

SCOTT E. STAHLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHLAND SERVICES,	)	DATE ISSUED: 07/11/2013
INCORPORATED	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE,	)	
INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Granting Claimant's Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Richard A. Nielsen (Nielsen Shields, PLLC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Order Granting Claimant's Motion for Reconsideration (2010-LHC-00134) of Administrative Law Judge Jennifer Gee 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 if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After claimant was hired to work as a crane operator for employer, he sustained a traumatic bitemporal hematoma on February 8, 2005, as a result of a fall on a barge while in transit via the Bering Sea from Dutch Harbor, Alaska, to employer's worksite in St. Paul, Alaska. Claimant underwent surgery for a right temporal intracerebral hematoma. He was released from the hospital after six days, prescribed a low dosage of Zyprexa for anxiety, and told to refrain from drinking alcohol, driving or operating heavy equipment, or doing anything that required exertion. In April 2005, claimant checked into Gentiva Rehab Without Walls, a Phoenix, Arizona treatment center, which provides rehabilitative services for those recovering from a neurological injury. Claimant suffered seizures on May 25, June 8, and July 3, 2005. Claimant was prescribed medication to manage the seizures and advised to refrain from operating heavy equipment, driving an automobile or working. As a consequence of a fall from his third seizure, claimant also sustained second and third degree burns of the left hand, acute left hand cellulitis with leukocytosis, and weakness in his left upper extremity. Claimant suffered a second head injury when, in the course of a traffic stop by police officers on October 25, 2006, he twice fell and hit his head on the pavement. Claimant was transported to the hospital where he underwent surgery for a right epidural hematoma.

Following recovery from his second head injury, claimant found work on March 2, 2007, as a janitor at a Kohl's department store in Phoenix, Arizona, and, subsequently, after quitting his employment at Kohl's, as a night manager at Crossroads, the rehabilitation facility in which he had been living and undergoing treatment. He held that position until October 1, 2007, when he began a jail sentence related to his October 25, 2006 traffic stop. Upon his release, claimant returned to live and work at Crossroads for one month, where he performed 24 hours of maintenance work per week, in exchange for the \$175 per week room and board fees. Claimant also worked, from March 2, 2008 to January 8, 2009, assisting a realtor with the maintenance and cleaning of foreclosed properties. In January 2009, claimant was rehired by Crossroads to perform maintenance work at \$10 per hour for 40 hours a week. Claimant held this position until May 23, 2009, when he left the area to return to Alaska to get married. In Anchorage, claimant had a series of jobs: he worked as a stock person at a Kohl's department store from October 2009 through November 6, 2009, as a maintenance man at the Parkwood Inn from December 2009 to January 2010, as a handyman in January and February 2010, as a stock person at Ace Hardware from March 2010 through June 25, 2010, and then again, as a handyman until September 2010, when, following the dissolution of his marriage and a relapse into alcoholism, he moved to his parents' home in Smithfield, Nebraska. In January 2011, claimant found work as a telemarketer, earning \$9 per hour at 40 hours per week.

Claimant filed a claim seeking benefits under the Act for all injuries resulting from the February 8, 2005 accident. The administrative law judge found that claimant's traumatic brain injury, as well as the resulting seizure disorder and other injuries sustained therefrom, i.e., the left upper extremity injury sustained on July 3, 2005, and

traumatic brain injury sustained on October 25, 2006, are all work-related. The administrative law judge found that claimant cannot return to his prior work for employer as a crane operator and that employer did not establish the availability of suitable alternate employment. Nonetheless, the administrative law judge found that claimant demonstrated his ability to perform alternate work in the various jobs he held after March 2, 2007. She therefore awarded claimant periods of temporary total disability benefits from February 5, 2005 through March 27, 2006, and permanent total disability from March 28, 2006 to March 1, 2007.¹ In the body of her decision, the administrative law judge stated that after March 1, 2007, claimant is entitled to permanent partial disability benefits during those times when he was working and to permanent total disability benefits when he was not. Decision and Order at 21, 23, 25. In her Order, however, the administrative law judge awarded claimant continuing permanent partial disability benefits from March 2, 2007 for a loss in wage-earning capacity and a scheduled award for a 15 percent impairment to his left upper extremity. *Id.* at 29. On reconsideration, the administrative law judge modified her decision to reflect that, pursuant to *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012), claimant is entitled to the higher maximum compensation rate for his permanent total disability award based on the National Average Weekly Wage (NAWW) in effect at the time he became eligible to receive permanent total disability benefits in 2006.

On appeal, claimant challenges the administrative law judge's finding that he was only partially disabled from February 8 to March 2, 2008. Claimant also contends he is entitled to permanent total disability benefits for each period subsequent to March 2, 2007, when he was not working. Claimant further contends that he is entitled to the new maximum compensation rate at the time of each of his periods of total disability and for the subsequent period of partial disability. Employer asserts that the administrative law judge's decision should be affirmed.² Claimant filed a reply brief.

¹The administrative law judge found that claimant reached maximum medical improvement with regard to his brain injury and seizure disorder on March 28, 2006. She also found that claimant reached maximum medical improvement with regard to his left upper extremity on February 20, 2006, with a resulting 15 percent impairment of his left upper extremity.

²We reject employer's contention that claimant's appeal was untimely filed. The administrative law judge's Order Granting Claimant's Motion for Reconsideration was filed by the district director on June 8, 2012. Claimant's appeal was mailed on Monday, July 9, 2012, and received by the Board on July 16, 2012. As the thirtieth day from the date of filing of the administrative law judge's decision by the district director was a Sunday, July 8, 2012, claimant's appeal, mailed on Monday, July 9, 2012, is timely. 20 C.F.R. §§802.207(b), 802.221(a).

Upon review of the administrative law judge's decisions and the parties' appellate briefs, it is apparent that we must remand this case for clarification with regard to the kind of benefits to which claimant is entitled for the various periods he did and did not work after his return to employment on March 2, 2007. The administrative law judge's findings regarding claimant's entitlement to benefits and her "Order" are not consistent with each other and fail to account for one of the stipulations by the parties. Moreover, it appears from the parties' pleadings and the district director's calculation of benefits that there is no agreement as to what benefits were ordered by the administrative law judge.³

The administrative law judge stated that "[t]hough claimant would be deemed permanently totally disabled during the periods when he was unemployed, I find he was only permanently partially disabled during those times when he was working." Decision and Order at 21. The administrative law judge subsequently reiterated, after reviewing claimant's actual work history and earnings after March 2, 2007, that "[f]or those periods when he did not work, the claimant is entitled to total disability benefits." *Id.* at 25. Nonetheless, the "Order" section of the administrative law judge's decision does not contain any statement regarding claimant's entitlement to total disability benefits after March 2, 2007. Rather, she ordered only that employer shall pay claimant "permanent partial disability compensation beginning March 2, 2007, and continuing as long as his partial disability continues."⁴ *Id.* at 29. Moreover, the administrative law judge's statement that claimant is entitled to permanent total disability benefits during periods in which he was unemployed after March 2, 2007, does not reflect the parties' stipulation, acknowledged by the administrative law judge, that "claimant is able to perform suitable alternate work and is not permanently totally disabled as of February 17, 2010." *Id.* at 2, 21, 25. Although claimant's base compensation rate for permanent total and permanent partial disability is the same due to claimant's high average weekly wage, it is necessary that the administrative law judge specifically determine claimant's entitlement to partial or total disability benefits for each period for the reasons discussed at p. 5-6, *infra*. Therefore, we remand the case for the administrative law judge to resolve the inconsistencies in her decision, as well as to address the following issues.

³In calculating the award of benefits, the district director treated those periods of unemployment subsequent to March 2, 2007, as entitling claimant to temporary, rather than permanent, total disability benefits.

⁴In its response brief, employer alleges that the administrative law judge's order of ongoing permanent partial disability benefits from March 2, 2007, is correct as any subsequent periods of unemployment experienced by claimant are not related to the work injury. Employer thus maintains that claimant is not entitled to any permanent total disability benefits after March 2, 2007. The administrative law judge did not address this contention in her decision.

Turning to claimant's other, specific contentions, first, claimant contends he is entitled to permanent total rather than permanent partial disability benefits for the period from February 8, 2008 through March 2, 2008, because, contrary to the administrative law judge's finding, he had no taxable earnings during this period of time. Claimant maintains that the administrative law judge did not discuss the decision of the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), in which the court held that the value of non-taxable benefits, in this case claimant's room and board at Crossroads, should not be included as "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13). Claimant similarly contends that the value of room and board does not establish he has a post-injury wage-earning capacity.⁵

In *Wausau Ins. Cos.*, 114 F.3d 120, 31 BRBS 41(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, reversed the Board's holding that the value of employer-provided room and board was includable in the calculation of an employee's average weekly wage. The court ruled that the Act defers to the Internal Revenue Service's criteria for deciding whether non-monetary compensation is "wages." After determining that the value of meals and lodging was not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of the claimant's meals and lodging should not have been included as "wages" under the Act. *Wausau Ins. Cos.*, 114 F.3d at 122, 31 BRBS at 42(CRT); *see also McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir. 1998).

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *see also Sestich v. Long Beach Container*

⁵Employer asserts that the Board should reject claimant's contention as it is being raised for the first time before the Board. Contrary to employer's assertion, claimant first raised this issue before the administrative law judge, as claimant argued in his post-hearing brief that the room and board which he received at Crossroads in exchange for his doing 24 hours of maintenance work per work and treatment, were "not taxable" and thus, "not considered earnings in the Ninth Circuit." *See Claimant's Post-Hearing Brief* at 9.

Terminal, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). Pursuant to the Ninth Circuit's decisions in *Wausau*, the value of the room and board claimant received in exchange for work while he was in treatment at Crossroads may not establish that he had a post-injury wage-earning capacity. As the administrative law judge did not address this contention, we vacate the administrative law judge's finding that claimant had a wage-earning capacity from February 8, 2008 through March 2, 2008, as well as her calculation of claimant's wage-earning capacity at \$233.67 for the period from March 3, 2008 through January 7, 2009.⁶ On remand, the administrative law judge must reconsider claimant's wage-earning capacity during these periods, addressing claimant's assertion that he is entitled to permanent total rather than permanent partial disability benefits for the earlier time period as well as employer's response that any loss of wage-earning capacity is not work-related. See n. 4, *supra*.

Second, claimant contends that if he is entitled to additional permanent total disability benefits, he should be compensated at the higher maximum compensation rate, in accordance with Section 6(c) of the Act, 33 U.S.C. §906(c), in effect at the time of each distinct period of permanent total, as well as for subsequent periods of permanent partial disability.

In her initial decision, the administrative law judge found that since claimant's average weekly wage is \$2,027.38, his award of benefits is, pursuant to Section 6(b)(1) of the Act, limited by the maximum compensation rate in effect at the time of claimant's February 8, 2005 injury, \$1,047.16. On reconsideration, the administrative law judge discussed the holdings of the Ninth Circuit and United States Supreme Court in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012). The administrative law judge found that "the maximum compensation rate for the claimant's permanent total disability shall be governed by the NAWW [National Average Weekly Wage] in effect at the time he became eligible to receive PTD." Order Granting Reconsideration at 7. Accordingly, she amended her decision to reflect claimant's entitlement to temporary total disability benefits from February 8, 2005 to March 27, 2006 based on the applicable NAWW for fiscal year 2005, \$1,047.16; permanent total disability benefits from March 28, 2006 through September 30, 2006, based on the applicable NAWW for fiscal year 2006, \$1,073.64; and permanent total disability benefits from October 1, 2006 through March 1, 2007 based on the applicable national average weekly wage for fiscal year 2007, \$1,114.44. The administrative law judge, however, affirmed her prior determination that the maximum compensation rate

⁶ The administrative law judge appears to have included the value of the room and board beyond the period of claimant's treatment at Crossroads. See Decision and Order at 24.

pertaining to any award of permanent partial disability benefits should be the maximum compensation rate in effect at the time of his February 8, 2005 injury, i.e., \$1,047.16. Moreover, the administrative law judge declined to address claimant's contention that the maximum compensation rate should be adjusted to the new maximum compensation rate every time claimant becomes eligible for permanent total disability. Order Granting Reconsideration at 3.

In *Roberts*, the claimant was awarded temporary total disability benefits from March 2002 to July 2005, permanent total disability benefits from July 2005 to October 9, 2005, and ongoing permanent partial disability benefits from October 10, 2005. The Ninth Circuit held that an employee is "newly awarded" compensation within the meaning of Section 6(c) when he first becomes entitled to compensation.⁷ As claimant Roberts became newly entitled to compensation in fiscal year 2002, the year in which Roberts first became disabled, the Ninth Circuit held that the administrative law judge had "properly applied the 2002 fiscal year maximum to Roberts's compensation for temporary total disability and permanent partial disability." *Roberts*, 625 F.3d at 1208, 44 BRBS at 75-76(CRT). Addressing the "currently receiving" phrase of Section 6(c), the Ninth Circuit held that since Roberts was entitled to receive permanent total disability compensation during the period between July 12, 2005 and September 30, 2005, the applicable maximum rate to be applied to that award should be based on the NAWW with respect to fiscal year 2005. Claimant filed a petition for certiorari challenging the Ninth Circuit's rulings as to the applicable NAWW when an injured worker is first awarded temporary total disability benefits and when that same worker first becomes permanently totally disabled. However, the Supreme Court granted review only on the first question. Affirming the Ninth Circuit's decision, the Supreme Court held that an employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation

⁷ The relevant portions of Section 6 state:

(b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage

* * *

(c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

order issues on his behalf. *Roberts*, 132 S.Ct. at 1358-1360, 46 BRBS at 18-19(CRT). Given the history in *Roberts*, the administrative law judge in this case accurately stated that the Ninth Circuit's rulings on all three issues, i.e., the applicable maximum compensation rate for: (1) temporary total, (2) permanent total: and (3) permanent partial, disability benefits, remain binding, "the first because it was affirmed by the U.S. Supreme Court, and the second and third because they have not been overruled." Order Granting Reconsideration at 6.

Thus, we affirm the administrative law judge's findings that: 1) claimant is entitled to temporary total disability benefits based on the fiscal year 2005 maximum rate, \$1,047.16; 2) claimant is entitled to permanent total disability benefits from March 28, 2006 through September 30, 2006, based on the fiscal year 2006 rate, \$1,073.64, and 3) to permanent total disability benefits from October 1, 2006 through March 1, 2007 based on the fiscal year 2007 rate, \$1,114.44.

Third, we reject claimant's assertion that his compensation rates for any award of permanent partial disability benefits should be the maximum rate in effect at the time of each preceding period of total disability. The administrative law judge properly limited the maximum rate for permanent partial disability to that in effect for fiscal year 2005, \$1,047.16, because claimant was neither newly awarded compensation nor currently receiving permanent total disability benefits at the time the new maximum rate went into effect. *Roberts*, 625 F.3d at 1208, 44 BRBS at 75-76(CRT). If claimant is awarded additional permanent total disability compensation on remand, his compensation would rise pursuant to Section 10(f), 33 U.S.C. §910(f), but be subject to the maximum in effect for each applicable period, in accordance with the "currently receiving" phrase of Section 6(c).⁸ *Id.*

⁸The administrative law judge ordered, on reconsideration, that the statutory maximum compensation rate relating to claimant's award of permanent total disability benefits increases on October 1 of each subsequent year, which is in accordance with Section 10(f), 33 U.S.C §910(f).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Claimant's Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge