

8.2 EXTENT OF DISABILITY

"Disability" under the LHWCA means **incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment.** 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an **economic loss** coupled with a physical or psychological **impairment.** Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage-earning capacity, no present loss but with a reasonable expectation of future loss (*de minimis*), a total loss, or a partial loss.

[ED. NOTE: In determining if a claimant is "disabled, the reader should not confuse container royalty payments and holiday/vacation payments which a claimant may be entitled to receive, with wages he can no longer earn. See Seaco v. Richardson, 136 F.3d 1290 (11th Cir. 1998).]

8.2.1 No Loss of Wage-Earning Capacity

When a claimant has a physical impairment from the injury but is doing his usual work adequately, regularly, full-time, and without due help, the ALJ may find that the employee's actual wages fairly represent his wage-earning capacity, and he has suffered no loss and therefore is not disabled. See 33 U.S.C. § 908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984). See also Darcell v. FMC Corp., Marine & Rail Equip. Div., 14 BRBS 294 (1981) (where an employee is working at a useful job which pre-dates his employment and pays wages commensurate with the work, and he is earning higher wages on the same union scale as he was prior to his injury, he has not suffered a loss in wage-earning capacity); Kendall v. Bethlehem Steel Corp., 3 BRBS 255 (1976), aff'd mem., 551 F.2d 307 (4th Cir.), cert. denied, 434 U.S. 829 (1977).

If a claimant's former, usual employer offers jobs which pay more than the claimant's present wages at the time of injury (and the claimant was not in one of those jobs prior to the injury nor would the claimant have moved to one but for the injury), the present earnings will be found to fairly and reasonably reflect the claimant's wage-earning capacity. Long v. Director, OWCP, 767 F.2d 1578, 1583, 17 BRBS 149, 153 (CRT) (9th Cir. 1985).

If an employee is promoted to a higher-paying post where his physical restrictions no longer matter, he has no economic disability. Owens v. Traynor, 274 F. Supp. 770, 774 (D. Md. 1967), aff'd, 396 F.2d 783 (4th Cir. 1968). Further, if he is doing full-time, steady work at a higher wage than previously, merely avoiding overtime or boat-based assignments, the judge may also find no loss of wage-earning capacity. Ford v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 687, 690-91 (1978).

[ED. NOTE: If overtime is a regular part of a claimant's job, however, it must be taken into account in determining any loss of wage-earning capacity. See Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 113 (1989).]

In the absence of any evidence of its likelihood, the ALJ can find the allegation that the employee will work less in the future to be speculative. Moore v. J.F. Shea Constr. Co., 13 BRBS 370, 373 (1981); Bolduc v. General Dynamics Corp., 9 BRBS 851 (1979). See De Minimis Awards, Topic 8.2.2, infra.

If the claimant is offered a job at his pre-injury wages as part of his employer's rehabilitation program, the judge can find that there is no lost wage-earning capacity and that the claimant therefore is not disabled. Swain v. Bath Iron Works Corp., 17 BRBS 145, 147 (1985). But see Sheltered Employment, Topic 8.2.3.1, infra.

The mere diagnosis of a disabling disease [asbestosis] which will inevitably become disabling, was not a “disability” [as a matter of law] before the disease diminished the worker’s earning capacity. Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750 (1st Cir. 1992). See, White v. Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978)(Reduction in earning capacity—not out-of-pocket loss—is the proper test for availability of permanent partial disability payments.), White v. Bath Iron Works Corp., 812 F.2d 33 (1st Cir. 1987); see also Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981).

8.2.2 _____ De Minimis Awards

[ED. NOTE: For more on de minimis see, Topic 22. Modification–De Minimis Awards.]

The **United States Supreme Court**, following the lead of the **Second, Fifth and District of Columbia Circuits**, has held that a *de minimis* award, under certain circumstances, can be appropriate. When an employee has proven a medical disability which presently causes no loss of wage-earning capacity, but has a reasonable expectation that a loss in wage-earning capacity will occur in the future, a *de minimis* award is appropriate. Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121 (1997); Randall v. Comfort Control, Inc., 725 F.2d 791, 800, 16 BRBS 56, 69-70 (CRT) (D.C. Cir. 1984), vacating 15 BRBS 233 (1983); Hole v. Miami Shipyards Corp., 640 F.2d 769, 773, 13 BRBS 237, 240 (5th Cir. 1981), rev'g 12 BRBS 38 (1980). The **Fourth Circuit** distinguished these cases in a claim where the claimant had steady, continuous post-injury employment. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 1234 n.9, 18 BRBS 12, 32-33 n.9 (CRT) (4th Cir. 1985), aff'g 16 BRBS 282 (1984).

[ED. NOTE: A de minimis award should be distinguished from an insubstantial award. An de minimis, or nominal disability award is a “mechanism for taking future effects of disability into account when present wage-earning ability remains undiminished.” An insubstantial award, though small, represents a real loss in wage-earning capacity. See Newport News Shipbuilding & Dry Dock Company v. Stallings, 250 F.3d 868, (4th Cir. 2001).]

The Board, prior to the holding in Rambo II, had declined to follow Randall and Hole, stating that *de minimis* awards are not authorized by the LHWCA. West v. Port of Portland, 21 BRBS 87

(1988), on recon. 20 BRBS 162 (case arising within **9th Cir.**); Porras v. Todd Shipyards Corp., 17 BRBS 222 (1985), aff'd sub. nom. Todd Shipyards Corp. v. Director, OWCP (Porras), 792 F.2d 1489, 19 BRBS 3 (CRT) (**9th Cir.** 1986); Smith v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 287 (1984); La Faille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT) (**2d Cir.** 1989), rev'g 18 BRBS 88 (1986). As emphasized in Porras, the LHWCA does not specifically provide for a lost wage-earning capacity that cannot be expressed as a dollar amount. Porris, 17 BRBS 222.

The Board further objected to such awards both because they indefinitely extended the time period for Section 22 modification, and the difficulty of identifying what constitutes substantial evidence to establish a significant possibility that an employee's impairment will result in future loss of wage earning capacity. Mavar v. Matson Terminals, 21 BRBS 336 (1988). Even after Rambo II, the Board has shown a reluctance to allow *de minimis* awards. See Barbera v. Director, OWCP, 245 F.3d 282, (**3rd Cir.** 2001)(Circuit court notes it is “troubled by the Board’s continued unwillingness to uphold properly-supported nominal awards, in the face of clear direction from four courts of appeals and even the Supreme Court.”). In Barbera, the **Third Circuit** found that the ALJ had reasonably inferred from the medical evidence that there was at least a “significant possibility” that the claimant would at some future time suffer economic harm as a result of his injury.

