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| HEATHER HEWINS                          | ) |                         |
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| Claimant-Respondent                     | ) |                         |
|   | ) |                         |
| v.                                      | ) |                         |
|   | ) |                         |
| CERES MARINE TERMINALS,<br>INCORPORATED | ) | DATE ISSUED: 04/12/2011 |
|   | ) |                         |
|   | ) |                         |
| Self-Insured                            | ) | ORDER on                |
| Employer-Petitioner                     | ) | RECONSIDERATION         |

Employer has filed a timely motion for reconsideration of the Board’s decision in the captioned case, *Hewins v. Ceres Marine Terminals, Inc.*, BRB No. 10-0465 (Jan. 19, 2011)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds that employer’s motion should be denied. We deny employer’s motion.

To recapitulate, claimant sought total disability compensation and medical benefits under the Act for injuries she sustained to her knees while working for employer as a driver. In her Decision and Order, the administrative law judge determined, *inter alia*, that claimant is unable to return to her work as a driver and that employer’s November 17, 2009, labor market survey established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from October 29, 2008, to November 17, 2009, temporary partial disability benefits from November 17, 2009 and continuing, and medical benefits.

On employer’s appeal, the Board determined that the administrative law judge’s award of temporary partial disability benefits to claimant commencing November 17, 2009, could not be affirmed. Specifically, the Board stated that the administrative law judge did not fully address all the evidence concerning the date on which suitable alternate employment became available. The Board therefore vacated the administrative law judge’s finding that claimant’s award of temporary partial disability benefits commenced on the date of employer’s labor market survey, November 17, 2009, and remanded the case for a determination of the date on which employer established the availability of suitable alternate employment.

In its motion for reconsideration, employer contends that the Board's order in this case is not consistent with its decision; specifically, employer contends that since it potentially established the availability of suitable alternate employment as of March 17, 2009, the Board should vacate the administrative law judge's award of temporary total disability benefits as of that date. Employer's contention is without merit. Where, as in this case, it is undisputed that claimant is incapable of resuming her usual employment duties with employer, claimant's disability remains total until employer establishes the availability of suitable alternate employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2<sup>d</sup> Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1073(1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). In its decision, the Board remanded this case for the administrative law judge to determine the earliest date upon which suitable alternate employment for claimant was available. Consequently, the date on which employer first established the availability of suitable alternate employment will be resolved by the administrative law judge on remand; it is on this date that claimant's total disability becomes partial. Until such a finding on that issue is made, however, claimant is entitled to the total disability benefits awarded, through November 17, 2009, as she established her *prima facie* case of total disability. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988); *Rinaldi*, 25 BRBS 128.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §§801.301(c), 802.409.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge