

BRB No. 91-0250

CLARA R. DIXON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Ronald T. Russell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

LuAnn B. Kressley (J. Davitt McAteer, Acting 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Program (the Director), appeals the Decision and Order - Awarding Benefits (89-LHC-522) of Administrative Law Judge A. A. Simpson, Jr., 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sought disability benefits for a neck condition she alleged arose out of her employment. The administrative law judge found, *inter alia*, that claimant's injury is work-related, and that claimant is unable to return to her usual work due to her neck impairment. The administrative law judge found, however, that employer established the availability of suitable alternate employment based on the testimony and labor market survey of employer's vocational expert. Claimant was awarded temporary total disability benefits from March 30, 1987 to October 19, 1987, which is the stipulated date of maximum medical improvement. Thereafter, the administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21) for a loss in wage-earning capacity. 33 U.S.C. §908(c)(21). Employer was awarded relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

On appeal, the Director contends that the administrative law judge erred in awarding permanent partial disability benefits from the date of maximum medical improvement in the absence of evidence that suitable alternate employment was available on that date. The Director seeks remand for the administrative law judge to determine the date suitable alternate employment became available and to award partial disability benefits from that date. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Claimant has not responded to this appeal.

We agree that the case must be remanded.¹ After the administrative law judge issued his Decision and Order in this case the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, held that a claimant's total disability becomes partial on the earliest date that suitable alternate employment is shown to be available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991). The court cited the decisions of three other courts of appeals in *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991), *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), and *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), that it is error to relate a finding of suitable alternate employment back to the date of maximum medical improvement in the absence of evidence of job availability on the date of maximum medical improvement, as this confuses medical and economic concepts. *Dollins*, 949 F.2d at 186, 25 BRBS at 90 (CRT); *see also Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). On remand, the administrative law judge must determine when suitable alternate employment was shown to be available. Claimant is entitled to permanent

¹We note that part of the record in this case is missing and the Board has been unsuccessful in obtaining the missing documents. As the sole issue on appeal involves legal interpretation, our decision herein does not require the missing materials.

total disability benefits from the date of maximum medical improvement until suitable alternate employment was shown to be available, and to permanent partial disability benefits thereafter.²

Accordingly, the finding regarding the onset of permanent partial disability benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²Contrary to claimant's contention, the administrative law judge did not award claimant permanent partial disability benefits because she did not cooperate with the vocational counselors. Rather, he stated claimant did not diligently seek alternate employment, once suitable alternate employment was identified, as evidenced by her failure to allow employer's expert to accompany her on job interviews. Decision and Order at 17-18.