BRB Nos. 01-0941
and 01-0941A

ROBERT MONAGHAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
5.	)	
	)	
INDEPENDENT PIER COMPANY	)	DATE ISSUED: Sept. 3, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and the Order of Denial of Reconsideration and Attorney Fee Award of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and the Order of Denial of Reconsideration and Attorney Fee Award (2000-LHC-3022) of Administrative Law Judge Ralph A. Romano 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).

Claimant, a holdman, suffered an injury to his back during the course of his employment on December 13, 1995. Employer voluntarily paid claimant temporary total disability compensation from December 14, 1995 to September 23, 1999, and temporary partial disability compensation from September 24, 1999, to May 4, 2000. It is uncontested that claimant, who has not worked since the date of his accident, cannot return to his usual employment duties. Claimant sought temporary total disability compensation, and employer controverted this claim, asserting that claimant is only partially disabled.

In his Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment, paying $346.15 per week, as of August 6, 1997, and that claimant did not exercise due diligence in seeking such employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from December 14, 1995 through August 6, 1997, and temporary partial disability compensation from August 7, 1997, and continuing. 33 U.S.C. '908(b), (e). Both claimant=s and employer=s subsequent motions for reconsideration were summarily denied by the administrative law judge.

In their respective appeals, claimant and employer challenge the administrative law judge=s determination of claimant=s post-injury wage-earning capacity.[1]

Where, as in the instant case, claimant is incapable of resuming his usual employment duties with his employer, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See, e.g., Roger=s Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Turner*, 661 F.2d 1031, 14 BRBS 156. If suitable alternate employment is available, claimant is only partially disabled and benefits are based on his loss in wage-earning capacity, which is determined by comparing his pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. '908(e), (h).

In his decision, the administrative law judge found that employer, through a rehabilitation counselor retained by the United States Department of Labor, identified two potential employment opportunities, specifically a cashier position with Faulkner and a dispatcher position with Trans Freight. The administrative law judge subsequently concluded that claimant could perform these positions, that claimant=s counsel admitted that claimant could perform the duties of the dispatcher position with Trans Freight, and that this dispatcher job was sufficient to establish the availability of

[1]In his brief, claimant refers to permanent total and permanent partial disability. However, the claim before the administrative law judge concerned the extent of claimant=s temporary disability.

suitable alternate employment as of August 6, 1997. *See* Decision and Order at 1-2. Next, the administrative law judge concluded that claimant had not exercised due diligence in seeking post-injury employment, and he consequently awarded claimant temporary partial, rather than temporary total, disability benefits.

On appeal, claimant initially contends that the administrative law judge erred in failing to consider all of the relevant evidence in determining claimant=s functional capacity. Specifically, claimant asserts that the administrative law judge did not discuss testimony of Dr. Lefkoe, who opined that claimant is capable of only part-time sedentary employment. We agree with claimant=s contention that the administrative law judge erred in failing to consider the opinion of Dr. Lefkoe, which was based on his September 28, 2000, evaluation of claimant.[2] *See* CX 2; RX 8. After conducting a physical examination of claimant and having reviewed claimant=s medical records, Dr. Lefkoe testified that it was his opinion that claimant was capable of only part-time, as opposed to full-time, sedentary employment. *Id.* In his decision, the administrative law judge, after finding that claimant=s counsel admitted that claimant is capable of performing the dispatcher position with Trans Freight, determined that this full-time position established the availability of suitable alternate employment as well as claimant=s post-injury wage-earning capacity as of August 6, 1997. However, the administrative law judge did not address the more recent medical evidence of record submitted by claimant and employer which addressed claimant=s medical condition three years later.[3] Decision and Order at 2. Moreover, contrary to the administrative law judge=s finding, claimant=s counsel did not concede claimant could work at the specific full-time position at Trans State. Rather, following a hypothetical position presented to Dr. Bennett based on dispatcher duties as described in *The Dictionary of Occupational Titles*, claimant=s counsel stated he had no objection to the hypothetical and agreed claimant was capable of working at a job with that description. Bennett Dep., JX 22 at 9-11. Employer=s hypothetical did not describe the position as full-time, and claimant=s counsel did not concede that claimant could work full-time.[4] As the administrative law

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[2]In his post-hearing brief to the administrative law judge, claimant acknowledged that the physicians who treated him immediately following his work-injury generally restricted him to full-time sedentary work. *See* Cl.=s post-hearing brief at 14.

[3]In addition to Dr. Lefkoe, employer offered evidence regarding claimant=s contemporaneous medical condition. Specifically, Dr. Bennett, who examined claimant on November 29, 2000, and Dr. Kahn, who examined claimant on February 15, 2001, each opined that claimant was capable of performing full-time sedentary work. *See* JX 22 at 15, 18; JX 23 at 14-16.

