entitled to a credit for its voluntary payments and to reimbursement from the Special Fund for payments in excess of its liability for the work injury due to the operation of Section 8(f). *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990), *aff'g Krotsis v. Gen.l Dynamics Corp.*, 22 BRBS 128 (1989); *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990) (Brown, J., dissenting). *Cf. Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993) (where an employee who had previously received compensation for a hearing loss which was entirely work-related brought a second claim alleging that his hearing loss was aggravated by his employment, the court distinguished *Krotsis* and held that the Special Fund, and not the employer, receives the benefit of the credit); *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003) (follows *Blanchette*).

The requirements for receiving Section 8(f) relief and issues relating to its application are addressed in Section 8(f) of the desk book.

The administrative law judge may credit audiograms which do not meet the requirements for a presumptive audiogram; it is for the administrative law judge to assess the probative value of audiograms in determining the extent of a claimant's hearing loss. *See Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001) (administrative law judge may give less weight to audiograms that do not meet the presumptive evidence standard); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (administrative law judge has discretion regarding which audiogram to credit); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991) (the administrative law judge may credit an audiogram over another reflecting a higher loss because the former was taken closest to claimants last exposure to noise with the covered employer); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991) (it is within the administrative law judge's authority to evaluate the medical evidence of record and to draw inferences from that evidence); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991) (administrative law judge rationally found the February 1988 evidence more reliable than the other relevant evidence because it included an audiogram and the identity of the test administrator, a certified audiologist, and because a doctor opined that the 1988 test was more complete); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991) (administrative law judge properly credited audiogram he found to be the only credible evidence rendered pursuant to the AMA *Guides*). In order for it to be determinative of claimant's hearing loss, an audiogram must apply the AMA *Guides* criteria in accordance with Section 8(c)(13)(E) of the Act and meet that requirement and the other criteria of Section 702.441(d). *See R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *see also Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009)

(administrative law judge may not credit audiogram that is missing results at a mandatory Hz level).

A claim for hearing loss is no different from other claims. Thus, the claim need not be accompanied by an interpreted audiogram or other evidence in order to constitute a valid claim and commence employer's obligation to either pay benefits or controvert in order to avoid fee liability under 33 U.S.C. §928(a). *Craig, et al v. Avondale Indus., Inc.,* 35 BRBS 164 (2001), *aff'd on recon. en banc,* 36 BRBS 65 (2002), *aff'd sub nom. Avondale Indus., Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

Case precedent establishes that claimant cannot receive a scheduled permanent partial disability award concurrently with total disability, either temporary or permanent, for a different injury. *See* Concurrent Awards, *infra.* Resolution of whether claimant is entitled to a separate scheduled award turns on whether the onset of the scheduled disability preceded or post-dated the onset of the total disability, regardless of which claim was filed first. Specific to hearing loss, if the onset of the hearing impairment precedes the onset of total disability, claimant can receive scheduled benefits for the period of time prior to the receipt of total disability benefits. In *B.S. [Stinson] v. Bath Iron Works Corp.,* 41 BRBS 97 (2007), the Board discussed this case law and held that the administrative law judge erred in allowing concurrent awards based on cases permitting such where claimant had an ongoing permanent partial disability due to a loss in wage-earning capacity under Section 8(c)(21) at the time he suffered a permanently totally disabling second injury. The Board remanded the case to the administrative law judge to apply the correct law as several audiograms of record predated the onset of claimant's total disability.

Additional hearing loss cases are found throughout the desk book, particularly in the sections on Aggravation under Section 2(2) and on Occupational Disease under Responsible Employer.

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

Where claimant filed a claim for a hearing loss in 1981 based on an audiogram at that time and introduced an audiogram documenting a higher loss at the 1984 hearing, the Board rejected the argument that the administrative law judge should have remanded the case for informal proceedings regarding the new audiogram. Whether the 1984 audiogram was a new claim, a modification of the old claim, or merely updated evidence of the 1981 claim, the Board concluded that the administrative law judge acted in the most judicially efficient manner, while preserving the rights of the parties, in addressing it. The administrative law judge found employer was not prejudiced and gave it the opportunity to respond to the new evidence; thus, employer's due process rights were protected. The Board thus affirmed the award of permanent partial disability benefits for a 6.1 percent binaural hearing loss in 1981 at claimant's 1981 average weekly wage, and for the 21 percent binaural loss shown in 1984 at his 1984 average weekly wage. Employer received a credit for the amount paid for the 1981 loss against its liability for the 21 percent award and relief pursuant to Section 8(f). *Downey v. Gen. Dynamics Corp.*, 22 BRBS 203 (1989).

Where claimant filed three claims in 1980, 1987 and 1988, based on audiograms in 1980 and 1986, the Board held that the administrative law judge properly merged the claims for adjudication, citing *Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990) (where a claim is filed and not adjudicated, it remains open until an order issues, and since the claims were for the same injury -- hearing loss due to noise exposure -- the pending claims merged into one claim for which one award is payable). However, the Board held that he erred in finding claimant's date of awareness for purposes of determining the responsible carrier was in 1980, as claimant continued to be exposed and his hearing loss worsened, evidencing a distinct aggravation, and modified to hold the carrier at the time of the 1986 audiogram liable for the entire hearing loss. *Spear v. Gen. Dynamics Corp.*, 25 BRBS 254 (1991). *Compare Stevedoring Services of Am. v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002) (where claimant files two separate claims against consecutive employers, each claim should be adjudicated separately, with each employer liable for its share of the loss); *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003) (following *Benjamin*, Board held claimant entitled to two awards on two claims; second employer is liable for full hearing loss with a credit for actual dollar amount paid in prior award).

The Board rejected employer's argument that its liability in hearing loss cases should be reduced to account for the effects of presbycusis, as the noise-induced loss had no effect on the underlying age-induced loss and the aggravation rule should not be applied in an additive manner. Under the aggravation rule, employer is properly liable for claimant's entire combined hearing loss. *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part and rev'd in part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). While the court reversed the Board's responsible employer holding, it affirmed the decision that claimant was entitled to compensation for his entire hearing loss without a deduction for the portion due to

presbycusis. The court reasoned that the aggravation rule does not require that the employment injury interact with the underlying condition itself to produce a worsening of the underlying impairment; under the aggravation rule, claimant is not required to prove that his disabilities combined in more than an additive way. *Port of Portland v. Director*, OWCP, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

The Board held that the administrative law judge erred in relying on *Stinson*, 41 BRBS 97, to find that claimant permanently lost his entitlement to his scheduled hearing loss award upon the commencement of a subsequent total disability award for a back injury as the Board explicitly stated in *Stinson* that if the total disability lapses, the scheduled award can be paid. As of the date that claimant's permanent total disability award ended and was replaced by a Section 8(c)(21) permanent partial disability award, he was entitled to resumption of his hearing loss award to be paid concurrently with his Section 8(c)(21) award for the back injury. *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010).

Where claimant was last exposed to injurious noise on the date he stopped working for employer due to a work-related back injury and where there were no audiograms prior to that date, that date represents the time of injury for purposes of claimant's hearing loss claim; claimant's assertion that he was regularly exposed to injurious noise for several years prior to that date is insufficient to establish that he sustained a work-related loss of hearing prior to the onset of his total disability due to his back injury. Adhering to its longstanding position that a claimant may not receive concurrently a scheduled award for one injury and a total disability award for a separate injury, the Board affirmed the administrative law judge's finding that claimant is not entitled to receive scheduled permanent partial disability benefits for his hearing loss concurrently with either his temporary or permanent total disability award for his back injury. *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011).

In this claim for disability for work-related hearing loss, the Board held the ALJ incorrectly found Claimant was entitled to benefits under Section 8(c)(13)(A) for monaural hearing loss. Claimant had 0% hearing loss in his right ear, 9.375% hearing loss in his left ear, and a converted binaural hearing loss rating of 1.56%. Claimant's physician added 4% impairment to his binaural impairment to account for tinnitus. Relying on the Sixth Edition of the AMA *Guides*, the Board concluded a claimant does not need measurable hearing loss in both ears to be entitled to compensation for tinnitus; rather, a claimant need only have a measurable binaural impairment using the accepted conversion formulas and then the ALJ may add up to the allotted 5% impairment for tinnitus pursuant to a credible medical opinion. As the Act requires use of the AMA *Guides* to calculate hearing loss, 33 U.S.C. §908(c)(13)(E), and it provides formulas for calculating hearing impairment, including when one or both ears have hearing loss, the Board remanded the case for the ALJ to convert Claimant's monaural hearing loss to a binaural rating to allow for the addition of the tinnitus impairment rating and award benefits under Section 8(c)(13)(B). The Board distinguished this case from those where the claimant solely has a monaural

impairment, and his benefits would be awarded under Section 8(c)(13)(A). *Tower v. Total Terminals Int'l*, __ BRBS __, BRB No. 21-0319 (July _, 2022) (Boggs, C.J., dissenting).

Timeliness of Notice and Filing

Under Section 8(c)(13)(B) of the Act, the time for filing notice of a hearing loss pursuant to Section 12 or a claim for compensation pursuant to Section 13 does not begin to run until the employee has received an audiogram and its accompanying report indicating a loss of hearing and is aware of the causal connection between his employment and his loss of hearing. *See Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985); *Ronne v. Jones Oregon Stevedoring Co.*, 18 BRBS 165 (1985); *Hollie v. Bethlehem Steel Corp.*, 17 BRBS 117 (1985); *Gentille v. Maryland Shipbuilding & Dry Dock Co.*, 17 BRBS 191 (1985); *Reggiannini v. Gen. Dynamics Corp*., 17 BRBS 254 (1985).

Claimant's knowledge of the results of the audiogram is insufficient to start the Sections 12 and 13 time limitations running. Actual physical receipt of the audiogram and accompanying report is mandated by the Act and its legislative history. *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986).

The Board initially rejected the argument that a hearing loss is not an occupational disease and held claimant entitled to the 1984 Amendment provisions expanding the time for filing notice to one year and for filing a claim to two years from the date of "awareness" in the case of "an occupational disease which does not immediately result in death or disability. 33 U.S.C. §§912(a), 913(b)(2). *See Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989); *Cox v. Brady-Hamilton Stevedore Co.*, 18 BRBS 10 (1985). The Board reasoned that where claimant's hearing loss is due to long-term, cumulative, and prolonged exposure to noise rather than due to a single traumatic injury, it is an occupational disease. *See Ronne*, 18 BRBS at 166. *See also Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). However, addressing whether hearing loss is an occupational disease "which does not immediately result in death or disability" and thus whether retirees with hearing loss were appropriately compensated under Section 8(c)(23) rather than Section 8(c)(13), the Supreme Court held that since a hearing loss is complete once exposure ends, hearing loss results in immediate disability. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Thus, the expanded limitations periods of Sections 12 and 13 do not apply in hearing loss cases, and notice must be given within 30 days and a claim filed within one year of claimant's receipt of an audiogram and "awareness" that his hearing loss is work-related. *See Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g on recon.* 26 BRBS 27 (1992).

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

The Eleventh Circuit held that in a hearing loss case, the employee must both receive an audiogram and be aware of the connection between the disability and the employment before the statute of limitations begins to run. The court held that substantial evidence supported the administrative law judge's finding that claimant was not aware of the relationship between his hearing loss and employment until a 1986 diagnosis, despite his receipt of a prior 1980 audiogram given to him by his doctor in a sealed envelope, which he never opened, with instructions to take it directly to a hearing aid clinic. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

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

The Board held that counsel's receipt of an audiogram is not constructive receipt by the employee, as Section 8(c)(13)(D) states that the Section 12 and 13 time limitations do not begin to run until claimant has physical receipt of an audiogram and accompanying report indicating a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). On reconsideration, the Board rejected employer's agency and constructive receipt arguments, holding that Congress specified that the statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g* 26 BRBS 27 (1992).

Pursuant to the Supreme Court's decision in *Bath Iron*, 506 U.S. 153, 26 BRBS 151(CRT), that occupational hearing loss is not a disease that does not immediately result in disability or death, the Ninth Circuit held that Section 12(a) dictates a 30-day notice period in this hearing loss case. Although claimant did not personally receive a copy of his audiogram and did not personally see the report until after the administrative law judge rendered a

decision, it is uncontested that claimant's attorney received the audiogram. Under the principles of agency, the Ninth Circuit held that the deadline for giving notice was not tolled until claimant personally received the audiogram, as the attorney's receipt of the audiogram was constructive receipt by the employee under Section 8(c)(13)(D). The court rejected the Board's contrary holding in *Vaughn*, 26 BRBS 27. The court nonetheless held the notice and claim timely on other grounds. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board initially affirmed the administrative law judge's finding that claimant received an audiogram, rejecting claimant's argument that an audiogram must meet the requirements for presumptive effect. The Board held that Section 8(c)(13)(C) and 20 C.F.R. §702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, are not related to timeliness determinations under Sections 8(c)(13)(D), 12 and 13. The Board reversed the administrative law judge's finding that a letter accompanying the audiogram, which indicated that claimant had "fair" and "below normal" hearing and was silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, was sufficient to constitute an "accompanying report." The Board noted that the letter did not state the extent of the loss or relate it to claimant's employment, nor did it provide a basis to find claimant should have made the connection in view of his history of non work-related hearing loss. The letter was thus insufficient to confer "awareness" of an employment-related hearing loss and inadequate to constitute an accompanying report under the statute. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

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

Determining the Extent of Loss

The scheduled compensation for loss of hearing in one ear is 52 weeks and for loss of hearing in both ears, 200 weeks.

Prior to the enactment of the 1984 Amendments, the Board held that it was within the administrative law judge's discretion to employ any reasonable method to determine the extent of claimant's hearing loss. *See, e.g., Linkous v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 158 (1984), and cases cited therein. In the 1984 Amendments, Congress added Section 8(c)(13)(E), which requires that hearing loss determinations be made in accordance with the current version of the AMA *Guides*. *See Reggiannini v. Gen. Dynamics Corp.*, 17 BRBS 254 (1985); *Gentille v. Maryland Shipbuilding & Dry Dock Co.*, 17 BRBS 191 (1985); *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985).

A ratable impairment under the AMA *Guides* is not necessary for an award of medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002). The administrative law judge must determine, based on the evidence that the treatment sought, e.g., hearing aids, is reasonable and necessary. *Id.*

Prior to the 1984 Amendments, the Board had held that employees who permanently and voluntarily retired prior to the manifestation of an occupational disease could not receive benefits, including a scheduled hearing loss award. *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984). The 1984 Amendments overruled this law by adding provisions providing compensation for those retired employees with "an occupational disease which does not immediately result in death or disability." 33 U.S.C. §§902(10), 910(d)(2), 910(i), 908(c)(23). A dispute arose regarding whether retired employees with hearing loss diagnosed after retirement should be compensated under Section 8(c)(13) or under those provisions, which provided for an average weekly wage calculated at the time claimant was aware of the relationship between his disease, employment and disability and ongoing benefits based on the percentage of impairment of the whole person.

Notwithstanding its holding that hearing loss cases were occupational diseases for purposes of the expanded statutes of limitations and application of Section 10(i) to calculate average weekly wage, the Board initially held that benefits for voluntary retirees who suffer hearing loss are to be calculated pursuant to Section 8(c)(13) based on the percentage of hearing loss under the AMA *Guides*. *Machado v. Gen. Dynamics Corp.*, 22 BRBS 176 (1989) (en banc) (Brown, J., concurring); *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *rev'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). *Accord Fucci v. Gen. Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds); *Cutting v. Gen. Dynamics Corp.*, 21 BRBS 108 (1988); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

The Fifth Circuit reversed the Board's holding that such claimants were entitled to compensation under Section 8(c)(13), and held that they were entitled to compensation under Section 8(c)(23) pursuant to the 1984 Amendments. The court remanded the cases for the Board to make the appropriate adjustments under the retiree scheme embodied in Sections 8(c)(23), 10(d)(2), 10(i), and 2(10). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), *rev'g in part and aff'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), and *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (en banc) (Brown, J., concurring). On remand, the Board modified the award to one for a whole man impairment under Section 8(c)(23) consistent with the Fifth Circuit's directive. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (Decision on Remand). *See also Howard v. Ingalls Shipbuilding, Inc.*, 25 BRBS 192 (1991) (decision on recon.) (when compensation for hearing loss is awarded under Section 8(c)(23) the award commences on the date that the hearing loss became permanent, which often is the first audiogram indicating a loss of hearing).

Following the Fifth Circuit's decision, the Board initially held that it would continue to apply its holding in *Machado*, 22 BRBS 176, finding Section 8(c)(13) applicable in all cases except those arising in the Fifth Circuit. *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated mem. sub nom. Director, OWCP v. Bath Iron Works Corp.*, 953 F.2d 633 (1st Cir. 1991). *Accord Brown v. Bath Iron Works Corp.*, 24 BRBS 89 (1990)(en banc) (Stage, C.J., concurring in the result) (Brown, J., dissenting on other grounds) (McGranery, J., dissenting), *aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991), *aff'd*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). However, the Board subsequently reconsidered its position in light of the Fifth Circuit's decision in *Fairley* and the Eleventh Circuit's decision in *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991), on Section 10(i), and it overruled *Machado*, holding that a retiree's hearing loss must be compensated under Section 8(c)(23). *Harms v. Stevedoring Services of Am.*, 25 BRBS 375 (1992) (Smith, J., dissenting), *rev'd in pert. part mem.*, 17 F.3d 396 (9th Cir. 1994).

The First Circuit, however, rejected the Fifth Circuit's holding in *Fairley*, 898 F.2d 1088, 23 BRBS 61(CRT), and held that hearing loss benefits for voluntary retirees must be calculated pursuant to Section 8(c)(13). The court reasoned that unlike asbestosis, a disease with symptoms that often do not appear until after retirement, hearing loss symptoms occur before retirement, whether or not they are noticed by the worker. Accepting the Director's position, the court held that hearing loss symptoms occur simultaneously with the disease and thus, hearing loss is not "an occupational disease which does not immediately result in death or disability." Accordingly, the post-retirement injury provisions were held inapplicable. *Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30(CRT) (1st Cir. 1991), *aff'd*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Affirming the First Circuit, the Supreme Court agreed that hearing loss is not an occupational disease which "does not immediately result in ... disability," and thus the retiree provisions are inapplicable. The Court held that a hearing loss injury occurs simultaneously with exposure to excessive noise, and therefore the injury is complete on the date of last exposure. Average weekly wage is thus calculated from the date of last exposure. Inasmuch as Section 10(i) is inapplicable, Sections 10(d)(2) and 8(c)(23) also are inapplicable and all hearing loss must be compensated pursuant to Section 8(c)(13). *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Digests

In General

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

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

The Board reversed the administrative law judge's award of benefits for hearing loss under Section 8(c)(13). Section 8(c)(13)(E) which was added to the Act by the 1984 Amendments, requires that hearing loss must be calculated in accordance with the AMA *Guides*. Since both physicians of record opined that claimant sustained no hearing loss under the AMA *Guides*, claimant was not entitled to an award under Section 8(c)(13). The Board also reversed the administrative law judge's award for tinnitus under Section 8(c)(21). The Board held that since tinnitus is a work-related condition that is manifested as a problem related to hearing loss, an award for disability due to tinnitus is subsumed in a hearing loss. Thus, a claimant who suffers from tinnitus is limited to seeking an award under Section 8(c)(13). *West v. Port of Portland*, 20 BRBS 162, *modified in part on recon.*, 21 BRBS 87 (1988). On reconsideration, the Board modified this decision, holding that an award for tinnitus under Section 8(c)(21) may be appropriate where claimant has a distinct physical impairment due to tinnitus and has established a loss in wage-earning capacity due to the condition. However, the Board reaffirmed its reversal of the administrative law

judge's award of benefits for tinnitus under Section 8(c)(21) because claimant failed to prove he had any loss in wage-earning capacity. *West v. Port of Portland*, 21 BRBS 87, *modifying on recon.* 20 BRBS 162 (1988).

In view of Section 8(c)(13)(E), all hearing loss determinations must be either initially calculated under the *Guides* standards or converted to such for use under Sections 8(c)(13) and (f). *Fucci v. Gen. Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds).

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

The Board affirmed the administrative law judge's decision to credit a 1980 audiogram, taken closest to claimant's last exposure to noise with the covered employer and the filing of the claim, rather than a 1982 audiogram reflecting a higher loss, stating that the administrative law judge did not err in determining that this audiogram best reflected the loss of hearing caused by claimant's employment with the responsible employer. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

In view of the lack of evidence that certain audiograms were performed in accordance with the procedures set forth in the Act and regulations, the administrative law judge rationally calculated claimant's hearing loss by averaging the results of the two audiograms that complied with the statutory and regulatory criteria. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

Audiometric tests that do not meet the "presumptive" standard are not invalid or inadmissible; it is for the administrative law judge to determine the probative value of such tests in determining the extent of claimant's hearing loss. Thus, the claimant's claim need not be accompanied by an interpreted audiogram or other evidence in order to constitute a valid claim and commence employer's obligation to either pay benefits or controvert in order to avoid fee liability under 33 U.S.C. §928(a). Moreover, the Board observed that two of the claims were accompanied by uninterpreted audiograms showing the hearing levels at 500, 1000, 2000, and 3000 Hz mandated by the AMA Guides and that hearing loss in each case was readily discernable by application of the methodology prescribed by the AMA Guides. *Craig, et al v. Avondale Indus., Inc.*, 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).
As the unequivocal evidence of record established that the 100 percent hearing impairment of the left ear was solely the result of a non-work-related intervening cause, the Board held that the aggravation rule was not applicable. As claimant's right ear impairment measures

zero percent under the AMA *Guides* and the left ear loss is not work-related, the Board affirmed the finding that claimant is not entitled to disability compensation. While claimant could be entitled to medical benefits despite the 0 percent rating, the Board also affirmed this denial as the administrative law judge rationally found the recommendation for hearing aids was related to the non-work-related hearing loss. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

The Board rejected the Director's argument that 20 C.F.R. §702.321, which states that a pre-existing hearing loss "must be documented by an audiogram which complies with the requirements of Section 702.441," requires that employer produce a "presumptive" audiogram pursuant to 20 C.F.R. §702.441(b) in order for it to establish the pre-existing hearing loss requisite for its entitlement to Section 8(f) relief. The Board explained that the key question relating to hearing loss for purposes of Section 8(f) relief, as well as for establishing the extent of hearing loss in adjudicating any other aspect of the claim, is whether there is sufficient probative evidence, applying the AMA *Guides* and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. A presumptive audiogram is not required in order to establish a compensable hearing loss. The Board rejected the Director's contention that the audiogram documenting claimant's pre-existing hearing impairment in this case was deficient under 20 C.F.R. §702.441(d), as the administrative law judge found that the examiner, type of equipment, and calibration date were on the audiogram results. The administrative law judge also found that claimant's current physical condition was noted in materials accompanying the audiogram. The administrative law judge relied on a doctor's testimony concerning the reliability of the audiogram, and the hearing loss was calculated under the AMA *Guides*. Thus, the Board affirmed the finding that the pre-existing permanent partial disability element for Section 8(f) relief was met, as well as the award of Section 8(f) relief. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

In this Section 8(f) case, the administrative law judge rationally credited the uncontradicted medical opinions stating that audiogram test results at any particular frequency that fall within a 5 decibel range of each other are within the range of test/retest variability and thus are a measure of the same hearing loss. In this case, the 2002 and 2003 audiogram results are within the range of test/retest variability such that the 2003 audiogram does not represent an increase in claimant's hearing loss since the 2002 audiogram. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011).

The Fourth Circuit held that the Board erred in affirming the administrative law judge's award based on a 1987 audiogram that lacked a reading at the 3000 Hz level, but was otherwise interpreted under the AMA *Guides* and had been found to be reliable by a physician; there was a reading at 4000 Hz. The court held that Section 8(c)(13)(E) contains mandatory language concerning application of the AMA *Guides*, and that the *Guides*, in turn, require "pure-tone" testing at the 500, 1000, 2000 and 3000 Hz levels. The audiogram

therefore was "disqualified entirely." As only the 2005 audiogram complied with the AMA *Guides*, the retiree's award was modified to reflect entitlement to the loss shown on that audiogram, consistent with *Labbe*, 24 BRBS 159. *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).

The decision in *Greenwich Collieries* does not preclude an administrative law judge from averaging impairment ratings where he finds audiograms to be equally probative. Thus, the Board affirmed the administrative law judge's decision to average the results of two audiograms to determine the extent of claimant's hearing loss when he found both audiograms credible and probative. *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

The Fourth Circuit reversed the Board's decision and held that when an administrative law judge finds impairment ratings equally probative and intends to average them, and one of those ratings represents a zero percent impairment, then claimant has not met his burden of proving he is disabled pursuant to *Greenwich Collieries*. In this case, the administrative law judge found credible and equally probative audiograms indicating a 3.75 percent loss and 0 percent binaural loss, and he averaged them. The Fourth Circuit reversed the award of benefits for a 1.875 percent impairment. The court specifically noted that it was not holding that an administrative law judge could not average ratings, only that he cannot find the claimant disabled if one of the ratings is zero. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

In this hearing loss case, claimant was examined by an audiologist of his choice, who found over 17 percent hearing loss, as well as an audiologist selected by employer, who found no ratable hearing loss. The administrative law judge found that both reports were credible and equally probative, and, in accordance with the Fourth Circuit's decision in *Green*, 656 F.3d 235, 45 BRBS 67(CRT), he declined to average the results, finding that the better evidence is that which shows the least amount of hearing loss. Accordingly, the Board affirmed the administrative law judge's finding that claimant has zero percent hearing loss and is not entitled to disability benefits. *Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017), *rev'd on other grounds on recon.*, 55 BRBS 1 (2021) (Boggs, C.J., dissenting), *appeal pending*.

In this claim for disability for work-related hearing loss, the Board held the ALJ incorrectly found Claimant was entitled to benefits under Section 8(c)(13)(A) for monaural hearing loss. Claimant had 0% hearing loss in his right ear, 9.375% hearing loss in his left ear, and a converted binaural hearing loss rating of 1.56%. Claimant's physician added 4% impairment to his binaural impairment to account for tinnitus. Relying on the Sixth Edition of the AMA *Guides*, the Board concluded a claimant does not need measurable hearing loss in both ears to be entitled to compensation for tinnitus; rather, a claimant need only have a measurable binaural impairment using the accepted conversion formulas and then the ALJ may add up to the allotted 5% impairment for tinnitus pursuant to a credible

medical opinion. As the Act requires use of the AMA *Guides* to calculate hearing loss, 33 U.S.C. §908(c)(13)(E), and it provides formulas for calculating hearing impairment, including when one or both ears have hearing loss, the Board remanded the case for the ALJ to convert Claimant's monaural hearing loss to a binaural rating to allow for the addition of the tinnitus impairment rating and award benefits under Section 8(c)(13)(B). The Board distinguished this case from those where the claimant solely has a monaural impairment, and his benefits would be awarded under Section 8(c)(13)(A). *Tower v. Total Terminals Int'l*, __ BRBS __, BRB No. 21-0319 (July _, 2022) (Boggs, C.J., dissenting).

Monaural v. Binaural Awards

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

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

In a Fifth Circuit case, the Board held that where a non-retiree claimant has a 0 percent hearing impairment in one ear and a measurable noise-induced impairment in the other, the administrative law judge properly awarded benefits on a binaural basis, pursuant to Section 8(c)(13)(B). The majority reiterated their position as stated in *Garner*, 24 BRBS 173, noting that the Fourth Circuit's reversal was in an unpublished decision without precedential effect. Additionally, the majority stated that Section 8(c)(13)(A) is limited to traumatic monaural impairments. *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43

(1992)(en banc) (Smith and Dolder, JJ., dissenting), *rev'd,* 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993).

In reversing the Board, the Fifth Circuit held that where claimant has a measurable occupational hearing loss in only one ear, his compensation must be calculated on a monaural basis pursuant to Section 8(c)(13)(A). The court held that this section is not in conflict with Section 8(c)(13)(E) which requires hearing loss to be calculated under the AMA *Guides*. *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993).

For the reasons stated in the Board's decision in *Tanner*, 26 BRBS 43, the Board affirmed the administrative law judge's award of permanent partial disability pursuant to Section 8(c)(13)(B) for a binaural impairment. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring in pert. part and dissenting on other grounds), *modified on recon.*, 28 BRBS 102 (1994) (en banc), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). On reconsideration, however, the Board followed the Fifth Circuit's holding in *Tanner*, 2 F.3d 143, 27 BRBS 113(CRT), vacated its prior decision and modified the administrative law judge's award to reflect that claimant is entitled to receive permanent partial disability benefits pursuant to Section 8(c)(13)(A) of the Act for his 5.6 percent monaural impairment. *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994)(en banc), *modifying on recon.* 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

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

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

Where claimant sustained a 39.4% monaural hearing loss in his left ear, the Board held that the administrative law judge erred in converting the monaural loss into a binaural loss of 6.6%. Pursuant to Section 8(c)(13)(A) and settled case law, the Board modified claimant's

award to reflect his entitlement to 20.475 weeks of benefits at a weekly rate of $835.74 for his monaural hearing loss. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

In this claim for disability for work-related hearing loss, the Board held the ALJ incorrectly found Claimant was entitled to benefits under Section 8(c)(13)(A) for monaural hearing loss. Claimant had 0% hearing loss in his right ear, 9.375% hearing loss in his left ear, and a converted binaural hearing loss rating of 1.56%. Claimant's physician added 4% impairment to his binaural impairment to account for tinnitus. Relying on the Sixth Edition of the AMA *Guides*, the Board concluded a claimant does not need measurable hearing loss in both ears to be entitled to compensation for tinnitus; rather, a claimant need only have a measurable binaural impairment using the accepted conversion formulas and then the ALJ may add up to the allotted 5% impairment for tinnitus pursuant to a credible medical opinion. As the Act requires use of the AMA *Guides* to calculate hearing loss, 33 U.S.C. §908(c)(13)(E), and it provides formulas for calculating hearing impairment, including when one or both ears have hearing loss, the Board remanded the case for the ALJ to convert Claimant's monaural hearing loss to a binaural rating to allow for the addition of the tinnitus impairment rating and award benefits under Section 8(c)(13)(B). The Board distinguished this case from those where the claimant solely has a monaural impairment, and his benefits would be awarded under Section 8(c)(13)(A). *Tower v. Total Terminals Int'l*, __ BRBS __, BRB No. 21-0319 (July _, 2022) (Boggs, C.J., dissenting).

Calculation after Claimant Leaves Covered Employment

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

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

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

In this hearing loss case factually similar to *Dubar*, 25 BRBS 5, claimant left covered employment in 1953; the earliest audiogram was administered in 1968 and showed either a 0 or 6.5 percent loss depending on the calibration of the equipment. Concluding that he could not project the 1968 audiogram's test values back to 1953 to find that claimant sustained a compensable hearing loss at the time he left covered employment, the administrative law judge denied benefits. The Board affirmed the administrative law judge's decision as within his authority as the fact-finder. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Following two remands after the Board's decision in *Brown*, 22 BRBS 384, the First Circuit upheld claimant's award based on a 1983 audiogram where he left covered employment in 1978. The issue of the compensability of claimant's hearing loss claim, i.e., whether it was related to exposure during covered employment, was decided in claimant's favor by the first administrative law judge; that decision was affirmed by the Board, and the court also affirmed it. The Board remanded the case for the second administrative law judge to determine the extent of claimant's work-related hearing loss until claimant transferred to the non-covered facility, and the Board properly found that that judge did not have compensability before him and vacated his finding that claimant did not establish any work-related hearing loss. Thus, the Board's decision holding claimant entitled to compensation based on the 1983 audiogram was affirmed. The court also discussed the last covered employer rule, relied on by the Board, but found it need not address this issue as compensability was established during claimant's covered employment. *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

Claimant's last covered employment occurred in 1975. Following a discussion and explanation of the Board's prior relevant decisions on this issue, i.e., *Brown*, 22 BRBS 384 [*see Brown*, 194 F.3d 1, 33 BRBS 162(CRT)], *Bruce*, 25 BRBS 157, *Dubar*, 25 BRBS 5, and *Labbe*, 24 BRBS 159, the Board concluded that claimant is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record, which the administrative law judge rationally determined are the two audiograms administered in 1998. In so holding, the Board rejected employer's contention that *Bruce* requires that the results from later audiograms be projected back to determine whether claimant sustained a compensable hearing loss at the time he left covered employment. Moreover, the Board distinguished the instant case from its decision in *Bruce*, as claimant herein retired from all employment in 1975, he was not exposed to noise in subsequent non-covered employment, and all audiograms of record revealed a measurable impairment. The Board held that the administrative law judge could properly find that the 1985 and 1992 audiograms were not of equal probative value to the 1998 audiograms in view of the lack of evidence that the earlier tests were performed in accordance with the procedures set forth in the Act and regulations and that he rationally relied on the average of the two audiograms administered in 1998 in determining the extent of claimant's work-related hearing loss. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Fourth Circuit held that the Board erred in affirming the administrative law judge's award based on a 1987 audiogram that lacked a reading at the 3000 Hz level, but was otherwise interpreted under the AMA *Guides* and had been found to be reliable by a physician; there was a reading at 4000 Hz. The court held that Section 8(c)(13)(E) contains mandatory language concerning application of the AMA *Guides*, and that the *Guides*, in turn, require "pure-tone" testing at the 500, 1000, 2000 and 3000 Hz levels. The audiogram therefore was "disqualified entirely." As only the 2005 audiogram complied with the AMA *Guides*, the retiree's award was modified to reflect entitlement to the loss shown on that

audiogram, consistent with *Labbe*, 24 BRBS 159. *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).

Disfigurement - Section 8(c)(20)

Section 8(c)(20) provides compensation not to exceed $7,500 "for serious disfigurement of the face, head or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment."

Where a claimant sustains a serious disfigurement to the face, head, or neck, it is automatically compensable; no economic loss need be shown. *Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611 (1978); *Sargent v. Matson Terminals, Inc.*, 8 BRBS 564 (1978). *See Brysiak v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 197 (1975) (remand to determine whether scar on face was "serious" disfigurement). Where there is serious disfigurement to other exposed areas, the disfigurement is compensable if it is likely to handicap the employee in securing or maintaining employment. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984) (claim denied where claimant failed to show his disfiguring hand and arm injuries were likely to handicap him in securing employment in the future as he had maintained employment with employer); *Wright v. Superior Boat Works*, 16 BRBS 17 (1983) (substantial evidence supported finding that claimant's disfigurement hindered his ability to obtain employment); *Creamer v. I .T.O. Corp. of Baltimore*, 9 BRBS 812 (1978) (benefits denied for scar on leg).

Neither the Act nor the regulations set standards for determining whether a disfigurement is serious. *Bean v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 605 (1978). In *Bean*, the Board affirmed a denial based on the administrative law judge's personal observations and declined the invitation to set objective standards for "seriousness," stating that it was more appropriate for the Director to do so. An award for facial disfigurement can run concurrently with an award under Section 8(c)(21). *Fuduli v. Maresca Boat Yard, Inc.*, 7 BRBS 982 (1978) (note that while the decision distinguishes other scheduled awards as not running concurrently with Section 8(c)(21) awards, the Board later held that such awards may run concurrently; *see* Concurrent Awards, *infra*). Similarly, a disfigurement award for a scheduled member (arm) runs concurrently with an award under the schedule for loss or loss of use of the scheduled member. *Wright*, 16 BRBS at 20-21.

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The Board rejected claimant's argument that he was automatically entitled to disfigurement benefits because his head, neck and face were burned. While claimant need not prove that a disfigurement to his head, neck or face impeded his employability, disfigurement to those body parts must be shown to be "serious" before benefits may be awarded. The Board affirmed the administrative law judge's determination that claimant failed to prove he

sustained "serious" disfigurement as he considered claimant's employability, lack of physical complications and medication, and that he returned to his usual work with no reduction in seniority. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Unscheduled Injuries - Section 8(c)(21)

Section 8(c)(21) compensates permanently injured employees who are not totally disabled or retirees and whose injuries are not covered by the schedule. An award under this section is based on wage-earning capacity lost as a result of injury. Claimants with injuries to parts of the body covered in the schedule may not receive benefits under Section 8(c)(21) based on economic loss. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Physical impairment alone will not entitle a claimant to benefits under this section; claimant must establish a loss in wage-earning capacity. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *Randall v. Comfort Control, Inc.*, 15 BRBS 233 (1983), *vac. and rem. on other grounds*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981).

Under Section 8(c)(21), compensation is based on 66 2/3 percent of the difference between claimant's average weekly wage at the time of the injury, determined under Section 10, and his wage-earning capacity after the injury, determined under Section 8(h). Correct application of Section 8(c)(21) requires that average weekly wage be compared with a precise dollar amount of post-injury wage-earning capacity to determine any loss of wage-earning capacity due to the injury. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 598 (1981); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); *Johnson v. Brady-Hamilton Stevedore Co.*, 11 BRBS 427 (1979); *Bennett v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 212 (1978); *Harris v. Atl. & Gulf Stevedores, Inc.*, 9 BRBS 7 (1978).

Despite the language of Section 8(c)(21) and (h), the Third Circuit has held that the proper comparison in determining partial disability is between the wage rate in claimant's post-injury job with the wages the employee would be earning had he continued in his pre-injury employment. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979). The Board declined to follow the "but-for" approach of *McCabe*, holding that the administrative law judge may not project the employee's pre-injury wages into the future as Section 10 of the Act mandates that average weekly wage be determined at the time of injury and the statute requires comparison between this number and claimant's post-injury wage-earning capacity. *See Pumphrey v. E. C. Ernst*, 15 BRBS 327 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). In order to account for inflation, the Board held that claimant's post-injury earning capacity must be adjusted downward to the rate paid at the time of injury. *Id.* The Board's approach has been affirmed by the D. C. Circuit, *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir. 1986), and the Ninth Circuit has also rejected the "but-

for" approach. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). *See* Section 8(h), Inflation, *infra*.

The determination of post-injury wage-earning capacity is addressed in Section 8(h) of the desk book. Section 8(e) addresses temporary partial disability, and such awards are also based on a loss of wage-earning capacity. *See* Section 8(a), (b) regarding determining whether disability is total or partial, and Section 10(a)-(c) regarding determining average weekly wage.

An award of disability benefits under Section 8(c)(21) may be modified under Section 22 based on a change in either claimant's physical or economic condition. *Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). *See* cases discussed in Section 22. Thus, where claimant's wage-earning capacity increases over time, employer may obtain modification based on evidence that claimant no longer has a loss in earning capacity. *Id. See also* Section 8(h), *De Minimis* Awards, *infra*.

Since Section 8(c)(21) compensates claimant for a loss of wage-earning capacity, payments under this section should continue while claimant is out on strike, *Schenker v. Washington Post Co.*, 7 BRBS 34 (1977), or unable to work due to a subsequent non-work-related injury. *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288 (1979). In addition, the fact that claimant withdraws from the labor market following injury does not affect his or her entitlement to benefits where a loss in wage-earning capacity is established. *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984). In *Hoopes*, claimant could not return to her usual employment and her loss of wage-earning capacity was established by evidence of suitable alternate employment paying $158.31 per week less than her usual employment. She was, therefore, entitled to an award under Section 8(c)(21) based on her established lost wage-earning capacity, despite her decision to forego the alternative employment to remain at home with her child. *See* Sections 8(c)(23) and 10(d)(2) for a discussion of compensation where claimant voluntarily retires and withdraws from the work force prior to the manifestation of an occupational disease.

The Board has affirmed the denial of permanent partial disability benefits where claimant's actual earnings showed no post-injury loss in earning capacity despite an error in the administrative law judge's pre-injury average weekly wage determination which required remand. *LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986) (DeGregorio, J., dissenting), *rev'd sub nom. LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989) The Board held benefits were properly denied as claimant maintained steady, productive employment and had a rise in income based on his income tax returns for calendar years prior to and after injury. As the Board affirmed the finding that claimant's actual post-injury earnings equaled his wage-earning capacity and found based on the tax records that these earnings exceeded his pre-injury earnings, the Board

found no need to remand for a "technical comparison" of pre-injury wages and post-injury earnings. The Second Circuit reversed this decision, stating that it was error for the Board to determine that claimant had no permanent loss of earning power based on claimant's income tax calendar-year earnings, since Section 8(c)(21) requires a comparison between a definite dollar figure representing pre-injury average weekly wage with a definite dollar figure representing post-injury wage-earning capacity. The Board erred in precluding the administrative law judge on remand from considering evidence other than claimant's nominal post-injury earnings to determine his residual earning capacity under Section 8(h), which requires an examination of the totality of the evidence. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989).

For cases involving Section 8(c)(21)**,** *see Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978), *aff'g* 7 BRBS 86 (1977) (example of analysis of loss of wage-earning capacity in an occupational disease case where claimant was transferred to another department); *Todd Shipyards Corp. v. Allen*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U. S. 1034 (1982), *aff'g* 12 BRBS 589 (1980) (fact that post-injury earnings exceed average weekly wage at the time of injury does not preclude conclusion that claimant suffered loss of wage-earning capacity; determination of post-injury wage-earning capacity reasonable where administrative law judge considered physician's opinion, claimant's future vulnerability to layoffs, limitations imposed due to claimant's physical restrictions, and claimant's limited education and work experience); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983) (Board held as a matter of law that claimant's actual post-injury wages are not representative of his wage-earning capacity); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981) (administrative law judge did not properly explain wage-earning capacity calculation); *Vilen v. Agmarine Contracting, Inc.*, 12 BRBS 769 (1980) (fact that worker's seniority increased and he received more frequent assignments to higher-paying jobs did not demonstrate that pre-injury wage-earning capacity was restored).

The denial of benefits under Section 8(c)(21) was affirmed as based upon substantial evidence of no loss of wage-earning capacity in the following cases: *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188 (1985) (although claimant unable to perform heavy labor after injury, claimant failed to produce evidence of his ability to perform heavy labor prior to work injury); *Fox v. Melville Shoe Corp.*, 17 BRBS 71 (1985); *Del Vacchio*, 16 BRBS at 194 (claimant continued to work adequately and regularly without help from co-workers); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984) (psychological disability, but wages higher than at time of injury).

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Where uncontradicted evidence established that claimant's occupational disease caused his pre-retirement work difficulties and subsequent reductions in income, the Board reversed the administrative law judge's finding that claimant experienced no compensable disability

until after he retired in 1983, and held that claimant is entitled to permanent partial disability benefits from the 1978 date on which his difficulties began to affect his income until his last day of work. In addition, since claimant retired due to his occupational disease and since employer did not present any evidence of the availability of suitable alternate employment, claimant is entitled to permanent total disability benefits from his retirement date. Since claimant's partial disability preceded his retirement, his partial disability award must be based on his actual pre-retirement wage-earning capacity loss under Section 8(c)(21) and (h), rather than on the extent of his medical impairment under Sections 2(10) and 8(c)(23), which apply to voluntary retirees. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

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

The Board initially held that claimant's recovery for tinnitus was limited to a scheduled hearing loss award under Section 8(c)(13). However, on reconsideration, the Board modified its original decision, holding that an award for tinnitus under Section 8(c)(21) may be appropriate where claimant has a distinct physical impairment and has established a loss in wage-earning capacity due to the condition. However, the Board reaffirmed its reversal of the administrative law judge's award of benefits for tinnitus under Section 8(c)(21) because claimant failed to prove he had any loss in wage-earning capacity due to this condition. *West v. Port of Portland*, 21 BRBS 87 (1988), *modifying on recon.* 20 BRBS 162 (1988).

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

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

The administrative law judge found that claimant, who left the workforce due to an arm injury, was a voluntary retiree for purposes of his occupational disease claim and, as his lung impairment was temporary rather than permanent, he denied claimant compensation pursuant to Sections 2(10) and 8(c)(23). The Board held that claimant cannot be said to have been retired at the time his occupational disease became manifest in that there was no evidence that claimant had withdrawn from the workforce and lacked a realistic expectation of returning at the time his disease became manifest, as required by 20 C.F.R. §702.601(c). The Board noted that the claim for the arm injury was not resolved until it

was settled subsequent to the manifestation of his occupational disease and whether claimant was able to work despite his arm injury remained in dispute. The Board also noted that when a claimant is diagnosed with an occupational disease which effectively precludes his returning to the workforce while convalescing from a work-related injury, it cannot be said that he has "voluntarily" withdrawn from the workforce. As claimant was not a retiree under Section 702.601(c), the Board remanded for the administrative law judge to enter an award based on claimant's loss of wage-earning capacity under Section 8(c)(21). *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992).

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

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

The administrative law judge found that claimant, who was injured while working in Afghanistan, would have ceased overseas work and returned to the United States to work no later than August 2011. Consequently, although the administrative law judge found that claimant had an actual loss of wage-earning capacity after January 1, 2009, he reduced claimant's compensation to $1 per week beginning September 1, 2011, as he found that the difference between claimant's post-injury wage-earning capacity and the earnings he had previously received in state-side employment was minimal. The Board held that nothing in the Act or the case law supports this type of two-tiered award. Section 8(c)(21) requires compensation for permanent partial disability to be paid "during the continuance of partial disability," the "football cases" on which the administrative law judge relied did not specifically address the legality of a two-tiered award, and it is improper to rely on a presumed future event which does not take a claimant's injured status into account in

awarding benefits. Thus, the Board vacated the administrative law judge's nominal award as of September 1, 2011 and reinstated the full permanent partial disability award. *Raymond v. Blackwater Sec. Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

Where Claimant suffers from tinnitus alongside hearing loss, the Board held he is not entitled to a nonscheduled award for his tinnitus as the Board previously held in *West*, 20 BRBS 162. The Sixth Edition of the AMA *Guides* provide tinnitus is now subsumed into the hearing loss paradigm. Because the AMA *Guides* consider tinnitus as a symptom of hearing loss and not a separate impairment, and they provide he should have converted Claimant's monaural impairment into a binaural rating and added the extra percentage for tinnitus impairment, the Board held the ALJ should have awarded Claimant benefits under Section 8(c)(13)(B). *Tower v. Total Terminals Int'l*, __ BRBS __, BRB No. 21-0319 (July _, 2022) (Boggs, C.J., dissenting).

Section 8(c)(22)

Section 8(c)(22) provides that, where injury occurs to more than one member or parts of more than one member under the schedule, an award shall be made for each injury, and the awards run consecutively, except where the injury affects only two or more digits of the same hand or foot, in which case Section 8(c)(17) applies. *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984); *Cross v. Lavino Shipping Co.*, 6 BRBS 579 (1977).

Claimant sustained injuries to each knee in separate accidents and sought concurrent awards. The Board applied the plain language of Section 8(c)(22), which states that "in any case" multiple permanent partial disability awards under the schedule shall run consecutively. The Board stated that this holding is consistent with the decision of the Fourth Circuit, within whose jurisdiction this case arises, in *Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). The Board noted the absence of any compelling reason that "[i]n any case" should be narrowly construed as applying only when a claimant has more than one scheduled disability from a single work accident. Thus, "whenever" a claimant sustains two or more scheduled permanent partial disabilities, the awards are to run consecutively, whether the disabilities arise from a single accident or more than one accident. *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010).

Section 8(c)(23)

Prior to the 1984 Amendments, the Board held that claimants who suffered from occupational diseases which did not become manifest until after their voluntary retirement and withdrawal from the work force did not have a disability under the Act as they had no loss of earning capacity. *See Jones v. Newport News Shipbuilding & Dry Dock Co.*, 16 BR3S 347 (1984); *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984); *Redick v. Bethlehem Steel Corp*., 16 BRBS 155 (1984). Thus, such claimants were not entitled to benefits.

The 1984 Amendments overruled these decisions, amending Section 2(10) and adding Sections 8(c)(23), 10(d)(2), and 9(e)(2) to expressly allow awards to voluntary retirees and their survivors. *See also* 20 C.F.R. §702.601. Under these sections, claimants who voluntarily retire are compensated for permanent partial disability based on the degree of medical impairment determined under the AMA *Guides*.

Section 8(c)(23) does not apply if retirement is involuntary, i.e., where retirement is due in part to the work injury. *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986). Section 702.601(c) of the regulations provides that "retirement" means the employee "has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce."

Section 8(c)(23) is also discussed under Section 10(d)(2) of the desk book. Hearing loss cases discussing Section 8(c)(23), e.g., *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), are discussed in Section 8(c)(13), *supra*.

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The Board rejected employer's contention that the claimants are involuntary retirees for purposes of their hearing loss claims because when they filed separate claims for asbestosis, they alleged that they left the workforce due to their respiratory impairments. Since claimants did not leave the workforce due to their hearing losses, they are voluntary retirees for purposes of these claims. *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989) (note that holding hearing loss claims for retirees were compensable under Section 8(c)(23) has been overruled by *Bath Iron*).

The administrative law judge relying on *Manders*, 23 BRBS 19, found that claimant who left the workforce due to an arm injury was a voluntary retiree for purposes of his occupational disease claim and, as his lung impairment was temporary rather than permanent, he denied claimant compensation pursuant to Sections 2(10) and 8(c)(23). The Board held that claimant was not retired at the time his occupational disease became manifest since there was no evidence that claimant had withdrawn from the workforce and

lacked a realistic expectation of returning at the time his disease became manifest, as required under 20 C.F.R. §702.601(c). The Board noted that the claim for the arm injury was not resolved until after the manifestation of his occupational disease and whether claimant was able to work despite his arm injury remained in dispute. Board also noted that when a claimant is diagnosed with an occupational disease which effectively precludes his returning to the workforce while convalescing from a work-related injury, it cannot be said that he has "voluntarily" withdrawn from the workforce. The Board thus held that claimant was not a voluntary retiree for purposes of his occupational disease claim and remanded for the administrative law judge to enter an award based on claimant's loss of wage-earning capacity. *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992).

The Board held that claimant, a voluntary retiree because he left the workforce for reasons unrelated to the stomach cancer for which he sought benefits, was not entitled to benefits under Section 8(c)(23) as he was already receiving compensation under the Act for permanent total disability due to asbestosis at the time he developed stomach cancer. Claimant cannot receive a Section 8(c)(23) award concurrently with permanent total disability. *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989).

In this D.C. workers' compensation case decided prior to *Keener v. Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (holding 1984 Amendments do not apply to cases arising under the 1928 D.C. Act), the Board held that the administrative law judge erred in applying *Aduddell*, 16 BRBS 131, to deny benefits as it was overruled by the 1984 Amendments. Moreover, *Aduddell* and the retiree provisions apply only where claimant is a voluntary retiree. As claimant testified that he retired in part due to his occupational disease, he is entitled to be compensated for a loss in wage-earning capacity. The case was remanded for findings. *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986).

The Board affirmed the denial of total disability benefits, holding that the administrative law judge properly found that the post-retirement injury provisions of the 1984 Amendments to the Act applied to limit claimant's recovery to a permanent partial disability award under Section 8(c)(23) where there was no evidence claimant retired due to his occupational disease and the parties stipulated that claimant first learned that his disease was related to his employment after his retirement. *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988).

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

The Board held that the administrative law judge's finding that claimant was a voluntary retiree, *see* 20 C.F.R. §702.601(c), was supported by substantial evidence, as there was no evidence that claimant was instructed by his physician to stop working because of his acute bronchitis, claimant never asked to be rehired and he sought no other employment after he requested to be and was laid-off. The Board therefore rejected claimant's argument that he was permanently totally disabled and affirmed the Section 8(c)(23) award based on the degree of his permanent physical impairment, and not on economic factors. *Smith v. Ingalls Shipbuilding Div., Litton Sys. Inc.*, 22 BRBS 46 (1989).

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

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

The Board affirmed the administrative law judge's finding that claimant left the workforce in order to receive SSA and pension benefits, reasons unrelated to his asbestosis. Since the wage-earning capacity of a voluntary retiree is irrelevant, the Board rejected claimant's argument that the administrative law judge erred in failing to consider whether employer established suitable alternate employment and whether a physician's recommendation that claimant avoid further exposure to asbestos caused a loss in earning capacity. As there was no medical opinion evaluating claimant's impairment, the denial of benefits was affirmed. *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989).

The Board held that decedent, who indicated to claimant, his widow, that he "decided to retire" at age 62, and who began receiving Social Security retirement benefits at the time, but who returned to part-time employment at his son's company several months later and was subsequently diagnosed as having work-related lung cancer which ultimately lead to his death, was a voluntary retiree at the time he left his full-time job. A part-time position to supplement retirement income does not necessarily defeat the contention that decedent was retired under the regulations, and in this case, decedent's part-time job was not a return to the work-force. The administrative law judge erred in awarding permanent total

disability benefits since the employee's occupational disease became manifest after his retirement, and he is limited to an award under Section 8(c)(23). The case was remanded. *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989).

The Board held that the administrative law judge's finding that claimant voluntarily retired was supported by substantial evidence where claimant filed for Social Security retirement benefits just prior to leaving employer but alleged no disability; his separation papers indicated voluntary retirement; claimant failed to subsequently seek any other employment; and the medical evidence did not establish a pre-retirement breathing impairment. Based on the "aggravation rule" the administrative law judge erred in awarding claimant benefits only for the 20 percent of his breathing impairment the doctor attributed to asbestosis rather than the 50 percent impairment due to that disease combined with his non work-related COPD. The Board thus modified to award claimant benefits for his 50 percent permanent impairment. *Johnson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 160 (1989).

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

The Board affirmed the administrative law judge's determination that decedent was a voluntary retiree where the only evidence which could establish that decedent had a disabling lung disease at the time of his retirement was his testimony and statements to doctors, which the administrative law judge discredited due to a lack of corroborating medical evidence. The Board held that a chest x-ray evidencing pleural thickening was insufficient to establish a commencement date for decedent's permanent partial disability award under Section 8(c)(23) since that alone is not a basis for permanent impairment under the AMA *Guides*. However, a physician's report stating that decedent had disability of his lungs related primarily to bronchitis and to a lesser extent to pulmonary asbestosis which was sufficient to permit rating established the commencement date for the Section 8(c)(23) award as a matter of law. The Board further held, assuming, *arguendo*, that two separate impairment ratings for asbestos-related lung disease and esophageal cancer were supported by the record, the administrative law judge erred in fashioning separate overlapping permanent partial disability awards for the period from May 31, 1985-November 5, 1986. Where a voluntary retiree has two or more impairments, the value of

each impairment must be determined separately and related to the "whole person" under the Combined Values Chart found in the AMA *Guides*. The retiree is entitled to only one award representing his overall disability from his conditions. The Board also vacated the award for a 65 percent disability due to esophageal cancer as the administrative law judge failed to discuss an earlier report of the doctor upon whose rating he relied which stated that decedent was disabled due to a combination of asbestos-related lung disease, esophageal cancer and the secondary effects of his malignancy. Because the Board was unable to determine whether the 65 percent impairment rating was based on decedent's esophageal cancer alone, the case was remanded for the administrative law judge to consider both reports and to determine the extent of decedent's impairment resulting from his esophageal cancer and his asbestos-related lung disease accordingly. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The Board held that the administrative law judge erred in concluding that claimant would have been entitled to permanent partial disability benefits under Section 8(c)(23) if he had filed a timely claim for his occupational disease, as the record contained no permanent impairment rating during the period prior to the onset of claimant's total disability from an unrelated neck injury. Thereafter, claimant was precluded from receiving an award under Section 8(c)(23) as he was receiving total disability benefits. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

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

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

The Board affirmed the administrative law judge's finding that claimant could not return to his former employment at least in part due to his pulmonary condition, and not due solely

to orthopedic problems as employer alleged, as the finding was supported by claimant's testimony, medical evidence, and the settlement for the orthopedic injuries which stated that claimant was partially disabled. Claimant therefore established a *prima facie* case of total disability under Section 8(a) and is not limited to an award under Section 8(c)(23). *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

The Board reversed the administrative law judge's determination that a pulmonary function study by the only physician who offered an opinion regarding onset of disability was not indicative of a Class II impairment under the AMA *Guides* as the administrative law judge misapplied the *Guides*. The Board held that this objective evidence was sufficient as a matter of law to establish a commencement date for claimant's pulmonary impairment and remanded the case for an award of benefits under Section 8(c)(23) as of that date. *Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1998). Following remand, the Board rejected employer's argument that the administrative law judge improperly utilized the 3rd Edition of the AMA *Guides* in determining the extent of claimant's respiratory impairment as of 1983. The Board upheld the administrative law judge's reliance on a physician's assessment of a Class 2 respiratory impairment in 1983 based on the 3rd Edition, which was the current version of the *Guides* at the time the physician's opinion was rendered in 1989, and, as such, represented the state of the art standard for the evaluation and rating of claimant's respiratory impairment. *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Board rejected claimant's assertion that the administrative law judge erred in determining that his disability commenced in 1993 rather than in 1985. The Board had previously held that claimant was a voluntary retiree and that the evidence did not support a finding that there was a permanent respiratory impairment in 1985. On remand, the administrative law judge used a 1999 medical report in conjunction with a 1993 report to conclude that claimant's disability commenced in 1993, as the impairment was essentially the same at both times. The Board affirmed, as the finding was rational and supported by substantial evidence. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd*, 303 F. App'x 928 (2d Cir. 2008).

The Board affirmed the administrative law judge's finding that claimant was a voluntary retiree. The administrative law judge found that, after claimant's employment in Iraq with employer ended, he unsuccessfully looked for work in the United States until he stopped receiving unemployment compensation. The Board held that the administrative law judge permissibly rejected claimant's vague testimony that he continued to look for work thereafter and the vague evidence that claimant owned or co-owned some businesses. The administrative law judge permissibly concluded that claimant's activities were of the type a retired person would engage in. Because claimant's occupational disease, PTSD, has not been rated under the AMA *Guides*, claimant is not entitled to benefits under the Act. *Gindo v. AECOM Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018), *vacated and remanded*, No. 4:19-CV-01745 (S.D. TX March 23, 2022).

In this case involving a voluntary retiree with an asbestos-related lung condition, benefits are to be awarded based on a percentage of permanent impairment pursuant to the AMA *Guides*. Claimant challenged the administrative law judge's use of the 6th Edition instead

of the 3rd Edition which was in effect at the time of his injury. The Board concluded the statutory language in Section 2(10) of the Act, "under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association," is ambiguous as to which version of the AMA *Guides* to use, but the regulatory language of 20 C.F.R. §702.601(b), "according to the *Guides to the Evaluation of Permanent Impairment* which is prepared and modified from time-to-time by the American Medical Association, using the most currently revised edition of this publication," is unambiguous. Following a review of the legislative history of the 1984 Amendments, the Board held the regulation comports with Congressional intent. Thus, the Board held the "most currently revised edition" requires a doctor to rate the retiree under the most recent edition as of the date he renders his medical opinion. The Board rejected claimant's contentions concerning the "non-delegation doctrine" and due process. The Board affirmed the administrative law judge's award of benefits for a 65% impairment as determined under the 6th Edition of the AMA *Guides* as it was supported by substantial evidence and in accordance with law. *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020).

Conflicts Between Applicable Sections

Raising Partial and Total

Problems arise in cases where the administrative law judge awards compensation for permanent total disability when the claim is for a lesser degree of disability. Where a claimant sought compensation for permanent partial disability but was awarded permanent total without prior notice by the administrative law judge, the Board remanded, noting that employer would in all likelihood defend a permanent total claim differently. *Swan v. George Hyman Constr. Co.*, 3 BRBS 490 (1976); *see also Seals v. Ingalls Shipbuilding, Div. of Litton Sys., Inc.*, 8 BRBS 182 (1978); *Hunter v. Duncanson-Harrelson Co.*, 8 BRBS 83 (1978); *Sams v. D.C. Transit Sys., Inc.*, 9 BRBS 741 (1978).

However, where the case record revealed that employer was under the impression at the hearing that the claim was for permanent total disability and was, therefore, presumably prepared to defend on that issue, the Board affirmed an award for permanent total, even though only temporary total was formally sought. *Walker v. AAF Exch. Serv.*, 5 BRBS 500 (1977); *but see Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977) (administrative law judge erred in awarding permanent total disability where only a scheduled award was discussed at hearing); *see also Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983) (administrative law judge properly considered the issue of permanent total disability although parties stipulated that only temporary total and permanent partial disability were unresolved). *See* Introduction to Section 8 of the desk book for additional cases.

Schedule Injuries and Total Disability

In cases where claimant establishes that he is permanently totally disabled, the schedule set forth in Section 8(c) does not apply. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366 n. 17 (1980) (*PEPCO*). In *PEPCO*, the Court reasoned that permanent total disability falls under Section 8(a), which directs that permanent total disability is determined based on the facts, and the Section 8(c) schedule applies only in cases of permanent partial disability. Thus, "once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id. Accord Fyall v. Delta Marine, Inc.*, 18 BRBS 241 (1986) (Brown, dissenting); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984); *Presley v. Tinsley Maint. Serv.*, 15 BRBS 245 (1983); *Sledge v. Sealand Terminal*, 16 BRBS 178 (1984); *Paiement v. Bath Iron Works Corp.*, 11 BRBS 767 (1980); *see Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975).

Therefore, a claimant who suffers injury to a scheduled member is not limited to recovery under the schedule, but may recover compensation for total disability if the facts support such. *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979), *aff'g* 8 BRBS 552 (1978); *Picoriello v. Caddell Dry Dock Co.*, 12 BRBS 84 (1980). This principle applies to requests for modification when the original award was for permanent partial disability under the schedule. *Presley*, 15 BRBS at 248. Since injuries arising under the schedule which result in permanent total disability are subsumed under Section 8(a), a claimant is not entitled to benefits

under the schedule in addition to total disability benefits. *Paiement*, 11 BRBS at 769. *See* Concurrent Awards, *infra*.

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

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

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

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

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

The Fourth Circuit reversed an award of temporary partial disability benefits to a claimant whose knee injury had reached maximum medical improvement and who was receiving scheduled permanent partial disability benefits. The Fourth Circuit gave deference to the Director's position that once claimant's partial disability award is set under the schedule (ppd), he is not entitled to additional temporary partial benefits for the same scheduled injury. Any subsequent temporary partial loss is subsumed by the benefits claimant received under the schedule, as those benefits are presumed to cover actual loss due to any flare-up of his permanent knee condition. The court further agreed with the Director that, in an appropriate case, such a claimant can receive permanent total, temporary total, or increased scheduled permanent partial, disability. *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118, 49 BRBS 33(CRT) (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

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

Prior to the Supreme Court's decision in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980) (*PEPCO*), if a claimant who was permanently partially disabled could show he had sustained a loss in wage-earning capacity which provided benefits greater than those provided in the schedule, he was not restricted to the schedule and could pursue his claim under Section 8(c)(21). *Potomac Elec. Power Co. v. Director, OWCP*, 606 F. 2d 1324, 10 BRBS 825 (D.C. Cir. 1979), *aff'g Cross v. Potomac Elec. Power Co*., 7 BRBS 10 (1977); *Hubert v. Bath Iron Works Corp*., 11 BRBS 143 (1979); *Collins v. Todd Shipyards Corp*., 9 BRBS 1015 (1979). Where claimant sought an award under Section 8(c)(21) for an injury falling under the schedule, administrative law judges were advised as an alternative to consider an award under the schedule if none was warranted under Section 8(c)(21). *Keeney v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 224 (1979).

However, in *PEPCO*, the Supreme Court reversed the D.C. Circuit and held that where a claimant is permanently partially disabled by an injury falling under the schedule, he is limited to a schedule award and cannot seek a higher recovery under Section 8(c)(21). The Board thereafter followed the Court's ruling. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984) (17 1/2 percent disability to each hand); *Walker v. Nat'l Steel & Shipbuilding Co.*, 13 BRBS 369 (1981) (knee injury); *Bluhm v. Cooper Stevedoring Co.*, 13 BRBS 427 (1981) (ankle injury and 10 percent loss of use of leg); *Spearman v. Foxhall E. Condo.*, 13 BRBS 722 (1981) (ankle injury); *McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981) (loss of use of foot); *Hicks v. Pac. Marine & Supply Co.*, 14 BRBS 549 (1981) (knee injury).

As discussed in the preceding section, *PEPCO* did not disturb earlier rulings that claimant may be entitled to compensation for total disability notwithstanding that an injury was to a scheduled member. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366 n.17. The schedule is the exclusive remedy for permanent partial disability under Section 8(c) for injuries covered therein; however, it does not apply to awards under Section 8(a), (b) or (e).

Prior to *PEPCO*, the Board held that the fact that claimant accepts voluntary payments under the schedule from employer does not preclude his pursuing an award under Section 8(c)(21). *Hubert*, 11 BRBS at 145; *Tibbetts v. Bath Iron Works Corp*., 10 BRBS 245 (1979). Following *PEPCO*, this ruling would apply only if it were ultimately found that claimant's injury was not covered by the schedule.

In *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982), and *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981), the Board held that an injury to the shoulder is compensable under Section 8(c)(21) rather than the schedule. This result is based on holdings that the schedule is not applicable where the actual site of the injury is a part of the body not specifically listed therein, even if the injury results in an impairment to a

scheduled part of the body. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Grimes*, 14 BRBS at 576.

Thus, where the site of injury is a part of the body not listed in the schedule, claimant is entitled to permanent partial disability benefits only under Section 8(c)(21); this award will encompass the lost earning capacity due to claimant's full impairment. The Board has held that an administrative law judge erred in awarding permanent partial disability under Section 8(c)(21) where claimant sustained knee and back injuries in two separate accidents; the Board remanded, holding that *PEPCO* requires a scheduled award for the knee injury and a Section 8(c)(21) award for the back injury, from which the administrative law judge must factor out any loss of wage-earning capacity attributable to the knee injury. *Turney*, 17 BRBS at 234-235. Similarly, where claimant injures both scheduled and unscheduled body parts in an accident, or injures a scheduled body part, and this injury leads to an impairment of an unscheduled part, e.g., back problems after a leg injury, claimant can receive both a Section 8(c)(21) and an award under the schedule. *Bass v. Broadway Maint.*, 28 BRBS 11 (1994).

The Board has rejected the contention that, where two scheduled injuries occur in two separate accidents and only permanent partial disability is the result, compensation should be awarded under Section 8(c)(21). *Brandt v. Stidham Tire Co*., 16 BRBS 277 (1984). Under those circumstances, compensation for both injuries must be made pursuant to the schedule and Section 8(c)(22), which states the manner for awarding benefits for more than one member.

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The Board held that claimant was limited to two schedule awards where he suffered a right leg injury which combined with a prior injury to the left leg to result in an arguably greater overall economic loss. The Board reasoned that adopting the Director's position that claimant was entitled to a Section 8(c)(21) award based on loss of wage-earning capacity for the second injury would be contrary to the holding of *PEPCO*. *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986).

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

The Board concluded that where claimant suffered two distinct injuries, a scheduled injury and a non-scheduled injury, arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(c)(21).

However, where harm to an unscheduled body part results from the natural progression of a scheduled injury, claimant's recovery is limited to an award under Section 8(c)(21) for the combined effects of his injuries. Because the record contained conflicting evidence as to whether claimant's back problems were due to a distinct back injury or were due to the natural progression of his ankle injury, the Board remanded the case for the administrative law judge to make this determination. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988) (overruled in part, *Bass v. Broadway Maint.*, 28 BRBS 11 (1994), *infra*)

The Board affirmed the administrative law judge's finding that claimant sustained both an actual injury and disability to his right shoulder and arm. However, the administrative law judge erred in finding claimant was entitled only to benefits under Section 8(c)(21) and no benefits under the schedule based on reasoning that the primary site of disability controls on this issue. Citing its decision in *Frye*, 21 BRBS 194, that claimant may receive both a scheduled and an unscheduled award for two distinct injuries, the Board remanded the case for the administrative law judge to reconsider claimant's entitlement to a schedule award for his right arm biceps tear in addition to the Section 8(c)(21) award for the right shoulder injury. Claimant also had a claim for a left shoulder injury, and in remanding for reconsideration of the timeliness of this claim, the Board noted that if, on remand, the left shoulder injury was found compensable, then *Frye* applies to that award as well. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

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

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

On appeal of this decision, in agreeing that claimant was entitled to concurrent permanent partial disability awards for scheduled and unscheduled injuries, the Fourth Circuit modified the calculation. The court held that, while a claimant is entitled to be fully compensated for both injuries, the amount of benefits he receives cannot exceed the amount he would have received if he was permanently totally disabled. Thus, in this case, as claimant was receiving unscheduled benefits for a shoulder injury ($200 per week), the court held that claimant was entitled to half the weekly benefits for his scheduled ankle injury ($200 instead of $400 per week), but for double the number of weeks provided in the schedule. *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

The Board rejected claimant's argument that the shoulder is a part of the arm and therefore compensable under Section 8(c)(1). Instead, the Board held that the shoulder is not expressly listed under the schedule and is not covered thereunder, even if a disability to the arm subsequently occurs. Thus, a shoulder injury must be compensated under Section 8(c)(21), and as claimant had no loss of wage-earning capacity, present or future, he was not entitled to benefits. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990).

The Board held that while *PEPCO* stands for the proposition that compensation under the schedule is the exclusive remedy for disability due to injuries to body parts enumerated therein, *PEPCO* is not dispositive where claimant's injury is not to a schedule member. As the Board affirmed the finding that claimant's injury was to the shoulder, it was properly compensated under Section 8(c)(21) even if it resulted in some impairment of the arm. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

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

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

The Fourth Circuit, citing *PEPCO*, 449 U.S. 268, 14 BRBS 363, and *Gilchrist*, 135 F.3d 915, 32 BRBS 15(CRT), held that where claimant is entitled to a scheduled permanent partial disability award, he may not seek to increase his compensation benefits based on economic factors; loss in wage-earning capacity is not considered in awarding benefits for scheduled injuries. *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999).

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

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

The Ninth Circuit affirmed the Board's holding that claimant's shoulder injury, with resultant impairment in the use of his arm is not a scheduled injury and, thus, could be compensated only under Section 8(c)(21). The court reaffirmed its holding that the site of injury is controlling, and it rejected the argument that the shoulder should be considered part of the arm. *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004).

While remanding the case for further consideration as to whether employer established suitable alternate employment on modification, the Board held if claimant was partially disabled, the administrative law judge erred in awarding claimant permanent partial disability benefits based on a loss in wage-earning capacity, inasmuch as claimant's injury is to his leg. Pursuant to *PEPCO*, 449 U.S. 268, 14 BRBS 363, claimant's recovery for permanent partial disability is limited to that provided in the schedule at Section 8(c)(2) based on the percentage of claimant's physical impairment. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000), *decision after remand*, 35 BRBS 174 (2001), *aff'd*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

In this case where claimant sustained an injury to his knee, the Board held that the administrative law judge erred in ordering an award of continuing permanent partial disability benefits. As claimant's injury was to a scheduled member, benefits are properly awarded under Section 8(c)(2) and not Section 8(c)(21). Therefore, the Board vacated the award of permanent partial disability benefits and remanded the case for the administrative

law judge to reconsider the nature and extent of claimant's disability. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Claimant injured her wrists and was paid permanent partial disability benefits pursuant to the schedule. Within three weeks of the last payment, she filed a motion requesting a *de minimis* award in accordance with *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The Board held that as claimant's injury was to a body part covered by the schedule and *de minimis* awards are provided under Section 8(c)(21), (h), claimant could not receive such an award pursuant to *PEPCO*. As she could not file a valid motion for modification requesting such benefits, the Board held that claimant's motion for modification was invalid, not only because she filed the motion as an attempt to keep her claim open indefinitely, but also because she based her claim on a type of benefit she could not receive. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

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

Concurrent Awards

An award under the schedule may not coincide with an award for permanent total disability, because permanent total disability presupposes the loss of all wage-earning capacity. *Rupert v. Todd Shipyards Corp*., 239 F. 2d 273 (9th Cir. 1956); *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 235 n.4 (1985); *Bouchard v. Gen. Dynamics Corp.*, 14 BRBS 839 (1982); *Mahar v. Todd Shipyards Corp.*, 13 BRBS 603 (1981); *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983). If a claimant's scheduled injury either contributes to his total disability or arises simultaneously or subsequent to his total disability, he may not recover a separate schedule award. *See Rathke v. Lockheed Shipbuilding & Constr. Co*., 16 BRBS 77 (1984); *Tisdale*, 13 BRBS at 171; *Mahar*, 13 BRBS at 606.

Applying this principle in hearing loss cases, e.g., *Tisdale, Rathke*, and *Mahar*, the Board was faced with the question of when the hearing loss injury occurred so that it could determine whether the scheduled injury occurred simultaneously or subsequent to the total disability. In these cases, the Board found the same result obtained under each of the three alternatives for date of injury--date of awareness, date of manifestation and date of last exposure to injurious stimuli. Regardless of which date was used, the Section 8(c)(13) awards were found to be subsumed by Section 8(a) in *Tisdale, Mahar* and *Rathke*.

Following the 1984 Amendments, the Board held that a hearing loss injury occurs when claimant receives an audiogram and is aware of the relationship between his employment and his hearing loss. *Byrd v. J.F. Shea Constr. Co.*, 18 BRBS 48 (1986), *aff'd mem.*, 802 F.2d 1483 (D.C. Cir. 1986)(table). Thus, in *Byrd*, as this date occurred after a permanently totally disabling injury, claimant was not entitled to the hearing loss award. The Supreme Court subsequently held that a hearing loss injury is complete when exposure ends, and thus the provisions applicable where claimant has an occupational disease which does not immediately result in death or disability do not apply. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Consistent with *Bath Iron*, claimant's entitlement to hearing loss benefits may commence as of the date of last exposure, and claimant may receive his scheduled award if this date precedes the onset of total disability. *See B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007), *infra*.

Similarly, the Board has held that it is inconsistent with the wage-earning capacity principle to allow an award for scheduled permanent partial disability to coincide with temporary total disability. *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977); *Collins v. Todd Shipyards Corp*., 5 BRBS 334 (1977). To avoid double recovery, schedule awards lapse during periods of temporary total disability; once the claimant reaches maximum medical improvement and the temporary total award is terminated, the scheduled award resumes. *Turney*, 17 BRBS at 235 n.4.

The D.C. Circuit has allowed an overlapping scheduled award and award of survivors' benefits, suggesting in passing that overlapping scheduled and temporary total disability benefits are permissible. *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984). However, the court distinguished the Board's prior holding in *James*, 5 BRBS at 712, in part because James was a living claimant who could collect his schedule award once the temporary total disability lapsed. *Henry*, 749 F.2d at 71 -72 n. 28, 17 BRBS at 44 n. 28(CRT). *See Turney*, 17 BRBS at 235 n.4.

Where there are injuries to scheduled and unscheduled body parts arising out of the same industrial accident, prior to *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980) (*PEPCO*), the Board did not allow concurrent scheduled and unscheduled awards, but required only one award under Section 8(c)(21), as compensation for loss of wage-earning capacity encompasses all injuries caused by the same accident. *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850 (1980).

Following *PEPCO*, in *Turney*, 17 BRBS at 234-235, which involved a knee injury and a back injury resulting from two separate accidents, the Board held that claimant was entitled to a scheduled award for his knee injury and an award under Section 8(c)(21) for his back injury. The Board also held that these awards could run concurrently, since the injuries arose out of separate accidents. To avoid double recovery, the administrative law judge was required on remand to factor out of his Section 8(c)(21) award any loss of wage-earning capacity attributable to the knee injury. The Board followed this reasoning in *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988), concluding that that where claimant suffered two distinct injuries, a scheduled injury and a non-scheduled injury, arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(c)(21). However, the Board held in *Frye* that where harm to an unscheduled body part results from the natural progression of a scheduled injury, claimant's recovery is limited to an award under Section 8(c)(21) for the combined effects of his injuries. This part of *Frye* was overruled in *Bass v. Broadway Maint.*, 28 BRBS 11 (1994), where the Board held, as a matter of law, that where harm to a non-scheduled part of the body results from the natural progression of an injury to a scheduled member, claimant may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to an award under the schedule for the initial injury. *See ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT)(4th Cir. 1999), *modifying* 32 BRBS 67 (1998) (court upheld concurrent scheduled and unscheduled awards, but modified, reasoning that the total benefits cannot exceed the amount he would have received if he was permanently totally disabled; since claimant was receiving unscheduled benefits of $200 per week for a shoulder injury, he was entitled to half the weekly benefits for his scheduled ankle injury but for double the number of weeks provided in the schedule).

Disfigurement awards under Section 8(c)(20) may run concurrently with a scheduled or unscheduled permanent partial award. *See Fuduli v. Maresca Boat Yard, Inc.*, 7 BRBS

982 (1978); *Wright v. Superior Boat Works*, 16 BRBS 17 (1983); Section 8(c)(20) of the desk book, *supra*.

Where a claimant suffers injury to more than one scheduled member, Section 8(c)(22) requires compensation for the loss or loss of use of each, with the awards to run consecutively rather than concurrently. *See Brandt*, 16 BRBS at 122. Similarly, where a scheduled disability deteriorates, claimant may receive successive awards. Thus, where claimant sustained a 5 percent scheduled permanent partial disability which deteriorated to 50 percent and finally to total disability, the Board held that claimant was entitled to consecutive and not concurrent awards. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). However, the first partial award commenced on the date of maximum medical improvement and the second on the date the deterioration was rated, not the date the 5 percent award was paid. As the second award overlapped the period of total disability, it terminated on the date total disability commenced. *Id.*, 18 BRBS at 196-197.

Where a claimant sustains multiple injuries, at different times, concurrent awards for permanent partial disability under Section 8(c)(21) and permanent total disability may be appropriate, providing that they do not result in compensation for more than total disability under Section 8(a). *See Crum v. Gen. Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part, rev'd and remanded in part on other grounds*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *aff'g in pert. part* 8 BRBS 519 (1978), *cert. denied*, 449 U.S. 905 (1980), claimant suffered a stroke, after which he returned to work on a part-time basis. Two years later, he was diagnosed with pulmonary emboli and phlebitis and was no longer able to work. He was found entitled to permanent partial disability benefits after the stroke and permanent total disability following his second injury. The D.C. Circuit affirmed concurrent awards of permanent partial disability under Section 8(c)(21) and permanent total disability, noting that the award for permanent total disability for the second injury was based on claimant's earning capacity remaining after the first injury. The court reasoned that terminating the first award for permanent partial disability would deprive claimant of compensation for his full loss of earning capacity, and the two awards combined compensated his total disability.

In *Crum*, the Board followed *Hastings*, rejecting employer's argument regarding a double recovery. Claimant in *Crum* had a 1975 neck injury resulting in an award of $33 per week under Section 8(c)(21), followed by total disability due to chest pains in 1977. Under *Hastings*, claimant's average weekly wage for his total disability was $288.55, the wage-earning capacity remaining after the first injury. Thus, claimant was entitled to compensation for total disability at the rate of two-thirds of this average weekly wage, $187. Combining this figure with the permanent partial disability benefits of $33 per week for the first injury, claimant's total compensation for both injuries was $220, two-thirds of his full average weekly wage of $330. On appeal, the D.C. Circuit affirmed this calculation. *Crum*, 738 F.2d at 480, 16 BRBS at 123-124(CRT).

In *Morgan v. Marine Corps Exch.*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exch. v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), the Board applied the *Hastings* rule notwithstanding that claimant's actual wages at the time of the second injury exceeded his average weekly wage at the time of the first injury. While noting that *Hastings* indicated that an adjustment in the initial award may be warranted where it is later apparent that claimant's initial disability was not as severe as originally determined, the Board declined to hold that claimant's increased wages at the time of the second injury required a finding that claimant's loss of wage-earning capacity decreased from the time of the initial injury to the time of the subsequent injury. Therefore, the Board held that claimant was entitled to permanent total disability benefits at his two-thirds of his average weekly wage at the time of the second injury in addition to his permanent partial disability award for the first injury.

In calculating an award for a second injury, the administrative law judge must base it on the average weekly wage at the time of the second injury so that the award will take into account any reduced earning capacity resulting from the first injury. *Bentley v. Sealand Terminals, Inc.*, 14 BRBS 469 (1981). The first award must reasonably reflect a claimant's loss in earning capacity so that when it is combined with the claimant's average weekly wage at the time of the second injury, it will represent the amount the claimant could have earned had he not sustained his first injury.

In *Bouchard*, 14 BRBS at 840-841, the Board held that the administrative law judge erred in terminating claimant's permanent partial award under Section 8(c)(21) on the date he became disabled due to a second injury. The award was reinstated, to run concurrently with the total disability award.

Digests

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

Relying on precedent that claimant cannot receive a scheduled permanent partial disability award for hearing loss concurrently with total disability for a different injury, the Board held that determining whether claimant was entitled to a scheduled award turned on whether the onset of the scheduled disability preceded or post-dated the onset of the total disability, regardless of which claim was filed first. If the onset of the hearing impairment preceded the onset of total disability, claimant was entitled to scheduled benefits for the period of time before he became totally disabled. The administrative law judge erred in relying on cases, e.g., *Hastings*, permitting concurrent awards where claimant has an ongoing permanent partial disability due to a loss in wage-earning capacity at the time he suffered a permanently totally disabling second injury. The Board remanded the case to

the administrative law judge to apply the correct law to the several audiograms of record predating the onset of claimant's total disability. *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007).

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

The Board rejected claimant's contention that an asbestosis claim which was settled did not constitute an award for permanent total disability, as substantial evidence supported the conclusion that claimant was compensated for permanent total disability. The Board therefore affirmed the administrative law judge's finding that claimant was permanently totally disabled due to his asbestosis and the denial of additional benefits under Section 8(c)(23) due to stomach cancer, which became manifest after the settlement. *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989).

The Board held, assuming, *arguendo*, that two separate impairment ratings for asbestos-related lung disease and esophageal cancer are supported by the record in this case, the administrative law judge erred in fashioning separate overlapping permanent partial disability awards under Section 8(c)(23) for the period from May 31, 1985 - November 5, 1986. Where a voluntary retiree has two or more impairments, the value of each impairment must be determined separately and related to the "whole person" under the Combined Values Chart found in the AMA *Guides*. The retiree is entitled to only one award representing his impairment from his conditions. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

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

The Board rejected the contention that claimant was barred from recovering benefits for his hearing loss because he settled a third-party claim for a crush injury. Claimant did not receive nor was he determined to be entitled to permanent total disability for the crush injury from employer, and he was not seeking such benefits. The third-party recovery could not be equated with permanent total disability which would preclude claimant from

recovering for his hearing loss. *Harms v. Stevedoring Services of Am.*, 25 BRBS 375 (1992) (Smith, J., dissenting), *rev'd mem. on other grounds*, 17 F.3d 396 (9th Cir. 1994).

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

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

Where the approval of the parties' settlement of the claim for the first injury stated that it represented a 45 percent loss in claimant's wage-earning capacity, and where claimant was subsequently injured after returning to light-duty, part-time work, the administrative law judge erred in reducing claimant's average weekly wage at the time of the second injury by 45 percent. Claimant is entitled to permanent total disability benefits based upon his stipulated average weekly wage in his light-duty job, which was earned in limited duties and already incorporated the reduction caused by the first injury. However, if the first claim had not settled, claimant would have been entitled to concurrent permanent partial disability and total disability awards. Facts here are indistinguishable from *Morgan*, 14 BRBS 784. *Wilson v. Matson Terminals, Inc.*, 21 BRBS 105 (1988).

The Board held that the administrative law judge erred by awarding claimant concurrent permanent partial disability awards for his 1980 and 1983 injuries, distinguishing *Hastings*, 628 F.2d 85, 14 BRBS 345, on the basis that this case involved a second aggravating injury to the same body part which was injured in the first accident, requiring application of the aggravation rule so that the carrier on the risk at the time of the second injury was fully responsible for the loss in earning capacity caused by the combination of the two injuries. Moreover, since the administrative law judge found that claimant had no actual loss in earning capacity as a result of the first injury, there is no factual basis for a concurrent award for the first injury. The administrative law judge also failed to consider claimant's actual earnings in the months prior to his second injury in calculating his 1983 average weekly wage. The case was remanded for recalculation of claimant's average weekly wage and to calculate one award compensating claimant's entire loss of earning capacity

resulting from the combination of the 1980 and 1983 injuries. *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989).

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

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

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

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

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

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

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

Where the Board affirmed the administrative law judge's awards of benefits under both Section 8(c)(2) for claimant's knee injury and under Section 8(c)(21) for claimant's back injury, the Board held that the administrative law judge properly followed the lead of the Fourth Circuit's decision in *Green*, 185 F.3d 239, 33 BRBS 151(CRT), in awarding concurrent benefits in this case which arises in the Ninth Circuit, as it is consistent with the

dictate of *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT). Specifically, where full payment of both a scheduled and an unscheduled award would exceed the maximum benefit allowable under the Act, the administrative law judge rationally awarded claimant unscheduled benefits to be paid at the full compensation rate for the duration of the disability and scheduled benefits to be paid at a rate equal to the difference between 2/3 of claimant's average weekly wage and claimant's weekly unscheduled benefits until such time as those benefits are paid in full. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The Board held that the administrative law judge erred in relying on *Stinson*, 41 BRBS 97, to find that claimant permanently lost his entitlement to his scheduled hearing loss award upon the commencement of a subsequent total disability award for a back injury as the Board explicitly stated in *Stinson* that if the total disability lapses, the scheduled award can be paid. As of the date that claimant's permanent total disability award ended and was replaced by a Section 8(c)(21) permanent partial disability award, he was entitled to resumption of his hearing loss award to be paid concurrently with his Section 8(c)(21) award for the back injury. The Board applied the Fourth Circuit's decision in *Green*, 185 F.3d 239, 33 BRBS 151(CRT), as it provides the only relevant precedent in this case which arises in the Third Circuit with respect to the calculation of claimant's concurrent awards. Here, full payment of both claimant's hearing loss award and his unscheduled permanent partial disability award would exceed the amount he would have received if he was permanently totally disabled. Thus, claimant is entitled to unscheduled benefits to be paid at the full compensation rate for the duration of the disability and scheduled benefits for his hearing loss to be paid at a rate equal to the difference between the total disability rate and claimant's unscheduled disability rate until such time as the hearing loss award is paid in full. *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010).

The Board rejected claimant's argument that, in light of the D.C. Circuit's decision in *Henry*, 749 F.2d 65, 17 BRBS 39(CRT), and the language contained in the preface of Section 8(c) of the Act, he is entitled to receive a scheduled permanent partial disability award for his hearing loss concurrently with his award of temporary total disability benefits for a back injury. Based on its reading of *Henry* and the legislative history of the 1934 Amendments to Section 8(c), the Board held that the court's holding in *Henry* does not control this case which, unlike *Henry*, involves two separate and distinct injuries. Therefore, adhering to its longstanding precedent that a claimant may not receive concurrently a scheduled award for one injury and a total disability award for a separate injury, the Board affirmed the administrative law judge's finding that claimant is not entitled to receive scheduled permanent partial disability benefits for his hearing loss concurrently with either his temporary or permanent total disability award for his back injury. *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011); *see also Maglione v. APM Terminals*, 50 BRBS 29 (2016).

The Ninth Circuit affirmed the Board's denial of the concurrent awards sought by claimant. Claimant sustained a work-related back injury for which he was awarded permanent total disability benefits, as well as a work-related hearing loss for which he sought an additional scheduled award. The Board affirmed the administrative law judge's denial of concurrent awards based on its longstanding position that a claimant is not entitled to receive scheduled permanent partial disability benefits for one injury concurrently with total disability benefits for a separate injury. The Ninth Circuit, in affirming the Board, likewise observed that concurrent payments for total disability and scheduled permanent partial disability are generally unavailable because claimant has already loss all wage-earning capacity due to the totally disabling injury. The Ninth Circuit also rejected claimant's contention that, based on *Price*, 382 F.3d 878, 38 BRBS 51(CRT), he is entitled to concurrent awards, because, unlike claimant in this case, claimant Price's permanent total disability followed his prior award of unscheduled permanent partial disability benefits, and thus, was based on the claimant's already reduced wage-earning capacity. The court also rejected claimant's contention that his hearing loss preceded his total disability, so that he could receive the schedule award. Pursuant to *Bath Iron Works*, 506 U.S. 153, 26 BRBS 151(CRT), claimant's date of last exposure was the date he sustained the totally disabling back injury. *Fenske v. Serv. Employees Int'l, Inc.*, 835 F.3d 978, 50 BRBS 71(CRT) (9th Cir. 2016).

Where claimant received a permanent partial award as a result of a 1979 injury and became permanently totally disabled in 1998, the Board held that claimant was entitled to concurrent awards. The Board affirmed the administrative law judge's conclusion that, consistent with *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT), claimant's combined awards could not exceed the maximum allowable compensation under Section 8(a) and Section 6(b)(1). The Board also affirmed the conclusion that claimant's increase in earnings between the two injuries was not the result of an increase in earning capacity and therefore it was not appropriate to reduce the first award. The Board held that the carrier liable for the permanent total award was thus entitled to a credit for the amount of the permanent partial disability award. Regarding claimant's argument that he could be deprived of a Section 10(f) adjustment, the Board held that claimant is entitled to receive the full amount of the Section 10(f) adjustment on his permanent total disability award in calculating the amount then subject to the credit for the initial permanent partial disability award. *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *rev'd in pert. part and aff'd, vacated and remanded, and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004) and No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

On appeal, the Ninth Circuit held that concurrent awards for permanent partial disability and permanent total disability do not result in impermissible "double dipping" where the increase in claimant's average weekly wage between injuries is not due to an increase in his wage-earning capacity. In this case the administrative law judge's finding that the increase in claimant's average weekly wage between 1979 and 1998 was not due to an

increase in wage-earning capacity was not challenged on appeal. Although the Board correctly held that as a result the first award could not be reduced, the Ninth Circuit held that the Board erred in reducing the second award pursuant to *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT), as there is no over-compensation in this case. Moreover, the court concluded that the Board erred in applying the Section 6(b)(1) maximum to limit the combined amount of claimant's two awards, holding that Section 6(b)(1) defines the maximum compensation from each award, not from all awards combined. *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

In this case involving concurrent awards for permanent partial and total disability in 1998 and 2000, the Board affirmed the administrative law judge's finding that claimant's wage earning capacity after a first injury equaled his actual earnings and that this residual earning capacity was his average weekly wage at the time of the second injury. The Board rejected the assertion that this average weekly wage should be reduced to 1998 levels, holding such an "inflation adjustment" is not applicable. Regarding the concurrent permanent partial and permanent total disability awards, the Board affirmed the administrative law judge's finding that the combined awards, pursuant to *Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT), could not exceed 2/3 of claimant's average weekly wage at the time of the first injury. In order to make claimant whole, the administrative law judge appropriately used the higher of claimant's two average weekly wages in addressing whether the combined awards exceed that allowed under Section 8(a). In this regard, the Board rejected the Director's assertion that the Board's holding in *Price*, 36 BRBS at 63, which used the higher wage at the time of the second injury is "plainly contrary to law," as the Board's statement in this regard in *Price* was not a statement of law but was based on the facts in that case. Pursuant to *Hastings*, 628 F.2d 85, 14 BRBS 345, and consistent with other cases involving concurrent awards, the Board held, as a general matter, that the combined awards cannot exceed 2/3 of the higher average weekly wage. The Board reversed the administrative law judge's finding that the statutory maximum of Section 6(b)(1) was inapplicable and held that the combined awards cannot exceed the statutory maximum. Allocation of any credit was to be determined consistent with the administrative law judge's findings on remand regarding whether claimant's cervical spine injury contributed to the permanent partial disability. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated in part on recon.*, 38 BRBS 56 (2004).

On reconsideration, the Board vacated its holding that the Section 6(b)(1) maximum compensation rate applies to the combined concurrent awards in this case. Pursuant to *Price*, 382 F.3d 878, 38 BRBS 51(CRT), the statutory maximum applies to each award individually. Thus, there can be no credit due to CUT for any payments made by SSA. *Carpenter v. California United Terminals*, 38 BRBS 56 (2004), *vacating in part on recon.* 37 BRBS 149 (2003).

The Board vacated the administrative law judge's order which accepted stipulations that evinced an incorrect application of concurrent awards law. Specifically, the stipulations purported to permit the payment of temporary total disability benefits at the same time as the payment for benefits under the schedule. Additionally, the stipulations purported to permit the payment of concurrent partial disability awards that exceeded the amount to which claimant would be entitled if he was totally disabled. The Board remanded the case for the administrative law judge to enter awards that accord with law or to accept proper stipulations that account for benefits for all periods of disability in accordance with law. *Aitmbarek v. L-3 Commc'ns*, 44 BRBS 115 (2010).

Claimant sustained injuries to each knee in separate accidents and sought concurrent awards. The Board applied the plain language of Section 8(c)(22), which states that "in any case" multiple permanent partial disability awards under the schedule shall run consecutively. The Board stated that this holding is consistent with the decision of the Fourth Circuit, in whose jurisdiction this case arises, in *Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). The Board noted the absence of any compelling reason that "[i]n any case" should be narrowly construed as applying only when a claimant has more than one scheduled disability from a single work accident. Thus, "whenever" a claimant sustains two or more scheduled permanent partial disabilities, the awards are to run consecutively, whether the disabilities arise from a single accident or more than one accident. *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010).

Section 8(d)

Section 8(d)(1), 33 U.S.C. §908(d)(1), provides for the payment of unpaid portions of scheduled permanent partial disability awards to survivors. Section 8(d)(1)(A)-(D) specifies the classes of survivors to receive the total amount of a scheduled award unpaid at the time of the death. *See* Section 2(14)-(18) for definitions of the various classes of survivors enumerated in Section 8(d)(l)(A)-(D).

Section 8(d)(2) provides that the total amount of the unpaid scheduled award is payable in full notwithstanding any other limitation in Section 9.

Prior to 1984, Section 8(d)(3) provided for the continuation of permanent partial disability awards under Section 8(c)(21) where an employee receiving such an award died from causes unrelated to his employment. 33 U.S.C. §908(d)(3)(1982)(repealed 1984). In *Casteel v. St. Louis Shipbuilding & Steel Co*., 6 BRBS 388 (1977), *aff'd*, 583 F.2d 876, 9 BRBS 730 (8th Cir. 1978), the Board and the Eighth Circuit held the Section 8(d)(3) provision applicable to claims wherein the permanent partial disability occurred prior to the enactment of the 1972 Amendments and the death occurred thereafter. The Board's decision described the proper method of calculating such an award. *Casteel*, 6 BRBS at 394. This section was repealed, consistent with the elimination of death benefits for employees who were receiving permanent total disability and died from unrelated causes in Section 9. *See Wilson v. Bethlehem Steel Corp.*, 44 BRBS 59 (2010). Former subsection 8(d)(4) was renumbered (d)(3) due to this change.

Current Section 8(d)(3) provides that an award for disability may be made after the death of the injured employee; this section is not limited to permanent partial disability awards.

The fact that a decedent with a scheduled permanent partial disability suffers a temporary exacerbation prior to death resulting in total disability does not preclude the survivors from obtaining death benefits. In a pre-1984 Amendment case, the Board applied this principle to a Section 8(c)(21) award and held the widow could recover under Section 8(d)(3) providing there is no evidence that decedent's condition would have improved to the point where he no longer possessed the permanent partial disability. The Board held that while a temporary total award subsumes a permanent partial award for the same injury, and thus only one award is payable, an underlying permanent disability does not disappear during periods of temporary exacerbation. *Leech v. Serv. Eng'g Co*., 15 BRBS 18 (1982). The Board relied on its holding in *Acuri v. Cataneo Lines Serv. Co*., 8 BRBS 102 (1978), that an employee need not be receiving permanent partial disability benefits at the time of death for purposes of pre-Amendment Section 8(d)(3), providing he was ultimately found to have been entitled to such compensation.

The Board further held that the underlying permanent partial disability survived solely to form the basis of a survivor's claim under Section 8(d) and did not support a concurrent award for the period prior to death when temporary total disability benefits were being paid. *Leech*, 15 BRBS at 21-22.

In *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983)**,** the Board held that a claim filed by decedent's estate for average weekly wage adjustments and Section 8(d) benefits was not time-barred, because the estate was merely substituted for the decedent in his timely-filed claim. The Board nevertheless denied continuing benefits under Section 8(d) because the decedent's survivors, his sisters, were not dependent upon him as required by the Act. The Board held that Section 8(d) does not provide for payment of unaccrued benefits to decedent's estate, but only to specified survivors. Decedent's estate was entitled only to unpaid benefits accruing prior to death and thus was not entitled to permanent partial disability compensation, as decedent had received payments for total disability before his death. The estate did recover compensation due to the increase in his average weekly wage for the period prior to death, as such awards do not abate at death. *See also Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985), *aff'd sub nom. Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986) (award for permanent total benefits accrued prior to death payable to estate).

In *Henry v. George Hyman Constr. Co.*, 15 BRBS 475 (1983), *rev'd*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984), the Board held that decedent's permanent partial disability (amputated leg) survived a finding of temporary total disability which existed at the time of death. The Board, nevertheless, found that decedent's permanent partial disability could not form the basis of a Section 8(d) award because Section 8(d) applies only when the decedent died from causes other than the injury, and the evidence established that decedent died from causes related to the injury; death benefits were therefore awarded under Section 9. The D.C. Circuit reversed the Board's decision, holding that the widow is entitled to both Section 9 death benefits and the unpaid portion of decedent's Section 8(c) scheduled permanent partial disability award under Section 8(d). *Henry*, 749 F.2d 65, 17 BRBS 39(CRT).

Section 8(d)(3) also provides that, where an employee who is entitled to scheduled permanent partial disability benefits dies without statutory survivors, the unpaid portion of the scheduled award is paid to the Special Fund. *Andrews*, 17 BRBS at 212 n.4; *Wilson*, 16 BRBS at 27.

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In a pre-1984 case, the Board held that where the employee suffered a work-related back injury prior to his death due to a cerebral vascular accident, which was unrelated to his work injury, claimant was entitled to death benefits under Section 8(d)(3) if the deceased

employee was permanently partially disabled at the time of death. If the deceased employee was permanently totally disabled at the time of death, his survivors were entitled to death benefits under Section 9. The Board held that the employee's disability was permanent but remanded for the administrative law judge to consider the extent of the employee's disability prior to his death. *Eckley v. Fibrex & Shipping Co., Inc.,* 21 BRBS 120 (1988).

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

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

Pre-1984 Section 8(d)(3) does not apply to cases where an employee who died prior to the adjudication of his claim was found to be permanently totally disabled before his death. An employee's death terminates the stream of payments, but all unpaid compensation accrued at the time of his death is payable to his dependents, or if he had none, to his estate. *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP,* 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986), *aff'g Andrews v. Alabama Dry Dock & Shipbuilding Co.,* 17 BRBS 209 (1985).

In interpreting post-1984 Section 8(d)(3) and determining whether an unpaid yet vested Section 8(c)(23) award was payable to decedent's estate or the Special Fund, the Board first analyzed Section 8(d) as a whole. Section 8(d)(1) refers to compensation payable under the schedule and provides that statutory survivors are to receive unpaid scheduled awards. Where decedent was posthumously awarded benefits under Section 8(c)(23),

benefits due decedent prior to his death are payable to his estate, and not to statutory survivors or to the Special Fund under Section 8(d)(3) in the absence of such persons. All other benefits under Section 8(c)(23) abate as of the date of death. In contrast, Congress intended full payment of scheduled awards under Section 8(d). *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114 (1992), *rev'd on other grounds mem. sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (5th Cir. March 10, 1993) (Section 8(c)(23) award reversed in hearing loss case and remanded for reconsideration in light of Supreme Court holding benefits are payable under Section 8(c)(13); *see infra* for disposition after remand).

Where an employee dies prior to the payment of his scheduled permanent partial disability benefits, for reasons unassociated with his work-related injury, Section 8(d) provides for the disbursement of those benefits in full. The Board held, in accordance with a long-recognized concept, that an employee has a vested interest in benefits which accrue during his lifetime; thus, upon his death, his estate is entitled to those accrued benefits. Further, as unaccrued benefits abate unless otherwise provided by statute, the Board held that the term "unpaid" in Section 8(d) means "unaccrued," and upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go to either his statutory survivors under Section 8(d)(1) or to the Special Fund upon his death without statutory survivors [§8(d)(3)]. The Board also held that where the employee was survived by his widow who later died prior to the adjudication of the claim, the operative time for determining survivorship under Section 8(d) was the date of the employee's death. Because the employee's widow survived him, she was a statutory survivor within the meaning of Section 8(d)(1). Had there been any unaccrued benefits in this case, the widow would have been entitled to them and, upon her death, her right to the payments would have passed to her estate. However, as all benefits in these cases accrued prior to the employees' deaths, their estates were entitled to them. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *modified on other grounds on recon.*, 28 BRBS 156 (1994); *Clemon v. ADDSCO Indus., Inc.*, 28 BRBS 104 (1994).

Following its decisions in *Clemon* and *Wood*, the Board held that decedent had a vested interest in benefits which accrued during his lifetime and, after his death, his estate was entitled to the accrued benefits, regardless of when the award was entered. In this case, decedent retired in 1972 and thus his entire award accrued prior to his 1989 death. Therefore, the Board held decedent's estate was entitled to the scheduled permanent partial disability benefits. The administrative law judge's award of these benefits to the Special Fund was therefore reversed. *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (Decision on Remand).

Where an employee dies prior to the payment of his scheduled permanent partial disability benefits, for reasons unassociated with his work-related injury, Section 8(d) provides for the disbursement of those benefits in full. In accordance with the holdings in *Clemon* and *Wood*, the Board held that, as all benefits in this case accrued prior to the employee's death,

his estate, and not the Special Fund, is entitled to them. *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting on other grounds).

Decedent suffered injuries to his left and right wrists during the course of his employment, and he filed a claim for benefits. He was awarded temporary total disability benefits in January 2014. Prior to his death due to non-work reasons, his wrist conditions were found to have reached maximum medical improvement and were given impairment ratings. Decedent's estate filed a claim for decedent's permanent partial disability benefits based on those ratings. Based on the doctor's opinion of permanency and the lack of evidence establishing that decedent could have returned to any work, the administrative law judge found decedent was entitled to permanent total disability benefits, and awarded them to his estate. The Board affirmed. Because decedent was not receiving or entitled to permanent partial disability benefits at the time of his death, one of the two primary elements for applying Section 8(d) is absent, and the Board affirmed the finding that Section 8(d) is wholly inapplicable to this case. *Guess v. Elec. Boat Corp.*, 52 BRBS 43 (2018).

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

The Board affirmed the administrative law judge's denial of benefits under pre-Amendment Section 8(d)(3) as the death occurred after the repeal of the section. The Board rejected the contention that a letter written in 1983 by employer's claims examiner explaining Section 8(d)(3) had any binding effect in view of the repeal of the section. In addition, the Board rejected the contention that, in stipulating to his entitlement to permanent partial disability benefits, decedent had bargained for benefits for his widow. The stipulations and compensation order are silent as to such benefits. Moreover, prior to the 1984 Amendments, claims for death benefits could not be settled, and, after the 1984 Amendments, claims for death benefits cannot be settled prior to death. *Wilson v. Bethlehem Steel Corp.*, 44 BRBS 59 (2010).

Section 8(e)

An employee found to be temporarily partially disabled is entitled to the same type of award for reduced earning capacity as is provided by Section 8(c)(21). Claimant is thus entitled to 66 2/3 percent of the difference between his pre-injury average weekly wage (defined in Section 10) and his post-injury wage-earning capacity in the same or other employment during the continuance of his disability, but for no more than five years.

Since temporary partial disability cannot run for longer than five years, wages and time lost after the cut off may not be considered in determining the amount of lost wage-earning capacity. *St. Regis Paper Co. v. McManigal*, 67 F. Supp. 146 (N.D.N.Y. 1946).

A partially disabled employee with a scheduled injury which has not yet reached maximum medical improvement, e.g., if he is still receiving treatment for it, is temporarily partially disabled until maximum medical improvement, and entitled to scheduled permanent partial disability benefits thereafter. *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791 (1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 858 (4th Cir. 1979). *See Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004) (claimant with a scheduled injury which has not reached permanency may be entitled to *de minimis* award under Section 8(e)).

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

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

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

The Fourth Circuit held that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's

contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

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

Although claimant suffered an injury under the schedule, which would preclude permanent partial disability benefits for a wage loss, including a *de minimis* award, under Section 8(c)(21) pursuant to *PEPCO*, in this case, claimant's injury had not been deemed permanent; she received only temporary total disability benefits for various periods of time when she was unable to work. *PEPCO* does not preclude a temporary partial disability *de minimis* award under Section 8(e), and claimant had a valid claim for modification. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004).

The Fourth Circuit reversed an award of temporary partial disability benefits to a claimant whose knee injury had reached maximum medical improvement and who was receiving scheduled permanent partial disability benefits. Claimant had returned to his usual work following his injury. Partially overlapping a period when claimant was receiving scheduled permanent partial disability benefits for his knee injury, claimant was placed on light-duty restrictions which prevented him from returning to his usual work for nearly 3 months. In a decision after remand from the Board, the administrative law judge found claimant entitled to temporary partial disability benefits during this period because employer established the availability of suitable alternate employment. The Fourth Circuit gave deference to the Director's position that once claimant's partial disability award is set under the schedule (ppd), he is not entitled to additional temporary partial benefits for the same scheduled injury. Any subsequent temporary partial loss is subsumed by the benefits claimant received under the schedule, as those benefits are presumed to cover actual loss due to any flare-up of his permanent knee condition. *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118, 49 BRBS 33(CRT) (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

Section 8(g)

Section 8(g) provides that an employee who is totally or partially disabled who is undergoing rehabilitation in order to be fit to engaged in a remunerative occupation "shall receive additional compensation necessary for his maintenance" not to exceed $25 per week. This payment is made from the Special Fund.

This payment is in addition to any disability benefits claimant may be entitled to receive while undergoing vocational rehabilitation. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). In *Castro*, 401 F.3d at 971 n. 7, 39 BRBS at 19 n.7(CRT), the Ninth Circuit rejected the contention that the only money Congress intended for claimants to receive during vocational rehabilitation was the $25 maintenance stipend under Section 8(g). The court relied on the plain language of the statute, which states that an injured worker engaged in vocational rehabilitation "shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week." 33 U.S.C. §908(g). The court found that the use of the words "additional compensation" indicates Congressional intent that maintenance be paid in addition to, rather than in place of, other appropriate compensation.

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

Section 8(h)

In General

Section 8(h) provides that the post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21) or 8(e) shall be equal to the employee's actual earnings if they fairly and reasonably represent his wage-earning capacity. If they do not, or if he has no actual earnings, the administrative law judge may fix a reasonable wage-earning capacity "having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. §908(h).

The statute mandates a two-part analysis: 1) If the employee is working post-injury, do his actual wages fairly and reasonably represent his wage-earning capacity? 2) If they do not, or he is not working, what is the reasonable dollar amount of his wage-earning capacity, giving due regard to the nature of his injury, the degree of his physical impairment, his usual employment, and any other factors affecting his ability to earn wages in his disabled condition, including the future effects of the disability? *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984), *vac'g and remanding* 15 BRBS 233 (1983); *Burch v. Superior Oil*, 15 BRBS 423 (1983); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); *Brooks v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 7 BRBS 1038 (1978). The administrative law judge need not consider the second prong if the first prong is met. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Devillier*, 10 BRBS at 660. The same factors apply in both parts of the analysis. *Randall*, 725 F.2d 791, 16 BRBS 56(CRT); *Devillier*, 10 BRBS at 660-661.

Thus, disability is measured by loss of wage-earning *capacity* rather than by absolute wage decrease. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). *See also Fleetwood v. Newport News Shipbuilding & Dry Dock*, 776 F.2d 1225, 1232 n.2, 18 BRBS 12, 14-15 n.2(CRT) (4th Cir. 1985) (referring to "accepted proposition that actual post-injury wages do not necessarily reflect wage-earning capacity"). Where an employee continues to receive wages which are no longer merited due to a disability, he or she may have a loss in wage-earning capacity. *Patterson*, 846 F.2d 715, 21 BRBS 51(CRT).

The party contending that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-

earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188 (1985); *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984); *Burch*, 15 BRBS at 427; *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

An administrative law judge must give a dollar figure for post-injury wage-earning capacity; finding a percentage loss of wage-earning capacity is not proper. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating in part on recon.* 23 BRBS 12 (1989); *Butler v. WMATA*, 14 BRBS 321, 323-324 (1981). *See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 1267, 9 BRBS 457 (4th Cir. 1978). A dollar amount is necessary in order for post-injury wage-earning capacity to be compared to pre-injury average weekly wage to determine entitlement under Section 8(c)(21), (e).

The degree of medical impairment is not determinative of the amount of lost wage-earning capacity. *Jennings*, 23 BRBS 312; *Butler*, 14 BRBS at 322 n.2. Where the administrative law judge expresses the lost wage-earning capacity as a percentage of the employee's pre-injury average weekly wage, there is a strong implication that he did not fully consider all of the relevant factors, particularly if the percentage is identical to the percentage of physical impairment established by the medical testimony. *Bouchard v. Gen. Dynamics Corp.*, 14 BRBS 839 (1982); *Chatterton v. Gen. Dynamics Corp.*, 12 BRBS 534 (1980); *see Allan v. Todd Shipyards Corp.*, 12 BRBS 589 (1980), *aff'd*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982).

Where claimant seeks total disability and employer establishes suitable alternate employment, the earnings established for the alternate employment may demonstrate claimant's earning capacity. *See, e.g., Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *S. v. Farmers Export Co.*, 17 BRBS 64 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). Thus, where suitable alternate employment is established through vocational evidence, the administrative law judge may use the wages paid in the jobs found to be suitable and available, adjusted to pre-injury levels to account for inflation, *see infra*, to establish wage-earning capacity. *See* Suitable Alternate Employment, *supra*.

Thus, where claimant had no actual earnings and suitable alternate employment was shown, the administrative law judge properly established his wage-earning capacity based on the Section 8(h) factors, as well as claimant's employability in other occupations, the possible necessity of retraining, and the possibility that employers might hesitate to hire claimant because of his physical condition. *Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340 (1979), *aff'd*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981).

Once the employee's post-injury wage-earning capacity is determined, it is compared with his pre-injury average weekly wage to result in an award under Section 8(c)(21) or (e). However, the Third Circuit held in an early case that the proper comparison in determining partial disability is between the wages paid in claimant's post-injury job and the wages the employee would be earning had he continued in his pre-injury employment. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979). The Board declined to follow the approach of *McCabe*, holding that the administrative law judge may not project the employee's pre-injury wages into the future as Section 10 of the Act mandates that average weekly wage be determined at the time of injury and the statute requires comparison between this number and claimant's post-injury wage-earning capacity. *See Pumphrey v. E. C. Ernst*, 15 BRBS 327 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The Board held that, in order to account for inflation, post-injury earnings must be adjusted to the levels paid at the time of the injury. *See* Inflation, *infra*.

The Board held that the administrative law judge properly calculated claimant's wage-earning capacity based on a 40 hour week in his suitable post-injury job where he was working part-time and attending vocational school 15 hours per week. The administrative law judge's conclusion that claimant was capable of working a 40 hour week was supported by substantial evidence, and the administrative law judge reasonably extrapolated claimant's wage-earning capacity from his part-time wages. *Sheek v. Gen. Dynamics Corp.*, 18 BRBS 1 (1985), *modified on recon. on other grounds*, 18 BRBS 151 (1986). *See also Bailey v. S. Auto Parts*, 13 BRBS 944 (1981) (Board remanded for reconsideration where claimant was a student who held some summer jobs and administrative law judge did not explain wage-earning capacity figure).

The fact that an employee withdraws from the labor market following her injury does not affect entitlement if loss of wage-earning capacity is established. *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984) (withdrawal to take care of child). *See also Schenker v. Washington Post Co.*, 7 BRBS 34 (1977) (strike).

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The Ninth Circuit stated that, under Section 8(h), higher post-injury earnings do not preclude compensation where claimant established he suffered a loss of wage-earning capacity. In this case, the court affirmed the administrative law judge's rational finding that claimant had a loss in wage-earning capacity despite higher post-injury earnings because claimant had a decrease in the number of hours worked, which the administrative law judge attributed to his disability, and claimant worked in pain and with limitations due to his financial obligations to his family. In addition, claimant had a significant physical impairment. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

Addressing post-injury wage-earning capacity, the Fifth Circuit relied on *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), and held that the availability of general job openings can be used to set claimant's wage-earning capacity at a rate higher than his actual post-injury earnings. The party seeking to prove that claimant's actual post-injury wages are not representative of his wage-earning capacity has the burden of proof on this issue. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

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

The Board rejected claimant's contention that she was entitled to recover, in a lump sum, a bonus paid out post-injury pursuant to a collective bargaining agreement; the bonus was paid to all employees who worked a certain number of hours, and claimant asserted that her injury precluded her working the number of hours. Rejecting the contention that the loss of this bonus represented a compensable loss in earning capacity, the Board reasoned that there is no basis in the act for a lump sum temporary partial disability award and that even if the loss of a bonus could be found to have reduced earning capacity, whether claimant would have earned it absent injury is speculative. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

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

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

In accordance with *Eagle Marine* and *Branch*, the Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty payments, received during the period of his temporary total disability, do not constitute wages within the meaning of Section 2(13) and have no impact on claimant's post-injury wage-earning capacity. Employer therefore is not entitled to a credit for claimant's receipt of these

payments. *Wright v. Universal Mar. Serv. Corp.*, 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

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

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

The Board reversed the administrative law judge's finding that employer is entitled to a credit against partial disability benefits for income claimant earned from other employers subsequent to the date employer laid him off, as the Act contains no provision entitling employer to a credit for income earned from other employers, and such an award would contravene Section 8(h) of the Act and the administrative law judge's finding that claimant has a residual wage-earning capacity of $170 per week. *Cooper v. Offshore Pipelines Int'l., Inc.*, 33 BRBS 46 (1999).

No party objected to the administrative law judge's decision to fashion separate permanent partial disability awards for the projected duration of claimant's football career and for his post-football career. The Board noted that this result was consistent with awards fashioned in other professional football cases. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Where claimant was unable to perform his usual work and employer provided a suitable job which claimant lost due to his misconduct, the Board rejected employer's argument that the partial disability award should be reversed because the job which claimant lost paid the same wages as his pre-injury employment. The Board held that the actual earnings in this job, like any other suitable job a claimant holds post-injury, should be considered by the administrative law judge in determining claimant's post-injury wage-earning capacity. A suitable job offered by employer and held for only a short period of time can establish claimant's wage-earning capacity if it supports a finding that suitable work was "realistically and regularly" available on the open market. Moreover, the fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that claimant had no loss of wage-earning capacity. The case was remanded for reconsideration of claimant's wage-earning capacity. *Mangaliman v. Lockheed Shipbuilding Co*., 30 BRBS 39 (1996).

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

The Fifth Circuit affirmed the administrative law judge's use of the average of the hourly wages of suitable jobs employer found for claimant to compute claimant's post-injury wage-earning capacity as employer located more than one suitable job for claimant and as averaging ensured that claimant's post-injury wage-earning capacity reflected all available jobs. The court rejected employer's argument that it should have used the highest wage. *Avondale Indus., Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998).

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

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

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

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

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

The Board affirmed the administrative law judge's finding that where claimant chose to work part-time prior to his injury, claimant's post-injury wage-earning capacity may not be reflected by the full-time wages paid by the two positions identified as suitable alternate employment. However, the Board vacated the award of total disability benefits, as these jobs indicate that suitable positions exist. The administrative law judge may calculate claimant's wage-earning capacity based on part-time wages extrapolated from the suitable jobs, or on any other relevant evidence of record consistent with Section 8(h). *Neff v. Foss Mar. Co.*, 41 BRBS 46 (2007).

The Board vacated the administrative law judge's calculation of claimant's wage-earning capacity based his averaging of only the lowest and highest paying jobs identified as

suitable by employer as the finding did not reflect a true average of the potential wages paid by all eight of the positions he found to be suitable alternate employment. Instead, it gave too much weight to the wages of one position, which paid nearly twice as much as any of the other seven jobs. The case was remanded for reconsideration. In addition, if on remand, the highest paying job was found to be unavailable, then the administrative law judge may not use it to establish claimant's wage-earning capacity. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

The Board held that claimant's usual work is the work with the last covered employer to expose claimant to the hazardous conditions that caused his PTSD and that any loss of wage-earning capacity due to PTSD is based on the earnings with this employer. The Board rejected the contention that claimant's usual employment was the subsequent employment for whom the claimant worked when his PTSD became manifest. *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

Factors Considered

General Principles

For both parts of the Section 8(h) test, i.e., whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, or, if not, what dollar amount does, the administrative law judge must consider the employee's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Other factors to be considered are the beneficence of a sympathetic employer, the employee's earning power on the open market, whether he must spend more time or use more effort or expertise to achieve pre-injury production, whether he can perform the physical work which he did pre-injury, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. *Id.*; *Hughes v. Litton Sys., Inc., Ingalls Shipbuilding Corp.*, 6 BRBS 301 (1977). *See also Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Parker v. Consol. Fibres, Inc.*, 14 BRBS 388 (1981); *Fiamengo v. Metro. Stevedore Co.*, 12 BRBS 546 (1980).

The Board's decision in *Devillier*, 10 BRBS 649, contains a comprehensive discussion of relevant factors, but it recognizes that its list is not exhaustive. The administrative law judge need not consider every possible factor nor assign each an individual dollar value, as long as his final determination of wage-earning capacity is based on appropriate factors and is reasonable. *Id.*

Cases in which appellate courts have approved the *Devillier* or equivalent standards include *Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1227 n.2, 18 BRBS 12, 14-15 n. 2(CRT) (4th Cir. 1985); *Randall*, 725 F.2d at 797, 16 BRBS at 61(CRT); *Air Am., Inc. v. Director, OWCP*, 597 F.2d 773, 778, 10 BRBS 505, 511 (1st Cir. 1979); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961); and *E. S.S. Lines v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940).

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The Board held the administrative law judge erred in failing to consider whether claimant's post-injury wages fairly and reasonably represent her residual wage-earning capacity and in failing to explain which *Devillier* factors he relied upon and how they affected his determination. The case was remanded for further consideration. *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

The Board rejected the argument that the administrative law judge erred in addressing the extent of claimant's disability where claimant was enrolled in a vocational rehabilitation

program and employer was paying temporary total disability benefits at the district director's recommendation, stating that extent must be based on claimant's wage-earning capacity at the time of the hearing. Nonetheless, the Board vacated the finding of partial disability as suitable alternate employment was not established. *Price v. Dravo Corp.*, 20 BRBS 94 (1987) (note: contains language inconsistent with later cases regarding total disability where claimant is enrolled in a DOL-sponsored rehabilitation program, *supra).*

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

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

The D.C. Circuit held that the administrative law judge erred in relying on claimant's disingenuous statement on a loan application that he earned $21,000 per year to find that was his wage-earning capacity. Other evidence of record indicated that claimant's lawful wage-earning capacity was substantially less than $21,000 per year, and "illegal earnings hardly constitute income received 'in the open labor market under normal employment conditions.'" The case was remanded for the administrative law judge to reconsider wage-earning capacity, applying the proper factors under *Randall. Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989).

The Board remanded the case to the administrative law judge for a second time for consideration of claimant's loss in wage-earning capacity prior to his leaving employment and becoming totally disabled based on the relevant factors. The administrative law judge erred in not addressing this issue as instructed in the Board's initial decision and in denying benefits based on a conclusion that while claimant's income decreased after 1977, he was unable to determine whether the decrease represented an actual reduction wage-earning capacity because claimant was compensated pre-injury on a commission basis. The Board noted that the administrative law judge had calculated a pre-injury average weekly wage

and again instructed the administrative law judge to calculate a post-injury wage-earning capacity using a Section 8(h) analysis. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

The administrative law judge properly applied the *Devillier* criteria in determining claimant's wage-earning capacity, including considering work opportunities due to a booming economy, and in finding that the primary reason for increased earnings was claimant's expanded marketable skills and seniority. Moreover, record evidence belied claimant's contention that he could not work as a linesman. The fact that claimant's increased wages may be due to night-shift work does not demonstrate a loss of wage-earning capacity where there is no evidence that claimant's injury was the reason for the switch to the night shift. The court thus affirmed the finding of no loss in present earning capacity, and the award of nominal benefits. *Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

The Ninth Circuit held that scheduled wage increases given by a non-union employer to all employees in a certain class based solely on seniority are a general increase in wages, akin to increased bargained-for wages, and do not increase a claimant's wage-earning capacity, unlike merit raises. Claimant obtained post-injury work with a different employer. The court reached its conclusion because, despite receiving these periodic wage increases, claimant had not learned new skills or taken on additional responsibility; thus, his increased length of service makes him more valuable only to the current employer such that if he were to seek work on the open market in his injured condition, he would start at minimum wage, just as he and all new employees did with this employer. The Ninth Circuit therefore remanded the case for a recalculation of the extent of claimant's partial disability. *Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013).

Claimant's wages in his suitable alternate employment decreased and claimant sought an increased permanent partial disability award through modification proceedings. The Eleventh Circuit held that the administrative law judge rationally determined that the lower post-injury wages represented claimant's wage-earning capacity under Section 8(h). As the Section 8(h) factors were taken into account in the initial proceedings, the administrative law judge was not required to examine them again, as the only basis for modification was the change in claimant's actual wages. There is no evidence that claimant's skills, education or other similar factor changed, and it was employer's burden to introduce evidence to that effect if it wished to demonstrate a higher wage-earning capacity. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

The administrative law judge found that claimant, who was injured while working in Afghanistan, would have ceased overseas work and returned to the United States to work no later than August 2011. Consequently, although the administrative law judge found that claimant had an actual loss of wage-earning capacity after January 1, 2009, he reduced claimant's compensation to $1 per week beginning September 1, 2011, as he found that the

difference between claimant's post-injury wage-earning capacity and the earnings he had previously received in state-side employment was minimal. The Board held that nothing in the Act or the case law supports this type of two-tiered award. Section 8(c)(21) requires compensation for permanent partial disability to be paid "during the continuance of partial disability," the "football cases" on which the administrative law judge relied did not specifically address the legality of a two-tiered award, and it is improper to rely on a presumed future event which does not take a claimant's injured status into account in awarding benefits. Thus, the Board vacated the administrative law judge's nominal award as of September 1, 2011 and reinstated the full permanent partial disability award. *Raymond v. Blackwater Sec. Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

Consideration of Actual Earnings--in General

Where claimant is working, the same factors are considered in addressing whether his actual earnings equal his wage-earning capacity as are used in addressing an alternate earning capacity. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). *See* cases cited above regarding the applicable factors.

A finding that the injury may cause claimant to terminate his employment earlier than he otherwise would is relevant and can establish a loss in his wage earning capacity. *Monahan v. Portland Stevedoring Co.*, 8 BRBS 653 (1978). *See generally Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (holding retirement plans are not relevant to average weekly wage determination, Board stated they may be relevant in addressing future factors in determining wage-earning capacity); *Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd mem. sub nom. Marine Terminals Corp. v. Director, OWCP*, 624 F.2d 192 (9th Cir. 1980) (Board affirmed total disability where claimant was unable to continue longshore work due to pain, rejecting argument claimant withdrew from the labor market by filing for retirement as he did not voluntarily retire).

Where an employee with a lung condition was transferred from a job which involved additional, potentially injurious, exposures to a different, lower rated job without such exposure where employer continued to pay him the same wages, the First Circuit affirmed a partial disability award. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). The court rejected employer's reliance on the wages paid claimant and its assertion that claimant was able to perform some strenuous tasks, stating that only employer's charitable treatment kept him at his former wage and if he lost this job, his earning capacity on the open market would be limited since higher paid work for which he is otherwise qualified is ruled out by his illness.

Regarding physical capacity, the administrative law judge may consider whether the employee seeks light work in order to continue working, *Fiamengo v. Metro. Stevedore*

Co., 12 BRBS 546 (1980); *Williams*, 8 BRBS at 203, or turns down heavy work and requires more time off. *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850 (1980). Even a minor physical impairment may result in a reduced wage-earning capacity. *Harville v. Alabama Dry Dock & Shipbuilding Co.*, 13 BRBS 588 (1981). The administrative law judge may also consider the fact that the employee has lost work due to physician's visits necessitated by the injury. *Barnes v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 528, *pet. dismissed mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F. 2d 330, 9 BRBS 453 (4th Cir 1978).

The administrative law judge may also consider whether a co-worker with less seniority was promoted over the employee, *Townsend v. Potomac Elec. Power Co.*, 13 BRBS 127 (1981), and whether the employee has had difficulty finding work since the injury. *Rodriguez v. Friedman*, 314 F.Supp. 266 (E.D.N.Y. 1969); *Creasy v. J .W. Bateson Co.*, 14 BRBS 434 (1981); *Feagin v. Gen. Dynamics Corp., Elec. Boat Div.*, 10 BRBS 664 (1979).

In *Decosta v. Gen. Dynamics Corp.*, 13 BRBS 469 (1981), the Board affirmed an administrative law judge finding that claimant's post-injury wages were not representative of his earning capacity where claimant was not required to perform all of the tasks connected with the position and when forced to do so, was physically unable to properly perform the job. The Board held that the administrative law judge also properly relied on a finding that claimant's condition adversely affected his ability to compete in the open market as well as his education, general appearance, mental attitude, and work experience in calculating an alternate earning capacity.

The Board vacated an administrative law judge's denial of any compensation which was based on a conclusion that it was not an injury but poor motivation which prevented claimant from working as a service station attendant, as the administrative law judge did not perform a proper analysis. The judge found claimant was no longer able to perform his former job due to back pain, and the issue was thus whether claimant had a wage loss in his job at the service station, which required a comparison of his earnings in that job with his pre-injury earnings. *Hollingsworth v. Caruthersville Shipyard*, 9 BRBS 775 (1978).

If there is no evidence that an employee is in any danger of losing his job, the administrative law job may find that it represents his wage-earning capacity, even if no other employer would pay wages as high as his current job. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). If the post-injury work is continuous and stable, the post-injury earnings are more likely to reasonably and fairly represent wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). *Cf. Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982) (shipbuilding

industry is often cyclical and thus post-injury earnings may not accurately represent future wage-earning capacity). *See* Actual Earnings vs. Open Market, *infra*.

An employee's earnings from self-employment may establish his wage-earning capacity. *Sledge v. Sealand Terminal*, 16 BRBS 178, 181 (1984); *Mitchell v. Bath Iron Works Corp*., 11 BRBS 770, 779 (1980). However, profit from ownership is not included in determining earning capacity. Thus, the administrative law judge should determine whether income from self-employment is the result of an ownership interest or claimant's personal services; only amounts representing salary are included. *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403 (1989).

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The Second Circuit reversed a Board decision which had found it unnecessary to remand for reconsideration of the Section 8(c)(21) calculation despite errors in calculating average weekly wage. The court stated that the Board erred in finding that claimant had no permanent loss of earning power based on his income tax calendar-year earnings, since such earnings may not be representative of his post-injury wage-earning capacity. The court held that the Board precluded the administrative law judge on remand from considering evidence other than claimant's nominal post-injury earnings to determine his residual earning capacity under Section 8(h), which requires an examination of the totality of the evidence. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), *rev'g LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986) (DeGregorio, J., dissenting).

The Board affirmed the administrative law judge's finding that claimant's actual, although meager, earnings as a real estate salesman established his wage-earning capacity. Employer failed to establish that claimant's actual earnings did not reasonably reflect his wage-earning capacity or that better paying realistic employment opportunities on a commission basis existed for claimant, whom the administrative law judge observed was not a salesman type. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

The Board affirmed an administrative law judge's finding that claimant was an employee rather than an owner of a comic book store since claimant made no capital investment in the business and performed extensive services for it. The administrative law judge erred, however, in including $5,000, which was a share of the estimated profit of the store claimant managed a few days per week, in claimant's wage-earning capacity. Claimant's receipt of this money is merely speculative because as yet no there have been no payments to claimant of any anticipated profits and no payments were anticipated. *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403 (1989).

The Board initially reversed the administrative law judge's finding that claimant's actual wages do not fairly and reasonably represent his post-injury wage-earning capacity where claimant had successfully held his current position which required no more effort than his previous job, and the job was regular and continuous and was not provided through employer's beneficence. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated in pert. part on recon.*, 23 BRBS 312 (1990). On reconsideration, the Board held that the administrative law judge's finding that claimant's actual wages do not represent his wage-earning capacity was supported by substantial evidence. Claimant was not able to perform heavy work, less overtime was available, he worked with some pain and with the awareness that if he aggravated his back, future employment prospects would be precluded, and claimant's employment with employer was not secure. The Board vacated the finding of a 10 percent loss, which equaled the degree of permanent impairment, and remanded the case for calculation of a dollar amount loss. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating in pert. part on recon.* 23 BRB 12 (1989).

The Board affirmed the administrative law judge's finding that claimant's post-injury wages did not establish his wage-earning capacity. The administrative law judge properly found that while claimant's seniority and age demonstrate that his work is stable, the wage rates paid had to be adjusted back to the time of injury to account for inflation. After this adjustment, claimant had a loss in wage-earning capacity and employer's contention to the contrary was rejected. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and vacated in part on recon. en banc*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring), *aff'd in pert. part and rev'd on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S.1155 (1997).

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

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

The Board affirmed the administrative law judge's finding that claimant's actual post-injury earnings fairly represent his post-injury wage-earning capacity, rejecting claimant's contentions in this regard. The administrative law judge found that claimant's position is secure and is not sheltered, noting that claimant was promoted fairly quickly. The administrative law judge permissibly rejected claimant's argument that he would not be able to earn wages on the open market as too speculative in light of these factors. Moreover, the administrative law judge did not err in including claimant's night shift differential in his wage-earning capacity calculation, and the administrative law judge properly accounted for inflation by reducing the post-injury earnings by the percentage point increase in the national average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Board affirmed the administrative law judge's computation of claimant's post-injury wage-earning capacity where claimant worked two part-time positions post-injury and presented evidence establishing the wages these jobs paid at the time of injury in 1989. The administrative law judge used these weekly wages and compared them to claimant's average weekly wage to determine claimant's entitlement to benefits under Section 8(c)(21). As this method is proper and as his conclusion is supported by substantial evidence, the Board rejected employer's assertions regarding alternate calculations. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

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

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

The Board affirmed the administrative law judge's finding that claimant's actual wages from September 12, 1999, to July 29, 2000, reasonably and fairly represented his residual wage-earning capacity for the March 10, 1998, injury. Claimant limited himself to jobs

within his physical capabilities and the administrative law judge found that he was no longer "carried" by his co-workers. The administrative law judge also appropriately adjusted the wages for inflation. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

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

Where claimant's wages in his suitable alternate employment decreased and claimant sought an increased permanent partial disability award through modification proceedings, the Eleventh Circuit affirmed the modification of the award. The court held that the administrative law judge rationally determined that the lower post-injury wages represented claimant's wage-earning capacity under Section 8(h). As the Section 8(h) factors were taken into account in the initial proceedings, the administrative law judge was not required to examine them again, as the only basis for modification was the change in claimant's actual wages. There is no evidence that claimant's skills, education or other similar factor changed, and it was employer's burden to introduce evidence to that effect if it wished to demonstrate a higher wage-earning capacity. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

The administrative law judge found that claimant, who was injured while working in Afghanistan, would have ceased overseas work and returned to the United States to work no later than August 2011. Consequently, although the administrative law judge found that claimant had an actual loss of wage-earning capacity after January 1, 2009, he reduced claimant's compensation to $1 per week beginning September 1, 2011, as he found that the difference between claimant's post-injury wage-earning capacity and the earnings he had previously received in state-side employment was minimal. The Board held that nothing in the Act or the case law supports this type of two-tiered award. Section 8(c)(21) requires compensation for permanent partial disability to be paid "during the continuance of partial disability," the "football cases" on which the administrative law judge relied did not specifically address the legality of a two-tiered award, and it is improper to rely on a presumed future event which does not take a claimant's injured status into account in awarding benefits. Thus, the Board vacated the administrative law judge's nominal award as of September 1, 2011 and reinstated the full permanent partial disability award. *Raymond v. Blackwater Sec. Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

The Ninth Circuit held that scheduled wage increases given by a non-union employer to all employees in a certain class based solely on seniority are a general increase in wages, akin to increased bargained-for wages, and do not increase a claimant's wage-earning capacity, unlike merit raises. Claimant obtained post-injury work with a different employer. The court reached its conclusion because, despite receiving these periodic wage increases, claimant had not learned new skills or taken on additional responsibility; thus, his increased length of service makes him more valuable only to the current employer such that if he were to seek work on the open market in his injured condition, he would start at minimum wage, just as he and all new employees did with this employer. The Ninth Circuit therefore remanded the case for a recalculation of the extent of claimant's partial disability. *Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013).

Loss of Overtime

A loss of overtime may establish a loss in claimant's wage-earning capacity. *See Townsend v. Potomac Elec. Power Co.*, 13 BRBS 127 (1981)**;** *Feagin v. Gen. Dynamics Corp., Elec. Boat Div.*, 10 BRBS 664 (1979); *Ford v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978); *Butler v. Washington Metro. Area Transit Auth.*, 14 BRBS 321 (1981). *See also McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979). However, in computing wage-earning capacity based on actual wages, overtime pay is only to be considered if it was considered when determining the employee's average weekly wage. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979). The administrative law judge may exclude overtime and standby pay from the employee's wage-earning capacity if he finds that they are not assured. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984).

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

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

The Board held that the fact that claimant earned the same wages working on an engraving machine as workers performing his former job as a Class A painter was not determinative of whether he suffered a loss in wage-earning capacity. The Board remanded for the

administrative law judge to determine whether claimant sustained a loss in wage-earning capacity based on a loss of overtime wages. *Frye v. Potomac Elec. Power Co.,* 21 BRBS 194 (1988).

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

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

Working with Pain and Limitations

Where claimant is working after an injury solely due to the beneficence of employer or due to extraordinary effort and in spite of excruciating pain, he may be entitled to total disability benefits. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F. 2d 447, 7 BRBS 838 (4th Cir. 1978). *See* Total Disability While Working, *supra*, and Beneficent Employer, *infra*.

However, where claimant's pain and limitations do not rise to this level, these factors may provide a basis for a finding that claimant's actual earnings do not represent his earning capacity and that he therefore has a loss in earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). In *Container Stevedoring*, the court affirmed a finding that claimant's increased earnings did not represent his earning capacity based on his physical impairment and credited testimony that he worked fewer hours due to his pain and continued working with pain and limitations due to his financial obligations to his family.

In *Barnes v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 528, *pet. dismissed mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F. 2d 330, 9 BRBS 453 (4th Cir 1978), the Board stated that evidence that claimant worked in pain and lost time from work due to doctor visits and his injury could support a conclusion that claimant's post-injury wages were not representative of his wage-earning capacity. In *Decosta v. Gen. Dynamics Corp.*, 13 BRBS 469 (1981), the Board affirmed an administrative law judge finding that claimant's post-injury wages were not representative where claimant was not required to perform all of the tasks connected with the position and when forced to do so, was physically unable to properly perform the job.

In *Fleetwood v. Newport News Shipbuilding & Dry Dock Co*., 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985), the court rejected claimant's argument that his post-injury wages did not fairly and reasonably represent his wage-earning capacity because he was able to work only by enduring almost continuous pain. The court stated that while claimant testified to his pain, he did not state that it affected his work, and the evidence indicated that he functioned on the job without special consideration or aid from co-workers. Although he did miss time from work due to his injury, this fact did not outweigh the evidence that claimant was able to continue working at higher wages than he earned pre-injury.

The Board affirmed an administrative law judge's decision rejecting claimant's contention that his wages were not representative of his wage-earning capacity because he worked in pain which was so bad that he drank in order to be able to work and had to be assisted by coworkers. The administrative law judge's findings that claimant did not make any unusual effort or withstand a lot of pain in order to work were supported by his credibility

determination and evidence that claimant stated he was happy in his job and had reported few complaints. *Carver v. Potomac Elec. Power Co.*, 14 BRBS 824 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982).

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Remanding the case for reconsideration after finding the administrative law judge erred in raising total disability, the Board noted that if claimant did not meet the standard for receipt of total disability benefits while he was working, factors such as claimant's pain and the physical or emotional limitations which caused him to avoid certain jobs offered by the hiring hall were relevant in determining post-injury wage-earning capacity and could support an award of permanent partial disability benefits under Section 8(c)(21), based on reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

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

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

Actual Earnings and Beneficent Employer

Where claimant's job is provided through the beneficence of his employer and is considered "sheltered employment," claimant may be entitled to total disability even though working. S*ee Patterson v. Savannah Shipyard & Mach.*, 15 BRBS 38 (1982) (Ramsey, dissenting), *aff'd sub nom. Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), and cases cited in section on Total Disability While Working, *supra.* Where claimant's job is not sheltered employment, factors such as assistance provided to claimant or changes in his duties to accommodate restrictions are relevant in considering whether he has a loss in wage-earning capacity even if his actual earnings increased.

The beneficence of a sympathetic employer may include arranging job locations to meet the employee's physical restrictions, hiring an extra person to help him with heavy work, *Lumber Mut. Cas. Ins. Co. v. O'Keeffe*, 217 F.2d 720 (2d Cir. 1954), paying him more than his co-workers, *Burch v. Superior Oil*, 15 BRBS 423, 427-428 (1983), or creating a position for him which would not necessarily be filled if he left and treating him with "kid gloves." *Twin Harbor Stevedoring A Tug Co. v. Marshall*, 103 F.2d 513 (9th Cir. 1939); *see Patterson*, 15 BRBS 38 (affirming award of total disability to a claimant under similar circumstances).

A job in a shop specially tailored for the injured employee is not sheltered employment if the job is necessary. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986) (since job constituted suitable alternate employment, claimant was only partially disabled and award fell under the schedule). Where employer employs claimant at such a suitable job within its own enterprise, it is not also required to show that claimant can earn wages in the open market. *Id.; see Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979).

Working for a family member may suggest beneficence. *See Lopes v. Georgia Ave. Tavern*, 13 BRBS 1125, 1128 (1981) (case remanded for reconsideration of loss in earning capacity as administrative law judge did not address the relevant factors). Paying an employee full-time wages for part-time work may be sheltered employment and assumes a loss of wage-earning capacity, *see Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979), as may a transfer to a lower-paid position at the full pay for a job made unsuitable by occupational disease. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 575, 8 BRBS 818, 832-824 (1st Cir. 1978). The administrative law judge may also consider whether the employee is being carried by his co-workers. *Harris v. Atl. & Gulf Stevedores, Inc.*, 9 BRBS 7 (1978); *Silberstein v. Serv. Printing Co., Inc.*, 2 BRBS 143 (1975). If the employer merely provides the necessary comforts so that the employee suffers no pain while working, and his work is necessary and of benefit to the employer, it is not due to employer's beneficence such that claimant is totally disabled; however, whether the wages

he earned resulted from employer's beneficence should be considered in addressing partial disability. *Morgan v. Marine Corps Exch.*, 10 BRBS 442 (1979).

The Board affirmed an administrative law judge's decision rejecting claimant's argument that employer was beneficent such that his actual earnings did not represent his earning capacity where the administrative law judge did not credit claimant's assertion that he drank heavily due to pain and employer was aware of this fact and did not fire him and that a promotion was also due to beneficence as it would involve less manual labor. *Carver v. Potomac Elec. Power Co.*, 14 BRBS 824 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982).

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Where claimant was provided suitable employment as a shore-side welder by employer from which he was fired for reasons unrelated to his disability, this job established suitable alternate employment, limiting him to a partial disability award. Although employer's shore-side welding positions may be light-duty work, they do not constitute sheltered employment as claimant was successfully performing the work, it was necessary to employer and at least 2 shifts of workers were performing the same work. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

The Board affirmed an administrative law judge's determination that claimant was not permanently totally disabled where claimant held a job in employer's MRA shop in which he performed tasks necessary and profitable to employer and which were within his physical capabilities. Thus, this job is not sheltered employment. The Board remanded for reconsideration of claimant's loss in wage-earning capacity based on an alleged loss in overtime. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

The Board held that the administrative law judge rationally rejected claimant's actual earnings of $3.50 per hour as representative of his wage-earning capacity since they were not equivalent to wages paid to other employees at the restaurant and may have been lower due to feelings of obligation possessed by claimant towards his mother-in-law, who owned the restaurant. The administrative law judge reasonably calculated claimant's post-injury wage-earning capacity based on the average pay of two comparable co-workers who were earning $5 and $4.50 per hour. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

The First Circuit affirmed the Board's finding that claimant's part-time work for employer constituted sheltered employment, and thus was not suitable alternative employment, where claimant performed the job only on an as-needed basis, averaging only approximately ten hours per week at the job, and he had a mattress in the office so that he could lie down during the day. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991)

The Fifth Circuit rejected the contention that a modified joiner position employer provided claimant was "sheltered employment." The evidence claimant relied upon to establish that employer would not fill the job if claimant left does not support his contention, and the fact that the joiner work was tailored to claimant's physical limitations is insufficient to establish it was sheltered. However, as the administrative law judge did not make a finding as to whether claimant's actual earnings in this job established his wage-earning capacity, the case was remanded. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The Board affirmed the administrative law judge's finding that claimant's actual post-injury earnings fairly represented his post-injury wage-earning capacity, rejecting claimant's contentions regarding sheltered employment. The administrative law judge rationally based this determination on the fact that claimant's job was secure, as he had been promoted in only a short period of time to a position where he supervised or assigned the work of others, and that his employer thought so well of him that it hired a friend of his on claimant's recommendation. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 52 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

The Board affirmed the conclusion that employer's offer to claimant, who was reinjured performing a light-duty position as a laundry worker, of a laundry worker job tailored to her restrictions was not sheltered employment. Claimant's voluntary performance of additional duties on her own initiative and without the request, knowledge, or acquiescence of employer did not defeat employer's attempt to tailor claimant's employment to her physical limitations. Moreover, the position was not sheltered as the work folding laundry was necessary and employer did not attempt or offer to pay claimant even if she could not do the work. In addition, the fact that the light duty laundry worker position was created especially for claimant and would not be filled if she left does not necessarily establish that it was sheltered employment, and claimant's assertion that the light duty position was not profitable for employer because it would have to pay two persons to perform the work of one person was not supported by the evidence, as there was testimony that someone already employed by employer would bring the laundry to claimant so she could fold it. As this job paid the same wages as prior to injury, claimant had no actual loss in earning capacity. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

The Board affirmed the administrative law judge's determination that employer established suitable alternate employment by virtue of a light duty position at its facility. The administrative law judge rationally found that employer's light duty position was not sheltered employment, as employer presented credible evidence that claimant was performing a necessary function, as supported by the fact that the position is currently occupied by another worker. The Board therefore vacated the administrative law judge's award of total disability while claimant was working in this job and remanded the case for consideration of loss in earning capacity as the administrative law judge found claimant

experienced pain while engaging in this light duty work. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Following remand, the Board affirmed the administrative law judge's conclusion that claimant was not entitled to total disability benefits based on working only due to extraordinary effort and in spite of excruciating pain. As the administrative law judge stated that claimant was entitled to temporary partial benefits but did not enter an award due to his finding on lack of coverage, which the Board reversed, the case was remanded for findings necessary to this award. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003)

Actual Earnings vs. Open Market

The ultimate objective of the wage-earning capacity formulation is to determine the wage that someone with the employee's injuries would earn on the open labor market under normal conditions. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Randall v. Comfort Control, Inc*., 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). A vocational expert's opinion is often determinative in assessing open market earnings. *Devillier*, 10 BRBS at 660. *See also* Suitable Alternate Employment, *supra*.

Where employer employs claimant at a suitable job within its own enterprise, it is not also required to show claimant can earn wages in the open market. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). When an employee who is working in gainful employment alleges that his wage-earning capacity on the open market is diminished, the resolution of the issue may turn on whether his employment is sufficiently regular and continuous to establish his true wage-earning capacity. *Randall v. Comfort Control, Inc.*, 15 BRBS 233 (1983), *vac. and rem. on other grounds*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Creasy v. J.W. Bateson Co*., 14 BRBS 434 (1981); *Darcell v. FMC Corp., Marine & Rail Equip. Div*., 14 BRBS 294 (1981); *Devillier*, 10 BRBS at 658. *See Long*, 767 F.2d 1578, 17 BRBS 149(CRT). Relevant questions include whether the work is suitable, claimant is physically capable of it, and he has the seniority to stay in the job. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). If claimant's actual employment is sufficient to establish his wage-earning capacity based on the appropriate factors, the open market need not be addressed. *Carver v. Potomac Elec. Power Co.*, 14 BRBS 824 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982).

However, the fact that a claimant's post-injury employment is regular and continuous does not preclude employer from establishing that claimant can earn higher wages on the open market. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

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

The Board vacated an award based on an administrative law judge's findings regarding claimant's earning capacity on the open market and remanded the case where the

administrative law judge did not make an explicit finding as to whether claimant's actual post-injury earnings fairly and reasonably represented his wage-earning capacity. The evidence indicated that claimant's employment was regular and continuous, he had worked for four years, and he had enough seniority to remain in his current position, although he could work at times for no more than 3 days in a row without pain. The Board also stated that evidence regarding the deterioration of claimant's medical condition and the beneficence of his co-workers, which the administrative law judge relied upon, was unclear. Also, the administrative law judge erred in considering the effects of inflation at this point. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

The Fifth Circuit reversed the Board's decision which had overturned an administrative law judge's denial of benefits based on vocational evidence of claimant's earning capacity on the open market exceeding his actual earnings in alternate employment. The Board concluded that claimant's actual wages fairly and reasonably represented his wage-earning capacity because employer failed to show that claimant's current employment was not continuous and stable and because the job was suitable. The court held that the Board erred in presuming from its own determination of continuous and stable employment that claimant's actual wages equaled his earning capacity rather than reviewing the administrative law judge's findings for substantial evidence. The administrative law judge could properly find based on a vocational expert's testimony regarding jobs in the Mobile area compatible with claimant's physical condition and credentials and paying salaries greater than his current job that claimant's lower actual earnings did not fairly and reasonably represent earning capacity. Thus, the finding that claimant was no longer disabled based on the expert's testimony was supported by substantial evidence. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

The Fifth Circuit vacated a finding of permanent partial disability based on claimant's earnings in a job he obtained consistent with his restrictions and remanded the case for reconsideration in light of vocational evidence of the availability of general job openings with higher wages in the surrounding areas. Evidence of specific jobs is not required, and the administrative law judge erred in not considering this evidence. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

The Board held that the administrative law judge acted reasonably in calculating claimant's post-injury wage-earning capacity based on the average of what he actually earned as a medical technician in a public hospital and the higher salary he would have earned in a private one, where the evidence was inconclusive as to whether claimant could have obtained a position in the private hospital. *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The Fifth Circuit affirmed this calculation, finding that the administrative law judge recognized that claimant's employment in a lower paying public hospital did not represent his true earning capacity and reasonably calculated it based on the market as a whole. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

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

The Board affirmed the administrative law judge's finding that claimant's actual post-injury earnings fairly represent his post-injury wage-earning capacity, rejecting claimant's contention that he would not be able to earn the same wages on the open market as too speculative as claimant's job is regular and expected to continue in the future. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

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

Inflation

In determining wage-earning capacity, the administrative law judge must use the wage rates in effect for the post-injury jobs at the time of the injury in order to make a proper comparison with claimant's average weekly wage, which is also calculated as of the time of the injury. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *Morgan v. Marine Corps Exch.*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exch. v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). This adjustment ensures that the calculation of lost wage-earning capacity is not distorted by a general inflation or depression. *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984); *Morgan*, 14 BRBS at 789 n.3.

However, the Third Circuit has held that the proper comparison is of the wage rate in claimant's post-injury job at the time of the hearing with the wages the employee would be earning at the time of the hearing had he continued in his pre-injury employment. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979). The Board declined to follow the *McCabe* holding regarding comparing the wages claimant would have earned "but for" the injury against the wages that claimant was actually earning in another position, holding that this calculation ignores the statutory mandate of Section 10, which provides that average weekly wage is determined at the time of injury, as well as the formula of Section 8(c)(21), (e) providing that average weekly wage is compared to claimant's wage-earning capacity to determine the loss in wage-earning capacity. *Pumphrey v. E. C. Ernst*, 15 BRBS 327 (1983); *Bethard*, 12 BRBS at 695-696 n.2. Adjusting the post-injury earnings to pre-injury levels addresses the effects of inflation within the statutory formula, and the Board has routinely remanded cases where the administrative law judge failed to make this adjustment. *Id.; Bury v. Joseph Smith & Sons*, 13 BRBS 694 (1981); *Moore v. J.F. Shea Constr. Co.*, 13 BRBS 370 (1981); *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288 (1979).

The other courts to have considered the issue have affirmed the Board's approach. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987); *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 101(CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986).

Where the wages paid by claimant's post-injury job at the time of injury are not in the record, the Board has held that the administrative law judge may use the percentage increase in the National Average Weekly Wage under Section 6 as a means of adjusting claimant's earnings downward to account for inflation. *Richardson v. Gen. Dynamics Corp.*, 23 BRBS 327 (1990). The Ninth Circuit affirmed an administrative law judge's decision which averaged claimant's actual earnings in several years of work and adjusted

them downward to account for contractual wage increases. *Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

The mere fact that the employee is earning the same or more money post-injury does not establish that he has suffered no lost wage-earning capacity if the higher wages only represent inflation. *Miller v. Cen. Dispatch, Inc.*, 16 BRBS 63 (1984).

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Statutory Scheme

The First Circuit affirmed the administrative law judge's determination of claimant's loss in wage-earning capacity based on the difference between the wage paid by his post-injury job as a planner in 1976 when he was injured and the wage rate of a welder, his pre-injury job, at that time. The court rejected employer's argument which would have nullified any adjustment. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987).

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

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

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

The Board discussed the holding of *McCabe*, 602 F.2d 59, 10 BRBS 614, with regard to making inflationary adjustments in claimant's post-injury wage-earning capacity in this Third Circuit case. The Board held that application of *McCabe* requires the administrative law judge to examine the wages that claimant's usual employment would have paid him at

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

In affirming the Board's decision, the Ninth Circuit held that the wages a claimant may have earned "but for" his injury are not to be taken into account in determining his loss in wage-earning capacity. The court rejected claimant's contention that, under Sections 8(c)(21) and 8(h), he should be entitled to annual benefits equal to two-thirds of the difference between the annual wages he could have been earning as a crane operator but for his work injury and the annual wages he was actually earning in his suitable alternate employment as a marine clerk. The proper comparison is between claimant's pre-injury wages and his post-injury earning capacity. As claimant's actual post-injury earnings adjusted for inflation exceeded his pre-injury average weekly wage, the Ninth Circuit held that the Board was correct in affirming the administrative law judge's termination of benefits under the Act. *Sestich v. Long Beach Container Terminal,* 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). *Accord Keenan v. Director for Benefits Review Board,* 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004).

Inflation Calculations

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

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

The Board affirmed the administrative law judge's finding that claimant's post-injury wages did not establish his wage-earning capacity. The administrative law judge properly found that while claimant's seniority and age demonstrate that his work is stable, the wage rates paid had to be adjusted back to the time of injury to account for inflation. After this adjustment, claimant had a loss in wage-earning capacity and employer's contention to the contrary was rejected. *Sproull v. Stevedoring Services of Am*., 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and vacated in part on recon. en banc*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring), *aff'd in pert. part and rev'd on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S.1155 (1997).

On appeal, the Ninth Circuit held that the Board properly affirmed the administrative law judge's finding that claimant's actual post-injury earnings did not fairly and reasonably represent his wage-earning capacity. Rejecting employer's contention, the court held that even though claimant's actual post-injury earnings are greater than his average weekly wage, where wage rates had increased approximately 15 percent, the administrative law judge properly reduced claimant's post-injury earnings by 15 percent and used this adjusted amount to determine benefits. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Board affirmed the administrative law judge's computation of claimant's post-injury wage-earning capacity where claimant worked two part-time positions post-injury and presented evidence establishing the wages these jobs paid at the time of injury in 1989. The administrative law judge used these weekly wages and compared them to claimant's average weekly wage to determine claimant's entitlement to benefits under Section 8(c)(21). As this method is proper and as his conclusion is supported by substantial evidence, the Board rejected employer's assertions regarding alternate calculations. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

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

The Board affirmed the administrative law judge's finding that claimant's actual wages from September 12, 1999, to July 29, 2000, reasonably and fairly represented his residual wage-earning capacity for the March 10, 1998, injury, and his adjustment of these wages for inflation. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

Finding No Loss

If the employee has a physical impairment from the injury but is doing his usual work adequately, regularly, full-time, and without undue help, the administrative law judge may find that the employee's actual wages fairly represent his wage-earning capacity, and he has therefore lost none and is not disabled. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 191 (1984); *see Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294 (1981); *Kendall v. Bethlehem Steel Corp.*, 3 BRBS 255 (1976), *aff'd mem.*, 551 F. 2d 307 (4th Cir. 1977). In addition, where employer establishes suitable alternate employment with vocational evidence of jobs paying higher wages than claimant's average weekly wage, claimant has no loss in earning capacity.

Where claimant was doing full-time, steady work at a higher wage than previously, merely avoiding overtime or boat-based assignments, the Board affirmed an administrative law judge's finding of no loss in wage-earning capacity. *Ford v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978). In the absence of any evidence of its likelihood, the administrative law judge can find the allegation that the employee will work less in the future to be speculative. *Moore v. J.F. Shea Constr. Co.*, 13 BRBS 370 (1981).

If an employee is promoted to a higher-paying post where his physical restrictions no longer matter, he has no economic disability. *Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). As long as he is doing the job satisfactorily, any loss of wage-earning capacity is speculative. *Bolduc v. Gen. Dynamics Corp.*, 9 BRBS 851 (1979). Even if his former usual employment offers jobs which pay more than his present wages, if he was not in one of those jobs prior to the injury and does not show that he would have moved to one but for the injury, he has not established that his present earnings do not fairly and reasonably reflect his wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 1583, 17 BRBS 149, 153(CRT) (9th Cir. 1985).

If the employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, the administrative law judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985).

Where an employee is working at a useful job which pre-existed his employment and pays wages commensurate with the work, and he is earning higher wages on the same union scale as he was on pre-injury, he has suffered no lost wage-earning capacity. *Darcell*, 14 BRBS at 298.

The Board affirmed the denial of permanent partial disability benefits where claimant's actual earnings showed no post-injury loss in earning capacity despite an error in the administrative law judge's pre-injury average weekly wage determination which required

remand. *LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986) (DeGregorio, J., dissenting), *rev'd sub nom. LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989). The Board held benefits were properly denied where claimant maintained steady, productive employment and had a rise in income based on income tax returns for calendar years prior to and after injury. As the Board affirmed the finding that claimant's actual post-injury earnings equaled his wage-earning capacity and found based on the tax records that these earnings exceeded his pre-injury earnings, the Board found no need to remand for a "technical comparison" of pre-injury wages and post-injury earnings. The Second Circuit reversed this decision, stating that the Board erred in finding that claimant had no permanent loss of earning power based on claimant's income tax calendar-year earnings, since Section 8(c)(21) requires a comparison between a definite dollar figure representing pre-injury average weekly wages with a definite dollar figure representing post-injury wage-earning capacity. The court held that the Board erred in precluding the administrative law judge on remand from considering evidence other than claimant's nominal post-injury earnings to determine his residual earning capacity under Section 8(h), which requires an examination of the totality of the evidence. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989).

Where claimant received a promotion and his earnings increased, the Fourth Circuit affirmed the modification of an award based on a finding that claimant no longer had a loss in wage-earning capacity. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co*., 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). *See Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), and cases discussed in Section 22 of the desk book.

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

The D.C. Circuit held that the administrative law judge erred in relying on claimant's disingenuous statement on a loan application that he earned $21,000 per year to find that claimant had no loss of wage-earning capacity. Other evidence of record indicated that claimant's lawful wage-earning capacity was substantially less than $21,000 per year and "illegal earnings hardly constitute income received 'in the open labor market under normal employment conditions.'" The case was remanded for the administrative law judge to reconsider wage-earning capacity, applying the proper factors. *Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989).

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

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

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

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

2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

Nominal/*De Minimis* Awards

In listing the factors to be considered in addressing wage-earning capacity, Section 8(h) specifically includes "the effect of disability as it may naturally extend into the future." 33 U.S.C. 908(h). In order to compensate the future effects of disability where an employee has no present calculable loss in wage-earning capacity, an administrative law judge may award nominal benefits to the claimant. *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The United States Courts of Appeals for the Fifth and District of Columbia Circuits were the first to hold that a *de minimis* award is appropriate when the employee has proven that he has a medical disability which presently causes no loss of wage-earning capacity, but there is a reasonable expectation that a loss in wage-earning capacity will occur in the future. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 800, 16 BRBS 56, 69-70(CRT) (D.C. Cir. 1984), *rev'g* 15 BRBS 233 (1983); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 773, 13 BRBS 237, 240 (5th Cir. 1981), *rev'g* 12 BRBS 38 (1980).

In *Hole*, the Fifth Circuit reversed the Board's decision which had overturned an administrative law judge's award of compensation for a one percent permanent partial disability based on a finding that the precise degree of claimant's loss of earning capacity could not be determined at that time. Noting concern for the one-year limit on modification under Section 22, the administrative law judge structured this award to keep the case alive for purposes of modification should claimant's circumstances change. The Board reversed the administrative law judge's award as "speculative" and "impermissibly influenced by his concern for the short statute of limitations." *Id.* The Fifth Circuit reinstated the administrative law judge's decision and held that the *de minimis* award was an appropriate response to uncertainty over the degree of reduction in wage-earning capacity. *Id.* The court found that the administrative law judge's opinion evidenced a proper regard for the Section 8(h) mandate to consider "the effect of disability as it may naturally extend into the future." 33 U.S.C. §908(h). The court acknowledged that such consideration is inherently speculative to some degree, but stated that as long as the administrative law judge does not go beyond drawing reasonable inferences from the evidence, his decision should not be reversed. Stating that substantial evidence supported the finding that Hole suffered some degree of economic harm, the court explained that concluding that the precise degree of harm cannot be determined at this time "is not a determination that the record is inadequate for decision but a recognition that the *extent* of Hole's economic injury is *unknowable* at the present time." Thus, a small award fashioned to preserve claimant's right to compensation should he become disabled in the future is less arbitrary than simply picking a "disability figure out of thin air." *Id.*

The D.C. Circuit specifically adopted *Hole* in *Randall.* In *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n. 9, 18 BRBS 12, 32-33 n. 9(CRT) (4th Cir. 1985), the Fourth Circuit noted that the approach in *Hole* may be appropriate in

some cases, but held that there was no need for a one-percent award to protect a worker whose economic loss cannot be ascertained on the facts in that case where claimant had steady, continuous post-injury employment.

The Board declined to follow *Randall* and *Hole* based on its conclusion that *de minimis* awards are not authorized by the Act. *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985)**,** *aff'd on other grounds sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986); *Smith v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 287 (1984). The Board stated that an administrative law judge may not make such an award based on mere speculation unsupported by any record evidence. *Smith*, 16 BRBS at 289; *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

Subsequently, the holding that *de minimis* awards are consistent with Section 8(h) of the Act was also adopted by the Second Circuit. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989).

Nothing that while the Ninth Circuit had not yet addressed the issue, the Board stated that the four circuits to do so had upheld *de minimis* awards and, in *Ward v. Cascade Gen., Inc.*, 31 BRBS 65 (1995), acquiesced in these holdings. The Ninth Circuit later also held that *de minimis* awards are permissible either in the initial proceedings or on modification. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The Ninth Circuit's decision was affirmed in this regard by the Supreme Court's decision holding that nominal benefits may be awarded under Section 8(h) in *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Stating that under certain circumstances there may arise a potential tension between the Section 8(h) mandate to account for the future effects of disability in determining wage-earning capacity and the Section 22 prohibition against issuing any new order to pay benefits more than one year after compensation ends or a denial is entered, the United States Supreme Court held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. The Court directed that the case be remanded to the administrative law judge for findings in accordance with this standard.

Cases following *Rambo II* generally focus on whether claimant established a "significant possibility" of future economic harm.

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The Board reluctantly affirmed the administrative law judge's two percent *de minimis* award, following the D.C. Circuit's decision in *Randall*, 725 F.2d 791, 16 BRBS 56(CRT), where claimant, a journeyman meat packer, received two promotions after his injury and thus had no actual loss in earning capacity. The Board initially affirmed a finding that claimant had a medical impairment to his back. The Board affirmed the administrative law judge's nominal award based on his findings that if claimant lost his current job, he would only be able to obtain work which pays minimum wage, his IQ, his reading test results, a vocational counselor's testimony that intellectually, claimant is over-employed in his current job, a doctor's testimony that claimant has latent weakness in his back, and claimant's testimony he may lose his current job, be demoted or lose time because of his back problems. *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

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

In a case arising in the Fourth Circuit, the Board stated that if the administrative law judge, on remand, found that claimant had not established a greater loss in wage-earning capacity due to loss of overtime, he could reaffirm his *de minimis* award of one percent. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

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

The Board reversed a *de minimis* award because the administrative law judge's finding that there was a significant possibility that claimant would suffer a future loss of wage-earning capacity was not supported by evidence. The Board distinguished the facts of this case from those in *Randall* as there was no evidence that claimant's job performance was materially affected by his work injury, claimant required employer's beneficence or claimant's work disability would deteriorate. Also, claimant's position with employer was secure. *Adams v. Washington Metro. Area Transit Auth.*, 21 BRBS 226 (1988).

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

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

The Board reversed the administrative law judge's 10 percent award, fining it was a *de minimis* award which was not supported where claimant had successfully performed his pre-injury job for 3 years following the work accident and was successfully performing his current job, which was regular and continuous and not provided through employer's beneficence. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on recon.*, 23 BRBS 312 (1990). On reconsideration, the Board held that the administrative law judge's award was not a nominal award but was based on the conclusion that claimant had a present loss in earning capacity. However, the Board remanded the case as the administrative law judge erred in stating the award as a percentage rather than a dollar amount. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating on recon.*, 23 BRBS 12 (1989).

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

Since the administrative law judge determined that claimant's injuries would likely degenerate in the future but that claimant's loss of wage-earning capacity could not be specifically documented, the Board vacated the administrative law judge's award of permanent partial disability based on a four percent loss of wage-earning capacity as it was not based on substantial evidence. The Board modified that award to reflect a one percent *de minimis* award, noting that such an award is sufficient to preserve claimant's right to seek modification in the future pursuant to Section 22 should he suffer an actual loss in

wage-earning capacity. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd in pert. part mem.*, No. 91-1601 (D.C. Cir. Dec. 18, 1992). After reviewing the criteria for a *de minimis* award, on reconsideration, the Board affirmed its prior decision which modified claimant's award of benefits to reflect a one percent *de minimis* loss in wage-earning capacity, rather than the four percent loss awarded by the administrative law judge. *Murphy v. Pro-Football, Inc.*, 25 BRBS 114 (1991), *aff'g on recon.* 24 BRBS 187 (1991), *rev'd in pert. part mem.*, 1992 WL 390763, No. 91-1601 (D.C. Cir. Dec. 18, 1992) (on appeal, court reinstated administrative law judge's award as it was supported by substantial evidence).

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

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

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

In remanding a case for further consideration of disability, the Board stated that if the administrative law judge found that claimant had no present loss in wage-earning capacity, the administrative law judge should consider claimant's entitlement to a nominal award consistent with *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT). *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

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

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

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

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

The Board affirmed the administrative law judge's denial of a nominal award where claimant continued to work after his injury without physical complaints or medical visits for a number of years while his earnings continued to increase, as there was no significant possibility of future economic harm. Moreover, as claimant sought a nominal award following a subsequent compensable injury, such an award was not necessary to hold open the Section 22 statute of limitations for the previous injury. *Price v. Stevedoring Services*

of Am., 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

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

The Board affirmed the administrative law judge's adjudication of claimant's pending modification request for a *de minimis* award. The administrative law judge rationally found that it was "part and parcel" of claimant's later claim for additional temporary total disability benefits. Moreover, the award was supported by substantial evidence in that the medical evidence noted a deteriorating physical condition, which was likely to impair claimant's earning capacity. Finally, although claimant suffered an injury under the schedule, in this case claimant's disability had not been deemed permanent. Thus, *PEPCO* does not preclude a temporary partial disability *de minimis* award under Section 8(e), and the case is distinguishable from *Porter*, 36 BRBS 113. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004).

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

The Board vacated the denial of a nominal award and remanded as the administrative law judge summarily found that claimant failed to demonstrate a significant possibility of future economic harm. Clamant asserted that evidence of sporadic post-injury employment and additional injuries established her entitlement to a nominal award. *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

The Board affirmed the administrative law judge's denial of a nominal award because his findings that claimant's job was a permanent assignment and that it was necessary to employer support his conclusion that claimant did not demonstrate the requisite significant possibility of future economic harm. Claimant also did not allege the likelihood that her physical condition would deteriorate. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009).

Claimant was injured in Afghanistan and the administrative law judge awarded benefits based on the difference between claimant's average weekly wage and his post-injury wage-earning capacity of $985.51 per week, then he reduced the amount to a *de minimis* award of $1 per week. Because he found that claimant was planning on returning to the U.S. no later than August 2011, voluntarily reducing his earning capacity, the administrative law judge concluded that the difference between claimant's post-injury wage-earning capacity and his pre-injury state-side earnings was minimal, warranting a nominal award. The Board vacated the nominal award, holding that nothing in the Act or case law supports a two-tiered award. Additionally, the Board stated that a *de minimis* award is not appropriate on the facts of this case, as claimant has a current loss of wage-earning capacity. The Board modified the award to reflect the continuance of benefits based on claimant's actual loss of wage-earning capacity. *Raymond v. Blackwater Sec. Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

Section 8(j)

Section 8(j) was added by the 1984 Amendments and provides for the employee to report post-injury earnings to the employer. Section 8(j)(1) states that "employer may inform a disabled employee" that he is obligated to report any earnings from any employment "not less than semiannually" on forms provided by the secretary. Under Section 8(j)(2), where the deputy commissioner finds an employee has failed to report earnings under subsection (1) upon request or has "knowingly and willfully" omitted or understated his earnings, he forfeits his right to compensation for any period during which he was required to file a report. Section 8(j)(3) provides that compensation so forfeited which has already been paid shall be recovered via a deduction from compensation due on a schedule determined by the deputy commissioner.

The accompanying regulations explain the requirements and application of Section 8(j). Section 702.285 provides with regard to the obligation and frequency of reporting:

> (a) An employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment. This report may not be required any more frequently than semi-annually. The report shall be made on a form prescribed by the Director and shall include all earnings from employment and self-employment and the periods for which the earnings apply. The employee must return the complete report on earnings even where he or she has no earnings to report.
>
> (b) For these purposes the term "earnings" is defined as all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss of if the profits were reinvested.

20 C.F.R. §702.285.

Section 702.286 provides procedures where the employee fails to file a required report or knowingly and willfully misstates earnings. Section 702.286(a) states that, for purposes of determining whether a violation has occurred, a completed report, even when no earnings are reported, must be returned within 30 days of receipt unless the period is extended by the district director for good cause. Subsection (b) states that any employer or carrier may file a charge with the district director accompanied by relevant evidence; the regulation specifies evidence which must accompany the allegation. Where the district director finds the evidence sufficient to support the charge, an informal conference must be convened followed by the issuance of a compensation order affirming or denying the charge and stating the compensation due for the specified period. Where there is a conflict over any

issue any party may request a formal hearing before an administrative law judge. Subsection (c) initially restates the provision for recovery of forfeited compensation where it has already been paid. It further provides that "the district director's discretion in such cases extends only to rescheduling repayment by crediting future compensation and not to whether and in what amounts compensation is forfeited. For this purpose, the district director shall consider the employee's essential expenses for living, income from whatever source, and assets, including cash, savings and checking accounts, stocks, bonds, and other securities." 20 C.F.R. §702.286(c).

The Board held that, pursuant to 20 C.F.R. §702.286(a), Section 8(j)(2)(A) applies when the claimant "fails to submit the report on earnings" when requested to do so, whereas Section 8(j)(2)(B) applies when claimant files the report but "knowingly and willfully omits or understates any part of such earnings" in that filing. This interpretation gives meaning to each part of Section 8(j)(2). As claimant complied with employer's requests to file a report of earnings, but did not list his rental income on those forms, the administrative law judge should have addressed whether claimant "knowingly and willfully" omitted his earnings on those reports pursuant to Section 8(j)(2)(B). The Board therefore vacated the administrative law judge's conclusion that claimant forfeited his right to disability payments under Section 8(j)(2)(A), and remanded the case for the administrative law judge to address whether, pursuant to Section 8(j)(2)(B), claimant's omission of his earnings was knowing and willful, thereby forfeiting his right to compensation during the periods in question. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

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The Board held that Section 8(j) does not apply in a death benefits case since it applies only to "disabled employees." Once claimant establishes that she is the surviving widow of the decedent, her financial situation is not relevant. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

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

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

Claimant did not report earnings from rental properties he owned. The administrative law judge found, based on his review of the surveillance footage and claimant's testimony, that claimant played a significant role in managing the property such that he engaged in "self-employment" and should have reported the rental payments as self-employment earnings on Form LS-200. As the administrative law judge could reasonably infer from the record that claimant's activities relating to his rental properties constituted self-employment, the Board affirmed his finding that claimant was required to report his rental income as "earnings" pursuant to Section 8(j) of the Act. The Board remanded the case for the administrative law judge to determine if claimant's failure to report his earnings was "knowing and willful." *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

The statutory scheme in Section 8(j) for recovery of overpayments of compensation does not authorize an action against claimant for repayment of benefits paid by employer; it contemplates only a suspension of prospective compensation payments and recovery of benefits paid through a credit. *Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

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

The Board held that Section 8(j) applies only prospectively from the effective date of its enactment, December 27, 1984. Thus, benefits claimant received prior to December 27, 1984, are not subject to forfeiture. Further, the Board held that a claimant's duty to report his post-injury earnings is not mandatory unless the information is first requested by his employer or the Director. Therefore, benefits are not forfeited under Section 8(j) unless the party seeking forfeiture establishes that it requested information concerning a claimant's post-injury income and that the claimant either failed to respond or responded falsely to the request. 20 C.F.R. §§702.285-702.286. The Board directed the administrative law judge on remand to address whether employer requested a report and claimant then failed to report or falsely reported his income in order to determine whether benefits claimant received after December 27, 1984, are subject to forfeiture. The Board rejected the Director's argument that the administrative law judge has no authority to suspend benefits, as the regulations provided for such authority in the event of a disagreement. However, the Board agreed that the authority to schedule the repayment of benefits is delegated to the district director. Therefore, if on remand the administrative law judge determined that claimant's post-December 27, 1984 benefits were subject to forfeiture, the case must be remanded to the district director for consideration of claimant's financial situation and establishment of a repayment schedule. *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon).

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

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

The Board affirmed the administrative law judge's rational conclusion that claimant willfully under-reported his earnings on his June 1995 LS-200 Form for the period of 9/1/92 - 5/17/95. Consequently, it affirmed the determination that claimant's benefits are subject to the forfeiture provisions of Section 8(j). The Board rejected claimant's assertion that the forfeiture period should be limited to six months. In so doing, the Board analyzed the language of the Act, the regulation and the legislative history of the section to conclude that Congress did not intend to create such a limitation. Rather, Congress' intent was to prevent employers from requesting post-injury earnings information more than twice per year and to apply forfeiture for omissions or under-reporting of earnings for a period equal to the period of non-compliance. Consequently, the Board affirmed the administrative law judge's determination that claimant's benefits for the period during which earnings were under-reported are subject to forfeiture. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

The Board rejected claimant's contention that all forfeiture proceedings must begin with the district director, and held, based on a consideration of Section 8(j) and its implementing regulations, 20 C.F.R. §§702.285 and 702.286, as well as 20 C.F.R. §702.336, that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the administrative law judge. Moreover, as the administrative law judge allowed claimant to fully present his defenses regarding his failure to comply with the reporting requirements of Section 8(j), and as his findings in this regard were rational, supported by substantial evidence and in accordance with law, they were affirmed. The Board rejected claimant's assertion that the administrative law judge erred in not considering money paid by employer to claimant as part of an aborted settlement agreement compensation forfeited by

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

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

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

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

The Board reversed the administrative law judge's finding that earnings from illegal activities need never be reported on an LS-200 earnings reporting form. Specifically, the Board held that the term "earnings" as it is used in Section 8(j) and defined by 20 C.F.R. §702.285(b) is broad enough to include earnings from illegal activities and, in light of the

plain language of the regulation, the Board stated that the holding in *Licor v. Washington Metro. Area Transit Auth.*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989), cannot be extended to apply to Section 8(j). Thus, when an appropriate request has been made, the knowing and/or willful failure to report, or to accurately or timely report, such income may result in the forfeiture of benefits. In this case, the administrative law judge made no finding regarding whether claimant had earnings from his illegal activities; therefore, the Board remanded the case for further findings. The Board advised that if the administrative law judge finds there was a violation of Section 8(j), compensation would be forfeited between January 1, 1992, and June 24, 1997, as those are the dates that coincide with the request and with claimant's disability, and that the suspension schedule would be set by the district director. The Board noted that the burden is on employer to present evidence of earnings in order to show that there has been a reporting violation. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).