

BRB No. 10-0465

HEATHER HEWINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CERES MARINE TERMINALS, INCORPORATED)	DATE ISSUED: 01/19/2011
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Mark C. Miller (William J. Blondell, Jr., Chartered), Baltimore, Maryland,
for claimant.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LHC-1167) of Administrative Law Judge Linda S. Chapman 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant suffered injuries to her knees during the course of her employment with employer as a driver.¹ Claimant, who has not worked since the date of her third work-related incident, September 29, 2008, subsequently sought total disability compensation and medical benefits under the Act.

In her Decision and Order, the administrative law judge determined that claimant established that injuries to her knees occurred at work on April 30 and September 29, 2008, that claimant is unable to return to work as a driver, and that employer 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 based on a loss of wage-earning capacity from November 17, 2009 and continuing, and medical benefits. 33 U.S.C. §§908(b), (e), 907.

On appeal, employer challenges the administrative law judge's decision to commence claimant's partial disability benefits on November 17, 2009. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer challenges the administrative law judge's decision to award claimant partial disability benefits as of the date of its labor market survey, November 17, 2009. Specifically, employer contends that as its vocational expert documented the availability of suitable alternate employment prior to the date of his report, the administrative law judge erred in concluding that the extent of claimant's disability converted from total to partial as of the date of the labor market survey, and not the date on which the identified jobs were shown to have been available to claimant.

We agree with employer that the administrative law judge's award of partial disability benefits to claimant commencing November 17, 2009, cannot be affirmed. Where, as in this case, it is undisputed that claimant cannot return to her usual work and employer has established the availability of suitable alternate employment, claimant's total disability becomes partial on the earliest date that the suitable employment is shown to have been available.² See *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT)

¹ Claimant suffered two injuries to her right knee in 2006: one while sliding out of a transport van and the other while driving a vehicle onto a ship. HT at 37-39. On April 30, 2008, claimant suffered another injury to her right knee when she struck it against the steering column while exiting an SUV. HT at 44-45. On September 29, 2008, claimant injured her left knee when she slipped while climbing stairs. HT at 56-57.

² The administrative law judge's finding that claimant's disability is temporary is not challenged on appeal.

(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). Employer may attempt to show the availability of suitable jobs at the “critical time” after claimant was released to return to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer may therefore submit a retrospective survey in an attempt to establish that suitable jobs were available at an earlier date than that of the vocational report. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Rinaldi*, 25 BRBS 128.

In her decision, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based on the November 17, 2009, report of its vocational expert, Mr. Sappington.³ EX 34. Without discussing the date on which these five positions were shown to have been suitable and available, the administrative law judge summarily determined that the extent of claimant’s temporary disability changed from total to partial on November 17, 2009, the date of Mr. Sappington’s labor market survey. Decision and Order at 31. That survey, however, states that the five suitable employment opportunities were available between March 17 and May 5, 2009. EX 34. Thus, employer has presented evidence which, if credited by the administrative law judge, would establish that suitable alternate employment was available to claimant at an earlier date than that of its labor market survey. As the administrative law judge did not address the date on which employer established the availability of suitable alternate employment, we vacate 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. We remand the case to the administrative law judge for a determination of the date upon which employer established the availability of such employment; claimant’s award for partial disability commences on this date. *See Rinaldi*, 25 BRBS at 131.

³ The positions identified by employer, and accepted by the administrative law judge, included that of a security officer, two cashier positions, and two customer care representative positions. EX 34; Decision and Order at 29. Claimant does not assert that these jobs are not suitable, as she acknowledges that the extent of her disability is partial rather than total. *See* Cl. Response Br. at 3 - 4.

Accordingly, the administrative law judge's award temporary partial disability benefits commencing November 17, 2009, is vacated and the case remanded for further consideration of this issue. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge