BRB Nos. 98-0182
and 98-0182A

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| GARY GROVER | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED: |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PROFCO, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| INDUSTRIAL INDEMNITY COMPANY | ) | |
| | ) | |
| Employer/Carrier- | ) | |
| Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeals of the Decision and Order Awarding Compensation Benefits, Order Granting Petition for Reconsideration, Order Denying Second Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Phil Watkins (Law Offices of Phil Watkins, P.C.), Corpus Christi, Texas, for claimant.

Michael D. Murphy (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Compensation Benefits, Order Granting Petition for Reconsideration, Order Denying Second Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration (96-LHC-566) of Administrative Law Judge Richard D. Mills 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.,* as extended by the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §1331 *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).

Claimant, a drilling fluids engineer on an offshore oil rig, injured his right knee on December 30, 1993, after he slipped and fell while retrieving a mud sample. Claimant received free room and board on the rig, the value of which the administrative law judge included in determining claimant's average weekly wage. Post-injury, claimant worked as an offshore oil worker for other employers besides employer, earning $300 in February 1995 for one day of consulting, $1,441 in March 1995 for two days of training, $15,000 in May and June 1995 for 11 days as a drilling fluids engineer, and $10,000 in August and September 1995 for 21 days of the same work. The administrative law judge awarded claimant temporary total disability benefits from January 4, 1994, to May 1, 1995, and permanent total disability benefits from May 1, 1995, the date of maximum medical improvement, until October 1, 1995, the date suitable alternate employment was established. The administrative law judge stated that employer was not liable for compensation on the 35 days that claimant received wages. Claimant was awarded permanent partial disability benefits pursuant to the schedule at Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), from May 1, 1995 for 30 percent to the right leg for 86.4 weeks,[1] but the administrative law judge found that employer was responsible only for the 64 weeks remaining on this award after suitable alternate employment was established on October 1, 1995, as claimant was receiving compensation for total disability prior to this time. The administrative law judge also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, interest, and an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, claimant appeals the administrative law judge's permanent partial disability award. Employer cross-appeals the administrative law judge's total disability awards and challenges the administrative law judge's inclusion of claimant's room and board in his determination of average weekly wage.

[1]Thirty percent of 288 equals 86.4 weeks. *See* 33 U.S.C. §908(c)(2), (19).

We first address employer's contention regarding the calculation of claimant's average weekly wage. In this regard, employer contends that the administrative law judge erred in including the value of the room and board provided by employer to claimant in his calculation of claimant's average weekly wage. Employer avers that the administrative law judge's reliance on *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), is in error as *Guthrie* was reversed by the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997). In the Board's *Guthrie* decision, the Board determined that claimant's "subsistence and quarters," essentially room and board, were includable in claimant's average weekly wage as they satisfied the definition of "wages" under Section 2(13) of the Act, 33 U.S.C. §902(13).[2] In reversing the Board's decision in *Guthrie*, the Ninth Circuit stated that the Act "defers to the IRS criteria for deciding whether non-monetary compensation counts as wages. If it is not money, or an 'advantage' subject to withholding, it is not included." *Guthrie*, 114 F.3d at 122, 31 BRBS at 42 (CRT). After determining that the value of meals and lodging were not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of claimant's meals and lodging should not have been included as wages.[3] The Ninth Circuit has applied the

[2]Section 2(13) defines wages as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. §3101 *et seq.]*(relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13)(1994).

[3]The Ninth Circuit thus read the term "including" contained in Section 2(13) as "or," stating that "wages" must be either monetary or an advantage subject to withholding. The Board has stated that under the Ninth Circuit's holding, the phrase "including the reasonable value of any advantage" becomes a mandatory limitation on the inclusion of non-monetary compensation in the definition of wages. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 9-10 (1998).

same reasoning to hold that a claimant's *per diem* is not includable in determining average weekly wage. *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71 (CRT)(9th Cir. 1998). Because this case arises within the jurisdiction

of the United States Court of Appeals for the Ninth Circuit, we are bound to follow that court's holding.[4]

The administrative law judge determined that the value of claimant's room and board is $110.25 per week. Decision and Order at 7-10. Pursuant to the Ninth Circuit's decision in *Guthrie* and *McNutt*, the room and board should not be included in calculating claimant's average weekly wage as they are not income under the Internal Revenue Code as they were furnished for the convenience of the employer on the business premises of the employer, and claimant was required to accept the room as a condition of his employment.[5] *See* Cl. Post-hearing Br. at 7. Consequently, we modify the administrative law judge's determination of average weekly wage to reflect an average weekly wage of $969.23.

We next address employer's appeal of the administrative law judge's award of total disability benefits. Employer contends that it is entitled to a credit of $1,741 against claimant's temporary total disability award since claimant earned this dollar amount during this time while working for another employer. Employer also contends that the administrative law judge erred in awarding claimant permanent

[4]The Board has declined to follow the holding of the Ninth Circuit that room and board are not includable in the calculation of average weekly wage in cases not arising within that court's jurisdiction. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998)(room and board includable in determining average weekly wage as the use of the term "including" in Section 2(13) does not mandate that a benefit not subject to tax withholding is not a wage *per se* in a Defense Base Act case arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit); *see also Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, n. 10 (4th Cir. 1998)(questioning the interpretation of the word "including" in Section 2(13) by the Ninth Circuit in *Guthrie*).

[5]Claimant testified that he worked 12-14 miles off the coast of Santa Barbara, California, on an Exxon oil platform, for 12 hours a day, 14 days on and 14 days off per month, where he was provided a room and four meals a day. Tr. at 38-41, 44-46.

total disability benefits between May 1 and October 1, 1995, as claimant earned more than $25,000 during the time these benefits were awarded. Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d

1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

In awarding claimant temporary total disability benefits from January 4, 1994, to May 1, 1995, and permanent total disability benefits from May 1, 1995, until October 1, 1995, the administrative law judge found that claimant established total disability and that employer did not offer evidence of suitable alternate employment prior to claimant's employment as a real estate agent in October 1995. Decision and Order at 10-11. The administrative law judge concluded that the 35 days claimant worked post-injury for other employers did not constitute suitable employment because claimant's knee problems precluded him from performing this job.[6] Decision and Order at 11. Nonetheless, the administrative law judge held that employer is not liable for compensation on the 35 days that claimant worked. Order Granting Petition for Reconsideration at 2; Order Denying Claimant's Motion for Reconsideration at 2. Despite employer's contention to the contrary, it may not receive credit under Section 14(j) of the Act, 33 U.S.C. §914(j), for wages received by claimant from another employer as the wages were not paid "in lieu of compensation." *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n. 1 (1981). Moreover, the administrative law judge rationally determined that claimant's post-injury work was not suitable because claimant's knee problems precluded him from performing this job.[7] *See generally Armfield v. Shell Offshore, Inc.*, 30 BRBS 122

[6]Claimant was only able to work 11 days of his 28 day shift the first time he went back to work in May and June 1995. Subsequently, he was able to work 21 days of his 28 day shift in August and September 1995. Tr. at 65-67.

[7]The administrative law judge essentially found that claimant's post-injury work was the same as his pre-injury work, and that claimant is physically unable to perform this work based on the medical opinions of record.

(1996)*; Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.* 29 BRBS 103 (1995); Decision and Order at 11. Thus, we affirm the administrative law judge's award of total disability benefits prior to the time suitable alternate employment was established on October 1, 1995, as well as his finding that employer is not liable for compensation on the 35 days claimant worked.

Turning to claimant's appeal of the administrative law judge's award of the remaining 64 weeks of his scheduled permanent partial disability award from October 1, 1995, we agree with claimant that the administrative law judge erred. In *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), the United States Court of Appeals for the Ninth Circuit held that total disability does not become partial, as a matter of law, retroactive to the date of maximum medical improvement, upon a later showing of suitable alternate employment by employer, since such a holding ignores the economic aspect of a claimant's disability and assumes that the job market was the same at the time of maximum medical improvement as it was when the job showing was made. The court held that the definition of "disability" contained in Section 2(10) of the Act, 33 U.S.C. §902(10), supports using the date of suitable alternate employment as the indicator for when total disability becomes partial.[8] The Board applies this holding in all circuits. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). Consequently, a partial disability award commences from the date suitable alternate employment is established. *See also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990).

In the instant case, the administrative law judge awarded claimant scheduled permanent partial disability benefits from the date of permanency, May 1, 1995, but noted that the payments should begin on October 1, 1995 for the 64 weeks remaining in the award as claimant was permanently totally disabled from May 1 until October 1, 1995, a period of approximately 22 weeks. Inasmuch as a total disability award does not become partial until employer establishes suitable alternate employment, we hold that claimant is entitled to the full scheduled permanent partial disability award for 86.4 weeks starting from the date suitable alternate employment was established on October 1, 1995, for his 30 percent impairment. 33 U.S.C. §908(c)(2), (19); *Stevens*, 909 F.2d at 1256, 23 BRBS at 89

[8]Section 2(10) defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; . . . ." 33 U.S.C. §902(10).

(CRT); *Rinaldi*, 25 BRBS at 128.

Accordingly, the administrative law judge's Decision and Order Awarding Compensation Benefits is modified to reflect that claimant's average weekly wage is $969.23. The administrative law judge's Order Granting Petition for Reconsideration, Order Denying Second Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration are modified to reflect that claimant's scheduled permanent partial disability award is to be paid from October 1, 1995, for the full 86.4 weeks. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge