BRB Nos. 96-567
and 96-567S

LUCAS BOUCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RICHMOND DRY DOCK COMPANY	)	
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DATE ISSUED:_____
	)	
and	)	
	)	
DONCO INDUSTRIES	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Re: Attorney's Fees of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Harvey Hereford, San Francisco, California, for claimant.

Michael L. Mowrey, San Francisco, California, for Richmond Dry Dock/State Compensation Insurance Fund.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for DONCO Industries/Eagle Pacific Insurance Company.

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

PER CURIAM:

DONCO Industries (DONCO) appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Re: Attorney's Fees (95-LHC-655, 95-LHC-656) of Administrative Law Judge Thomas Schneider rendered on claims 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a welder-fitter at Richmond Dry Dock (Richmond) and hurt his back and neck in April 1989 when he tried to lift a heavy pipe. He underwent treatment and worked on occasion while trying to return to his usual position, but was laid off for lack of work in March 1990. Rich. Ex. BB; Tr. at 172-176. With the aid of vocational rehabilitation counselors, claimant secured a light duty position with Oceanic Boatworks as a welder. Within approximately ten months, Oceanic Boatworks closed. *Id.* at 181-183. In late 1991, without undergoing a pre-employment physical or revealing his prior back and neck condition, claimant obtained employment with DONCO as a combination welder-fitter. After approximately three months of work, in January 1992 claimant injured his back and neck when he and a co-worker attempted to lift a steel plate. *Id.* at 185-187. Claimant underwent treatment and therapy. He has not returned to work at DONCO, but he has secured subsequent employment. Claimant filed claims for permanent disability benefits. Both employers voluntarily paid some benefits. Cl. Exs. 3, 5.

The administrative law judge found, *inter alia*, that claimant has been physically disabled from performing welding work since his 1989 injury and that his earnings since the first injury are not representative of his wage-earning capacity. Therefore, the administrative law judge calculated benefits for claimant's second injury based upon his average weekly wage at the time of his first injury. Additionally, the administrative law judge concluded that claimant has a retained wage-earning capacity after his second injury of $150 per week in 1989 dollars. Decision and Order at 7-10. Consequently, he held both employers liable for additional benefits beyond the amounts they voluntarily paid, with Richmond's liability ceasing upon the date of the second injury.[1] *Id.* at 11-12.

[1]The administrative law judge determined that Richmond is liable for temporary total disability benefits from April 12, 1989, through January 19, 1992, based on an average weekly wage of $499, less amounts paid and wages earned. He held DONCO liable for temporary total disability benefits from January 20 through December 27, 1992, and permanent total disability benefits from December 28, 1992, through December 28, 1994, based on an average weekly wage of $499, less amounts paid and wages earned. Thereafter, until July 13, 1995, he awarded claimant permanent total disability benefits payable by the Special Fund pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). After July 13, 1995, the Special Fund is liable for permanent partial disability benefits. Additionally, the administrative law judge determined that DONCO is liable for medical benefits and an attorney's fee. Decision and Order at 12-13.

Thereafter, the administrative law judge approved an attorney's fee for 89.41 hours of services at a rate of $180 per hour, totalling $16,093.80, plus $2,913.80 in expenses. He assessed the entire fee against DONCO. Supp. Decision and Order at 1-2. DONCO appeals the administrative law judge's decisions. Claimant and Richmond respond, urging affirmance.[2]

DONCO first contends the administrative law judge erred in using claimant's average weekly wage at the time of the 1989 injury to calculate benefits for the 1992 injury. Specifically, it argues that such action is contrary to law and that there is evidence of record which demonstrates that claimant's average weekly wage was not $499. We agree with DONCO. In this case, the administrative law judge stated he was unable to determine claimant's earning capacity after the first injury because of claimant's attempts to return to work as a welder, even though such work was beyond his capacity. Although it may be difficult to calculate, the law clearly requires that a claimant's average weekly wage at the time of his second injury or aggravation must be used to calculate benefits for that injury. 33 U.S.C. §910; *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). The average weekly wage must be based on the claimant's actual earnings at the time of the second injury or on his wage-earning capacity remaining after the first injury if that is representative of his average weekly wage. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Lopez*, 23 BRBS at 299; *see generally* 33 U.S.C. §910(c). Because the administrative law judge specifically found that claimant was not fit for welding work after his 1989 injury, it follows that his actual wages at Richmond were not representative of his wage-earning capacity after the first injury. Moreover, the administrative law judge found that claimant's employment with Oceanic Boatworks was light duty work, and claimant testified that, before he worked for DONCO, he was rejected from employment because he did not pass a pre-employment physical. Decision and Order at 4; Tr. at 184-185. Nonetheless, after his injury he was able to obtain employment at Oceanic Boatworks and DONCO, and he worked at DONCO until his second injury. Accordingly, we vacate the administrative law judge's finding that benefits for claimant's 1992 injury should be based on his average weekly wage at the time of his 1989 injury. On remand, the administrative law judge must reconsider the evidence of record and recalculate claimant's average weekly wage as of the time of his 1992 injury pursuant to Section 10 of the Act. This figure shall be used to compute all disability benefits payable by DONCO. *Brady-Hamilton*, 58 F.3d at 419, 29 BRBS at 101 (CRT); *Lopez*, 23 BRBS at 299.

DONCO also contends claimant should receive concurrent permanent partial disability awards. Specifically, it argues Richmond is liable for permanent partial disability benefits for disability caused by the first injury based on an average weekly wage of $499 and it is liable for

[2]Richmond moves to dismiss the appeal of the award for the 1989 injury, stating that DONCO has no standing to appeal this aspect of the administrative law judge's decision. Alternatively, Richmond and its insurer wish to be removed as parties to the appeal. Because Richmond may potentially be held liable for additional benefits and/or attorney's fees, we deny the motion. 20 C.F.R. §802.219.

continuing disability benefits related to the second injury based on a different average weekly wage. Richmond argues that claimant's second injury was an aggravation of the first injury; therefore, DONCO is responsible for all compensation. Thus, Richmond asserts that the administrative law judge properly awarded consecutive, and not concurrent, awards.

Under the aggravation rule, an employer is liable for the entire disability if an injury occurs during a claimant's employment which aggravates a pre-existing condition and results in disability. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). However, a claimant may be entitled to concurrent awards for his permanent disabilities to fully compensate him for the reduction in his earning power where he has successive injuries, each resulting in some loss of wage-earning capacity. *Brady-Hamilton*, 58 F.3d at 419, 29 BRBS at 101 (CRT); *Hastings*, 628 F.2d at 85, 14 BRBS at 345; *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The United States Court of Appeals for the Ninth Circuit, which has appellate jurisdiction in this case, has held that concurrent awards may be appropriate in a case where the subsequent injury aggravated the first. *Brady-Hamilton*, 58 F.3d at 421-422, 29 BRBS at 102-103 (CRT); *see also Nelson*, 29 BRBS at 90.

The administrative law judge properly designated this an aggravation case, Decision and Order at 9-10; DONCO Ex. 12; Rich. Exs. C-D, and distinguished *Hastings* on this basis; however, he incorrectly concluded that the *Hastings* precepts could not apply.[3] In fact, this case is one which clearly falls within the scope of *Hastings*. Not only did the administrative law judge reject the principle requiring application of the average weekly wage at the time of the second injury, *see* discussion *supra*, but he also limited Richmond's liability for benefits to those accruing prior to January 20, 1992, the date of the second injury, when his findings indicate that claimant's first injury had a permanent effect on his wage-earning capacity. Because we conclude this case must be remanded for a new determination of claimant's average weekly wage at the time of his second injury, and because this new average weekly wage may represent a decrease in claimant's wage-earning capacity, we must also vacate the administrative law judge's consecutive disability awards. If claimant suffered a loss of wage-earning capacity after each injury, then consecutive awards based on the appropriate wages would not fully compensate him for his injuries.[4] On remand, the administrative law judge must reconsider the respective liability of each employer in view of his

[3]In *Hastings*, the United States Court of Appeals for the District of Columbia Circuit held that the claimant was entitled to concurrent awards of permanent partial disability benefits due to a stroke and to permanent total disability benefits due to phlebitis and a pulmonary emboli. The awards of benefits were based on the claimant's average weekly wages at the time of each of his injuries. *Hastings*, 628 F.2d at 85, 14 BRBS at 345.

[4]Similarly, if claimant's wage-earning capacity increased after his first injury but before his second injury, concurrent awards may be appropriate but may exceed the statutory limit. Therefore, it may be necessary to modify the first award based on the increased wage-earning capacity. *Nelson*, 29 BRBS at 94-95.

average weekly wage and wage-earning capacity determinations and award benefits consistent with the decisions in *Brady-Hamilton* and *Hastings*.

Next, DONCO contends the administrative law judge erred in concluding that claimant has a retained wage-earning capacity of $150 per week after his 1992 injury. Claimant responds, arguing that the administrative law judge's finding is reasonable. In this case, DONCO presented evidence of alternate employment with wages ranging from $4.50 to $12 per hour. The administrative law judge discussed only the suitability of full-time security guard and cashier positions, excluding those in the Oakland and Berkeley areas, and a part-time medical records copying position. He gave greater weight to the copying position because it was actually offered to claimant, but he deemed all three positions suitable, and he calculated that claimant has a wage-earning capacity after the second injury of $150 in 1989 dollars. Decision and Order at 8-9. We agree with DONCO that the administrative law judge committed error in so concluding.

Once a claimant establishes a *prima facie* case of total disability, the burden shifts to the employer to establish the availability of other specific jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In this case, the administrative law judge found that DONCO presented evidence of suitable alternate employment in July 1995. However, DONCO presented many alternate positions, including employment as a clerk, courier, customer service representative, lab trainee, and telemarketer which were not discussed by the administrative law judge. DONCO Ex. 22-24. Moreover, the administrative law judge rejected the security guard and cashier positions "listed for Oakland and Berkeley as being beyond reasonable commuting distance[.]" While this is within his authority in appropriate cases, *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994), he did not explain why he rejected employment in those areas from consideration. For example, the administrative law judge did not state the distance from claimant's home to Oakland and Berkeley, or compare claimant's medical restrictions with the work to be performed or with the effort and distance necessary to reach those jobs. He also did not explain why the other positions submitted by DONCO were not acceptable. For instance, he credited two security guard or cashier positions located in Walnut Creek, *see* Decision and Order at 8, but he did not discuss a clerical or a courier position, both of which were also located in Walnut Creek, *see* DONCO Ex. 23. Further, it was unreasonable for him to have credited a part-time position claimant was offered while simultaneously crediting a physician who stated that claimant is able to work a full eight-hour day. *See* Decision and Order at 8-9; Cl. Ex. 30; DONCO Ex. 22. Because the administrative law judge's discussion on the suitability of the alternate employment submitted by DONCO does not fully explain his reasons for rejecting numerous positions from consideration, we vacate his findings on suitable alternate employment and remand the case for him to reconsider this issue.[5]

[5]However, we affirm the administrative law judge's conclusion that the medical assistant positions do not constitute suitable alternate employment, as the evidence supports his finding that claimant diligently sought but was unable to secure a job as a medical assistant. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991).

In addition to the above errors, the administrative law judge erred in calculating claimant's retained wage-earning capacity from the alternate employment he considered acceptable. Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Section 8(h) provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Cook*, 21 BRBS at 4. Sections 8(c)(21) and 8(h) of the Act require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of the claimant's injury and then compared with his average weekly wage to compensate for inflationary effects. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 7; *see also Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995) (The Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation). Although the administrative law judge accounted for inflation by adjusting the wages of the jobs he considered suitable, he adjusted them to 1989 dollars instead of 1992 dollars. As the wage-earning capacity at issue is the retained wage-earning capacity after the 1992 injury, the wages should have been adjusted to 1992 dollars so as to compare them with claimant's 1992 average weekly wage. *Richardson*, 23 BRBS at 327. Thus, we also vacate the administrative law judge's determination of claimant's retained wage-earning capacity, and we remand the case for further consideration of this issue.

Finally, DONCO contends the administrative law judge erred in assessing the entire attorney's fee against it. Specifically, it argues he should have split the fee between DONCO and Richmond, as both employers were held liable for benefits. Claimant and Richmond respond, urging affirmance of the administrative law judge's fee award. They argue that the administrative law judge's fee assessment took into account Richmond's minimal liability for disability benefits and avoided a *de minimis* fee award.

Under Section 28(b) of the Act, 33 U.S.C. §928(b), a claimant is entitled to a fee if, after a controversy, he obtains additional benefits over the amount voluntarily tendered or paid by his employer. *See generally Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). In this case, the administrative law judge held both employers liable for additional benefits beyond the amounts they voluntarily paid. Consequently, both employers are liable for a portion of claimant's attorney's fee. Moreover, as we have vacated the administrative law judge's award and remanded the case for him to reconsider several issues and to recalculate claimant's disability benefits, we must vacate the award of an attorney's fee against DONCO and remand the case for him to reconsider the fee, and each employer's liability therefor, in light of his decision on remand regarding disability benefits.

Accordingly, the administrative law judge's decisions are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge