BRB No. 92-1583

STEVEN PALMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCWELL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Phillip J. Myles (Scott, Myles, and Hanauer), San Diego, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff & Tichy), San Diego, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-LHC-0658) of Administrative Law Judge John C. Holmes awarding benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time that this case has been appealed to the Board. Claimant, an outside mechanic, sustained an injury to his back on March 13, 1983, while lifting bearing caps. Claimant was subsequently diagnosed as having sustained a herniation of the L5-S1 disc with compressive neuropathy, which thereafter precluded his performing heavy lifting of over 50 pounds. Unable to return to his usual employment, claimant subsequently obtained employment as a landscaper.

In his first Decision and Order, the administrative law judge found that although claimant had reached maximum medical improvement on January 16, 1984, he remained temporarily totally disabled through October 26, 1986, because claimant was unable to find alternate employment that

was suitable for him until that date, at which time claimant was employed as a landscaper. The administrative law judge thus awarded claimant temporary total disability compensation from March 13, 1983, through October 26, 1986, based on an average weekly wage of $508.65, and permanent partial disability compensation, based on a weekly loss in wage-earning capacity of $268.65, thereafter. Lastly, the administrative law judge determined that employer was entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). On reconsideration, the administrative law judge determined that claimant was entitled to permanent total disability compensation from January 16, 1984, until October 26, 1986, since claimant had been unable to find suitable alternate employment during this period.

Employer appealed the administrative law judge's decision to the Board. *See Palmer v. Arcwell Corp.*, BRB No. 87-1235 (April 30, 1991)(unpublished). The Board held that the administrative law judge erred by using the wrong standard in determining whether claimant is entitled to total disability benefits; accordingly, the Board vacated the administrative law judge's award of permanent total disability benefits from January 16, 1984, until October 26, 1986, and permanent partial disability benefits thereafter, and remanded the case for reconsideration of the evidence of record.

On remand, the administrative law judge determined that claimant's disability became partial on May 21, 1985, the date on which employer first established the availability of suitable alternate employment; thereafter, the administrative law judge adjusted the wages paid by these positions to 1983 dollars by using the National Average Weekly Wage (NAWW) and determined that claimant, as of May 1985, had a wage-earning capacity of $139.79 in 1983 dollars. Next, the administrative law judge found that, although the jobs identified by employer in August 1986 did not establish the availability of suitable alternate employment, claimant's employment as a landscaper in October 1986 was suitable alternate employment paying claimant an inflation adjusted weekly wage of $217.41. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from March 15, 1983, through May 21, 1985, less periods of employment, permanent partial disability compensation from May 21, 1985, through October 26, 1986, based on a loss of wage-earning capacity of $368.86, and permanent partial disability compensation thereafter based on a loss of wage-earning capacity of $291.24.[1]

On appeal, employer contends that the administrative law judge erred in adjusting the wages available to claimant in 1985 by using the NAWW. Employer additionally challenges the administrative law judge's decision to reject the jobs that it identified as being available in August 1986, and in basing claimant's current loss of wage-earning capacity on the wages paid in his current position as a landscaper. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's decision to adjust the wages which claimant was capable of earning in May 1985 for inflation by using the NAWW. In this regard, employer asserts that the administrative law judge erred in failing to credit the testimony of

[1]It is undisputed that claimant's average weekly wage at the time of his work injury was $508.65.

its vocational expert, Mr. Thrush, who opined that the inflation factor between 1983 and 1986 for the jobs identified as suitable for claimant was negligible. We disagree. In his decision on remand, the administrative law judge initially averaged the wages paid in the positions identified by Mr. Thrush as being available in May 1985, and determined that the average weekly wage paid by those positions was $151.75. *See Louisiana Ins. Guaranty Ass'n v. Abbot*, 4 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). Because the actual 1983 wages of the positions identified by Mr. Thrush were not available, the administrative law judge then converted claimant's post-injury wage-earning capacity of $151.51 into 1983 dollars by using the NAWW, resulting in a figure of $139.79, which the administrative law judge then used to calculate claimant's loss in wage-earning capacity.

An award for permanent partial disability compensation 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), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C.Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). This insures that a claimant's wage-earning capacity is considered on an equal footing with the determination under Section 10 of average weekly wage at the time of injury. 33 U.S.C. §910. The NAWW is based on the national average earnings of production or nonsupervisory workers on private nonagricultural payrolls and represents the average of these earnings during the three consecutive calendar quarters ending on June 30 of each particular year as obtained from the Bureau of Labor Statistics. LHCA Bulletin No. 90-1 (Oct. 1, 1989). Because the NAWW accurately reflects the increase in wages over time, the Board has held that the percentage increase in the NAWW for each year may be used to adjust the claimant's post-injury wages downward when, in a case such as this one, the actual wages paid at the time of injury in post-injury jobs are unknown. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). We, therefore, affirm the administrative law judge's computation of claimant's benefits by applying the NAWW to adjust claimant's May 1985 post-injury wage-earning capacity of $151.75 to 1983 dollars, resulting in a figure of $139.79, and his consequent finding that claimant, as of that time, had a weekly loss in wage-earning capacity of $368.86.

Employer next argues that the administrative law judge erred in finding that, subsequent to October 26, 1986, claimant's loss in wage-earning capacity should be based on his wages earned in his position as a landscaper. Specifically, employer contends that, in calculating claimant's award, the administrative law judge should have utilized the positions identified at the formal hearing by its vocational consultant, Mr. Thrush, who testified as to the availability of suitable alternate employment paying weekly wages higher than those which claimant was actually earning as of October 1986. We disagree. Where, as in the instant case, it is uncontested that claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area where claimant resides, which claimant, by virtue of his age,

education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order for employment opportunities to be considered realistic, employer must establish their precise nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). The post-injury wage-earning capacity of a partially disabled claimant shall be determined to be his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. *See* 33 U.S.C. §908(h). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983).

In the instant case, at the formal hearing on August 20, 1986, Mr. Thrush identified additional employment opportunities not documented in his previous report which, he opined, claimant was capable of performing. *See* Tr. at 197-206. Additionally, Mr. Thrush identified positions which he found in the previous Sunday's newspaper and opined that claimant could compete for these positions. *See id.* at 208-210, 221-222. The administrative law judge concluded that Mr. Thrush's testimony failed to establish that claimant has the physical capability or training to obtain any of the jobs identified at the formal hearing, or that the identified jobs were in fact actually available. *See* Decision on Remand at 3. Our review of the record indicates that Mr. Thrush, who conceded that the positions which he identified in August 1986 were not documented in his written report, failed to set forth the precise nature and terms of those positions. We therefore affirm the administrative law judge's finding that Mr. Thrush's August 1986 testimony fails to establish the availability of suitable alternate employment, as it is rational and supported by substantial evidence, *see generally Bumble Bee Seafoods*, 629 F.2d at 1327, 12 BRBS at 660, and his consequent finding that claimant, as of October 26, 1986, had a post-injury wage-earning capacity of $240 per week based upon his earnings as a landscaper. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge