BRB No. 99-0905

WILLIAM D. LARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DETYENS SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Thomas M. White (The Steinberg Law Firm, L.L.P.), Goose Creek, South Carolina, for claimant.

Stephen P. Groves, Elizabeth Luzuriaga, and Stephen L. Brown (Young, Clement, Rivers & Tisdale, L.L.P.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-LHC-1056) of Administrative Law Judge Thomas M. Burke 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).

This case is before the Board for the second time. To recapitulate, claimant, a shipfitter welder, injured his back on April 5, 1993, while working for employer. After undergoing L3-L4 fusion surgery with insertion of pedicel screws bilaterally on October 6, 1993, and a second surgical procedure to remove the screw on October 13, 1993, claimant

returned to work for employer in a light duty capacity on February 13, 1994. Thereafter, the shipyard reassigned claimant to a permanent light duty position as a modified tool room attendant. Employer voluntarily paid claimant temporary total and temporary partial disability compensation for various periods. Claimant sought additional temporary total and permanent total disability compensation, alleging that the tool room attendant job which employer provided at its facility exceeded his restrictions, and that he continued to perform this job in pain and only through extraordinary effort because he needed to work to support his family.

After noting that it was undisputed that claimant could not perform his usual work, the administrative law judge found that the modified tool room attendant position did not constitute suitable alternate employment. The administrative law judge determined, however, that as claimant had actually been earning his full wages, although working outside his restrictions and at the cost of excessive pain, employer should not be required to pay claimant total disability compensation in addition to those wages. Accordingly, he held that claimant's award of permanent total disability compensation was to commence as of the time he ceased working as a tool room attendant. Employer's motion for reconsideration was denied.

Employer appealed these decisions to the Board. *Lark v. Deyten Shipyards, Inc.*, BRB No. 97-1324 (June 24, 1998)(unpub.). The Board reviewed the administrative law judge's finding that despite employer's efforts to accommodate claimant's restrictions, the tool attendant job it provided was not suitable for claimant. The administrative law judge compared claimant's physical restrictions to the job requirements as described by claimant and employer's safety manager. He concluded that the tool room attendant position requirements exceed claimant's medical restrictions and thus was insufficient to establish suitable alternate employment. The Board affirmed this finding inasmuch as employer failed to establish any error made by the administrative law judge in evaluating the record evidence relevant to this issue and in making credibility determinations, and thus affirmed the award of permanent total disability benefits. In addition, the Board affirmed the administrative law judge's award of prospective benefits, noting that while it was unusual, claimant had not appealed the administrative law judge's finding that he is not entitled to benefits while working. The Board noted that after claimant stops working, employer may introduce evidence of suitable alternate employment via a modification proceeding under 33 U.S.C. §922. Lastly, the Board vacated the administrative law judge's award of benefits using an average weekly wage of $499.59 based on one of the parties' stipulations, in view of a conflicting stipulation that claimant's compensation rate is $312.11, which yields an average weekly wage of $468.17. On remand, the administrative law judge was to reconsider the issue and resolve the conflict in the parties' stipulations.[1]

[1]Employer appealed the Board's decision to the United States Court of Appeals for the

In his Decision and Order on Remand, the administrative law judge found that claimant's average weekly wage is $468.17, with a corresponding compensation rate of $312.11, based on a consent decree filed by the parties in the proceedings on remand. Employer appeals the administrative law judge's Decision and Order on Remand.

On appeal, employer again contends that the administrative law judge erred in finding that the light duty job claimant performed at its facility did not constitute suitable alternate employment, and that he therefore erred in his original decision in awarding claimant permanent total disability benefits.[2] The Board thoroughly considered and addressed employer's contentions in its previous decision and we will not reexamine the issue. Thus, we hold that the Board's previous decision on the issues raised constitutes the law of the case, *see, e.g., Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988), and we affirm the administrative law judge's decision on remand.

Fourth Circuit, which dismissed the appeal on November 5, 1998.

[2]Employer seemingly has filed the same brief with the Board that it filed in its previous appeal, as employer raises the average weekly wage issue even though that issue was resolved in its favor in the administrative law judge's decision on remand. In addition, in its "Statement of the Issues on Appeal," employer alleges error in the administrative law judge's remanding the case to the district director for consideration of employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f). This issue is not mentioned again in employer's brief; we therefore decline to address this issue as it is not adequately briefed. 20 C.F.R. §802.211(b); *see generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (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

JAMES F. BROWN
Administrative Appeals Judge