BRB Nos. 91-1625
and 92-1625A

MARK G. WAINWRIGHT	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION AND ORDER

Appeals of the Decision and Order-Award of Benefits and Ruling Denying Motion for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Paul M. Doolittle and Robert M. Sharp (Sharp & Doolittle), Jacksonville, Florida, for employer.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order-Award of Benefits and Ruling Denying Motion for Reconsideration (89-LHC-257) of Administrative Law Judge Aaron Silverman 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 injured his back on August 22, 1980 while working for employer as a first class

shipfitter. Claimant underwent lumbar laminectomies on March 31, 1981, October 7, 1981, and February 16, 1987. Claimant was unable to return to his usual work, and subsequently worked at various light duty jobs. Claimant testified that most of these jobs hurt his back. At the time of the hearing claimant worked for First Solution performing smoke and fire restoration services 27 to 30 hours a week at $6 per hour.

The administrative law judge found that employer did not establish suitable alternate employment and that claimant is totally disabled, but nonetheless concluded that claimant is entitled to an award of temporary partial disability benefits based on his earnings at First Solution. In finding claimant is totally disabled, the administrative law judge noted that claimant worked with limitations, could not work five days a week, and that his boss understands his condition and does the heavy lifting for him. The administrative law judge also found that due to the sympathy of his boss, claimant's wages may be more than the real worth of his services. Decision and Order at 3. The administrative law judge also found that claimant's disability was not permanent because there is no "updated information" in the record on maximum medical improvement. Decision and Order at 4.

The administrative law judge further found that claimant's average weekly wage at the time of the injury was not in the record, and he therefore calculated claimant's average weekly wage based on claimant's testimony that a shipfitter earned $11 per hour or $440 per week at the time of the hearing. The administrative law judge determined claimant's post-injury wage-earning capacity was $171 per week, which he obtained by multiplying claimant's average weekly number of hours at First Solution, 28.5, times $6 per hour. The administrative law judge therefore awarded temporary partial disability benefits based on the difference between the current average weekly wage of a shipfitter, $440, and claimant's post-injury wage-earning capacity, $171, commencing on the date claimant's job at First Solution began, although, as the administrative law judge noted, that date is not in the record.

Employer filed a Motion for Reconsideration in which it contended that the administrative law judge erred in failing to rely on the parties' stipulation that claimant's average weekly wage was $215, and that, therefore, claimant's loss in wage-earning capacity should be $29.33 ($215 - $171 x 2/3) per week. The administrative law judge denied the motion without addressing the parties' stipulation, and stated that, due to the absence of information in the record, his were the only findings and conclusions the evidentiary record permitted. Decision and Order on Recon. at 2.

On appeal, employer challenges the administrative law judge's findings as to average weekly wage and loss in wage-earning capacity. BRB No. 91-1625. On cross-appeal, claimant contends that the administrative law judge erred in failing to find that he is permanently totally disabled, in failing to calculate the date of maximum medical improvement, and in failing to award Section 10(f), 33 U.S.C. §910(f), adjustments. BRB No. 91-1625A. The Director responds to these appeals, agreeing with the contentions of both parties, and she also contends that the administrative law judge erred in failing to account for claimant's disability status for the eight-year period following his injury.

We agree that the administrative law judge's decision contains numerous errors and that the case must be remanded for further findings. We first address the issue of permanency. Claimant contends that his disability is permanent, and that the parties stipulated at the hearing that claimant reached maximum medical improvement on July 18, 1981. Claimant notes that his treating physician, Dr. Sullivan, opined that he reached maximum medical improvement on that date, that he was 5 percent permanently partially disabled, and cannot return to his usual work.[1] The Director also contends that the administrative law judge erred in failing to accept the parties' stipulation. Additionally, the Director contends that the evidence establishes that claimant's disability was permanent since 1981 because since then claimant's condition did not improve to the point that his wage-earning capacity increased. Employer responds, contending that the administrative law judge's finding that claimant's disability is temporary should be affirmed. In the alternative, employer contends that it did not stipulate that the date of maximum medical improvement was July 18, 1981.[2]

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration as opposed to one which merely awaits a normal healing period. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *petition for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A determination of maximum medical improvement is primarily a question of fact based on medical evidence. *Ballesteros v. Western Willamette Corp.*, 20 BRBS 184 (1988). A condition becomes permanent when the employee is no longer undergoing treatment with a view towards improving his condition, *see Abbott*, 40 F.3d at 126, 29 BRBS at 25 (CRT), but a prognosis that claimant may improve in the future does not preclude a finding of permanency. *See Mills v. Marine Repair Service*, 21 BRBS 115 (1989), *modified on other grounds on recon.*, 22 BRBS 340 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Although maximum medical improvement may not be reached when surgery is anticipated, *see Kuhn v. Associated Press*, 16 BRBS 46 (1983), the possibility that claimant may undergo surgery does not necessarily preclude a

[1]On July 13, 1981, Dr. Sullivan opined that claimant was 5 percent permanently partially disabled and cannot perform his usual work, but he also stated that he anticipates that claimant will reach maximum medical improvement as of August 1, 1981. Cl. Ex. 4.

[2]Employer notes that Dr. Sullivan's letter dated July 13, 1981, states that he anticipated maximum medical improvement as of August 1, 1981, that he performed a partial hemilaminectomy and decompression at L5 on October 7, 1981, that on October 26, 1982, Dr. Sullivan mentions the possibility of "further surgery," that on January 14, 1983, Dr. Sullivan states that "further improvement is likely," and on July 31, 1983, he states that claimant had reached maximum medical improvement. Emp. Ex. 6, 7, 8, 10. Employer therefore contends the earliest date of maximum medical improvement was July 31, 1983, although employer notes claimant also underwent surgery in 1987.

finding of permanency especially where claimant's ability to recover or to do work after surgery is unknown. *See White v. Exxon Co.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

In the instant case, we must vacate the administrative law judge's finding that claimant's condition is temporary, and remand for the administrative law judge to determine whether the parties stipulated to the date of maximum medical improvement. The administrative law judge may accept the parties' stipulation if it is in accordance with law. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 135 (1991). The administrative law judge's rejection of a stipulation, however, must be adequately explained. *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). If, on remand, the administrative law judge determines that the parties did not stipulate to a date of permanency or if he rejects the stipulation, he must determine whether claimant's disability is permanent in accordance with the *Watson* criteria. Contrary to the administrative law judge's finding that there is insufficient evidence in the record on which to make a determination of permanency, there appears to be ample evidence in the record on the issue, including claimant's medical history and Dr. Sullivan's opinions.

Claimant and the Director next contend the administrative law judge erred in concluding that claimant is partially disabled because the administrative law judge found that claimant is totally disabled based on claimant's testimony that he is only able to work part-time at First Solution, his boss is sympathetic to his situation and performs the heavy work for him, and that without his boss's sympathy, claimant's wages may exceed the value of his services. The Director states that the administrative law judge's conclusion that claimant is partially disabled is inconsistent with his findings. Employer responds, urging affirmance of the administrative law judge's finding that claimant is partially disabled, contending that it established that claimant is capable of working since 1983 as claimant had his own landscaping company, and successively worked for Schwab Investigations, the City of Jacksonville, and Arlington Fence Company prior to obtaining his current position.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Abbott*, 40 F.3d at 127, 29 BRBS at 26 (CRT). The burden then shifts to employer to establish that the employee is capable of performing other realistically available jobs. *Abbott*, 40 F.3d at 127, 29 BRBS at 26 (CRT); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT)(5th Cir. 1981). Claimant may be totally disabled even if he is working if he does so only with extraordinary effort, excruciating pain, or at the beneficence of employer. *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). The Board has emphasized that an award of total disability while claimant is working should be the exception, not the rule. *See Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983).

The case must be remanded for the administrative law judge to determine whether any of the post-injury jobs, including claimant's current job at First Solution, were within claimant's restrictions and constitute suitable alternate employment, or if claimant is totally disabled despite his continued

employment. On remand, the administrative law judge must reconcile his findings that claimant is partially and totally disabled as claimant cannot be both at the same time. Moreover, the Director asserts in her brief that employer paid claimant temporary total disability benefits for certain periods between August 30, 1980 and January 11, 1984, and temporary partial disability benefits for periods between February 1, 1983 and the date of the Decision and Order. It is unclear when the administrative law judge found claimant became partially disabled since the date claimant began working for First Solution is not in the record. On remand, the administrative law judge should account for claimant's disability status for all time periods from the date of injury. Partial disability, if applicable, commences at the time suitable alternate employment is established, and claimant is entitled to total disabilty prior to that time. *See Abbott*, 40 F.3d at 126, 29 BRBS at 25-26 (CRT). If the record does not contain sufficient information to establish the date suitable alternate employment is established, the administrative law judge may reopen the record to obtain that information. *See* 20 C.F.R. §702.338.

Employer contends that the administrative law judge erred in failing to rely on the parties' stipulation that claimant's average weekly wage at the time of injury was $215, and it contends that claimant's loss in wage-earning capacity therefore is $29.33 per week. In its Reply Brief, employer acknowledges that claimant's loss in wage-earning capacity must be measured by the difference between his average weekly wage at the time of injury and the wages the post-injury job paid at the time of injury. The Director agrees that the administrative law judge erred in computing claimant's average weekly wage, and, if claimant is partially disabled, erred in calculating claimant's loss in wage-earning capacity.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), a partially disabled employee is entitled to 66 2/3 percent of the difference between his average weekly wage and his post-injury wage-earning capacity. *Abbott*, 40 F.3d at 129, 29 BRBS at 22 (CRT). The Act requires comparison of claimant's average weekly wage at the time of the injury with his post-injury wage-earning capacity adjusted to wage levels at the time of injury. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 59 (1992); *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990); *Fox v. Melville Shoe Corp, Inc.*, 17 BRBS 71, 74 (1985).

In this case, the administrative law judge erred in failing to address the parties' stipulation as to claimant's average weekly wage, and in failing to give reasons for accepting or rejecting it.[3] *See Thompson*, 26 BRBS at 59; *Duncan*, 24 BRBS at 135; *Fox*, 17 BRBS at 73-74. Moreover, absent unusual circumstances, claimant's average weekly wage should be based on his earnings at the time of his injury, and thus, the administrative law judge's use of the wages a shipfitter earned at the time of the hearing is clearly erroneous. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); 33 U.S.C. §910.

Furthermore, the administrative law judge erred in failing to adjust claimant's post-injury

[3]At the hearing, the administrative law judge asked that counsel for the parties attempt to agree to an average weekly wage. Two weeks after the hearing, employer submitted a letter to the administrative law judge stating that the parties agreed that claimant's average weekly wage is $215.

wage-earning capacity to wage levels at the time of claimant's injury. If the wages claimant's current job paid at the time of the injury are unknown, the administrative law judge may reduce claimant's current wages by the percentile increase in the national average weekly wage over the same time period. *See Richardson*, 23 BRBS at 330. Therefore, if on remand, the administrative law judge finds that claimant is partially disabled, he should make the appropriate comparison of claimant's pre-injury average weekly wage with claimant's post-injury wage-earning capacity adjusted to wage levels at the time of injury.

Lastly, if on remand the administrative law judge finds that claimant is entitled to permanent total disability benefits, claimant is entitled to annual cost-of-living adjustments pursuant to Section 10(f), 33 U.S.C. §910(f), that occurred during any previous periods of temporary total disability. *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), *aff'g Hamilton v. Crowder Construction Co.*, 22 BRBS 121 (1989). *Cf. Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*).

Accordingly, the administrative law judge Decision and Order -Award of Benefits and Ruling Denying Motion for Reconsideration are vacated, and the case is remanded for further consideration in a manner consistent with this opinion.[4]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Claimant's counsel filed a "Motion for Attorney Fee," which is not accompanied by a fee petition. The Board cannot award a fee unless and until counsel complies with the regulation at 20 C.F.R. §802.203.