BRB No. 98-0981

CHARLES DRIVER Claimant-Petitioner v. SAUNDERS ENGINE COMPANY, INCORPORATED and UNITED STATES FIDELITY & GUARANTY COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Mary Beth Mantiply (Mantiply & Associates), Mobile, Alabama, for claimant.

David A. Hamby, Jr. and Jene W. Owens, Jr. (Brooks and Hamby, P.C.), Mobile, Alabama, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (97-LHC-0001) of Administrative Law Judge Ainsworth H. Brown 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 if they 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).

Claimant injured his back during the course of his employment as a diesel mechanic on November 12, 1985. He also sustained work-related aggravations of his back condition in 1986, 1988, and 1989, but continued to work in this job. Employer voluntarily provided medical benefits and paid sick leave when claimant lost work due to his back condition. In October 1994, claimant's treating physician, Dr. Saiter, advised claimant that his back condition prohibited his continued employment as a diesel mechanic. Employer then voluntarily hired claimant as a service writer in the truck division of the company and paid claimant the wages he earned as diesel mechanic in 1993. On June 5, 1995, Dr. Saiter prescribed an exercise program at Pro-Health. Employer's insurance carrier refused to authorize payment for the treatment and claimant filed a claim for benefits under the Act on August 28, 1995.

In his Decision and |Order, the administrative law judge found that the claim was timely filed, *see* 33 U.S.C. §913, that claimant sustained work-related injuries, and that he is unable to return to his usual employment as a diesel mechanic. He also found that employer offered suitable alternate employment as a service writer and that claimant did not sustain a loss of wage-earning capacity. Based on the diagnosis of Dr. Saiter, the administrative law judge further found that claimant's back impairment became permanent on October 5, 1995. Finally, the administrative law judge denied the claim for past and future medical expenses.

On appeal, claimant contends the administrative law judge erred in finding that he did not sustain a loss of wage-earning capacity when his back condition caused a change in job duties from diesel mechanic to service writer. Claimant also asserts that the administrative law judge erred in denying his claim for treatment at Pro-Health as prescribed by Dr. Saiter. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's finding that his actual post-injury wages establish his post-injury wage-earning capacity. Specifically, claimant argues that his actual post-injury wages fail to account for his reduced access to the job market due to his back impairment, employer's benevolence in providing him suitable alternate employment as a service writer, and the loss of overtime, a company car and raises given diesel mechanics, which he contends are no longer available to him due to his work injuries. Claimant also argues that his loss of wage-earning capacity should be determined by comparing his actual wages in 1996 as a service writer of $33,922, with the average annual

wage employer paid diesel mechanics in 1996 of $50,558. *See* CX 10.

Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act 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; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

We agree with claimant that the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity due to his work injury cannot be affirmed as he has not fully analyzed this issue as required by the Act. The administrative law judge initially erred by stating that where employer has provided claimant with suitable, non-sheltered alternative employment, an inquiry into claimant's wage-earning capacity on the open market is irrelevant. *See Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). Rather, the administrative law judge must first determine whether claimant's actual post-injury wages fairly and reasonably represent his post-injury wage-earning capacity, and in order to do so, the administrative law judge must expressly consider the relevant factors noted *supra*, including the specific effects on his earning capacity raised by claimant. Moreover, the administrative law judge erred in failing to neutralize the effects of inflation by utilizing claimant's 1996 earnings as his post-injury wage-earning capacity. If he determines claimant's earnings as a service writer fairly and reasonably represent his wage-earning capacity, he must adjust those earnings back to the wage level paid at the time of claimant's November 12, 1985, work injury. *See*, *e.g.*, *Richardson*, 23 BRBS at 330-331. Accordingly, we vacate the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity, and we remand for the administrative law judge to apply the applicable law to the relevant evidence and redetermine claimant's post-injury wage-

earning capacity, which he must then adjust for inflation and compare with claimant's pre-injury average weekly wage.

Claimant next argues that the administrative law judge erred by failing to order employer to pay for the exercise program prescribed by Dr. Saiter. In declining to find employer liable for this program, the administrative law judge found no evidence that a qualified physician rendered an opinion that this treatment is reasonable and necessary, and he noted that claimant failed to address this issue in his post-hearing brief.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment...medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, while claimant did not address this issue in his post-hearing brief, he did raise the issue in his pre-hearing statement and at the formal hearing, *see* Tr at 10; accordingly, the issue was properly raised before the administrative law judge. *See* 20 C.F.R. §702.338. Moreover, contrary to the administrative law judge's decision, there is evidence that claimant requested the treatment at Pro-Health and it was prescribed by Dr. Saiter, who is Board-certified in orthopedics and claimant's treating physician. *See* Tr. at 54-55; CX 2 at 1-2. Accordingly, we vacate the administrative law judge's denial of medical benefits, and we remand for the administrative law judge to address the evidence relevant to this issue.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge