BRB No. 94-843

DANIEL F. BUSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order on Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

D.A. Bass Frazier (Huey & Leon), Mobile, Alabama, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision and Order on Claimant's Motion for Reconsideration (93-LHC-850) of Administrative Law Judge C. Richard Avery 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).[1] We must affirm the findings of

[1]Claimant's appeal was reinstated on the Board's docket on May 16, 1996, following modification proceedings before an administrative law judge. The Board considers the one-year period for review provided by Public Laws 14-134 and 104-208 to run from this date.

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 worked for employer as a refrigerator mechanic. On January 3, 1991, claimant suffered a back injury as he attempted to change an oil seal on a container. He immediately sought treatment by the company physician, who diagnosed an "L-5 sprain." Emp. Ex. 4. Following an MRI, claimant's treating physician concluded that he had a significant disc herniation and that it was likely claimant would require surgery. Emp. Exs. 6, 7. Claimant underwent surgery performed by Dr. Hopper on September 4, 1991, followed by physical therapy and work hardening. Dr. Hopper released claimant to work on January 7, 1992 with restrictions. Tr. at 24. Subsequently, claimant participated in a retraining program. He sought permanent total disability benefits under the Act for the period he was undergoing retraining and continuing permanent partial disability benefits thereafter.

In his decision, the administrative law judge found that claimant is entitled to temporary total disability benefits from January 3, 1991, until January 7, 1992, when he was released to work by Dr. Hopper with a twenty percent impairment. Decision and Order at 10. The administrative law judge also found claimant entitled to permanent total disability benefits from January 7, 1992, through March 9, 1992, when employer established suitable alternate employment through a labor market survey conducted by Tavia Tiblets, and permanent partial disability benefits continuing from March 9, 1992, based on a post-injury wage-earning capacity of $329.91 per week. Decision and Order at 11. Claimant's motion for reconsideration was denied.[2]

Claimant appealed this decision, but while the appeal was pending, employer filed a motion for modification pursuant to 33 U.S.C. §922. The Board remanded the case to the administrative law judge, dismissing claimant's appeal subject to reinstatement upon the conclusion of modification proceedings. In a Decision and Order dated February 29, 1996, Administrative Law Judge Fletcher E. Campbell found that the parties agreed that claimant had completed his Department of Labor sponsored reeducation and was able to obtain suitable alternate employment at a higher wage rate, thus reducing his post-injury loss in earning capacity. Judge Campbell found that claimant's permanent partial disability benefits are to be calculated as of June 15, 1995, based on his post-injury wage-earning capacity of $697.45 in 1991 dollars.[3] This decision has not been appealed. Claimant's

[2]The administrative law judge also found that employer is not responsible for paying for counseling provided by Mr. Bennet, a social worker, as it was unauthorized, but is responsible for treatment by Dr. Dauterive, a physical therapist, since claimant was referred to him by Dr. Hopper. In a Decision and Order on Employer's Motion for Reconsideration the administrative law judge amended his original order to reflect employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), and in a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's attorney a fee in the amount of $23,656.25 representing 189.25 hours of legal services at the rate of $125 an hour and 2.75 hours at the rate of $55 per hour, plus costs in the amount of $124. These findings are not at issue on appeal.

[3]The administrative law judge also ordered that the overpayment that occurred since June 15, 1995, can be recovered by a deduction of $25 per week from claimant's continuing permanent partial

original appeal was reinstated by Order dated May 16, 1996, pursuant to claimant's request.

On appeal, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment during the period he was attending a Department of Labor sponsored reeducation program. Moreover, he contends that he was not qualified for one of the identified technician positions the administrative law judge found were suitable alternate employment. Claimant also contends that employer is liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Employer responds, urging affirmance of the administrative law judge's finding that claimant is entitled to permanent partial disability benefits during the period he participated in the retraining program.[4]

Initially, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment as the positions identified were not realistically available to him while he is enrolled in a full-time rehabilitation program. As it is undisputed that claimant cannot return to his usual employment due to his work-related injury, the burden shifted to employer to establish the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The Board addressed the issue of suitable alternate employment where claimant is enrolled in a full-time vocational rehabilitation program in *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1995), holding that an injured worker is entitled to receive permanent total disability benefits while undergoing certain types of vocational rehabilitation, notwithstanding that he was physically capable of performing minimum wage jobs that an expert identified as having been available. The administrative law judge did not discuss the Board's decision in *Abbott* in deciding this case. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fifth Circuit affirmed the Board's holding in *Abbott*, stating that the Board's decision is consistent with "the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force." *Abbott*, 40 F.3d at 127, 29 BRBS at 26 (CRT).

In the present case, claimant initially contacted Paul Spivey of the Department of Labor on

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disability benefits and that employer remains responsible for medical benefits. The administrative law judge also noted that employer agrees to pay claimant's attorney's fees and expenses in an amount not to exceed $10,500.

[4]Employer also contends in its response brief that the administrative law judge erred in his determinations of claimant's average weekly wage and post-injury wage-earning capacity. We will not address issues raised in a response brief which challenge the administrative law judge's findings as such arguments must be raised in a cross-appeal. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

May 21, 1991, about starting a retraining program coordinated through the Department of Labor, which was eventually handled by Leon Tingle, a vocational rehabilitation counselor. Tr. at 74. Following his medical release in January 1992, claimant took four pre-nursing classes at a community college in the Spring 1992 semester and two classes in the Summer 1992 session. Tr. at 25. This was considered full-time participation in the reeducation program. During this period, employer had hired another vocational counselor, Ms. Tiblets, to identify suitable alternate employment. Of the positions Ms. Tiblets identified, the administrative law judge found that claimant was capable of realistically securing three scientific technician positions. Decision and Order at 11.

Claimant was accepted in a formal nursing program beginning in August 1992, but was offered a light duty position by employer, which he accepted and started on August 6, 1992. Tr. at 35, 52, 60. However, he worked only three days before his back pain returned, so Dr. Hopper sent him back to physical therapy and added the restriction that claimant should not sit for more than one hour at a time. Tr. at 36. As claimant was not able to work during this period of recuperation, he began the nursing program in September 1992, but again left the program in November 1992 to attempt to work again. However, claimant alleges that employer would not hire him with the added restriction. Tr. at 52, 38-39. Claimant sought counseling at this time to help with depression. Cl. Ex. 6.

Claimant took one course in the nursing program in the Spring 1993 semester in order to keep his enrollment active, but paid for the course himself, because the Department of Labor would sponsor only full-time course work. Tr. at 42. It appears from claimant's testimony, and the subsequent history on modification, that claimant returned to the Department of Labor sponsored program in August 1993, and graduated on June 5, 1995. Tr. at 42; Decision and Order of February 29, 1996. The parties stipulated that he is now employed and has a weekly wage of $697.45 in 1991 dollars. *Id.*

In discussing the evidence of suitable alternate employment in 1992, the administrative law judge did not consider that claimant was participating in a Department of Labor sponsored retraining program at that time. While claimant was not consistently enrolled in classes from the date of maximum medical improvement to the date he eventually graduated, the administrative law judge found that employer established suitable alternate employment as of March 9, 1992, including the periods claimant was fully participating in the program. Moreover, the testimony of claimant and Mr. Tingle indicate that employer agreed to claimant's retraining if benefits were reduced to reflect claimant's ability to earn at least the minimum wage during this period if he had worked instead, and claimant testified it was because of this reduction that he dropped out of the nursing program in order to better support his family. Tr. at 89-90.

As the administrative law judge did not consider the decisions in *Abbott* that a claimant, in some circumstances, may receive permanent total disability benefits while undergoing full-time vocational rehabilitation, we vacate the administrative law judge's finding that employer established suitable alternate employment as of March 9, 1992, and remand the case to the administrative law

judge for further findings. *See generally Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994). The administrative law judge must reconsider claimant's entitlement to benefits from March 1992 to June 1995 when claimant completed his rehabilitation program and obtained the job relied upon on modification. In so doing, the administrative law judge may consider that there are periods of time during which claimant was not enrolled full-time in the retraining program.

In addition, claimant contends that one of the alternate jobs identified by Ms. Tiblets, that at National Marine Fisheries Laboratory, requires education he does not possess, and that he nonetheless tried, unsuccessfully, to obtain this position. The administrative law judge relied on the wages this job paid in establishing claimant's post-injury wage-earning capacity. On remand the administrative law judge must reconsider whether claimant satisfied the educational requirements of this position, *see generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991), as well as evidence of claimant's allegedly unsuccessful attempts to obtain this position. *See generally Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If this job is not suitable for or realistically available to claimant, the administrative law judge cannot rely on the wages of this job to establish claimant's post-injury wage-earning capacity.[5] *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

Claimant also contends on appeal that employer is liable for a penalty pursuant to Section 14(e) of the Act. We disagree. Section 14(e) provides that if employer fails to pay compensation voluntarily within 14 days after it becomes due, employer shall be liable for an additional 10 percent added to unpaid installments. 33 U.S.C. §914(e). A notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is being paid voluntarily. *See Lorenz v. F.M.C. Corp., Marine and Rail Div.*, 12 BRBS 592 (1980).

[5]Claimant does not challenge the suitability or availability of two positions at Gulf Coast Research Laboratory. *See generally P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

In the present case, employer had actual notice of claimant's injury on January 3, 1991, and began paying temporary total disability benefits on January 3, 1991. These benefits continued, and claimant did not dispute the amount paid, until employer reduced the benefits to permanent partial disability on May 6, 1992 as noted in the LS-208 dated May 18, 1992.[6] Employer also filed a notice of controversion on May 18, 1992. Therefore, as a controversy did not arise until May 6, 1992, when employer reduced claimant's benefits, and employer timely filed a notice of controversion on May 18, 1992, we deny claimant's request for a Section 14(e) penalty. *See generally Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

Claimant's attorney also petitions the Board for a fee for work performed before the Board on employer's cross-appeal, BRB No. 94-843A, which the Board dismissed as untimely. Claimant's counsel requests a fee in the amount of $303.75 for 2.25 hours of legal services at the rate of $135 per hour. Inasmuch as the hours requested are reasonably commensurate with the necessary work done, claimant's counsel is entitled to a fee in the amount of $303.75 representing 2.25 hours of legal services at the hourly rate of $135 to be paid by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's finding that employer established suitable alternate employment as of March 9, 1992 is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's decisions are affirmed in all other respects, and claimant's request for a Section 14(e) penalty is denied. Claimant's attorney is awarded a fee of $303.75 for work performed before the Board in BRB No. 94-843A to be paid directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[6]Employer also requested a credit to reflect overpayment of temporary total disability benefits from January 7, 1992 through May 6, 1992, a period employer alleges claimant was only due permanent partial disability benefits.