BRB Nos. 92-2476
and 92-2476A

OLLIE KOGER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	DATE ISSUED: _____
	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

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

Dorsey Redland (Dorsey Redland, Inc.), San Francisco, California, for claimant.

Phil N. Walker (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Granting Benefits (91-LHC-1480) of Administrative Law Judge John C. Holmes, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 12, 1985, claimant, who had previously suffered an injury to his left knee which resulted in a fourteen percent permanent physical impairment, suffered an injury to his right knee while performing work as a boilermaker for employer, Todd Shipyards Corporation. Claimant attempted to return to work on October 23, 1985, but was apparently unable to do so and was laid off the same day. Thereafter, for a short period of time in December 1985 and May and June 1986, claimant worked at Triple A Machine Shop, Inc. (Triple A) as a slinger, a job that required less exertion than his job with employer. Claimant was diagnosed as suffering from a torn medial meniscus and underwent arthroscopic surgeries in 1986, 1987 and 1991. He sought permanent total disability compensation under the Act. Both employer and Triple A contended that claimant was limited to permanent partial disability under the schedule because he could perform suitable alternate employment.[1]

The administrative law judge determined that employer was liable as the responsible employer, finding that any increased anatomical impairment claimant sustained to either knee was a result of the natural progression of the August 12, 1985, injury claimant received while working for employer and/or the result of the surgical procedures for the right knee working in combination with his prior injury to the left knee. The administrative law judge also denied the claim for total disability, finding that while it was undisputed that claimant could not perform his usual work, employer established the availability of suitable alternate employment as of June 11, 1987. The administrative law judge further determined that claimant was not diligent in seeking alternate work and that the nature of his disability was temporary. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 12, 1985 to June 11, 1987, December 14, 1987 through April 14, 1988, and April 22, 1991 through June 17, 1991, during which periods claimant was recovering from surgery. From June 12, 1987 and continuing, except for the aforementioned periods of temporary total disability, claimant was awarded temporary partial disability benefits.

Claimant appeals, arguing that the administrative law judge erred in finding that employer established the availability of suitable alternate employment and in finding that permanency had not been reached. BRB No. 92-2476. Employer cross-appeals, arguing that the administrative law judge's finding that it is liable as the responsible employer is contrary to law and that there is no evidentiary basis to support his conclusion that claimant's August 12, 1985, injury resulted in a tear of the meniscus which did not become

[1]Employer paid temporary total disability benefits from August 13, 1985 to November 24, 1985, from January 21, 1986 until May 13, 1986, and from June 12, 1986 until October 17, 1988. Employer also paid permanent partial disability benefits for a fourteen percent loss of use of claimant's right knee. Todd's Exhibit 18.

apparent until almost a year later. In addition, employer maintains that the administrative law judge erred in awarding claimant temporary total disability benefits during the periods that claimant was working for Triple A. BRB No. 92-2476A.

Initially, we will address claimant's argument regarding the administrative law judge's finding that employer established the availability of suitable alternate employment. In the present case, as it was undisputed that claimant was unable to perform his usual employment with employer due to his work-related injury, claimant established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Hairston v. Todd Shipyards Corp.*, 21 BRBS 122 (CRT) (9th Cir. 1988), *rev'g* 19 BRBS 6 (1986); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984).

Employer attempted to meet its burden of demonstrating suitable alternate employment through the vocational reports of Lee Whitney and Jeannie Johnson of Crawford & Company, Michael Haag, and Howard B. Stauber which listed numerous specific job opportunities. Todd's Exhibits 62, 63, 64. After considering this evidence, the administrative law judge summarily found, without identifying the jobs which formed the basis for his conclusion, that at all times since his return to work in November 1985, claimant could have worked in suitable alternate employment with the exception of those periods when he was undergoing surgery and the subsequent recovery periods. The administrative law judge further determined that Mr. Haag's June 11, 1987, report provided the earliest evidence of suitable alternate employment and that these jobs paid from $4.00 to $7.50 per hour. The administrative law judge stated that this and subsequent vocational reports accurately described claimant's medical limitations as well as his age, education and background. Noting that Crawford's March 15, 1991, report listed positions with hourly rates from $4.25 to $10, and giving claimant the benefit of the doubt that the higher range job offers may not have been available, the administrative law judge found that claimant had a post-injury wage-earning capacity of $260 per week based on an hourly rate of $6.50, and was thus entitled to compensation based on a $209.58 loss in wage-earning capacity during his periods of temporary partial disability.

We agree with the claimant that the administrative law judge's finding that suitable alternate employment was first established based on the June 11, 1987, report of Michael Haag is erroneous, as no specific jobs opportunities were identified in this report. Although in later reports Mr. Haag identified jobs for security guards and parking lot attendants and Ms. Johnson and Ms. Whitney identified security and a variety of other types of jobs each believed claimant could perform, the record reflects that some of the jobs identified were not actually available at the time the surveys were performed and others appear to require experience or education which claimant did not possess. Moreover, while the vocational experts' surveys were conducted based on a functional capacity evaluation performed by

Dr. Sampson on May 18, 1987[2] which stated that claimant was able to sit for up to eight hours a day, stand for up to five hours, walk for up to three hours, and was to avoid bending stooping, squatting, crawling, crouching, kneeling, lifting and carrying over 50 pounds, many of the jobs identified required standing and/or walking and the amount of each activity required is not discernable. Thus, not every job identified was suitable for claimant or available to him. The deficiencies in the vocational evidence, in conjunction with the administrative law judge's failure to identify the specific jobs constituting suitable alternate employment, mandate that we vacate the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment and remand this case for further consideration. On remand, the administrative law judge must adequately detail the rationale behind his decision, identifying the specific available jobs he relied upon and why consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).[3]

On remand, the administrative law judge should also explicitly determine when suitable alternate work was first shown to be available after each of claimant's surgeries. As claimant avers, the administrative law judge's summary finding that claimant was entitled to temporary total compensation during each surgery and for a brief period of healing is insufficient. Claimant's entitlement to total disability continues until such time that suitable alternate employment is shown to be available. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).[4] In addition, if the administrative law judge finds employer demonstrated suitable available jobs on remand and again awards temporary partial disability benefits, 33 U.S.C. §908(e), he must make specific findings as to the wages paid by those jobs, adjusted to the rate paid at the time of claimant's injury in order to account for inflation. *See, e.g., Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). The administrative law judge's summary conclusion that claimant has a post-injury wage-earning capacity of $6.50 per-hour does not adequately address loss of wage-earning capacity under Section 8(e). *See* 33 U.S.C. §908(h).

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[2]Ms. Johnson also considered Dr. Raimondo's limitations in conducting her labor market survey. Ex. 62, p 648.

[3]Although the administrative law judge found that claimant was limited to temporary partial disability because of his failure to establish due diligence in seeking alternate work, claimant's duty to diligently seek work does not arise until after employer has proven the existence of suitable alternate employment. *See Williams v. Halter Marine Services, Inc.*, 19 BRBS 248 (1987).

[4]We reject, however, claimant's contention that the vocational reports are not adequate in that Mr. Haag did not inform prospective employers about claimant's physical condition, his low reading scores, his filing of a compensation case, or the fact that he was taking narcotic pain medication. The vocational expert need not directly contact the prospective employers. *See Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990).

Citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), claimant also argues that he is permanently disabled because his condition has continued for a lengthy time and appears to be of lasting or indefinite duration, as opposed to a condition which merely awaits a normal healing period. We disagree. The administrative law judge rationally found that claimant's disability was temporary in nature based on the opinions of Drs. Sampson and Stark that maximum medical improvement had not yet been achieved. *See* Todd's Exhibit 59 at 20; Transcript 406. *See also Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990); *Ballesteros v. Willamette Western Corporation*, 20 BRBS 184 (1988). The finding that claimant's disability is temporary in nature is thus affirmed.

Turning to the arguments raised by employer on cross-appeal, we initially reject employer's assertion that the administrative law judge's finding that it is liable as the responsible employer does not comport with the applicable law. In allocating liability among successive employers and carriers in the case of multiple or cumulative traumatic injuries, if the disability resulted from the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, the employer at the time of the initial injury is liable for the entire resultant disability. If, however, claimant sustains an aggravation of the initial injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

In the present case, the administrative law judge found that there was clear and convincing evidence establishing that claimant's injury with employer on August 12, 1985 caused the damage to claimant's right knee, and that this was the sole cause of claimant's current condition. The administrative law judge based this conclusion on the brevity and lighter nature of the work claimant subsequently performed at Triple A,[5] and the fact that three out of four physicians testifying, Drs. Sampson, Stark, and Vickman, found that claimant's injury was due solely to the August 1985 injury. Inasmuch as the administrative law judge's finding in this regard is rational and supported by substantial evidence, his determination that employer is liable as the responsible employer is affirmed. *See Cordero*

[5]During his work at Todd, claimant had to perform frequent crawling, standing, lifting, and climbing ladders. *See* Todd's Exhibit 68 at 8. In comparison, claimant's job at Triple A simply required him to hook objects up with a crane. *See* Todd's Exhibit 57 at 64; Transcript at 375-376.

v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Kooley v. Marine Industries Northwest*, 22 BRBS 142, 146 (1989).[6]

We agree with employer, however, that the administrative law judge erred in awarding claimant temporary total disability benefits during the periods of time that claimant was employed at Triple A from December 12 to December 23, 1985, December 26 to 27, 1985, May 28 to 31, 1986, and from June 2 to 5, 1986. Total disability compensation while a claimant is working is an exception and is applicable only to those situations where the claimant works through extraordinary effort or is provided a position through an employer's beneficence. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316, 319 (1990). In the present case, the record is void of any evidence indicating that claimant's work at Triple A was due to Triple A's beneficence or the result of claimant's extraordinary effort. *See Jordan v. Bethlehem Steel Corp.,* 19 BRBS 82 (1986). Accordingly, we vacate the administrative law judge award of temporary total disability benefits for the periods claimant worked at Triple A as improper and remand for him to reconsider the extent of claimant's disability during these periods.

Accordingly, the administrative law judge's findings that employer established the availability of suitable alternate employment and his award of temporary total disability benefits for the periods of time that claimant was working at Triple A are vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other aspects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]Employer's contention that it should be entitled to invoke the Section 20(a), 33 U.S.C. §920(a), presumption on its behalf against Triple A is without merit. This Board has previously stated that the Section 20(a) presumption is a presumption of compensability which has no bearing on the responsible employer issue. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).