BRB No. 13-0593

JAMES GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: Aug. 19, 2014
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

Lawrence P. Postal (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-LHC-01774) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his back, neck, right shoulder, hip and leg on December 26, 2010, during the course of his employment as a rigger when a 50-pound rod fell and struck him across the head, neck and back.[1] An MRI of claimant's neck showed degenerative changes and foraminal compromise, and an MRI of claimant's lower back showed congenital stenosis, degenerative changes, herniation at L3-4 and L4-5 and a stenotic dural sac at L5-S1. CX 1 at 5; EX 22. Following his injury, claimant returned to longshore work on April 30, 2012, but he testified that he was limited to performing light-duty jobs as a flagman, whipman and foreman. Tr. at 27-28. Claimant sought compensation for total disability from the date of his injury until he returned to work, and partial disability compensation thereafter based on a loss of wage-earning capacity. 33 U.S.C. §908(a), (b), (c)(21). Employer controverted the claim.

In his decision, the administrative law judge credited the opinion of Dr. Likover to find that claimant's work injuries reached maximum medical improvement on December 15, 2011. Decision and Order at 21. The administrative law judge credited the opinion of Dr. Whitsell to find that claimant was capable of working in a light-duty duty capacity as of March 21, 2011, with restrictions of lifting no more than 30 pounds and no prolonged bending, squatting, or crawling. *Id*. at 22-23. The administrative law judge found that claimant obtained work within his restrictions after he returned to longshore employment on April 30, 2012, and that claimant could have obtained longshore work within his restrictions as of March 21, 2011, with no loss of wage-earning capacity. *Id*. at 23. The administrative law judge determined claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), by dividing claimant's agreed-upon total earnings during the year preceding the work injury, $46,233.20, by the number of weeks claimant actually worked, 48.14286, to derive an average weekly wage of $960.33. *Id*. at 24. Thus, the administrative law judge awarded claimant temporary total disability compensation from December 26, 2010 through March 21, 2011.[2]

On appeal, claimant challenges the administrative law judge's findings that he could have returned to light-duty work on March 21, 2011; that employer established the availability of suitable alternate employment on that date; and that he has had no post-injury loss of wage-earning capacity after his return to longshore work on April 30, 2012. Claimant also challenges the administrative law judge's average weekly wage

[1] Claimant did not start working as a longshoreman until he was 60 years old, and he was 70 as of the April 2013 hearing. Tr. at 12-14. He testified he primarily worked heavy-duty longshore jobs due to his lack of seniority. *Id.* at 14-15.

[2] Given this award, the administrative law judge found that employer's claim for Section 8(f) relief, 33 U.S.C. §908(f), was moot.

calculation. Employer responds that the administrative law judge's decision should be affirmed. Claimant filed a reply brief.[3]

Claimant contends the administrative law judge erred in finding that he could return to modified work on March 21, 2011 and that suitable longshore work was available on that date. We agree that these findings cannot be affirmed and that the case must be remanded for the administrative law judge to reconsider the relevant evidence.

We first address claimant's contention that the administrative law judge erred in finding claimant could have obtained suitable light-duty longshore work as of March 21, 2011 when Dr. Whitsell released claimant to return to work with restrictions. *See* discussion, *infra*. Claimant returned to light-duty longshore work in April 2012. The administrative law judge noted that employer's first labor market survey was conducted on January 12, 2012, but he found that "there is no evidence showing claimant was prevented from returning to work on the waterfront as of Dr. Whitsell's release on March 21, 2011." Decision and Order at 23. The administrative law judge thus summarily concluded that claimant's disability ended on March 21, 2011.

Where, as here, claimant is unable to return to his usual heavy-duty longshore employment because of his work injury,[4] claimant has established a prima facie case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet this burden by demonstrating the existence of suitable jobs at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Employer can attempt to establish retroactively that suitable alternate employment was available at the time claimant was able to work. *See Stevens v.*

[3] We accept the additional pleadings filed by employer on July 1, 2014 and by claimant on August 4, 2014. 20 C.F.R. §802.215.

[4] The administrative law judge found that claimant established he could not return to his usual employment as of December 26, 2010, when Dr. Sassard took him off work. Claimant's uncontradicted testimony at the hearing and in his deposition was that he could no longer perform the heavy-duty longshore jobs he performed pre-injury and that post-injury he limited himself to working as a flagman, whipman for ships with 20 pounds or less twist locks, and infrequent work as a foreman. Tr. at 14-15, 17, 26-28; EX 61 at 16-22, 57-59. The administrative law judge found claimant a credible witness with "valid" complaints of pain. Decision and Order at 20.

Director, OWCP, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

We vacate the administrative law judge's finding that suitable jobs were available to claimant on the waterfront in March 2011. The administrative law judge erred in relying on the absence of evidence that claimant was prevented from returning to work on the waterfront on March 21, 2011. Decision and Order at 23. The burden is on employer to affirmatively establish that suitable work was available to claimant. *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 evidence regarding waterfront work is contained in the deposition testimony of employer's operations manager, Steve McCormick, who explained how gang sheets from February and March 2013 could be analyzed to determine what claimant could have earned during those months. Mr. McCormick averred that these gang sheets demonstrate that, as of claimant's return to work in April 2012, claimant could have worked twice as much if he had chosen to do so. The administrative law judge rationally rejected this testimony. *See* Decision and Order at 4, 20. Moreover, the testimony does not establish the availability of suitable jobs on the waterfront in March 2011. In addition, claimant testified at his deposition that he could not have obtained as many suitable jobs in March 2011 since he had less seniority at that time than when he returned to work on April 30, 2012. EX 61 at 50-51.

In this case, employer's earliest evidence of allegedly suitable alternate employment is a labor market survey dated January 12, 2012, based on Dr. Likover's December 2011 restrictions.[5] EX 29. Therefore, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment on March 21, 2011. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). In the absence of any evidence of alternate employment until January 12, 2012, we modify the administrative law judge's decision to award claimant compensation for temporary total disability until he reached maximum medical improvement on December 15, 2011, and for permanent total disability until January 11, 2012. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998). We remand the case for the administrative law judge to address employer's evidence and determine whether employer established the availability of suitable alternate employment on the open market prior to the time claimant returned to light-duty work on the waterfront.[6] *See*

[5] Additional surveys were conducted on February 17, 2012, March 14, 2012, March 28, 2012, April 11, 2012, May 16, 2012, June 7, 2012 and July 2, 2012. EXs 32, 37, 38, 39, 44, 45, 46.

[6] Claimant also argues that he is entitled to total disability benefits from July 7, 2011 to April 30, 2012, while he was being evaluated for vocational retraining, pursuant

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. 1998).

We also agree with claimant that the administrative law judge must reconsider the medical restrictions resulting from claimant's injury. Dr. Likover originally opined on February 11, 2011, that claimant could return to his usual work without any restrictions. EX 17. However, claimant continued to complain of pain and was treated by Dr. Sassard and examined again by Dr. Likover. *See* EXs 15, 22; CX 1. Dr. Likover stated on December 15, 2011, that claimant had reached maximum medical improvement and could return to light-duty work with the following limitations: no lifting of more than 20 pounds regularly; occasional bending permitted; sitting six to eight hours per day permitted; and walking only two hours per day.[7] EX 28B. The administrative law judge specifically credited Dr. Likover's opinion as to the date claimant's work injuries reached maximum medical improvement. Decision and Order at 21. After claimant had returned to longshore work, Dr. Likover stated on June 12, 2012, that claimant was capable of full-time, light-duty work. EX 42. Notwithstanding this reliance on Dr. Likover's opinion with respect to maximum medical improvement, in addressing claimant's ability to return to work and residual restrictions the administrative law judge relied on Dr. Whitsell's March 21, 2011 opinion that, as of that date, claimant could return to light-duty work with no lifting of more than 30 pounds, and with no prolonged bending, squatting or crawling. Dr. Whitsell stated that claimant's shoulder contusion had "essentially resolved" and that he had sustained a lumbar strain. EXs 20, 21.

We cannot affirm the basis on which the administrative law judge apparently gave determinative weight to Dr. Whitsell's opinion regarding claimant's residual restrictions and the date on which claimant was capable of returning to work. The administrative law judge rationally gave less weight to Dr. Sassard's opinion that claimant was capable of

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to the recommendation of Dr. Sassard (EX 25) and the referral of the Office of Workers' Compensation Programs. *See generally Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). However, claimant never received vocational retraining; he was only evaluated for possible retraining. *See* EXs 19, 27, 28, 35, 52. Thus, claimant was not prevented from working due to his participation in a vocational rehabilitation program. Accordingly, claimant is not entitled to compensation for permanent total disability during this period. *See Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

[7] Dr. Likover's opinion was given after claimant had an MRI on May 3, 2011, which showed congenital stenosis, degenerative changes, herniations at L3-4 and L4-5, and a stenotic dural sac at L5-S1. EX 22. Claimant received a steroid injection for symptoms related to the L4-L5 disc herniation in June 2011. EXs 23; 70 at 2.

clerical work only as of May 7, 2012, on the ground that both Dr. Likover and Dr. Whitsell had opined claimant could return to waterfront work with restrictions at earlier dates. Decision and Order at 23; *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge apparently gave less weight to Dr. Likover's opinion on the ground that he had originally opined that claimant could return to work without restrictions and later gave a differing opinion. We do not find this to be a valid basis for discounting Dr. Likover's changed opinion. The change in Dr. Likover's opinion was based on several factors: his additional examinations of claimant and claimant's complaints of pain; the May MRI; and his agreement with Dr. Sassard's recommendation that claimant should have a steroid injection. Moreover, the administrative law judge found claimant's testimony credible and his complaints to his physicians consistent. Decision and Order at 20. The administrative law judge noted that Dr. Likover found claimant was cooperative and sincere; the administrative law judge found there is no evidence that claimant was malingering. *Id*. As the administrative law judge did not provide a valid rationale for relying on Dr. Whitsell's March 2011 opinion in view of claimant's later date of maximum medical improvement, claimant's continued medical treatment, and the reasons for Dr. Likover's change of opinion, we remand this case for additional findings of facts concerning the date claimant was able to return to work and the extent of the restrictions caused by his work injuries.

Claimant challenges the administrative law judge's finding that he sustained no loss of wage-earning capacity due to his work injuries. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If they do not, or if claimant does not have any actual earnings, the administrative law judge must determine a dollar amount which reasonably represents his post-injury wage-earning capacity taking into consideration the factors enumerated in Section 8(h).[8] *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS

[8] Section 8(h) states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, 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

108(CRT) (5th Cir. 1990); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). In this regard, claimant's post-injury wage-earning capacity must reflect that he worked part time prior to his injury, although employer may establish suitable alternate employment based on full-time positions. *See Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007); *Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007). Under Section 8(c)(21) of the Act, claimant is compensated for the amount of wage-earning capacity lost as a result of the injury based on two-thirds of the difference between claimant's average weekly wage at the time of the injury and his wage-earning capacity after the injury. That is, the administrative law judge must compare claimant's pre-injury part-time wages with his post-injury wage-earning capacity as a part-time employee. *Neff*, 41 BRBS 46.

In this case, the administrative law judge summarily stated "[T]here is nothing to show that claimant's earning capacity was diminished due to the 2010 accident. Claimant has not proven he would have gotten more work but for the accident." Decision and Order at 23. The administrative law judge also found that claimant was a part-time worker both before and after the work injury, and he noted claimant's testimony that he could work despite experiencing pain. The concept of wage-earning capacity concerns claimant's ability to earn in his injured condition, and not what he would have earned but-for his injury. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). Thus, the administrative law judge erred in stating that claimant did not prove he would have earned more but for his injury. The administrative law judge did not perform the requisite analysis: determine if claimant's actual post-injury wages represent his wage-earning capacity; compare claimant's post-injury wage-earning capacity to his pre-injury earnings; or determine what claimant could earn in part-time work on the open market, based on labor market survey evidence. *See Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *Neff*, 41 BRBS 46. In this regard, we note that the burden of proof is on the party contending that claimant's actual post-injury earnings are not representative of his wage-earning capacity.[9] *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *Penrod Drilling Co.*, 905 F.2d 84, 23 BRBS 108(CRT). Accordingly, we vacate the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity due to his work injury and we remand for him to address the relevant evidence pursuant to the applicable law.

> affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

[9] On appeal, claimant asserts that comparing his actual pre- and post-injury longshore wages establishes a wage loss of approximately $450 per week.

Lastly, claimant contends that, in calculating average weekly wage, the administrative law judge erred in failing to account for "wages" claimant received during the year preceding the work injury. The administrative law judge relied on the parties' agreement as to claimant's earnings in the year prior to his injury. Claimant was represented by a different attorney before the administrative law judge than he retained on appeal. Claimant contends that his trial attorney misstated his total income, which was based solely on his longshore hourly earnings, by omitting container royalty income and other "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13), that are reported on his Social Security earnings statement. *Compare* EX 10 *with* EX 55 at 13-18; *see generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000) (holding that container royalty payments are "wages" if they are earned by working); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Claimant asserts his correct average weekly wage is $1,068.11, rather than the $960.33 average weekly wage calculated by the administrative law judge.

In his decision, the administrative law judge calculated claimant's average weekly wage under Section 10(c),[10] since he was not a five- or six-day a week worker. Decision and Order at 24; *see generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge stated that the parties had agreed that claimant had earnings of $46,233.20 from December 26, 2009 to December 23, 2010. However, there was no formal stipulation. *See generally Ramos v. Global Container Services, Inc.*, 34 BRBS 83 (1999). The administrative law judge subtracted 27 days claimant missed work due to a work-related finger injury and divided by 48.14286 weeks claimant earnings of $46,233.20 to derive an average weekly wage of $960.33. Decision and Order at 24.

Since claimant's argument that he had additional "wages" in the year prior to the work injury could be addressed pursuant to a Section 22 modification request based on a mistake of fact, 33 U.S.C. §922, and as we are remanding this case, we hold that claimant may raise his average weekly wage contention before the administrative law judge on remand in the interest of judicial economy. *See generally S.K.* [*Khan*] *v. Service Employers Int'l*, 41 BRBS 123 (2007); *Ramos*, 34 BRBS 83.

[10] Claimant does not challenge the administrative law judge's use of Section 10(c) or his methodology for computing his average weekly wage.

Accordingly, the administrative law judge's Decision and Order is modified to award claimant compensation for temporary total disability from December 26, 2010 to December 15, 2011, and for permanent total disability from December 16, 2011 until January 12, 2012. We remand the case for the administrative law judge to address whether claimant is entitled to additional disability benefits. Consistent with this decision, the administrative law judge should address the issues of claimant's medical restrictions, the availability of suitable alternate employment, and claimant's post-injury wage-earning capacity. If the administrative law judge awards claimant permanent disability benefits for more than 104 weeks, he must address employer's claim for Section 8(f) relief.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge