BRB No. 92-1985

DONNELL MAZYCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Donnell Mazyck, Mt. Pleasant, South Carolina, *pro se*.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order - Award of Benefits (89-LHC-3493) of Administrative Law Judge Robert J. Shea 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). In reviewing this *pro se* appeal, the Board will review the administrative law judge's findings of fact and conclusions of law to determine whether 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant sustained injuries to his back and neck, and pain in his legs, on April 18, 1988, when the container he was hauling broke loose and struck the truck cab in which he was riding. Claimant has only worked sporadically since the date of his injury. Employer voluntarily paid claimant temporary total disability compensation from April 19, 1988, until November 28, 1988. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge determined that claimant reached maximum medical improvement on November 2, 1988, and that claimant could not return to his usual employment duties as a longshoreman with employer. Next, the administrative law judge determined that employer established the availability of suitable alternate employment paying $250 per week, and thus awarded claimant temporary total disability compensation from April 19, 1988, through November 1, 1988, and permanent partial disability compensation thereafter based upon the difference between claimant's average weekly wage at the time of his April 1988 injury and his post-injury wage-earning capacity of $250 per week. Lastly, the administrative law judge found that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant, appearing without the assistance of counsel, challenges the administrative law judge's decision on his claim. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in the instant case, it is uncontroverted that claimant cannot return to his usual employment, the burden of proof shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In the instant case, the administrative law judge implicitly credited the labor market survey and testimony of Patricia Bell, employer's vocational rehabilitation specialist, in concluding that employer had established the availability of suitable alternate employment. Ms. Bell, who reviewed claimant's medical reports and interviewed claimant, identified eight potential employment opportunities which she believed were within claimant's physical capabilities and restrictions.[1] *See* Tr. at 64. Although Ms. Bell testified that she took into consideration claimant's restrictions, our review of the record reveals that Ms. Bell's labor market survey fails to describe the jobs set forth as suitable for claimant; rather, that report lists only the position name along with the rate of pay associated with the position. *See* EX 12. Moreover, the administrative law judge, in determining that claimant was capable of performing the position of a concrete delivery driver, made no findings regarding claimant's physical restrictions and, thus, did not compare claimant's restrictions with the requirements of the jobs identified by Ms. Bell.[2]

[1]Of the eight positions identified, six were for drivers, one was a cashier, and the last was a vertical blinds assembler. EX 12.

[2]We note that Dr. Arnold, claimant's treating physician, opined that claimant could return to work "as he was doing" on November 2, 1988, *see* EX 5; that claimant, on July 21, 1989, could perform light duty but "will need some lifting limitations," *see* CX 3; that claimant could perform light duty "as tolerated" on January 8, 1990, *see* CX 4; and, on March 12, 1991, that claimant could return to

Although the administrative law judge specifically cited to the job of a concrete delivery driver, and he used the wages of this position in setting claimant's post-injury wage-earning capacity, we hold that the administrative law judge's failure to both determine claimant's physical restrictions and compare those restrictions to the positions identified by Ms. Bell requires that we vacate his finding that employer established the availability of suitable alternate employment. An administrative law judge must determine claimant's physical restrictions based on the medical opinions of record and compare those restrictions to the specific requirements of identified jobs. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, *aff'd on recon.*, 17 BRBS 160 (1985) (Ramsey, C.J., dissenting on other grounds). Thus, in the instant case, since the administrative law judge failed to determine the physical restrictions of claimant, we are unable to apply our standard of review in order to determine whether the administrative law judge's decision to implicitly credit Ms. Bell's testimony and report is supported by the medical evidence of record, since such fact-finding functions reside with the administrative law judge. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Lastly, the Fourth Circuit, in *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT), stated that it is employer's burden to identify a range of jobs that are reasonably available and which the claimant can both realistically secure and perform. We, therefore, vacate the administrative law judge's finding that employer established the availability of suitable alternate employment, and we remand the case for the administrative law judge to determine claimant's actual physical restrictions, to compare those restrictions with the requirements of the positions identified by employer as constituting suitable alternate employment, and to determine whether employer has met its burden under the standard set forth in *Lentz*. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Should the administrative law judge find, on remand, that employer has established the availability of suitable alternate employment, he must additionally reconsider the issue of claimant's post-injury wage-earning capacity. In the instant case, the administrative law judge, without explanation, used the position of concrete delivery driver, which in 1990 paid a wage of $250 per week, to determine claimant's post-injury wage-earning capacity. In order to neutralize the effects of inflation, however, the administrative law judge, when calculating claimant's post-injury wage-earning capacity, must adjust the wages of the positions upon which he relied to find suitable alternate employment to the wage levels that those jobs paid at the time of claimant's injury. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Thus, we vacate the administrative law judge's finding regarding claimant's post-injury wage-earning capacity; if, on remand, the administrative law judge determines that employer has established the availability of suitable alternate employment, he must calculate claimant's permanent partial disability award pursuant to the statutory scheme established in Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). *See Cook*, 21 BRBS at 4.

Lastly, the administrative law judge in the instant case commenced claimant's permanent partial disability award on November 2, 1988, the date claimant reached maximum medical improvement. An award of permanent partial, rather than total, disability, commences on the date employer establishes the availability of suitable alternate employment. *See generally Director,*

---

work but "[t]here are certain activities that he knows to avoid." EX 13.

OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *modifying on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished). Thus, should the administrative law judge on remand award claimant permanent partial disability benefits, the proper commencement date for those benefits is the date employer established the availability of suitable alternate employment.

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge