

KENNETH CLINTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONTINENTAL GRAIN COMPANY)	DATE ISSUED:
)	
and)	
)	
CIGNA INSURANCE COMPANY)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeal of the Decision and Order, Decision on Motion for Reconsideration, and Errata Decision on Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Pete Lewis (Lewis & Caplan), New Orleans, Louisiana, for claimant.

Douglas P. Matthews (Frlot, Partridge, Kohnke & Clements), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision on Motion for Reconsideration, and Errata on Decision On Motion For Reconsideration (94-LHC-1418) of Administrative Law Judge James W. Kerr, Jr., 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).

On December 18, 1990, while working as a millwright doing various odd jobs for employer, claimant sustained an injury to his back. Employer voluntarily paid temporary total disability benefits to claimant from December 19, 1990 until March 26, 1991, temporary partial disability benefits from March 26, 1991 to July 2, 1991, temporary total disability benefits from November 21, 1991 to July 13, 1993, and permanent partial disability benefits from July 14, 1993, and continuing. Claimant sought permanent total disability or, alternatively, increased permanent partial disability benefits under the Act.

The only unresolved issue before the administrative law judge was the nature and extent of claimant's disability. Based on the medical opinion of Dr. George Murphy, the administrative law judge found that claimant established that he could not return to his usual employment. He then determined that employer established the availability of suitable alternate employment based on jobs for a night watchman and parking lot cashier which employer's vocational experts, Larry Strokes and Cindy Harris, identified in labor market surveys performed in June and October 1993 and of which claimant was advised on August 15, 1994. Based on the alternate jobs identified, the administrative law judge determined claimant had a post-injury wage-earning capacity of \$4.25 per hour and awarded him temporary total disability benefits from December 19, 1990 until July 13, 1993, permanent total disability benefits from July 14, 1993 until August 15, 1994 and permanent partial disability benefits pursuant to 33 U.S.C. §908(c)(21), (h), thereafter. In response to employer's motion for reconsideration, the administrative law judge issued a Decision on Motion for Reconsideration and Errata Decision on Motion for Reconsideration in which he found that because claimant had worked from March 25, 1991 until November 20, 1991 in a light duty position and did not request additional benefits during this time, claimant was not entitled to compensation during this period. The administrative law judge also changed the commencement date for the award of permanent partial disability benefits from August 16, 1994 to October 22, 1993.

Employer appeals the award of permanent partial disability compensation, contending that the administrative law judge erred in determining claimant's post-injury wage-earning capacity because, in addition to the night watchman and cashier jobs found to constitute suitable alternate employment by the administrative law judge, it identified a similar job for a toll booth operator paying higher wages, which the administrative law judge rejected without comment. Claimant responds, urging affirmance.

We conclude that the case must be remanded for additional consideration. Although the administrative law judge determined that employer established the availability of suitable alternate employment based on the night watchman and parking lot cashier positions identified by employer's vocational experts, these experts also identified a job as a toll booth operator. The administrative law judge failed to make an explicit finding regarding this job's suitability in assessing claimant's post-injury wage-earning capacity. Because the administrative law judge failed to explicitly consider and provide an explanation as to why the toll booth operator position employer identified was not within claimant's capabilities, his decision does not comport with the requirements of the Administrative Procedures Act (APA), 5 U.S.C. §557(c)(3)(A). Pursuant to the APA,

decisions rendered under the Longshore Act must contain a statement of “findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record.” The administrative law judge must adequately detail the rationale behind his decision; he must analyze and discuss the evidence of record, and explicitly set forth his reasons as to why he has accepted or rejected such evidence, consistent with the APA. See *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

There is conflicting evidence in the record relevant to the suitability of the toll booth operator position. Dr. Murphy, claimant's treating orthopedic surgeon, opined that claimant could not return to his former occupation and imposed the following work restrictions: that claimant could sit intermittently for eight hours and stand intermittently for four hours; could lift ten pounds on a frequent basis and ten to twenty pounds on an occasional basis; and could not bend at the waist or climb. Claimant's Exhibit 16. Employer's vocational experts evaluated various job opportunities, including the toll booth operator position, in light of Dr. Murphy's restrictions, and determined that claimant was capable of performing these jobs. Claimant's vocational expert, Bobby Roberts of Work Recovery Centers, disagreed with their conclusion, testifying that the amount of standing and bending involved exceeded Dr. Murphy's restrictions. On October 19, 1993, based on brief job descriptions provided by employer's vocational experts, Dr. Murphy opined that claimant was capable of performing various jobs, including that of toll booth collector, but stated that he would defer to the vocational evaluator as to whether these jobs actually fit claimant's physical restrictions. Claimant's Exhibit 18 at 17. Inasmuch as the administrative law judge did not explicitly discuss this evidence relevant to the suitability of the toll booth operator position in assessing claimant's post-injury wage-earning capacity, we vacate this finding and remand for him to reconsider this issue based on all of the relevant evidence of record. See generally *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 146 (1991).

Accordingly, the case is remanded for further consideration of the issue of claimant's post-injury wage-earning capacity consistent with this opinion. In all other respects, the Decision and Order, Decision on Motion for Reconsideration, and Errata On Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge