U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0168

COSMO COLARUOTOLO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA CONTAINERS, INCORPORATED	)	
	)	DATE ISSUED: Feb. 25, 2015
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order Granting Employer's Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for employer/carrier.

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

HALL, Acting Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order and the Decision and Order Granting Employer's Motion for Reconsideration (2013-LHC-0095) of Administrative Law Judge Larry W. Price 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 if they 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).

Claimant, as a result of a slip and fall accident which allegedly occurred in the course of his work for employer on September 13, 2010,[1] claimed that he aggravated pre-existing neck and back conditions. Claimant did not return to work and took a medical retirement from the union in 2011. Claimant thereafter filed a claim seeking benefits under the Act alleging that the September 13, 2010 incident aggravated his pre-existing neck and back conditions and that cumulative trauma over the course of his entire longshore work contributed to his present neck and back injuries. Employer controverted the claim.

In his initial decision, the administrative law judge found that the September 13, 2010 fall occurred as alleged, and that this fall caused exacerbations of claimant's pre-existing neck and back conditions. The administrative law judge, however, found that claimant did not sustain any cumulative traumatic injuries. The administrative law judge found claimant incapable of returning to his pre-injury work as a result of his injuries and that employer did not establish the availability of suitable alternate employment. Thus, he awarded claimant temporary total disability benefits from September 14, 2010 through August 8, 2011, and ongoing permanent total disability benefits from August 9, 2011, based on an average weekly wage of $1,557.16. 33 U.S.C. §908(a), (b). On reconsideration, the administrative law judge found that employer established the availability of suitable alternate employment as of August 9, 2011, with a residual weekly wage-earning capacity of $1,232.58. He thus modified his prior award of benefits to reflect claimant's entitlement to permanent partial, rather than permanent total, disability benefits from August 9, 2011. 33 U.S.C. §908(c)(21), (h).

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment, as well as his calculations of claimant's average weekly wage and post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant first contends the administrative law judge erred in finding that he is medically capable of performing suitable alternate employment as a tower clerk. Where, as in this case, it is uncontested that claimant cannot return to his usual employment and thus has established his prima facie case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee*

[1]From 2004 until the September 13, 2010 injury, claimant received assignments from the casualty board as a result of his having obtained an Americans with Disabilities Act accommodation due to his having had his cervical spine fused at C5-7, two artificial knees implanted, and two bad shoulders treated.

Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). As the fact-finder, the administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Employer may meet its burden by offering an injured employee a light-duty job in its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We reject claimant's contention that the administrative law judge did not adequately address all of claimant's restrictions in assessing his ability to perform the tower clerk position. The administrative law judge addressed the limitations utilized by the parties' vocational experts, Howard Stauber and Thomas Yankowski, following claimant's functional capacity evaluation, as well as claimant's testimony regarding his "mobility impairment."[2] Decision and Order at 5, 13-14, 22-23. The administrative law judge's findings reflect an analysis of claimant's limitations and abilities in terms of the job requirements of the marine clerk position.[3] Contrary to claimant's contention, the physical requirements of the position, as the administrative law judge found, are within the physical restrictions of the functional capacity evaluation, as well as those imposed by

[2]The administrative law judge found that the parties' vocational experts agreed on claimant's physical limitations following his functional capacity evaluation, i.e., a limited range of motion, increased neck pain with push/pull testing, limited toleration for repetitive reaching, difficulty climbing stairs, limited ability to lift 10-15 pounds with reported pain, and limited ability to withstand either sitting or standing for more than 20 minutes. Decision and Order at 22.

[3]Mr. Stauber's job analysis includes a description of the job site/work station, including the availability of worksite ergonomic adjustments, as well as the specific physical factors required by such work, e.g., alternate sitting/standing/walking, lifting less than 5 pounds, minimal pushing/pulling, no kneeling, bending or climbing. EX 7.

Dr. Nagelberg.[4] *Hernandez*, 32 BRBS 109. Moreover, the record establishes that Dr. London opined that claimant is capable of working as a tower clerk. EX 4.

The administrative law judge additionally credited Mr. Stauber's deposition testimony that the tower clerk position could be modified to accommodate claimant's need to move around. Mr. Stauber explained that the work station, including the alignment of the computer screen, monitor, console and keyboard, may be configured to enable a clerk to regularly alternate positions. EX 7. In finding the tower clerk job suitable, the administrative law judge considered the statements of Mr. Yankowski regarding claimant's discomfort during repetitive keyboarding, as well as claimant's testimony that the position would hurt his back. The administrative law judge, however, is charged with weighing conflicting evidence, and substantial evidence supports his conclusion that the tower clerk position constitutes suitable alternate employment. Consequently, we affirm the administrative law judge's conclusion that employer established suitable alternate employment via the tower clerk position, as his findings are rational, supported by substantial evidence and in accordance with law. *Edwards*, 999 F.2d at 1375, 27 BRBS at 82(CRT); *Wilson*, 30 BRBS 199; *see generally Darby*, 99 F.3d 685, 30 BRBS 93(CRT).

Claimant next contends that even if he were able to perform the tower clerk job, employer did not put forth sufficient evidence to support a finding that he had a residual wage-earning capacity, because employer's evidence that such work is available three times per week is too speculative to support a partial disability finding. In this regard, claimant asserts that there is "great uncertainty" in Mr. Stauber's testimony regarding the availability of the tower clerk positions. Claimant further asserts that Mr. Stauber's testimony is unsupported by any studies or data and based on his inaccurate recollection of what claimant had told him regarding his ability to do this work. Moreover, claimant avers that the administrative law judge's finding is contrary to Mr. Yankowski's report, which indicates that tower clerk positions are available only on a sporadic basis.

In his initial decision, the administrative law judge determined that Mr. Stauber's testimony regarding the availability of tower work jobs was too "speculative" to support a finding that such work constituted suitable alternate employment. Decision and Order at 23. However, on reconsideration, the administrative law judge found that the speculative nature of Mr. Stauber's testimony was limited only to whether claimant could obtain the job three, four or five days per week. Decision and Order on Reconsideration at 4-5. The administrative law judge found that Mr. Stauber reasonably determined,

[4]Dr. Nagelberg limited claimant "from lifting more than ten pounds, precluded prolonged standing or walking, and precluded repetitive bending." Decision and Order at 21, *citing* CX 3.

based on claimant's description as to the method by which tower clerk positions are obtained, as well as Mr. Stauber's conversations with other medically-restricted clerks and with terminal managers, that claimant could likely obtain the tower clerk position three shifts per week. *Id.* at 5.

In his Job Analysis, Mr. Stauber indicated that a tower clerk can work shifts of varying duration, including shorter shifts of 4 hours per day, up to 5 days per week and that such work is available between 3 and 5 days a week, with 3 days "being the more likely scenario" for claimant. EX 7; EX 15 at 44. Mr. Stauber added that he reached this conclusion based on his conversations with claimant,[5] as well as with other similarly situated clerks, i.e., injured workers performing tower clerk work, and terminal managers. EX 15 at 44-45. In contrast, claimant's vocational expert, Mr. Yankowski, stated that, "according to [claimant]," the tower clerk position "is only available a minimal number of days, perhaps 3-4 times a month." CX 16. Claimant testified that he tried to avoid tower clerk work because of the toll it would take on his back, HT at 53, 72, and moreover, that, in contrast to Mr. Stauber's statements, he never told employer's expert that he could obtain tower clerk work three or four days per week. HT at 72. Faced with differing opinions as to the availability of tower clerk positions, the administrative law judge credited the testimony of Mr. Stauber, that claimant should be able to obtain such work three shifts per week, over the contrary evidence of record, i.e., claimant's testimony and Mr. Yankowski's general statement, premised on claimant's statements, that such work is only available 3-4 times a month.[6] Decision and Order on Reconsideration at 4-5. In reaching this determination, the administrative law judge considered the underlying bases of Mr. Stauber's opinion, as well as the contrary evidence of record. Consequently, the administrative law judge addressed the evidence regarding the availability of the tower clerk position, explained the basis for his credibility determinations, and thus rationally concluded that the evidence supports a finding that the tower clerk position could be reasonably available to claimant three days per week. As the administrative law judge's credibility determinations are neither "inherently incredible nor patently unreasonable," *Cordero*, 580 F.2d at 1335, 8 BRBS at

[5]Mr. Stauber stated claimant indicated to him that "he can do the job of a tower clerk without difficulty," EX 15 at 57, and that "if he were to show up at the waterfront five, six days, the likelihood [is] that he would go out maybe three days as a tower clerk." *Id.* Claimant's counsel disputed whether claimant ever made these statements, to which Mr. Stauber replied "sure he did" and that "that's my recollection of what [claimant] said." *Id.* at 45.

[6]Claimant's contention that the administrative law judge "failed to weigh conflicting evidence regarding how often the tower clerk job would be available" to claimant is therefore inaccurate.

747, these findings are affirmed. Thus, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment in the form of a tower clerk position which is reasonably available to claimant on a three days per week basis.

Claimant also contends that the administrative law judge erred, on reconsideration, by not addressing whether he became totally disabled upon the failure of the first C4-5 fusion surgery. Specifically, claimant asserts that he should be entitled to total disability benefits from the time that claimant became aware of the failure of that screw, i.e., March 7, 2012, until Dr. Nagelberg declared claimant was again permanent and stationary on February 26, 2013. The administrative law judge, in his initial decision, found that claimant has been receiving treatment for his compensable back and neck conditions, including a disc herniation at C4-5, from Long Beach Memorial Hospital, Dr. Nagelberg and Kaiser Foundation Hospital, "where he had his surgeries," and that this "medical treatment was reasonable and necessary in light of the record as a whole." Decision and Order at 25. Dr. Hwang performed surgical procedures on claimant's neck at Kaiser Foundation Hospital on March 23, 2011 and again on August 16, 2012. As these surgeries were related to claimant's work-related conditions, claimant may be entitled to total disability benefits for any periods following these procedures during which he was unable to perform the suitable alternate employment identified by employer. *See generally Pacific Ship Repair & Fabrication Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012). Accordingly, we must remand this case for consideration of this issue. On remand, the administrative law judge should address whether claimant is entitled to total disability benefits following the August 16, 2012 surgical procedure.

Claimant next contends that the administrative law judge's finding that claimant has a post-injury wage-earning capacity of $1,232.58 per week is not supported by substantial evidence. Claimant maintains that there is undisputed evidence in the record that he is unable to work more than six hours per day, a specific restriction which the administrative law judge did not address. Claimant's contention has merit. The administrative law judge found that claimant could be expected to earn $1,232.58 per week as a tower clerk, since his pay as a union clerk is $410.86 per shift, and he is capable of working three ten-hour shifts per week. However, the administrative law judge did not discuss evidence that claimant may be limited to working no more than six hours per day. Mr. Yankowski stated that a phone conversation with claimant's orthopedist, Dr. Nagelberg, revealed that the physician "anticipated that [claimant] would be able to work a maximum of 6 hours per day." CX 16. Additionally, Mr. Yankowski stated that claimant was unable to continue with his functional capacity evaluation on April 16 and 17, 2012, after about 5-6 hours due to increasing discomfort in his back and neck. *Id.* While Mr. Stauber's Comprehensive Employment Feasibility Report dated March 28, 2012, does not specifically address the number of hours per day that claimant

might physically be capable of working, it does contain a notation that his identification of suitable employment is based on, among other things, claimant's "functional capacities/work limitations, per PTP Stephen Nagelberg." CX 7. Additionally, Mr. Stauber's Job Analysis of the Tower Clerk position discusses "Work Hours" exclusively in the following manner:

> The Kitchen Tower Clerk works shifts of varying duration; the Tower Clerk can arrange to work 4 hours/day. The Kitchen Tower Clerk may be so assigned, i.e., shifts of 4 hours/day, up to 5 days per week, or a total of 20 hours per week, if so desired.

Id. Thus, the record contains evidence, not discussed by the administrative law judge, which undermines his conclusion that claimant is capable of working and/or obtaining three 10-hour shifts per week as a tower clerk. Therefore, we vacate the administrative law judge's finding that claimant's post-injury wage-earning capacity is $1,232.58. On remand, the administrative law judge should determine the number of hours per day which claimant can perform and obtain the tower clerk position, and calculate claimant's post-injury wage-earning capacity based on that determination.

Lastly, claimant argues that the administrative law judge erred in calculating his average weekly wage as he improperly excluded holiday pay and all shifts where claimant earned more than just standard pay. In this regard, claimant maintains that between his June 3, 2010 return to full work and the September 13, 2010 injury, he earned more than the $410.86 shift rate used by the administrative law judge on six days, and received three days of holiday pay as well. Claimant also contends that the administrative law judge inappropriately included his wages prior to his July 3, 2010 pay raise. Claimant contends that the most appropriate calculation of his average weekly wage involves dividing his total earnings for the period from July 5 to September 13, 2010, $17,256.18, by the actual number of days in that time frame, i.e., 71 days or 10.14286 weeks, which results in an average weekly wage of $1,701.31.

The administrative law judge, pursuant to Section 10(c), found that claimant was released to full employment after his right knee replacement and began working at his maximum pay rate on June 3, 2010, and that he received a general pay increase for union clerks which took effect on July 3, 2010, such that at the time of his September 13, 2010 accident, claimant was paid $410.86 per daily shift. The administrative law judge multiplied this daily pay rate by the average number of days per week claimant worked between June 3 and September 13, 2010, 3.79 days, to conclude that claimant had an average weekly wage at the time of injury of $1,557.16 ($410.86 times 3.79).

Section 10(c) of the Act is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied.[7] 33 U.S.C. §910; *see Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The goal of Section 10(c) is to arrive at a sum that reflects the claimant's potential to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). The administrative law judge has broad discretion in determining an employee's average weekly wage under Section 10(c). *Id.* Pursuant to Section 10(c), the administrative law judge may account for, inter alia, a claimant's intermittent work history and a raise in pay he received prior to the injury. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT).

Claimant's payroll records reflect that between June 3 and September 13, 2010, he worked 52 10-hour shifts, earning a total of $22,106.36 in wages. Specifically, claimant earned $410.86 during 36 shifts, $399.86 during 10 shifts, and amounts of $560.30 and $545.30 during three shifts each. In addition, claimant earned $784.32 in holiday pay during this time, i.e., three days of holiday pay at a daily rate of $261.44. The payroll records thus reflect that claimant earned a total of $22,890.68 from June 3 to September 13, 2010. Claimant's payroll records and testimony generally support the administrative law judge's finding that claimant worked, on average, 3.79 days per week following his full release from medical care. *See* HT at 45; CX 5.[8] However, the administrative law judge did not discuss those days in which claimant earned greater than his average shift pay of $410.86 or claimant's receipt of three days of holiday pay. *See* 33 U.S.C. §902(13); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997);[9] *Siminiski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). Additionally, the administrative law judge did not address claimant's contention,

[7]As the administrative law judge correctly noted, the parties agreed that Section 10(c) is applicable to the calculation of claimant's average weekly wage in this case.

[8]Claimant's payroll records indicate that in the 102 days between June 3 and September 13, 2010, he worked one shift per week for one week; two shifts per week for three weeks; three shifts per week for three weeks; four shifts per week for four weeks; and four shifts per week for five weeks. CX 5. Claimant testified that during this time he "was only limited to about three days, maybe four, and a very, very rare five days a week." HT at 45.

[9]Holiday pay generally is includable in a claimant's average weekly wage. *See* 33 U.S.C. §902(13); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *see also Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

raised below, that the administrative law judge should have used only claimant's earnings from July 3 through September 13, 2010, the period after which the pay raise went into effect. *See generally Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). We thus vacate the administrative law judge's average weekly wage finding and remand the case for the administrative law judge to address these issues.

Accordingly, the administrative law judge's finding that the tower clerk position identified by employer constitutes suitable alternate employment is affirmed. The administrative law judge's calculations of claimant's average weekly wage and post-injury wage-earning capacity are vacated and the case is remanded for further consideration consistent with this opinion. The administrative law judge also must consider, on remand, whether claimant is entitled to total disability benefits following his August 16, 2012 surgical procedure. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

_____
REGINA C. McGRANERY
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' finding that the administrative law judge's calculation of claimant's average weekly wage should be vacated and the case remanded for additional findings. I also agree with the majority that the administrative law judge must address whether claimant is entitled to total disability benefits following his August 16, 2012 surgical procedure. However, I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that employer met its burden to demonstrate the availability of suitable alternate employment in the form of the tower clerk position identified by employer. I would hold that the administrative law judge properly found in his initial decision that claimant is totally disabled.[10]

While I agree that the administrative law judge adequately addressed claimant's restrictions in assessing his physical ability to perform the tower clerk position, I disagree with the determination that he "rationally concluded that the evidence supports a finding that the tower clerk position could be reasonably available to claimant three days per week." *See* p. 5, *supra.* As the administrative law judge correctly stated in his first Decision and Order dated December 10, 2013, after identifying "the tower clerk position as being within [c]laimant's physical and mental capabilities, [e]mployer must next show that the position is reasonably available to [c]laimant." Decision and Order at 23, (citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 165 (5th Cir. 1981)). In initially concluding that employer failed to establish that the tower clerk position is reasonably available, the administrative law judge identified several statements by employer's vocational expert, Mr. Stauber, indicating that the availability of this position is "not assured," "speculative," and "difficult to nail down." *Id.* Thus, the administrative law judge rightfully concluded that "[e]mployer has not shown that the tower clerk position would be reasonably available to [c]laimant except on a random basis." *Id.*

On employer's motion, the administrative law judge reconsidered the issue of the reasonable availability of the tower clerk position and changed his opinion, concluding that any speculation in Mr. Stauber's testimony related not to whether the position was reasonably available, but "to whether [c]laimant could obtain the tower clerk position three, four, or five days per week" – essentially determining that the evidence establishes that, at a minimum, claimant could obtain the position at least three days per week. Decision and Order Granting Employer's Motion for Recon. at 5. I would hold that the administrative law judge erred in changing his conclusion on this point, as the initial decision was rational and supported by substantial evidence, and the latter decision is not.

[10]This holding would obviate the need to remand the case for claimant's post-injury wage-earning capacity.

In his first decision, the administrative law judge correctly identified several instances demonstrating the equivocal, speculative nature of Mr. Stauber's testimony.[11] Moreover, in both decisions, the administrative law judge credited testimony indicating that the availability of the tower clerk job depends on a number of complicated and uncertain factors outside of claimant's control.[12] This supports the administrative law judge's original finding that "[e]mployer has not shown that the tower clerk position would be reasonably available to [c]laimant except on a random basis." Decision and Order at 23.

I, therefore, do not agree that substantial evidence supports the administrative law judge's finding on reconsideration that one of Mr. Stauber's statements, that "the more likely scenario" is that the tower clerk position is available three days per week, remedies his other equivocal testimony and his unambiguous agreement that the job's availability is "speculative."[13] Nor do I agree, in light of the other evidence, that the statement

[11]For instance, while Mr. Stauber stated that "to my knowledge, the way this works . . . is that [the claimant] could literally get a tower clerk job three, four times a week," immediately thereafter he "concede[d], that is not assured." EX 15 at 44. Additionally, Mr. Stauber agreed that the availability of the tower clerk job is "actually speculative given all the intimate forces," and that the speculative nature of the job's availability means that "we can't put a hard number on it." *Id.* at 50. Moreover, Mr. Stauber's job analysis states "[t]he Kitchen Tower Clerk works shifts of varying duration [and] may be so assigned . . . shifts of 4 hours/day, up to 5 days per week, or a total of 20 hours per week, if so desired." EX 7

[12]For example, Mr. Stauber stated, "[T]here is a great deal of politics that goes on on the waterfront when it comes to jobs that workers do. And no . . . greater impact are these than on 63 tower clerk...[T]here are so many other forces going on…Sometimes [the availability of the tower clerk job is] difficult to nail down." EX 15 at 49-50. Further, in summarizing claimant's testimony on "how a worker with medical restrictions obtains employment," the administrative law judge found that, "Availability of the tower clerk job, thus, depends on how many positions are available once [the members of a union that the claimant does not belong to] have made their choices, where [the claimant's union] falls in line [for job-selection priority], and how many hours [of work] [c]laimant has [secured] compared to his union co-workers." Decision and Order at 23; Decision Granting Employer's Motion for Recon. at 4; HT at 43-45.

[13]To put it into context, Mr. Stauber's assertion that "three [days per week is] the more likely scenario" was preceded by his statement that "three, four times a week" is "not assured," and was followed by his testimony that the availability of the job is "difficult to nail down" and his agreement that the availability of the job is "speculative," by which he meant that "we can't put a hard number on it." EX 15 at 44, 50.

supports a finding that employer met its burden of establishing the reasonable availability of the job. Consequently, I would vacate the administrative law judge's determination on reconsideration that the evidence establishes that the tower clerk position is reasonably available to claimant at least three days per week. I would, instead, reinstate the administrative law judge's earlier determination that "[e]mployer has not shown that the tower clerk position would be reasonably available to [c]laimant except on a random basis" and thus, "has not established suitable alternative employment sufficient to overcome [c]laimant's *prima facie* showing of total disability." Decision and Order at 23. Thus, I would affirm the initial award of total disability benefits and I respectfully dissent from my colleagues' decision to affirm the award of partial disability benefits and to remand for recalculation of claimant's post-injury wage-earning capacity.

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GREG J. BUZZARD
Administrative Appeals Judge