[4]In claimant=s post-hearing brief to the administrative law judge, claimant specifically asserted that, should the administrative law judge determine that employer established the availability of suitable alternate employment, claimant=s post-injury wage-earning capacity as of September 28, 2000, should be calculated by taking one-half of the average earnings indicated by the labor market surveys of record, pursuant to Dr. Lefkoe=s

judge did not consider all of the relevant evidence submitted by the parties regarding claimant=s ability to work full-time, we must remand this case for the administrative law judge to consider all of the relevant evidence on this issue. *See generally Brown v. Nat=l Steel & Shipbuilding Co.,* 34 BRBS 195 (2001).

Claimant additionally argues that the administrative law judge, after finding that employer established the availability of suitable alternate employment, erred by failing to calculate claimant=s initial post-injury wage-earning capacity by utilizing the mean average of the salaries of the positions identified by the four vocational experts whose opinions were submitted. *See* JXS 9, 11, 19; CX 1. In its cross-appeal, employer also challenges the administrative law judge=s determination of claimant=s post-injury wage-earning capacity as of August 6, 1997, the date on which it established the availability of suitable alternate employment, contending that as it is undisputed that the dispatcher position identified with Trans Freight paid $30,000 per year, the administrative law judge erred in failing to use that figure in determining claimant=s post-injury wage-earning capacity. For the reasons that follow, we agree with both parties that the administrative law judge=s calculation of claimant=s post-injury wage-earning capacity also cannot be affirmed.

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medical opinion that claimant is capable of only part-time work. *See* Cl.=s post-hearing brief at 16-17, n. 3. Claimant reiterated this position in his motion for reconsideration following the issuance of the administrative law judge=s decision.

In his decision, the administrative law judge, after determining that the dispatcher position with Trans Freight established the availability of suitable alternate employment which claimant was capable of performing as of August 6, 1997, summarily concluded without discussion Athat Claimant has been shown to have possessed a wage-earning capacity of $346.15 per week (JX11 @ 6). . . .@ Decision and Order at 2, (footnote omitted). Page 6 of Joint Exhibit 11, cited by the administrative law judge, indicates that pursuant to *The Dictionary of Occupational Titles* the average weekly salary for a dispatcher is $346.15.[5] In the instant case, however, employer submitted into evidence the actual wages paid by the position relied upon by the administrative law judge to establish the availability of suitable alternate employment. These wages must be considered by the administrative law judge. Moreover, as claimant sets forth in his brief, the record contains the reports of three additional vocational rehabilitation experts who conducted labor market surveys and offered opinions regarding claimant=s post-injury wage-earning capacity. These reports are not mentioned in the administrative law judge=s decision. As the objective of the inquiry concerning claimant=s post-injury wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured, *see Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985), the administrative law judge is required to discuss and weigh all of the relevant evidence when rendering his decision. *See* 5 U.S.C. '557(c)(3)(A); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). The administrative law judge must therefore address this evidence and determine claimant=s wage-earning capacity in accordance with the relevant statutory factors set forth in Section 8(h) of the Act, 33 U.S.C. '908(h).

With regard to claimant=s specific contention that the administrative law judge must average the salaries of the suitable jobs, the United States Court of Appeals for the Fifth Circuit has held that an average of the salaries of the positions identified as establishing the availability of suitable alternate employment is a reasonable method for determining a claimant=s post-injury wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 37 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In rejecting employer=s argument in *Pulliam* that the administrative law judge should have used the wages of the highest paying job instead of the average of five jobs, the court explained that since the courts have no way of determining which of the range of jobs shown to be available a claimant will obtain, averaging ensures that claimant=s wage-earning capacity reflects each job that is available. While the court did not mandate averaging, and thus the evidence in a case may support an alternate method of calculation, the administrative law judge must provide a rational explanation for his finding regarding claimant=s wage-earning capacity after addressing all of the relevant evidence. In the instant case, the administrative law judge did not consider the vocational evidence submitted by both claimant and employer relevant to claimant=s post-injury wage-earning capacity, nor did he provide any explanation which could comply with Section 8(h). Accordingly, we must vacate the administrative law judge=s calculation of claimant=s post-injury wage-earning capacity; on remand, the administrative law judge must reconsider this issue, taking into consideration all of the relevant evidence of record. Moreover, in order to account for inflation, claimant=s post-injury wage-earning capacity must be adjusted to

[5]Joint Exhibit 11 is the labor market survey which documents the dispatcher position with Trans Freight.

represent the wages that the post-injury jobs found to be suitable for claimant paid at the time of claimant=s injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Accordingly, the administrative law judge=s determination of the extent of claimant=s disability is vacated, and the case is remanded for the administrative law judge to reconsider this issue in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge