

ASTERIO MANGALIMAN)
)
 Claimant-Respondent)
)
 v.)
)
 LOCKHEED SHIPBUILDING)
 COMPANY)
)
 Self-Insured)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order After Remand of James J. Butler, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz, Frol & Jorgensen, P.S.), Seattle, Washington, for self-insured employer.

Karen B. Kracov (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order After Remand (86-LHC-924) of Administrative Law Judge James J. Butler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee

award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. Claimant injured his left shoulder on January 6, 1984, while working in employer's pipe shop. He returned to work and, on October 29, 1984, reinjured his left shoulder. He returned to work again on November 27, 1984. After reinjuring his arm several more times and his shoulder in September 1985, claimant was ultimately placed on light duty assignment in October 1985. Claimant was fired on April 8, 1986, after having received three performance notices within twelve months for unauthorized absences and unsatisfactory work. Claimant has not worked since that time. Employer voluntarily paid temporary total disability compensation through February 20, 1984, from October 31, 1984 to November 27, 1984, and from May 29, 1985 to June 2, 1985.

In his Decision and Order dated March 18, 1988, Administrative Law Judge Butler found that claimant was entitled to temporary total disability for various periods. The administrative law judge also awarded claimant continuing permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), as of his November 4, 1986, date of permanency, finding that although claimant is unable to perform his regular work on a sustained basis, employer has demonstrated the availability of suitable alternate employment as a phlebotomist (blood drawer) and restaurant manager, with an average salary of \$7.00 per hour. The administrative law judge, however, denied claimant compensation between the date of his dismissal, April 8, 1986, and November 4, 1986, finding that claimant's temporary loss of wage-earning capacity during this period was unrelated to his injury. Finally, the administrative law judge found that employer was not entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer sought reconsideration, based in part on *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986), *decision on remand after* 642 F.2d 445 (3d Cir. 1981)(mem.), *vacating and remanding* 12 BRBS 133 (1980).

In his Decision and Order on Reconsideration, the administrative law judge reaffirmed his finding that claimant sustained a loss in his wage-earning capacity as a result of the 1984 and 1985 work injuries, as well as his finding that claimant was unable to perform his usual work. Citing *Walker*, 19 BRBS at 171, the administrative law judge also determined that employer met its burden of demonstrating suitable alternate employment by providing claimant with light-duty work in its facility which claimant was capable of performing but, without explanation, found it and similar cases cited by employer were distinguishable from the present case. Accordingly, he determined that in addition to the compensation previously awarded, claimant was also entitled to temporary partial disability from April 8 to November 4, 1986, the period between his dismissal and maximum medical improvement and from September 30, 1985, to October 17, 1985, when he was performing light duty work.¹ In a Supplemental Order Awarding Attorneys' Fee, employer was also held liable for a \$5,637.50 fee plus \$1,062.02 in expenses.

¹The administrative law judge stated that these awards were to be based on the difference between claimant's pre-injury wages and the wages he earned in his light-duty job, but did not make a specific finding as to what claimant earned in that job.

Employer appealed to the Board, challenging the compensation award, the denial of Section 8(f) relief, and the propriety of the fee award. In its Decision, the Board remanded the case for reconsideration of the extent of disability. The Board noted that the administrative law judge found that employer provided claimant with a suitable light duty job within its facility from which he was terminated and without explanation found this case distinguishable from *Walker*. The Board stated that pursuant to *Walker*, if the claimant has lost his suitable light duty job with employer due to factors solely within his control, rather than because of his disability, then the light duty job establishes claimant's post-injury wage-earning capacity. Noting the similarity between the facts of *Walker* and those in the instant case, the Board directed the administrative law judge on remand to determine whether claimant lost his job due to factors within his control, to explain how *Walker* is distinguishable, and to determine whether claimant sustained a loss of wage-earning capacity. The Board also affirmed the administrative law judge's denial of Section 8(f) relief and vacated the fee award, instructing the administrative law judge to reconsider this issue in accordance with his disability findings on remand. *Mangaliman v. Lockheed Shipbuilding Co.*, BRB No. 88-4146 (December 30, 1991)(unpublished).

In his Decision and Order After Remand, the administrative law judge reinstated his prior awards. He found that the Board was correct in stating that pursuant to *Walker*, where an employer has met its suitable alternate employment burden by providing claimant with a job within its facility and claimant is subsequently discharged for violating a company policy, as was true here, the employer need not show the availability of jobs in the open labor market to meet its burden. Nonetheless, the administrative law judge determined that *Walker* does not preclude employer from assuming this burden, as employer did here. The administrative law judge also found *Walker* distinguishable because it was concerned with total disability, not the measure of the extent of permanent partial disability. In addition, he determined that nothing in *Walker* stands for the principle announced in the remand, *i.e.*, that any light duty assignment establishes a permanently partially disabled employee's wage-earning capacity, and suggested that perhaps that is why employer assumed the burden here of introducing evidence of other available jobs. The administrative law judge further found that "it was all but stipulated" that claimant's wages remained the same both before and after his termination.² Finally, he affirmed his prior finding that claimant's attorney is entitled to a fee payable by employer on the rationale that claimant obtained permanent partial disability benefits as a result of counsel's efforts in the proceedings before him.

In its appeal of the administrative law judge's Decision and Order After Remand, employer argues that the administrative law judge erred in failing to reconsider the issue of suitable alternate employment in accordance with the Board's remand instructions and incorrectly determined that *Walker* is distinguishable from the present case. Employer argues that the award of permanent partial disability compensation must be reversed consistent with *Walker* because on remand the administrative law judge determined that claimant lost his suitable light-duty job based on factors

²From the context, it appears that the administrative law judge meant to say that claimant's wages remained the same before and after claimant's injury, not before and after his termination.

within his control and that his light duty employment earnings were the same as his pre-injury wages.

The Director responds that Section 8(h) of the Act, 33 U.S.C. §908(h), mandates that all evidence relating to claimant's wage-earning capacity on the open labor market be considered in determining wage-earning capacity and that adherence to *Walker* precludes the administrative law judge from performing this statutory duty. The Director further contends that the fact that claimant may have received post-injury wages equal to his pre-injury wages does not conclusively prevent a finding of lost wage-earning capacity and that *Walker* is contrary to *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1539 (1994), which is controlling, as this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The Director also maintains that, in any event, the administrative law judge properly found *Walker* distinguishable from the present case because employer introduced evidence of suitable alternate employment following claimant's light duty job which the administrative law judge was bound to consider.

Employer replies that it is well settled that the availability of suitable alternate employment on the open market need not be considered where employer has provided claimant with a suitable job within its facility, and that, contrary to the Director's assertion, *Walker* comports with Section 8(h). In addition, employer avers that both *Walker* and the present case are distinguishable from *Edwards* and that where the facts of a case fall within *Walker*, it is not altered by employer's introducing other evidence of job availability in the open market. Accordingly, employer contends that the Board should reverse the award of permanent partial disability compensation and the award of an attorney's fee contained in the Decision and Order on Remand or alternatively remand the case again for the administrative law judge to reconsider the question of suitable alternate employment consistent with the Board's initial decision remanding the case.

Section 8(c)(21), (e) of the Act, 33 U.S.C. §908(c)(21), (e), provides for award for partial disability benefits based on the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), which provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988).

In his Decision After Remand, the administrative law judge found that claimant sustained a loss of wage-earning capacity and awarded him permanent partial disability benefits based on the difference between his \$515.86 pre-injury average weekly wage and the \$7.00 per hour which employer established he could have earned on the open market. The administrative law judge based

this wage-earning capacity of \$7.00 per hour on an average of the salaries of a phlebotomist and restaurant manager, the alternate employment positions in the open market identified by employer. He also found that the light-duty job employer provided in its facility constituted suitable alternate employment under *Walker* and that claimant's earnings were essentially the same before and after his injury. The administrative law judge did not, however, consider whether claimant's post-injury earnings in employer's facility fairly and reasonably represented his post-injury wage-earning capacity or include those earnings in his wage-earning capacity calculations.

Initially, we reject employer's assertion that application of *Walker* mandates reversal of the administrative law judge's award of permanent partial disability benefits in this case. As the administrative law judge properly noted on remand, *Walker* is distinguishable from the present case on the ground that it was concerned with claimant's entitlement to total disability, rather than the extent of permanent partial disability. In *Walker*, claimant, who had sustained injuries to both knees, sought temporary total disability benefits. The administrative law judge initially denied the total disability claim, as claimant was offered light duty employment with employer and was discharged from that job for reasons unrelated to his disability. The administrative law judge awarded claimant temporary partial disability benefits based on his loss of wage-earning capacity. Claimant appealed, asserting entitlement to total disability benefits, and the Board affirmed the administrative law judge's decision. *Walker*, 12 BRBS at 133. After appeal to the United States Court of Appeals for the Third Circuit, the case was remanded for further findings regarding the facts surrounding claimant's discharge and whether it was related to his disability. *Walker*, 642 F.2d at 445. Following remand, the administrative law judge found claimant was discharged for violating the collective bargaining agreement. Therefore, he again denied total disability and reinstated his partial disability award. The Board affirmed. *Walker*, 19 BRBS at 172-173.

The issue in each of these appeals concerned whether a job at employer's facility which claimant loses for reasons unrelated to his disability can constitute suitable alternate employment precluding an award of total disability. Under *Walker*, such a suitable job can constitute suitable alternate employment. The issue of the extent of claimant's post-injury wage-earning capacity in suitable alternate employment was not raised in any appeals of *Walker*, however, nor was the partial disability award challenged. Thus, the administrative law judge in the present case properly determined that "there is nothing in [*Walker*] that stands for the principle that any light duty assignment wage following an injury establishes a permanently partially disabled claimant's post-injury wage-earning capacity." Decision and Order on Remand at 1. However, the actual earnings in a suitable job lost by claimant's misconduct, like any other suitable job claimant holds post-injury, should be considered by the administrative law judge in determining claimant's wage-earning capacity.

The decision of the United States Court of Appeals for the Ninth Circuit in *Edwards*, 999 F.2d 1374, 27 BRBS at 81 (CRT), supports the administrative law judge's analysis. In *Edwards*, employer retrained claimant as a mechanical inspector after his injury, and claimant thereafter found work in that capacity with a different employer, but was laid off after 11 weeks because of a

reduction-in-force.³ The Ninth Circuit reversed the Board's holding that employer established suitable alternate employment by introducing evidence of this post-injury employment, indicating that it agreed with the Director that claimant's short-lived employment did not prove that such work was "*realistically and regularly* available to claimant on the open market." *Edwards*, 999 F.2d at 1375, 27 BRBS at 83 (CRT) (emphasis in original). In deferring to the Director's position that wage-earning capacity is the touchstone of the extent of disability determination and that post-injury earnings must be sufficiently regular to establish true earning capacity, the court stated that this interpretation "fairly serves the long-term remedial purpose of the LHWCA, an act designed to compensate for any injury-related reduction in wage-earning capacity through the claimant's lifetime." *Id.*, quoting *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 799 (D.C. Cir. 1984)(emphasis in *Edwards*). Thus, in *Edwards*, the court held that where claimant holds a job for a short period of time, the administrative law judge can reasonably conclude that his earnings in that job do not reasonably reflect his post-injury wage-earning capacity. This holding is not inconsistent with *Walker*, since in finding employer's job offer met its burden in that case, the administrative law judge specifically found that at least 90 similar positions existed at all times from claimant's 1977 injury through the date of the second hearing several years later. Thus, the job employer established in *Walker* was sufficient to establish realistic job availability. Under these circumstances, we reject the Director's contention that these decisions are conflicting. We agree that *Edwards* is controlling,⁴ and under its holding, a suitable job offered by employer can establish claimant's earning capacity if it supports a conclusion that suitable work was "realistically and regularly" available on the open market. *See also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988).

The Board's initial decision remanding this case was issued prior to *Edwards*. Contrary to the Director's argument, we cannot affirm the administrative law judge's decision, as he did not determine whether the job claimant held was sufficient to establish a true earning capacity or factor it into his wage-earning capacity calculation, despite his statement that the job would meet employer's burden of demonstrating suitable alternate employment. Therefore, the case must be remanded for reconsideration of claimant's wage-earning capacity under Section 8(h) consistent with *Edwards*.

³In summarizing the facts in *Edwards*, the Director erroneously states that claimant worked for "his employer" after being retrained. Claimant's employer when he was injured was Todd Shipyards; following his retraining by Todd, claimant obtained a position at Nordon Manufacturing.

⁴Employer has attached *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), in support of its argument that claimant is not entitled to benefits. *Brooks* is similar to *Walker* in that it deals with total disability and the effect of a claimant's discharge for reasons unrelated to disability on the availability of a suitable job. These cases establish that the fact that claimant loses a job for reasons unrelated to his disability does not preclude consideration of the job as suitable alternate employment. They do not exempt employer from meeting the normal tests for establishing suitable alternate employment, nor do they address loss in wage-earning capacity.

In view of *Edwards* and other case precedent, we agree with the Director that the administrative law judge did not err in considering employer's evidence relating to claimant's earning capabilities on the open market. On remand, we thus conclude that it is proper for the administrative law judge to consider all evidence relevant to claimant's wage-earning capacity, including both the job offered by employer and other suitable jobs. Section 8(h) requires that the administrative law judge evaluate all relevant evidence under a range of relevant factors in determining claimant's post-injury wage-earning capacity. See *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 2150 (1995); *Randall*, 725 F.2d at 796-797, 16 BRBS at 64-65 (CRT); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 17 (1980); see also 20 C.F.R. §702.338. We note that the Board has stated in past cases that where claimant is employed and his employment is regular, continuous and necessary to employer, that job is sufficient to establish his wage-earning capacity and it is not necessary for the administrative law judge to consider the open market. See, e.g., *Cook*, 21 BRBS at 6. On the facts of a specific case, this statement may remain applicable; an administrative law judge may analyze relevant factors and conclude that where claimant has such a job, it establishes his earning capacity under *Edwards*. However, an administrative law judge may clearly rely on open market evidence, as the test adopted by the Ninth Circuit in *Edwards* specifically refers to determining job availability on the open market in order to compensate loss in wage-earning capacity throughout claimant's lifetime. *Edwards*, 999 F.2d at 1375, 27 BRBS at 83 (CRT). In determining claimant's earning capacity, the administrative law judge's inquiry is not limited to exclude relevant evidence regarding the open market. See *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (5th Cir. 1990).⁵ See also *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), cert. denied, 459 U.S. 1034 (1982)(affirming administrative law judge's finding claimant's post-injury earnings do not represent his wage-earning capacity because his disabilities made it unlikely he could compete in the open market). As the courts have recognized that determinations of wage-earning capacity under Section 8(h) require a comprehensive review of all relevant factors and evidence, including that related to the open market, the administrative law judge may consider such evidence on remand.

Finally, we note that, contrary to employer's assertions, the fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that he has no loss in wage-earning capacity. See, e.g., *Rambo*, ___ U.S. at ___, 115 S.Ct. at 2150; *Container Stevedoring Co. v. Director, OWCP (Gross)*, 935 F.2d 1544, 1549, 24 BRBS 213, 220 (CRT) (9th Cir. 1991); *Allan*, 666 F.2d at 402, 14 BRBS at 430. The administrative law judge in this case did

⁵*Penrod Drilling* involved an appeal of the Board's reversal of an administrative law judge's decision relying on evidence of higher earnings in the open market than claimant achieved in the job he held. The court reversed the Board's conclusion that the administrative law judge erred in going to the open market where his job was "continuous and stable" as well as suitable to claimant's physical limitations. The court acknowledged that some courts had stated that post-injury earnings in such employment were likely to fairly represent earning capacity, but found that "such a presumption, if unrebutted, could lead to the conclusion that actual earnings equal earning capacity. *Id.*, 905 F.2d at 88, 23 BRBS at 112 (CRT). The court found that the Board erred in conclusively presuming from its determination of continuous and stable employment that actual earnings equal earning capacity rather than reviewing the administrative law judge's decision to determine whether it was supported by substantial evidence.

not address whether claimant's actual earnings in his light duty job could establish his wage-earning capacity under the relevant factors. Accordingly, we vacate the administrative law judge's award of permanent partial disability compensation and remand this case for reconsideration consistent with this opinion.

Employer also appeals the administrative law judge's award of an attorney's fee to claimant's attorney, arguing that as no permanent partial disability compensation is owed, claimant's counsel is not entitled to an attorney's fee. In a Supplemental Order Awarding Attorney's Fee issued February 1, 1989, prior to the initial appeal in this case, the administrative law judge awarded claimant's attorney \$5,637.50 for 45.1 hours of services at \$125 per hour, plus \$1,062.02 in expenses.⁶ In its Decision and Order remanding the case, the Board instructed the administrative law judge to determine whether, in fact, claimant, received additional compensation sufficient to support a finding of fee liability under 33 U.S.C. §928(b). On remand, without making any specific findings, the administrative law judge indicated that "claimant obtained a measure of permanent partial compensation" and

⁶In his original Decision and Order, the administrative law judge found, based on the parties' stipulations, that for the periods between May 29, 1985 and June 2, 1985, and October 31, 1984 and November 27, 1984, employer paid claimant temporary total disability compensation at the rate of \$318.13 per week, instead of \$343.91 per week, which suggests that additional compensation was obtained without regard to the permanent partial disability claim.

his attorney should be reasonably compensated. Inasmuch as the case must again be remanded for the administrative law judge to assess the extent, if any, of claimant's permanent partial disability, we again vacate his award of attorney's fees. On remand, the administrative law judge should reconsider the fee award consistent with his disability findings on remand and should provide a more detailed explanation of his fee liability determination. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 287-288 (1990)(Lawrence, J., dissenting).

Accordingly, both the administrative law judge's award of permanent partial disability compensation subsequent to April 1986 and his award of an attorney's fee are vacated and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision After Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge