BRB Nos. 96-1519

ALAN ROMANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HAVEN TERMINAL	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1069) of Administrative Law Judge Robert G. Mahony 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 longshore laborer, sustained work-related injuries to his upper back and

right shoulder during the course of his employment on February 8, 1989. Claimant underwent two surgical interventions, and thereafter commenced employment as a service manager with Lincoln Service Center on May 21, 1991. Claimant remained employed with Lincoln until mid-1993, when he relocated to Florida.

In his Decision and Order, the administrative law judge initially awarded claimant temporary total disability benefits from February 8, 1989 to May 20, 1991. Next, after determining that claimant's employment with Lincoln constituted suitable alternate employment, the administrative law judge awarded claimant permanent partial disability benefits from May 21, 1991, and continuing, based upon two-thirds of the difference between claimant's pre-injury average weekly wage and his salary with Lincoln at the time claimant relocated to Florida in 1993. Lastly, employer was granted relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's calculation of his post-injury loss in wage-earning capacity. Employer has not responded to this appeal.

Claimant contends that the administrative law judge erred in calculating his post-injury wage-earning capacity. We agree. An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Where, as in the instant case, a claimant is unable to return to his usual employment as a result of his injury but employer establishes the availability of suitable alternate employment which claimant is capable of performing, the wages which the new job would have paid at the time of claimant's injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. *See generally Sproull v. Stevedoring Services of America,* 26 BRBS 100, 108-110 (1991)(Brown, J., dissenting on other grounds), *aff'd in pert. part on recon. en banc*, 28 BRBS 271 (1994). Subsections 8(c)(21) and 8(h) of the Act require that a claimant's post-injury wage-earning capacity be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, the administrative law judge found that claimant's employment as a service manager with Lincoln constituted suitable alternate employment and thus provided a basis for calculating claimant's post-injury wage-earning capacity; the administrative law judge then utilized the hourly rate earned by claimant in 1993, four years after his work-injury, in calculating claimant's post-injury loss in wage-earning capacity. At no point in his discussion or determination, however, did the administrative law judge calculate a figure based on the hourly rate paid to a service manager by Lincoln at the time

of claimant's injury to be compared to claimant's pre-injury average weekly wage.[1] We, therefore, vacate the administrative law judge's finding regarding claimant's post-injury wage-earning capacity, and we remand the case for the administrative law judge to consider claimant's post-injury wage-earning capacity consistent with the statutory scheme established in Section 8(c)(21) of the Act. *See Cook*, 21 BRBS at 4.

Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]We note that claimant submitted into evidence testimony regarding the salary paid by Lincoln to service managers in 1989. *See* CX-15.