U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0122
and 18-0122A

MATTHEW MARTIN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 01/08/2019
AEGIS DEFENSE SERVICES, LLC	)	
	)	
Employer	)	
	)	
and	)	
	)	
ALLIED WORLD ASSURANCE COMPANY	)	
	)	
Carrier-Petitioner	)	
Cross-Respondent	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Amended Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer and Allied World Assurance Company.

Marcy Singer Ruiz (Law Offices of Edward Kozel), Chicago, Illinois, for employer and Continental Insurance Company.

Milne Young (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier Allied World Assurance Company (Allied) appeal, and claimant cross-appeals, the Amended Decision and Order Awarding Compensation and Benefits[1] (2015-LDA-00202, 00203) of Administrative Law Judge Richard M. Clark 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

[1]The administrative law judge issued an amended decision "to clarify that Allied is entitled to a credit for any disability and medical benefits that Continental [Insurance Company (CNA)] has already paid to Claimant beginning on September 1, 2012." Amended Decision and Order at 1 n.1. The amended decision is otherwise identical to the original decision.

Claimant, after serving in the United States Marine Corps, obtained work with employer in January 2012 as a Designated Defensive Marksman/PSS Personal Security Specialist (DDM). As a DDM, claimant worked under employer's contract securing the United States Embassy in Kabul, Afghanistan. JX 1. Prior to his deployment, claimant, while participating in an employer-sanctioned refresher training course on May 26, 2012, fractured his neck at the C1 level.[2] Claimant received treatment from Dr. Khosla, who provided him with a C-collar and pain medication, and told him to let the fracture heal on its own. Continental Insurance Company (CNA), who insured employer at the time of the May 26, 2012 injury, voluntarily paid claimant temporary total disability benefits for the neck fracture from May 27 to September 1, 2012, at the maximum compensation rate of $1,295.60 per week. On August 22, 2012, Dr. Khosla released claimant to full-duty work, but explained to claimant that he could have flare-ups of pain while in Afghanistan. Claimant informed employer of his full-duty release and was deployed to Afghanistan around September 6, 2012. HT at 95-96.

As a DDM in Afghanistan, claimant agreed to work 12-hour shifts, six days per week, with fifteen weeks on and five weeks off, at a daily rate of $544.43. When on duty, he was required to move every four hours among three different posts at the embassy. He had to wear his gear and helmet when moving, as well as during the daily convoys between his living quarters at Camp Sullivan and the embassy.[3] Claimant stated he experienced neck pain from the outset of his work in Afghanistan, particularly when wearing his helmet, and that in November 2012, he began noticing pain radiating down his neck to his right arm and experiencing migraine headaches. He saw the doctor at Camp Sullivan on November 2, 2012, for temporal, orbital headaches, on November 25, 2012, for frequent migraines, and on January 11, 2013, for an occipital nerve block. Claimant extended his tour twice without going home, but returned stateside in January 2013 for scheduled leave because he missed his family and had neck pain.

Once stateside, claimant was referred by Dr. Khosla to Dr. Blake, who gave claimant facet point injections and imposed work restrictions of no lifting, pushing, or pulling over 80 pounds. Claimant did not return to work in Afghanistan. Instead, he worked as a forklift driver at Costco from November 3, 2014 to July 25, 2015, and as a

[2]A CT scan of claimant's cervical spine dated May 30, 2012, revealed a non-displaced vertical fracture through the right lateral aspect of the right anterior arch of C-1, and small non-displaced fractures through the inferior left lateral mass of C-1. JX 18. An MRI taken on the same day also showed a ring fracture of C-1. *Id.*

[3]Claimant stated his body armor, fully loaded, weighed between 60 and 80 pounds and that his helmet weighed roughly between 5 to 7 pounds. HT at 104-105.

full-time roofer at Kodiak Roofing since August 10, 2015. CNA again voluntarily paid claimant temporary total disability benefits from January 16, 2013, to September 9, 2014. Claimant filed claims seeking additional benefits for the May 26, 2012 neck fracture, as well as for the post-January 15, 2013 inability to return to his DDM work.[4] Employer and its carriers controverted the claim,[5] and the case was transferred to the Office of Administrative Law Judges for a formal hearing. Allied also sought Section 8(f) relief, 33 U.S.C. §908(f).

The administrative law judge, having found that claimant sustained a work-related neck injury on May 26, 2012, and aggravated that condition while working for employer in Afghanistan through January 15, 2013, concluded that Allied, as employer's carrier as of September 1, 2012, is the responsible carrier. The administrative law judge found claimant's work-related neck condition precludes him from returning to his DDM work and that employer did not demonstrate the availability of suitable alternate employment. Based on claimant's average weekly wage of $4,286.10, and his earnings from his post-injury work at Costco and Kodiak Roofing, the administrative law judge awarded claimant disability benefits as follows: 1) temporary total disability benefits from February 13, 2013 to March 23, 2014; 2) permanent total disability benefits from March 24, to November 1, 2014; 3) permanent partial disability benefits from November 2, 2014 to August 9, 2015, based on a weekly loss of wage-earning capacity of $3,541.54; and 4) ongoing permanent partial disability benefits from August 10, 2015, based on a weekly loss of wage-earning capacity of $3,586.74. Additionally, the administrative law judge ordered CNA and Allied to reimburse claimant for certain out-of-pocket medical expenses and medical mileage incurred while each was employer's carrier, but he denied claimant's request for reimbursement of his home refinancing expenses.[6]

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[4]Claimant stated the two month gap in his receipt of income from CNA's last compensation payment on September 9, 2014, until he started work with Costco in early November 2014, coupled with his diminished post-injury earnings and employer/carriers' refusal to pay continuing compensation, prompted the refinancing of his home on June 19, 2015. Claimant maintained that but for the work injury and employer/carriers' failure to pay continuing compensation, he likely would not have refinanced his home and thus, incurred the costs associated with that action. Claimant, therefore, sought reimbursement of refinancing costs totaling $6,524.81 from employer and its carriers.

[5]CNA alleged that Allied, whose period of coverage began on September 1, 2012, is liable for all benefits due after that date. Allied alleged that, at most, it was liable for a period of temporary total disability benefits for claimant's aggravating injury.

[6]The administrative law judge also ordered Allied to pay for any reasonable and necessary future medical benefits arising out of claimant's work-related neck injury,

On appeal, Allied contends the administrative law judge failed to address whether claimant had an ongoing permanent partial disability due to the May 2012 neck fracture such that it is liable only for the loss in claimant's already reduced wage-earning capacity. Allied also challenges the administrative law judge's average weekly wage and post-injury wage-earning capacity findings. In her response brief, the Director, Office of Workers' Compensation Programs (the Director), requests that the Board remand the case to the administrative law judge to reconsider his finding that claimant's neck injury had fully healed by August 22, 2012, but affirm his inclusion of claimant's increased salary in his average weekly wage finding. Claimant and CNA also respond, urging rejection of Allied's contentions. Allied filed a reply brief. On cross-appeal, claimant challenges the administrative law judge's denial of his refinancing costs. CNA responds, urging affirmance of the denial of those costs. Claimant filed a reply brief.

Concurrent Awards

Allied contends the administrative law judge erred by not addressing whether claimant sustained a permanent partial disability following the May 2012 work accident. Allied maintains that this missed analytical step affects claimant's entitlement to concurrent permanent partial disability awards and, thus, its liability for benefits due after the January 2013 work injury.[7] The Director agrees with this contention.

The administrative law judge found claimant sustained a neck fracture in May 2012 while CNA was the carrier on the risk, that the neck injury had healed by August 22, 2012, and that claimant sustained an aggravation of his neck condition as a result of his work for employer in Afghanistan from September 2012 to January 2013 while Allied was the carrier on the risk. The administrative law judge thus found Allied liable for all compensation due claimant because it was on the risk at the time claimant's work caused the new aggravation injury.

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including facet point injections by Dr. Blake. The administrative law judge granted Allied's request for Section 8(f) relief, 33 U.S.C. §908(f), as of March 24, 2016.

[7]Allied contends the record establishes that claimant sustained a permanent disability following the May 2012 work accident and a further permanent disability following the January 2013 aggravation, thereby entitling him to concurrent permanent partial disability awards – the first relating to claimant's loss in wage-earning capacity after the first injury and payable by CNA, and the second representing the loss in wage-earning capacity between claimant's average weekly wage after the first injury and his current wage-earning capacity, payable by Allied. *See, e.g., Brady-Hamilton Stevedore Co. v. Director, OWCP,* 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

We reject the assertions by Allied and the Director that the administrative law judge failed to address evidence suggesting claimant may not have fully healed from the May 26, 2012 neck fracture at the time he began his deployment in September 2012.[8] The administrative law judge fully summarized and discussed this evidence prior to finding that claimant sustained an aggravating injury.[9] *See* Decision and Order at 9-11, 14-15, 22, 26, 27. Moreover, the administrative law judge's findings that claimant sustained an aggravating neck injury as result of his work in Afghanistan and that Allied, as employer's carrier at the time of the aggravation, is liable for all post-January 2013 benefits, are supported by substantial evidence and in accordance with law.

Under the aggravation rule, an employer is liable for the entire resulting disability if an injury occurs during claimant's employment which aggravates a pre-existing condition and results in disability. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). A claimant may be entitled to concurrent awards for his permanent disabilities to fully compensate him for the reduction in his earning power where he has successive injuries, each resulting in some loss of wage-earning capacity. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Kooley v. Marine Indus. Northwest*, 22 BRBS 142 (1989); *see generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that concurrent awards may be appropriate in a case

[8]Dr. Kip opined that claimant's May 2012 fracture healed, albeit in an imperfect manner (a non-anatomic position), which has directly led to claimant having chronic neck pain. ABX 29. Dr. Kip opined that claimant could return to work without restrictions, but should not work in a war zone. *Id.* Dr. Khosla's August 22, 2012 report states that claimant "is clear to return to work in Afghanistan, full duty," but it also cautions that claimant "may, however, experience flare up of symptoms requiring him to take a Medrol Dosepak," and that "if he does have a flare-up of symptoms then he will need to take it easy for several days in order to allow himself time to heal." JX 21.

[9]The administrative law judge, in according diminished weight to Dr. Kip's admonition that claimant should not work in a war zone after the May 2012 work injury, stated he was "more persuaded by the opinions of treating doctors who were aware of [claimant's] treatment and found that his neck was aggravated by the sniper work." Decision and Order at 26, 29. The administrative law judge also found that Dr. Khosla's decision to release claimant to full-duty work on August 22, 2012, indicated that claimant's subsequent injury, which rendered him incapable of continuing in his usual job after January 2013, was an aggravation of the May 26, 2012 work injury. *Id.*

where the subsequent injury aggravated the first. *Brady-Hamilton*, 58 F.3d at 421-422, 29 BRBS at 102-103(CRT). However, in order to be eligible for concurrent awards, the claimant must establish that he sustained a permanent loss in wage-earning capacity as a result of the initial injury. Where there is no loss in earning capacity as a result of the first injury, and a second aggravating injury occurs to the same body part which was injured in the first accident, the aggravation rule applies so that the carrier on the risk at the time of the second injury is fully responsible for the loss in earning capacity caused by the combination of the two injuries.[10] *See generally Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Foundation Constructors, Inc.*, 950 F.2d 621, 25 BRBS 71(CRT); *Kooley*, 22 BRBS 142.

The record evidence does not establish that claimant had a loss in wage-earning capacity after the May 2012 work injury. Although a claimant may have a loss in wage-earning capacity without a loss in actual wages, *see generally Todd Shipyards Corp. v. Allen*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U. S. 1034 (1982), here there is no record evidence from which a loss in wage-earning capacity after the first injury could be calculated. As the administrative law judge found, claimant was released to return to full-duty work with no restrictions on August 22, 2012, by his treating physician, Dr. Kholsa, JX 21, and he passed a pre-deployment physical which enabled him to work in Afghanistan. ACX 2; *see also* Decision and Order at 2, 5, 6, 10, 11, and 25. Regardless of the accuracy of the work duties relied on by Dr. Khosla in releasing claimant to full-duty work,[11] it is undisputed that claimant, once deployed to Afghanistan in September 2012, "continued to work and did not miss any shift related to neck pain" over the course of his entire tour of duty overseas. Decision and Order at 26. The administrative law judge thus properly determined that claimant's inability to work after January 15, 2013, is due to the conditions of his employment in Afghanistan that aggravated his neck condition. *Id.* Claimant, therefore, cannot be entitled to concurrent awards in this case because there is

[10]However, the liability of the second carrier may be limited in certain cases as a consequence of the application of Section 8(f), as occurred here.

[11]Dr. Khosla opined that claimant "may suffer from a flare-up if he were wearing a heavy helmet for several hours, but luckily this does not sound as though it will be the case with the expectation of on a very rare basis and the helmets [claimant will be wearing] are not very heavy." JX 21. Claimant testified that he had to wear his helmet each day on the trip to and from the embassy, as well as during additional times throughout his daily work, and that his DDM helmet was "heavier" than the one he used in his days with the Marine Corps, i.e., his DDM helmet weighed approximately 5 to 7 pounds as opposed to the 1 to 2 pound Marine Corps issued helmet. HT at 104-105, 164.

no evidence that he sustained any permanent diminished earning capacity following the May 26, 2012 work injury. *See Kooley*, 22 BRBS at 146-147 (as the claimant had no loss in wage-earning capacity, there is no factual basis in the record for a concurrent permanent partial disability award for the first injury). Allied's contention that the administrative law judge erred by not considering whether the May 2012 injury resulted in a compensable permanent partial disability, as well as the Director's assertion that the administrative law judge's consideration of the relevant evidence is incomplete,[12] are therefore without merit. Moreover, since the administrative law judge's finding that the work claimant was doing for employer in Afghanistan aggravated the May 26, 2012 work injury is not specifically challenged on appeal, it is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Accordingly, we affirm the administrative law judge's finding that Allied is the carrier liable for all disability and medical benefits due claimant after September 1, 2012.

Average Weekly Wage

Allied contends the administrative law judge erred in including the daily wage increases claimant received, as well as the estimation of the earnings from claimant's undocumented final two pay periods, in his average weekly wage calculation for the January 15, 2013 injury.

Section 10 of the Act provides for the calculation of a claimant's average weekly wage. Section 10(c) is a catch-all provision when Section 10(a) or (b) cannot reasonably and fairly be applied.[13] 33 U.S.C. §910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32

[12]In the absence of evidence of diminished wage-earning capacity, the evidence identified by the Director as not being properly addressed by the administrative law judge has no bearing on the issue of whether claimant incurred any permanent loss in earning capacity as a result of the May 26, 2012 work injury. Neither Allied nor the Director suggests any evidence of record demonstrates such a loss.

[13]Section 10(c) of the Act states:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-

BRBS 148(CRT) (9th Cir. 1998). Under Section 10(c), an administrative law judge is afforded broad discretion to arrive at a sum that "shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Claimant's employment contract for work in Afghanistan specified that he would be paid a wage of $544.43 per day worked for a rotation of six days per week for 15 weeks on, followed by five weeks off. JX 1. Employer, due to a staff shortage,[14] subsequently offered to increase its employees' daily wages first by $200 and then by $1,000, as an incentive to forgo their scheduled leave. Claimant extended his tour of duty by five weeks and received the increased daily pay. HT at 99-100, 131. The administrative law judge included the incentive pay in claimant's average weekly wage, rejecting employer's contention that it was a "bonus" or reward that may be excluded. Rather, he concluded that the increases in daily wages were paid to claimant for his actual work for employer while there was a shortage of employees and thus are includable in claimant's average weekly wage.

Contrary to Allied's contention, the administrative law judge's finding that the additional pay was for actual work during an employee shortage is supported by substantial evidence and consistent with law. This pay constitutes "wages" within the meaning of the Act because claimant received extra pay for his services under the principles of supply and demand. 33 U.S.C. §902(13);[15] *see generally Wausau Ins. Companies v. Director, OWCP*

> employment, shall reasonably represent the annual earning capacity of the injured employee.

The administrative law judge's use of Section 10(c) to calculate claimant's average weekly wage is not challenged in this case.

[14]Claimant testified that employer's contract required 14 DDMs and that employer would be charged $2,000 a day per person for any number of employees under that. HT at 99-100. Claimant stated that employer's concern over a shortage of DDMs prompted the payment of additional wages to employees, like claimant, who agreed to extend their deployments. *Id.* The administrative law judge found that under the terms of his employment contract claimant would have ended his first 15-week stint on December 20, 2012, but that he extended his tour over the holidays and returned stateside for his regular five-week leave on or about January 15, 2013. Decision and Order at 36.

[15]33 U.S.C. §902(13) provides:

[*Guthrie*], 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). Therefore, we affirm the inclusion of this incentive pay in the calculation of claimant's average weekly wage. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (overseas post allowances and incentive compensation are properly included in average weekly wage as they are readily calculable).

In addition, we reject Allied's contention that the administrative law judge's calculation unfairly inflates claimant's average weekly wage over that which he would have earned had he not been injured. The administrative law judge has broad discretion in crafting a calculation under Section 10(c). 33 U.S.C. §910(c); *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). The goal of Section 10(c) is to approximate claimant's annual earning capacity. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006). Dividing claimant's total earnings by the number of weeks he worked achieves this goal. *Id.* Moreover, claimant testified that employer did not have sufficient staffing during his tour in Afghanistan, HT at 98-99, and employer did not offer any evidence as to how often employees forwent their leave in return for incentive pay. Consequently, we find no abuse of the administrative law judge's discretion in the calculation he applied.

Finally, we reject Allied's contention that the administrative law judge erred in estimating claimant's earnings for the final two pay periods he worked in Afghanistan based on his actual earnings from the immediately preceding pay period. This calculation represents a permissible approximation of claimant's earning capacity for that period given the lack of documentation. *See Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). Allied has not established that the administrative law judge abused his discretion in this regard or that the calculation is not supported by substantial evidence of record. As the administrative law judge's finding that claimant's average weekly wage pursuant to Section 10(c) as of January 15, 2013, was $4,286.10 is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Id.*

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Wage-Earning Capacity

Allied challenges the administrative law judge's calculation of claimant's post-injury wage-earning capacity based on his actual earnings with Costco and Kodiak Roofing. Allied asserts that the administrative law judge erred by failing to consider the wages claimant could have earned stateside in private or public law enforcement since the administrative law judge found claimant was physically capable of performing such work post-injury. Allied additionally avers the administrative law judge erroneously reduced claimant's wage-earning capacity effective August 10, 2015, based on a change in his employment from a higher to lower paying job, i.e., his leaving Costco for Kodiak Roofing for reasons unrelated to his injury.

An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that a claimant's wage-earning capacity shall be his actual earnings if these earnings fairly and reasonably represent his wage-earning capacity. The objective of this inquiry is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Petitt v. Sause Bros.*, 730 F.2d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The party contending that the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *See Container Stevedoring Co. v. Director, OWCP* [*Gross*], 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *see also Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

The administrative law judge found employer did not, through its labor market survey, establish the availability of suitable alternate employment.[16] Decision and Order at 30-31. Moreover, the administrative law judge found that claimant applied, but was not hired, for law enforcement jobs. *Id.* at 30 n.15. Therefore, the wages of any such jobs cannot, as a matter of law, establish claimant's post-injury wage-earning capacity. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Thus, we reject Allied's contention in this regard.

[16]Allied does not dispute the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and thus, we affirm that finding. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

The administrative law judge found that claimant secured alternative employment as a result of his own job search. He reviewed claimant's earnings at Costco from November 2, 2014 until July 25, 2015, and at Kodiak Roofing commencing August 10, 2015, in terms of Section 8(h),[17] and found that claimant's actual wages should be used to calculate his wage-earning capacity. Decision and Order at 32. He therefore calculated claimant's weekly wage-earning capacity for the period from November 2, 2014 to July 25, 2015, as $773.97, by dividing his total earnings at Costco, $29,411.02, by the corresponding number of weeks he worked there, 38. He next found that claimant earned $680 per week at Kodiak Roofing starting on August 10, 2015. However, noting that claimant earned higher wages at Costco, and that he left Costco for reasons unrelated to his injury, the administrative law judge averaged the wages claimant earned at Costco and Kodiak Roofing, finding both jobs fairly and reasonably reflect his wage-earning capacity on the open market. *Id.* The administrative law judge thus calculated claimant's weekly wage-earning capacity from August 10, 2015, as $726.99. Adjusting these figures for inflation,[18] the administrative law judge determined that claimant's post-injury wage-earning capacity is $744.56 for the period of November 2, 2014 to July 25, 2015, and $699.36 commencing August 10, 2015.

We reject Allied's contention that the administrative law judge was required to use only the Costco wages because claimant voluntarily left this job. The administrative law judge has discretion in calculating a claimant's wage-earning capacity based on wages he earns on the open market. *See Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192, 204-205 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Moreover, it cannot be said that the finding is unsupported by substantial evidence of record. Therefore,

[17]In making this determination, the administrative law judge acknowledged that the relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, the beneficence of a sympathetic employer, and any other reasonable variable that could form a factual basis for the decision. 33 U.S.C. §908(h); *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

[18]The administrative law judge appropriately used the percentage changes in the National Average Weekly Wage between claimant's January 15, 2013 date of injury and the dates on which claimant began working at Costco and at Kodiak Roofing to calculate a conversion factor in order to reflect claimant's post-injury wage-earning capacity in time-of-injury dollars. *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990).

we affirm the administrative law judge's post-injury wage-earning capacity determinations.

Claimant's Cross-Appeal

Claimant contends the administrative law judge erred by denying costs associated with the refinancing of his home. *See* n.4, *supra*. Claimant alleges the correct legal analysis is whether a carrier must pay a claimant's cost to borrow money where a carrier wrongfully denies the compensation claim and the claimant proves that the costs to borrow money are a direct result of the carriers' actions. Claimant puts forth policy considerations to support his position.[19]

The administrative law judge, noting that he did not "find any authority for providing reimbursement for the refinance expense," denied claimant's request because he was not satisfied that the refinancing was related to the benefits lost by employer's controversion and because there was nothing in the record to suggest "the refinance and subsequent expenses were related to any medical treatment or were medically necessary." Decision and Order at 39. The administrative law judge also relied on claimant's testimony to having had financial difficulties prior to working for employer.

The administrative law judge correctly stated that there is no authority in the Act or its regulations for providing reimbursement of refinancing expenses. The record establishes that claimant declared bankruptcy in 2008, prior to working for employer, HT at 62, which supports the administrative law judge's finding that claimant had financial difficulties in the past. Moreover, the administrative law judge found claimant presented no evidence that the refinancing was due to medical expenses incurred as a result of his work injury or was medically necessary. 20 C.F.R. §702.401(a).[20] While some house-

[19]Claimant cites *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), for the proposition that one of the purposes of the Act, in requiring interest on past-due benefits, is "to try to fully compensate workers for their valid claims." Cl. Brief at 6. Claimant asserts that this remedial purpose is equally applicable to the facts in this case, where claimant, while waiting to obtain an enforceable order on his claim, incurred refinancing costs in order to borrow money to support his family.

[20]To be "medically necessary," under Section 7(a) of the Act, the item or medical care must be "recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. §702.401(a).

related expenses have been approved as "medical care" under Section 7(a) because they were determined to be "reasonable and necessary" for the treatment of work-related conditions, e.g., house modifications[21] and moving expenses,[22] there is no such evidence in this case. Consequently, as the administrative law judge applied the proper test for determining whether employer is liable for the requested costs,[23] *see, e.g.*, *Ramsey Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015), and there is no evidence of record that claimant's refinancing costs were medically necessary for the treatment of his work-related condition, we affirm the administrative law judge's denial of those expenses.

Accordingly, the administrative law judge's Amended Decision and Order Awarding Compensation and Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[21]*Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

[22]*Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981) (Kalaris, J., dissenting).

[23]Claimant has not established that the remedial purpose of the Act, alone, is sufficient to warrant reimbursement of his refinancing costs, particularly since the Act includes no provisions for such an award and otherwise states that only those costs deemed "reasonable and necessary" for the treatment of work-related conditions may be recouped. *See* 33 U.S.C. §907(a); *see also generally, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009) (policy considerations do not override the plain language of a statute).