

BRB Nos. 92-2188
and 92-2188A

DAVID MERRILL)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Decision and Order on Remand of James J. Butler, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorehead), Wilmington, California, for claimant.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (88-LHC-252, 88-LHC-253, 88-LHC-254) of Administrative Law Judge James J. Butler 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 administrative law judge's findings of fact and conclusions of law 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. To briefly recapitulate,

claimant, a marine coppersmith, sustained a low back injury during the course of his employment on July 30, 1985, while attempting to lift a tank onto a rack. Claimant subsequently returned to his usual job until he was laid off on February 26, 1987. On April 10, 1987, while at home, claimant experienced back pain and, except for a half day in May 1987, has not worked since that time.

In his first decision, the administrative law judge found that the incident at home was not a new injury but an exacerbation or aggravation of claimant's on-going back condition precipitated by the work injury of July 1985. He further found that claimant could not return to his former job and that employer failed to demonstrate the availability of suitable alternate employment. Thereafter, the administrative law judge determined that claimant's average weekly wage was \$466.34, based on the 52 week period preceding April 10, 1987. Accordingly, the administrative law judge awarded claimant permanent total disability benefits commencing May 17, 1987, when employer terminated its voluntary payments of compensation to claimant. Lastly, the administrative law judge found that employer was not entitled to relief from continuing compensation liability under Section 8(f), 33 U.S.C. §908(f). In his Order Denying Motion for Reconsideration, the administrative law judge subsequently reiterated the findings set forth in his decision.

Employer appealed, and claimant cross-appealed, the administrative law judge's decision to the Board. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In its decision, the Board initially determined that the weight of the evidence supported the administrative law judge's finding that claimant aggravated his chronic back condition which began as a result of his work injury. Next, the Board found that the administrative law judge misinterpreted the evidence in reaching his conclusions regarding the issues of suitable alternate employment and employer's entitlement to relief under Section 8(f). Lastly, the Board vacated the administrative law judge's finding that claimant's compensation should be based on his 1987 average weekly wage, holding that in addressing this issue the administrative law judge must determine if claimant's disability is a result of his 1985 injury or the 1987 aggravation of that condition. Accordingly, the case was remanded to the administrative law judge for reconsideration.

On remand, the administrative law judge reiterated his prior opinion that employer failed to demonstrate the availability of suitable alternate employment and that claimant's average weekly wage for compensation purposes should be based on his earnings at the time of the 1987 injury. The administrative law judge thus reinstated his award of permanent total disability compensation to claimant. Finally, the administrative law judge found that the 1985 injury resulted in a pre-existing permanent partial disability that was aggravated by his continued work for employer; accordingly, the administrative law judge granted employer relief under Section 8(f).

On appeal, claimant argues that the administrative law judge erred in basing his compensation on claimant's earnings at the time of the 1987 incident. Employer responds, urging the Board to affirm the administrative law judge's finding on this issue. In its cross-appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment.

I. Suitable Alternate Employment

We initially address employer's appeal of the administrative law judge's determination that employer has failed to establish the availability of suitable alternate employment. Where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the existence of realistically available job opportunities within the geographical area where the employee resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994).

In the instant case, employer contends that the administrative law judge erred in failing to set forth an independent analysis of the evidence of record; specifically, employer asserts that the administrative law judge erred in rejecting the testimony of Ms. Cafferty, its vocational consultant, which, employer avers, was sufficient to establish the availability of suitable alternate employment which claimant is capable of performing. Employer asserts that Ms. Cafferty identified specific positions, *i.e.*, restaurant jobs, customer service representative, shipping/receiving clerk, order desk clerk, credit clerk, and purchasing agent, which she determined were appropriate for claimant.

The Board's prior decision remanding this case to the administrative law judge explicitly stated that, on remand, the administrative law judge must address all of the jobs identified by employer's vocational counselor as constituting suitable alternate employment. Moreover, the Board specifically stated that the administrative law judge had misinterpreted the evidence of record; specifically, the Board noted that claimant had two years of college education, that he had participated in the management of his parents' nightclub, and that he trained as an assistant manager in another nightclub, and that Dr. London as well as claimant had opined that claimant was capable of performing a job in restaurant management. *See Merrill*, 25 BRBS at 146. On remand, however, the administrative law judge, after first restating his prior findings on this issue, once again failed to address the employment opportunities set forth by employer's witness, Ms. Cafferty. Moreover, the administrative law judge did not address the testimony of either claimant or Dr. London regarding claimant's ability to perform the positions located by employer's vocational counselor.

We hold that the administrative law judge erred on remand when he failed to comply with the Board's remand order. Section 802.405(a) of the regulations governing the operations of the Board provides that "[w]here a case is remanded, such additional proceedings shall be initiated and

such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a). See *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989). Based upon this failure to comply with the directives set forth by the Board in its previous decision, we are compelled to vacate the administrative law judge's determination that employer has failed to establish the availability of suitable alternate employment and remand the case once again for proper consideration of the record evidence in accordance with the Board's previous decision. See *Obert*, 23 BRBS at 157; *Randolph*, 22 BRBS at 443.

II. Average Weekly Wage

On appeal, claimant argues that the administrative law judge erred in determining that his average weekly wage should be calculated based upon the wages he earned in the year prior to April 10, 1987. Specifically, claimant contends that the administrative law judge erred when, in disregard of the Board's instructions on remand, he failed to make specific findings as to whether claimant's present disability was the result of a new injury sustained in 1987 based on work-related aggravations. We agree.

In his initial decision, the administrative law judge calculated claimant's average weekly wage based upon the wages claimant earned during the 52 week period preceding the April 10, 1987, incident. The Board vacated this determination, stating the average weekly wage issue must be resolved consistent with the opinion of the United States Court of Appeals for the Ninth Circuit in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). In *Johnson*, the Ninth Circuit, in whose jurisdiction the instant case arises, held that for purposes of Section 10 of the Act,¹ an injury occurs when claimant becomes aware of the full extent of the harm done to him. See, e.g., *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In this regard, the court noted that in most traumatic injury cases, the time of injury will coincide with the date of disability. Pursuant to *Johnson*, the Board determined that resolution of the average weekly wage issue in the case at bar turned on whether claimant's condition is the natural and unavoidable result of only one injury, *i.e.*, claimant's 1985 accident, or whether claimant's condition is the result of subsequent aggravations at work through February 1987. Thus, the Board remanded the case to the administrative law judge for a determination as to whether claimant's disability stems from his 1985 injury or whether claimant sustained a new injury in 1987 based on work-related aggravations.

On remand, the administrative law judge initially reiterated his prior finding that claimant's 1985 work injury was the proximate cause of his entire resultant and fully compensable disability. Next, the administrative law judge summarily noted that an exacerbation occurred in 1987 and, citing to both *Johnson* and Section 10(c) of the Act, 33 U.S.C. §910(c), thereafter calculated claimant's average weekly wage based upon the 52 week period preceding the 1987 incident. See Decision on Remand at 5. These findings set forth by the administrative law judge are inconsistent and fail to address the issues for which the Board initially remanded the case; accordingly, we vacate

¹Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's annual earnings, which are then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage.

the administrative law judge's finding that claimant's compensation should be based on his 1987 average weekly wage, and remand the case to the administrative law judge for reconsideration of this issue pursuant to our prior opinion.

Accordingly, the administrative law judge's findings on the issues of average weekly wage and suitable alternate employment are vacated, and the case is remanded for further consideration consistent with this opinion. In all other aspects, 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