The Board has held that the judge may not make such an award based on mere speculation of future harm that is unsupported by any evidence in the record. Smith, 16 BRBS at 289; Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172-73 (1984).

In Spinner v. Safeway Stores, 18 BRBS 155 (1986), the Board reluctantly affirmed the ALJ’s two percent *de minimis* award, following the Randall decision. The judge's conclusion that the employee had carried his burden of proving a reasonable expectation of future loss of wage-earning capacity was found to be in accordance with **District of Columbia of Circuit** case law and was affirmed.

In Adams v. Washington Metropolitan Area Transit Authority, 21 BRBS 226 (1988) (**D.C. Act** case), however, the Board reversed a *de minimis* award. The Board held that the judge's finding that the employee could significantly expect a future loss of wage-earning capacity was not supported by evidence.

The Board distinguished the facts of this case from those of Randall, noting that in Adams, there was no evidence that the employee's job performance was materially affected by his work injury, no evidence that the employee required employer's beneficence, no evidence that the employee's work disability would deteriorate, and no evidence that the employee's position with employer was not secure. Adams, 21 BRBS 226. See also Jennings v. Sea-Land Serv., 23 BRBS 12, vacated on other grounds, 23 BRBS 312 (1989) (as the employee did not establish a "significant" possibility of future economic harm, the claimant was not entitled to a *de minimis* award).

In Palmer v. Washington Metropolitan Area Transit Authority, 20 BRBS 39 (1987) (**D.C. Cir.** case), the Board affirmed the judge's determination that the employee was not entitled to a *de minimis* award where the judge found that the employee had no reasonable expectation of future loss of wage-earning capacity, based on medical reports that the employee was physically able to perform his work without the aid of co-workers; the lack of evidence that the employee's condition could deteriorate; and the statements that the type of position in which the employee was employed would increase in number in the future.

In Burkhardt v. Bethlehem Steel Corp., 23 BRBS 273 (1990), the Board affirmed the judge's finding that the employee had no actual loss of wage-earning capacity and that he was not entitled to a *de minimis* award. The Board noted that although the employee was unable to perform his pre-injury welding job, he had not performed this job for more than two years, having been promoted to a foreman position at a higher pay than his pre-injury welder job. The record did not include any evidence that the employee's chances of retaining his foreman job were less secure because of his work-related injury. Therefore, the Board concluded that the employee did not establish a significant possibility of future economic harm.

The Board was reversed, however, in La Faille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT) (**2d Cir.** 1989), *rev'g* 18 BRBS 88 (1986). The **Second Circuit** held that the Board erred in failing to award the employee a *de minimis* award, as there was substantial evidence that he was likely to suffer a future loss of earnings as his condition (progressive lung disease) deteriorated or when his environment changed.

In Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, the **Supreme Court**, held that *de minimis* awards were appropriate in the instance where the claimant had no immediate economic harm; however, it was reasonable probable that he would suffer future economic harm from the present injury or disability. The purpose of the award is to provide a continuing nominal award designed to perpetuate the ability to utilize a Section 22 modification of the current order if there is future economic harm. The trigger for the granting of a *de minimis* award is not the realization of a physical injury, rather, it is the possibility of economic harm. The **Court** left open the degree of injury that might be needed, or the degree of probability that it would occur in order to justify the award.

Case law is scant as to Section 8(f) relief when a *de minimis* award is made. In Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987), the Board found such relief improper, since the requirement that the employee's disability (asbestosis) be "materially and substantially" greater than that due to the subsequent injury alone could not be satisfied.

In Newport News Shipbuilding & Dry Dock Company v. Stallings, 250 F.3d 868, (**4th Cir.** 2001), the **Fourth Circuit** held that a small disability award that reflects an actual loss in wage earning capacity does not preclude an employer from seeking relief under Section 8(f) of the LHWCA. The court distinguished this case from one in which the award was "nominal" (A "nominal" disability award is a "mechanism for taking future effects of disability into account when

present wage-earning ability remains undiminished.” Rambo II, 521 U.S. at 136). The Director had argued that the award of \$3.78 per week was so “utterly insubstantial, that for Section 8(f) purposes it should be treated the same as are nominal awards. The Board had accepted the Director’s argument and had specifically held that because the award was so small, the “employer would be legally unable to establish that the claimant’s disability was not due solely to the work injury, and is, in fact, ‘materially and substantially greater’ than that caused by the last injury alone.” In vacating the Board, the **Fourth Circuit** recognized that the \$3.78 per week is insubstantial and that the claimant’s disability did not greatly affect his wage-earning capacity. Nevertheless, the court noted that the small size of the award did not answer the statutory question of whether the claimant’s current disability was “materially and substantially” greater than the kind of disability he would have been facing if he had only metal fume fever and had not suffered from COPD and hypertension. Important to the court was the fact that the employer had been ordered to pay compensation calculated on the basis of an actual loss in wage-earning capacity, to an employee with a permanent partial disability.

8.2.3 TOTAL DISABILITY Defined; Employee's *Prima Facie* Case

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the **initial burden** of proving total disability. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury.

[ED. NOTE: *To what extent the Americans with Disabilities Act (hereinafter ADA) will impact on this initial burden remains to be determined. Previously, attention had not focused on whether a claimant could resume his former employment if the working conditions were modified. The ADA, however, places a new obligation on the employer--not to discriminate against a disabled employee if "reasonable accommodation" would enable the employee to do the job. 42 U.S.C. §§ 12112(b)(5), 12111(9). For this reason, the initial burden may have to change. Perhaps the employee may have to show that he cannot resume his former employment "as is," and the employer will then have to show that it cannot reasonably accommodate the employee's impairment.*

Of general interest to the Longshore community is the ADA case, Willis v. Pacific Maritime Assoc., 236 F.3d 1160 (9th Cir. 2001), amended and rehearing en banc denied at 244 F.3d 675 (9th Cir. 2001)(ADA accommodation that is contrary to a CBA seniority system is unreasonable per se; ADA cannot preempt the NLRA because preemption doctrine applies only to conflicts between state and federal law.).

The reader should also keep in mind that a claimant must be given the opportunity to explain discrepancies between statements filed in various claims, i.e. LHWCA and ADA. See Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)(Held, (1) claims for Social Security Disability Insurance benefits and for ADA damages did not inherently conflict, and (2) employee was entitled to an opportunity to explain discrepancy between her statement in pursuing SSDI

benefits that she was totally disabled and her ADA claim that she could perform essential functions of her job.)]

The judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988); Mills v. Marine Repair Serv., 21 BRBS 115, on recon., 22 BRBS 335 (1988); Carroll v. Hanover Bridge Marine, 17 BRBS 176 (1985); Bell v. Volpe/Head Constr. Co., 11 BRBS 377 (1979).

At this initial stage, the claimant need not establish that he cannot return to **any** employment, only that he cannot return to his former employment. Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). See, e.g., Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (employee required lighter duty which did not require the use of his right hand for heavy grip, and thus could not resume his former employment of holdman); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988) (due to permanent restrictions against heavy lifting and excessive bending, employee cannot resume usual job as a sandblaster).

The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 BRBS 171 (1986).

"Usual" employment is the claimant's regular duties at the time that he was injured. Hence, even if he only did the latest duties for four months, those duties, and not his prior job, are his "usual" employment. Ramirez v. Vessel Jeanne Lou, Inc., 14 BRBS 689 (1982). Similarly, where the claimant was promoted to foreman before his injury, that is his usual employment. Moore McCormack Lines v. Quigley, 178 F. Supp. 837 (S.D.N.Y. 1959). A claimant who is a full-time student at the time of the injury, however, may thereafter receive compensation if unable to return to the former employment as a laborer. Lewis v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 613 (1978). See Kilson v. Sun Shipbuilding & Dry Dock Co., 2 BRBS 172 (1975).

The **District of Columbia Circuit** has held that, in determining whether an employee can perform his pre-injury job, the judge must address economic as well as medical considerations. The fact that a claimant's job was no longer open to him after his injury (employer would not offer it to him) and the fact that the employee was physically capable of performing his pre-injury duties were both relevant at this stage of the ALJ's disability determination.

The court noted in McBride v. Eastman Kodak Co., 844 F.2d 797, 21 BRBS 45 (CRT) (**D.C. Cir.** 1988), that since relevant evidence demonstrated that the lack of availability of a claimant's pre-injury job was related to his work injury, the injury had resulted in the claimant's "inability to return to his usual employment." The court accordingly remanded the case for the judge to consider the evidence bearing on suitable alternative employment.

[ED. NOTE: See Topic 48a, infra, dealing with Discrimination Claims, for a discussion of circumstances that constitute a retaliatory action against an employee for filing a worker's compensation claim.]

Even a minor physical impairment can establish total disability if it prevents the employee from performing her usual employment, Elliot, 16 BRBS at 92 n.4, or from performing the only kind of employment for which she is qualified. Equitable Equip. Co. v. Hardy, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977), vacating on other grounds 3 BRBS 426 (1976); Nardella v. Campbell Mach., 525 F.2d 46, 49, 3 BRBS 78, 80 (9th Cir. 1975); American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970); Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778 (1981); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 476 (1978); Ridgely v. Great Lakes Storage & Contracting Co., 7 BRBS 297 (1977), aff'd sub nom. Ridgely v. Ceres, Inc., 594 F.2d 1175, 9 BRBS 948 (8th Cir. 1979). It is irrelevant that a physician terms such an impairment "partial." Employers Liability Assurance Corp. v. Hughes, 188 F. Supp. 623 (S.D.N.Y. 1959).

The claimant's credible complaints of pain alone may be enough to meet his burden. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Richardson v. Safeway Stores, 14 BRBS 855 (1982); Miranda v. Excavation Constr., 13 BRBS 882, 884 (1981); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). On the other hand, a judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. Peterson v. Washington Metro. Area Transit Auth., 13 BRBS 891 (1981).

A psychiatrist's opinion that the claimant's medication would limit him to part-time work with limited responsibilities establishes that he cannot perform his usual employment. Brown v. Potomac Elec. Power Co., 15 BRBS 337, 339 (1983).

Similarly, a physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988); Lobue v. Army & Air Force Exch. Serv., 15 BRBS 407 (1983); Sweitzer v. Lockheed Shipbuilding & Constr. Co., 8 BRBS 257, 261 (1978). Contra Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388 (1978) (not total merely because continued employment would be hazardous to employee's health).

If the physician recommends surgery and light-duty work and the claimant experiences pain while performing many activities, he has also met his burden. Carter v. General Elevator Co., 14 BRBS 90 (1981). See Offshore Food Serv. v. Murillo, 1 BRBS 9 (1974), aff'd sub nom. Offshore Food Serv. v. Benefits Review Bd., 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975).

The ALJ may find that claimant cannot perform his usual employment, even if he did so for several months after his injury, if the claimant must either wear ear protection, impairing his ability to hear warnings, or suffer pain due to the effect of ambient noise on the injured ear. Nguyen v. Ebbtide Fabricators, Inc., 19 BRBS 142 (1986).

If the claimant's physical injury leads to psychological injuries, including alcoholism, the ALJ may find him permanently totally disabled. Parent v. Duluth, Missabe & Iron Range Ry. Co., 7 BRBS 41 (1977); Mitchell v. Lake Charles Stevedores, 5 BRBS 777 (1977); Carpenter v. Potomac Iron Works, 1 BRBS 332 (1975), aff'd mem., 535 F.2d 1325 (**D.C. Cir.** 1976) (compensation neurosis secondary to compensable injury may establish permanent total disability).

Having trouble coping does not, however, establish disability. Johnson v. Toledo Overseas Terminals Co., 10 BRBS 478 (1979), aff'd mem., 647 F.2d 165 (**6th Cir.** 1981) (no evidence of conversion neurosis; having trouble coping does not establish disability). If a physician finds the employee physically capable of performing routine repetitive tasks but emotionally unable to perform the tasks, the judge may find total disability. Quick v. Martin, 397 F.2d 644, 647 (**D.C. Cir.** 1968).

In Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988), the Board remanded the case for reconsideration of the extent of the employee's disability under the appropriate standard, where the judge found the employee permanently totally disabled based on his belief that the employee was unemployable because no cautious employer would hire or retain him.

The Board directed that, on remand, the ALJ determine whether the employee is able to perform his usual work. If the employee is unable to perform his usual work, the Board directed that the employee is entitled to total disability benefits since employer has offered no evidence of suitable alternative employment. Blake, 21 BRBS 49.

If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment. Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986). (See Partial Disability, *infra*.) A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (involving injury to a scheduled member); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff'd, (No. 86-3444)(**11th Cir.** 1987)(Unpublished).

8.2.3.1 Total disability while working - Beneficent employer/ sheltered employment and extraordinary effort

No requirement exists that a claimant be bedridden to be totally disabled. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (**5th Cir.** 1968), cert. denied, 394 U.S. 976 (1969). The fact that the claimant works after his injury does not necessarily preclude a finding of total disability. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (**4th Cir.** 1978), aff'g 5 BRBS 62 (1976); Walker v. Pacific Architects & Eng'rs, 1 BRBS 145, 148 (1974); Offshore Food Serv. v. Murillo, 1 BRBS 9, 14 (1974).

The Board has cautioned against a broad application of these cases and has emphasized that circumstances which warrant an award of total disability, concurrent with a period where the claimant is working, are the exception and not the rule. Shoemaker v. Sun Shipbuilding & Dry Dock

Co., 12 BRBS 141, 145 (1980); Chase v. Bethlehem Steel Corp., 9 BRBS 143 (1978); Ford v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 687 (1978).

An award of total disability concurrent with continued employment has been limited to two situations. The first is the "**beneficent employer**" or "**sheltered employment**" situation, where claimant's post-injury employment is due solely to the beneficence of employer. Walker v. Pacific Architects & Eng'rs, 1 BRBS 145, 147-48 (1974). See also Proffitt v. E.J. Bartells Co., 10 BRBS 435 (1979). Sheltered employment has been held to be insufficient to establish suitable alternate employment. The Board has defined it as a **job for which the employee is paid even if he cannot do the work and which is unnecessary**. Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980).

Sheltered employment has been found where an employee would not necessarily be replaced if his job were terminated and where he was treated with "kid gloves," implying that his work was of little benefit to his employer and his wages were not justified by his service. Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38 (1982). An employee's part-time work for employer, on an as-needed basis and with a mattress in the office for him to rest on, was found to be sheltered employment. See CNA Insurance Co. v. Legrow, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In CNA, the record did not contain any evidence that the employee, in his brief stint as a security guard, was able to perform the job adequately.

The Board has **not** found sheltered employment or beneficence where the employee is in a job which he is capable of doing, is protected by collective bargaining, and he would have to be replaced if he left, or if he is performing necessary work. See Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412, 416 (1981). The fact that the same job exists on other shifts shows that it is not makeshift and is necessary. Id.; Darcell v. FMC Corp., Marine & Rail Equip. Div., 14 BRBS 294 (1981); Harrod, 12 BRBS at 13-14; Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676 (1979). Moreover, a job specifically tailored to the employee's restrictions is not sheltered so long as it involves necessary work. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224, 226 (1986).

Light-duty work is not sheltered employment if the employee is capable of performing it, it is necessary to employer's operations, it is profitable to employer, and several shifts perform the same work. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987); Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

In the **Eleventh Circuit**, should a job be found to be sheltered employment, the extent of the employee's disability should be measured by his loss of wage-earning capacity rather than by his actual reduction in earnings. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), aff'g in part and rev'g in part 15 BRBS 38 (1982). Accordingly, in Argonaut, it was not error for the ALJ to award compensation for total disability despite the fact that the claimant was earning wages during the relevant period, since these wages were earned only by virtue of the employer's "benevolence."

The other facts supporting total disability for a working claimant involve "**extraordinary effort**," where the claimant continues employment due to an extraordinary effort and in spite of excruciating pain and diminished strength. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 451, 7 BRBS 838, 850 (4th Cir. 1978), aff'g 5 BRBS 62 (1976). See also Richardson v. Safeway Stores, 14 BRBS 855, 857-58 (1982).

A job held for only eight days during which the employee worked only part-time, through extraordinary effort and considerable pain, but for which he was paid full-time wages, did not bar a finding of permanent total disability. Shoemaker v. Schiavone & Sons, Inc., 11 BRBS 33, 37 (1979). See also Holmes v. Tampa Ship Repair & Dry Dock Co., 8 BRBS 455 (1978); Steele v. Associated Banning Co., 7 BRBS 501, 509 (1978).

The fact that the claimant had a short-term job post-injury does not establish that he is not now totally disabled, unless the employer shows that it is currently available. See Carter v. General Elevator Co., 14 BRBS 90, 97 (1981); Jarrell v. Newport News Shipbuilding & Dry Dock Co., 9 BRBS 734, 740 (1978). Sporadic post-injury work also does not rule out permanent total disability. Seals v. Ingalls Shipbuilding, Div. of Litton Sys., 8 BRBS 182, 184 (1978). For example, a claimant who fished to support his family was held not to have shown thereby that fishing was suitable alternate employment, as the job was seasonal, his ex-employer did not establish the pay scale for it, and he worked only out of necessity. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024, 1027 (1978).

Where employer provided a light-duty job for the claimant which was necessary and the claimant was capable of performing, however, the Board affirmed the finding that employer met its burden even though the employee worked only one month. Walker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 133 (1980), vacated, 642 F.2d 445 (3d Cir. 1981). On appeal, the **Third Circuit** found the evidence that the claimant's discharge was unrelated to his disability unconvincing. Following remand to a judge for further findings, the Board again affirmed the denial of total disability, finding substantial evidence to support the conclusion that the discharge was due solely to the claimant's violation of a company rule. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

Cases where pain, sometimes in conjunction with reduced duties, was found insufficient to establish extraordinary effort include: Jordan v. Bethlehem Steel Corp., 19 BRBS 82 (1986); Adam v. Nicholson Terminal & Dry Dock Corp., 14 BRBS 735 (1981); Carter v. General Elevator Co., 14 BRBS 90, 97-98 (1981); Feezor v. Paducah Marine Ways, 13 BRBS 509, 515 (1981), petition for review dismissed, 673 F.2d 1328 (6th Cir. 1981); Williams v. General Dynamics Corp., 10 BRBS 915, 919 (1979); Ford v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 687, 691 (1978); Allen v. Waterman Corp., 7 BRBS 221 (1977). See also Collins v. Todd Shipyards Corp., 9 BRBS 1015, 1020 (1979) (considerable pain walking to work area, but none while working, is not enough).

In Sams v. D.C. Transit System, 9 BRBS 741, 747-48 (1978), the Board reversed the judge's determination that the claimant was totally disabled, when the claimant earned more after his disabling injury than before and was not working through "extraordinary effort."

8.2.3.2 Disability While Undergoing Vocational Rehabilitation

A claimant may receive continuing permanent total disability compensation where the employer has established the availability of suitable alternate employment at a minimum-wage level, but the claimant is precluded from working because he is undergoing vocational rehabilitation. Abbott v. Louisiana Ins. Guaranty Assoc., 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (5th Cir. 1995). In Abbott, the Board held that while the claimant was physically capable of performing entry level minimum wage work of a sedentary nature, this employment was not realistically available to him because his participation in the U.S. Department of Labor-sponsored program precluded him from working. Id. at 203.

Although the Board noted that this remedy is not explicitly provided for in the LHWCA, it comports with the fundamental policies underlying the statute and its humanitarian purposes. Furthermore, the LHWCA and regulations do provide for the Department of Labor to direct the vocational rehabilitation of permanently disabled employees. See 33 U.S.C. § 939(c)(2); 20 C.F.R. §§ 702.501-702.508; Abbott 27 BRBS at 203 n.8.

The Board explained that depriving a claimant of total disability status under circumstances such as in Abbott would effectively place him in the "Catch 22" position of being unable to work without being expelled from the vocational training program, yet being unable to collect total disability compensation because of his undisputed ability to perform minimum-wage work. The Board found that its holding clearly served the LHWCA'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. Id.; see P & M Crane Co. v. Hayes, 930 F.2d 424 (5th Cir. 1991), reh'g denied, 935 F.2d 1293 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156, 164 (CRT) (5th Cir. 1981); Stevens v. Director, OWCP, 909 F.2d 1256, 1260, 23 BRBS 89, 95 (CRT) (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991).

Relying on Abbott, in Bush v. I.T.O. Corporation, 32 BRBS 213 (1998), the Board held that the claimant was entitled to total disability compensation during the period that his full-time enrollment in a DOL-sponsored rehabilitation program precluded him from working, even if he already possessed a college degree prior to rehabilitation and even though the employer established that he had a capacity to earn greater than minimum wage during the full-time enrollment in the DOL plan. The vocational counselor had determined that the claimant was an excellent candidate for retraining and that a career in nursing would be the best way to utilize his prior education and transferable skills, and to ensure his ability to care for himself and his family while at the same time minimizing the employer's compensation liability. Importantly the Board concluded that **claimant was not pursuing a personal choice**, but rather a program based upon the course his counselor found would maximize his skills and minimize employer's liability.

However, the Board distinguished Abbott in Gregory v. Norfolk Shipbuilding and Dry Dock Co., 32 BRBS 264(1998)(Claimant limited to the scheduled recovery as of MMI since claimant actually obtained employment while she was enrolled in a rehab program and thus the rehab program did not preclude claimant from working.). In Gregory the Board noted that the application of Abbott rests on the fact that alternate jobs are not realistically available due to enrollment in rehabilitation; the fact that the disability in Gregory was controlled by the schedule was not determinative.

It is the claimant's burden to prove that he is unable to perform suitable alternate employment due to his participation in a vocational training program. Kee v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 221 (2000). The Board found this result consistent with well-established case law placing the burden of proof on a claimant to show he was unable to obtain alternative employment despite a diligent effort in order to be entitled to total disability benefits notwithstanding a showing by employer of suitable alternate employment.

In Brown v. National Steel and Shipbuilding Co., 34 BRBS 195 (2001), the Board once again applied Abbott finding that it did not matter that the claimant was participating in a state-sponsored vocational rehab program, nor that the injury involved the schedule. The Board noted that it was in everyone's interest to facilitate rehabilitation of injured employees and that any acquired skills reduce the likelihood that the claimant would be unable to obtain suitable alternate employment. The Board also supported the ALJ's determination that it was unreasonable to expect the claimant to arise at 5:30 a.m., attend both classroom work and hands-on training from 7 a.m. until 1 p.m. and then commence part-time employment.

In Turner, the **Fifth Circuit** stated that the LHWCA does not provide any standard for determining the extent of disability; thus the degree of disability is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, **rehabilitative potential**, and the **availability** of work that a claimant can perform. Turner, 661 F.2d at 1037-38, 14 BRBS at 160 (CRT).

[ED. NOTE: When considering physical limitation it may be important to consider the claimant's psychological limitations as well. Armfield v. Shell Offshore, Inc., 30 BRBS 122 (1996) (the claimant was unable to perform a secretarial job as she suffered from "hopeless/helpless syndrome" - an inability to work because of difficulty with concentration, anxiety and fatigue, and difficulty in handling stressful situations); White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995)(must consider the mental state of the claimant and the affect of any medication he is taking).]

In reference to Turner, the Board, in Abbott, noted that the **Fifth Circuit** recognized that an individual may be totally disabled "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Abbott 27 BRBS at 202, citing Turner, 661 F.2d at 1038, 14 BRBS at 164 (CRT). See generally Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT) (**5th Cir.** 1992).

The Board, in Abbott, further noted that its holding will also serve employer/carrier interests. Abbott 27 BRBS at 203. While an employer/carrier will have to pay more compensation in the short term during the period of rehabilitation, it will ultimately recoup its initial payments and save substantial money in the future, as it will have to pay little, if any, disability compensation after a claimant is rehabilitated, once again becoming a productive working member of society. Id. The **Fifth Circuit** held that the period during which the claimant was receiving compensation while undergoing rehabilitation should be classified as permanent total compensation since it occurred after the claimant had reached maximum medical improvement. Abbott v. Louisiana Ins. Guaranty Ass'n, 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (**5th Cir.** 1995).

8.2.4 Partial Disability/Suitable Alternate Employment

An ALJ is not bound by nebulous stipulations pertaining to alternate employment. Ceres Marine Terminals v. Hinton, 243 F.3d 222 (**5th Cir.** 2001).

In Steevens v. Umpqua River Navigation, ___ BRBS ___, (BRB Nos. 00-1027 and 00-1027A)(July 17, 2001), the Board held that a scheduled award of permanent partial disability is not, for purposes of Section 6(b)(2) equivalent to an award of total disability for a limited time.

8.2.4.1 Burdens of Proof

As mentioned above, if the claimant establishes a *prima facie* case of total disability, the **burden shifts** to employer to establish suitable alternate employment. **An employer must show 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.** The ALJ must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work was available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. Mendoza v. Marine Personnel Co., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (**5th Cir.** 1995); Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995).

Most circuits have adopted a version of this standard. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 16 BRBS 74 (CRT) (**4th Cir.** 1984), rev'g Tarner v. Trans-State Dredging, 13 BRBS 53 (1980); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (**5th Cir.** 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (**9th Cir.** 1980), aff'g Hansen v. Bumble Bee Seafoods, 7 BRBS 680 (1978); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, 10 BRBS 614 (**3d Cir.** 1979), aff'g in pertinent part 7 BRBS 333 (1977); Ridgley v. Ceres, Inc., 594 F.2d 1175, 9 BRBS 948 (**8th**

Cir. 1979), aff'g Ridgely v. Great Lakes Storage & Contracting Co., 7 BRBS 297 (1977); Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell], 592 F.2d 762, 765, 10 BRBS 81, 86-87 (**4th Cir.** 1979); Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (**5th Cir.** 1978), aff'g Kilsby v. Diamond M. Drilling Co., 6 BRBS 114 (1977); American Stevedores v. Salzano, 538 F.2d 933, 4 BRBS 195 (**2d Cir.** 1976), aff'g 2 BRBS 178 (1975). See also Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989); Young v. Todd Pac. Shipyards, 17 BRBS 201, 203 (1985); Miller v. Prolerized New England Co., 14 BRBS 811 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (**1st Cir.** 1982); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (1978); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (**7th Cir.** 2000).

In addition to the employer's evidence of suitable alternate employment, the ALJ must also consider any other evidence put forth by the claimant in making a decision in this matter. For example, in Newport News shipbuilding and Dry Dock Co. v. Wiggins, (Unpublished) (No. 00-2532) (**4th Cir.** December 14, 2001), relying on the evidence as a whole, the **Fourth Circuit** affirmed the ALJ's award of total disability benefits to the claimant. The employer had argued that the claimant's part-time job as a newspaper carrier constituted suitable alternate employment. In upholding the award, the **Fourth Circuit** agreed that the newspaper route did not establish a continuing ability to earn wages. The evidence showed that the claimant experienced problems with her hands, wrists and knee, and that it swelled and gave way if she walked too much or too quickly. It further showed that she sometimes received help from her children in carrying out her duties. Furthermore, the court noted that her doctor noted that the carrier job was causing her a "lot of pain in her knee" and he prescribe medication and a knee brace to ease the pain and stabilize her knee.

The claimant does not have the burden of showing that no conceivable suitable alternate employment is available; rather, the employer must prove that suitable alternate employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 11 BRBS 635 (1979). An employee's **death** does not alter the employer's burden to establish that suitable alternate employment was available during the period of the employee's life subsequent to his injury. Mikell v. Savannah Shipyard Co., 24 BRBS 100 (1990). The ALJ must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work is available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. Mendoza v. Marine Personnel Co., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (**5th Cir.** 1995); Hawthorne v. Ingalls Shipbuilding, Inc., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995).

The **First Circuit** has adopted a somewhat different standard, holding that the severity of the claimant's employer's burden must reflect the reality of the situation and it will not shift the burden in all cases. Air America, Inc. v. Director, OWCP, 597 F.2d 773, 10 BRBS 505 (**1st Cir.** 1979), aff'g and rev'g in part Kerch v. Air America, Inc., 8 BRBS 490 (1978). The **First Circuit** stated that

it will not put the burden of proving that actual available jobs exist on the employer when it is "obvious" that there are available jobs that someone of the claimant's age, education, and experience could do.

The court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. The court therefore held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. Air America, 597 F.2d at 778, 780, 10 BRBS at 511-12, 514. See also Argonaut Ins. Co. v. Director, OWCP, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981) (young intelligent man not unemployable).

The Board has declined to follow Air America in this regard. Lobue v. Army & Air Force Exch. Serv., 15 BRBS 407, 409 (1983); Lunsford v. Marathon Oil Co., 15 BRBS 204 (1982), aff'd, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984); Miller v. Prolerized New England Co., 14 BRBS 811, 819 n.9 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982); Dantes v. Western Found. Corp. Ass'n, 10 BRBS 541 (1979), petition for review dismissed, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980).

The Board chooses instead to follow the test placing the **burden on the employer** in every case, because the Air America rule would require individual review of every case to determine what the appropriate burden of proof is, causing unnecessary litigation and delay. Furthermore, the Board prefers the traditional analysis because it is an impossible burden to prove oneself unfit for all employment, and the employer can usually better bear the cost of proof that some suitable alternate employment exists. Dantes, 10 BRBS at 548-49. See also Newport News (Chappell), 592 F.2d at 764-65, 10 BRBS at 85-86 (APA mandates that proponent bear burden of proof; moreover, employee should not have to prove the negative).

The Board will follow Air America, however, in the **First Circuit**. Dixon v. John J. McMullen & Assocs., 19 BRBS 243 (1986). **In all other circuits**, the Board follows Turner, 661 F.2d at 1038, 14 BRBS at 161. Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986).

If the employer meets its burden and shows suitable alternative employment, the **burden shifts back** to the claimant to prove a diligent search and willingness to work. See Topic 8.2.4.9, infra; Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If employee does not prove such, at the most his disability is partial not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Once a claimant presents a prima facie showing of disability, it is the employer's burden to show that there was suitable alternate employment. **An employer cannot simply show that a claimant was terminated for cause.** Newport News Shipbuilding & Dry Dock Co. v. Riley, 262 F.3d 227 (4th Cir. 2001)(Motion to publish was granted by the court on June 29, 2001). The employer has the burden of showing that there was suitable alternate employment, either within or without the company.

8.2.4.2 Suitable alternate employment: Employer must show nature, terms, and availability

The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Armfield v. Shell Offshore, Inc., 30 BRBS 122, 123 (1996); Royce v. Elrich Constr. Co., 17 BRBS 157 (1985); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 480 (1978); Salzano v. American Stevedores, 2 BRBS 178 (1975), aff'd, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (7th Cir. 2000). The employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993); cert. denied, 511 U.S. 1031 (1994). The Edwards court also stressed the importance of these jobs being regularly available. The judge must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucas v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994).

Accordingly, the employer need not rehire the claimant. Turner, 661 F.2d at 1043, 14 BRBS at 165; Ferrell v. Jacksonville Shipyards, 12 BRBS 566, 570 (1980).

Suitable alternate employment may be unavailable to a claimant if the employer finds out that the claimant violated company rules. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993) (work-related injury led employer to discover petitioner's falsification of company records and to fire petitioners; Board's denial of benefits was upheld); see also Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job given claimant, even though claimant was later fired for violating a company rule against bringing handguns to work); but see Manship v. Norfolk & Western Railway Co., 30 BRBS 175 (1996) (Employer's termination was not due to misfeasance; it was not a "legitimate personnel action and claimant was not discharged for reasons unrelated to his disability.).

[ED. NOTE: Any termination of employment may, however, be in violation of 33 U.S.C. § 948a (unless the termination is for due cause as noted in Brooks and Harrod above) and the ADA.]

The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165; Turney v. Bethlehem Steel Corp., 17 BRBS 232, 237 n.7 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 234 (1984); Feezor v. Paducah Marine Ways, 13 BRBS 509, petition for review dismissed, 673 F.2d 1328 (6th Cir. 1981).

Furthermore, the employer need not establish that the claimant was offered a specific job. Trans-State Dredging, 731 F.2d at 201, 16 BRBS at 75 (CRT). For the job opportunities to be **realistic**, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988); Price v. Dravo Corp., 20 BRBS 94 (1987); Rieche v. Tracor Marine, 16 BRBS 272 (1984); Daniele v. Bromfield Corp., 11 BRBS 801 (1980).

The judge must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucus v. Louisiana Ins. Guaranty Ass'n, 28 BRBS 1 (1994); Ion v. Duluth, Missabe and Iron Range Railway Co., 31 BRBS 75 (1997)(When ALJ properly allowed claimant to conduct post hearing job search and present affidavit about search, Board held ALJ denied respondents' due process rights by not allowing defendants to cross examine claimant about job search). In the **Ninth Circuit**, the **employer** must demonstrate that the claimant "would be hired if he diligently sought the job." Hairston v. Todd Pacific Shipyards Corp., 849 F.2d 1194, 1196 (**9th Cir.** 1988); Fox v. West State Inc., 31 BRBS 118 (1997). However, in the **Fourth**, **Fifth** and **Seventh Circuits**, employer need only show that "work [is] available to a claimant which is within that claimant's physical and educational ability, age, experience, etc. to perform and secure." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (**5th Cir.** 1981); Trans-State Dredging, 731 F.2d 199, 201 (**4th Cir.** 1984); Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (**7th Cir.** 2000).. The burden then switches to the claimant to show that with "due diligence," he was unable to secure any of the employer's suitable alternative employment.

Recently the Board has sought to reconcile the more **moderate test** (Employers must simply present evidence that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform) of the **First, Forth Fifth and Seventh Circuits** with the "**stricter**" test (Employer must identify specific positions for a specific employer, that the claimant can perform and that the claimant could likely obtain) of the **Ninth Circuit**. See Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (**7th Cir.** 2000). In Berezin v. Cascade General, Inc., 34 BRBS 163 (2000), the Board "re-examined" the **Ninth Circuit's** holding in Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (**9th Cir.** 1980) and held that where an employer had identified only one actual assemble position that was both suitable for and realistically available to the claimant where the employer also demonstrated the general availability of similar assembler positions during the questionable period.

The Board is, in effect, aligning the **Ninth Circuit** law with the position of the **Fifth Circuit**:

The **Ninth Circuit's** rejection of the employer's offer of evidence [in Bumble Bee] that claimant could perform sedentary work, therefore, is just as susceptible to the interpretation that the employer cannot meet its burden of showing merely that the claimant possesses the physical capacity to engage in certain activities. Such a showing is plainly insufficient to satisfy employer's burden of establishing suitable alternate employment. [cites omitted.] The **Ninth Circuit** emphasized the word

“specific,” not the word “jobs” and its explanation of its rejection of employer’s evidence seems to indicate that an employer must identify the availability of jobs that are within claimant’s physical, educational capabilities, which, in fact, is the test also utilized by the **Fifth Circuit**.

The employer must establish the claimant's earning capacity by at least establishing the pay scale for alternate jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978); Dupuis v. Teledyne Seacraft, 5 BRBS 628 (1977). Merely alleging that such work is available will not do. 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); American Mut. Ins. Co. v. Jones, 426 F.2d 1263, 1265-66 (**D.C. Cir.** 1970); Burke v. San Leandro Boat Works, 14 BRBS 198 (1981); Bostrom v. I.T.O. Corp. of Baltimore, 11 BRBS 63, 65 (1979); Perry v. Stan Flowers Co., 8 BRBS 533, 536-37 (1978). It is not enough when a position is open for a short period of time, with no new vacancies anticipated. Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (**4th Cir.** 1988).

The employer does not meet its burden of demonstrating the availability of suitable alternate employment by introducing classified ads, as there is no evidence of the precise nature, terms, and availability of the positions listed. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). As well in Manigault, the Board rejected the employer's contention that the employee's testimony regarding his ability to drive, garden, and clean his home satisfies its burden of proof.

See also Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (**9th Cir.** 1993) (where employer presented no possible alternate employment other than car salesman, and the employee previously failed in this work, the Board affirmed the finding that the auto sales job did not constitute suitable alternative employment); Uglesich v. Stevedoring Servs. of America, 24 BRBS 180 (1991) (jobs identified by the vocational counselor did not constitute suitable alternate employment when there was doubt as to whether the employee could perform the jobs due to his education and physical restrictions).

Further, the determination of the extent of the claimant's disability must be based on the claimant's vocational capabilities at the time of the hearing. It is not error to fail to consider evidence of jobs that the employee could perform after vocational rehabilitation. Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated on other grounds, 24 BRBS 116 (CRT) (**5th Cir.** 1991).

When a claimant is temporarily laid off for economic reasons, an employer must make the same showing of suitable alternate employment during the layoff period as in response to an initial claim. Norfolk Shipbuilding & Drydock Corp. v. Hord, 193 F.3d 797 (**4th Cir.** 1999)(Pointing to a single light duty position that is not available by virtue of a layoff is a failure of employer to meet its burden.).

8.2.4.3 Suitable alternate employment: location of jobs

Turner specifies that the employer must show jobs which are available within the claimant's "local community." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). See Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 16 (CRT) (2d Cir. 1991). "Local community" has been interpreted to mean the community in which the injury occurred, but may include the area where the claimant resided at the time of injury. Jameson v. Marine Terminals, 10 BRBS 194 (1979).

The Board has held, however, that jobs 65 and 200 miles away are **not** within the geographical area, even if the employee took such jobs before his injury. Kilsby v. Diamond M. Drilling Co., 6 BRBS 114 (1977), aff'd sub nom. Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978).

If the **claimant relocates** for personal reasons, the employer meets its burden if it shows that jobs are available within the geographical area in which the claimant resided at the time of the injury. Elliot v. C & P Tel. Co., 16 BRBS 89, 92 (1984). See Hicks v. Pacific Marine & Supply Co., 14 BRBS 549, 564 (1981) (where employer failed to show available jobs in Hawaii, claimant's desire to return to the mainland is not relevant); Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130, 1137 n.5 (1981).

The **First Circuit**, in Wood v. U.S. Department of Labor, 112 F.3d 592 (1st Cir. 1997), has made a significant change in how suitable alternative employment is determined for claimants that have moved since the injury. Wood had been working for Employer as an insulator when, in October 1988, he developed a skin rash and sinus problems from the dust and fumes. He was then moved to a position that would not expose him to such materials until December when his job was terminated. Wood filed a claim for compensation in May of 1989 but returned to work at Bath in February 1991 as a truck driver. His position was again terminated in August 1991. At that time he was notified that this was a permanent situation so he moved to Shortsville, New York, where most of his family resided. Wood, 112 F.3d at 593.

In March 1991 a judge had awarded total disability to Wood for two days in December 1988, and partial disability payments for about two months based on the difference between the \$356 weekly pay as an insulator and his actual wages earned thereafter for other employers. Wood, 112 F.3d at 594. He was awarded no disability benefits after his re-employment with Bath because he was making higher wages than he had as an insulator. In August 1991, Wood renewed his claim for disability benefits based on the lower wages that he was earning in Shortsville. He wanted to get a Section 22 modification based on the difference between his wage earning ability at the time of the injury and the actual wage earning ability which his jobs in Shortsville reflected under 8(h). Id.

The ALJ in the second hearing ruled that Wood was entitled to a modification for the period of August 1991 to March 1993. However the judge also found that Bath had made a bona fide re-employment offer in February and March 1993 that would have paid more than Wood's pre-injury

wage. (It should be noted that the first offer was a mistake and the second expired in 30 days). Wood appealed the holding to the Board which affirmed the holding under Pub.L.104-134, §101(d), 110 Stat. 1321-219 (1996). The **First Circuit** overturned the ALJ and Board holdings, finding that the test for suitable alternative employment needed to be amended in cases concerning employees that had moved to a new local.

According to the **First Circuit**, the test should follow that enumerated in See v. Washington Metropolitan Area Transit Auth., 36 F.3d 375 (4th Cir. 1994). There the **Fourth Circuit** held:

“[T]he ALJ’s determination of the relevant labor market should include consideration of such factors as the claimant’s residence at the time of his filing for disability benefits, his motivation for relocation after the accident, the legitimacy of that motivation, the duration of his stay in that new community, his ties to that new community, the availability of suitable job opportunities in the new community as opposed to those in his former residence, and the degree of undue prejudice to the employer in proving suitable alternative employment in the claimant’s new community.

Wood, 112 F.3d at 596, citing See, 36 F.3d at 383. The Wood court went on to note that the Department of Labor had argued in See that “a legitimately motivated post-accident relocation can create a new relevant labor market.” Id. The Department went on to argue:

“[C]onsideration should be afforded to such factors as whether the claimant has relocated for a proper purpose, or in an effort to frustrate an employer’s ability to establish suitable alternative employment, and whether a finding that the relevant labor market is the community to which the claimant has relocated would unduly prejudice the employer.”

Wood, 112 F.3d at 596. The holding in See has been followed by the Board in Wilson v. Crowley Maritime, 30 BRBS 199, 203-204 (1996).

[ED. NOTE: The Board, at times, has seemed reluctant to give such equal weight to the claimant’s personal reasons for moving. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428, 430 (1990); McCullough v. Marathon LeTourneau Co., 22 BRBS 359, 365-66 (1989).]

The **First Circuit** went one step farther when it declared that the “employee’s chosen community is presumptively the proper choice for determining earning capacity, and that the employer bears the burden of showing that the original move, or refusal to move again, is unjustified.” Wood, 112 F.3d at 597.

In Holder v. Texas Eastern Products Pipeline, Inc., 35 BRBS 23(2001)(March 12, 2001) the Board **overruled** Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986)(held that employer need only show that SAE is available to the claimant within the community where the injury occurred;

employer could also meet its burden, however, if it showed available SAE within the community to which the claimant moved after his injury) and Dixon v. John J. McMullen & Assocs., 19 BRBS 243 (1986)(held that claimant need only show suitable alternate employment in the vicinity where the claimant was injured.) In light of the circuit cases of See and Wood. Holder was in the jurisdiction of the **Fifth Circuit** which the Board found had not specifically addressed the relocation issue. The Board found that the **Fifth Circuit's** language in P&M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT) (**5th Cir.** 1991) and New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (**5th Cir.** 1981) that in order for jobs to qualify as suitable alternate employment, they need to be reasonably available "in the local or surrounding community," does not preclude a consideration of the factors enumerated by the courts in See and Wood.

8.2.4.4 Suitable alternate employment: number of available jobs required to meet burden

The Board and the **Fourth Circuit** have both held that a showing by an employer of a **single job opening** is **not** sufficient to satisfy the employer's burden of suitable alternate employment. The employer must present evidence that a range of jobs exists which is reasonably available and which the disabled claimant is realistically able to secure and perform. Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (**4th Cir.** 1988); Vonthronsohnhaus v. Ingalls Shipbuilding, Inc., 24 BRBS 154 (1990); Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated, 24 BRBS 116 (CRT) (**5th Cir.** 1991); Green v. Suderman Stevedores, 23 BRBS 322 (1990).

The **Fifth Circuit** takes a **different** approach. It has held that the identification of a **single job opening** *may* be sufficient. As it stated in P & M Crane, the

decision in Turner leaves open the possibility that an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances. Such an opportunity could well exist, for example, where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small.

P & M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (**5th Cir.** 1991)(Whether a job is reasonably available to a claimant in a particular case is a factual determination), vacating 23 BRBS 389 (1990), 23 BRBS 322 (1990); Diosdado v. John Bludworth Marine, Inc., 37 F.3d 629 (1994) (**5th Cir.** 1994) (Table)(Determining that there is a reasonable likelihood that a claimant could obtain a job is case-specific; in the absence of a reasonable likelihood that a claimant could obtain the single job noted by employer, it becomes significant that the employer did not proffer any testimony of the general availability of jobs the claimant could perform.).

[ED. NOTE: Whether a job paying minimum wage or slightly higher could meet this standard is questionable, as generally every worker has the necessary skills to compete for such a job.

*Furthermore, unpublished decisions in the **Fifth Circuit** had precedential value until January 1, 1996. Thereafter, their value is only persuasive.]*

A single job **offer** is sufficient to establish suitable alternative employment under the Board's standard. In Shiver v. United States Marine Corp, Marine Base Exch., 23 BRBS 246 (1990), the possible employer testified that it would accommodate the claimant until she was re-acclimated to a work schedule, and two physicians stated that the job was suitable from a medical and psychiatric standpoint.

8.2.4.5 Suitable alternate employment: vocational evidence

The trier-of-fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available).

The counselors must identify specific available jobs; labor market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs).

The judge may not rely on a psychologist unfamiliar with the local job market as a vocational expert. Villasenor v. Marine Maintenance Indus., 17 BRBS 99, 103, motion for recon. denied, 17 BRBS 160 (1985). Cf. Feezor v. Paducah Marine Ways, 13 BRBS 509, 512 (1981), petition for review dismissed, 673 F.2d 1328 (**6th Cir.** 1981) (report of clinical psychiatrist who works at rehabilitative service is relevant, if not necessarily sufficient, as to whether the claimant could perform certain jobs and their availability).

The testimony of a paramedic with no vocational expertise is also insufficient. Rieche v. Tracor Marine, 16 BRBS 272, 274 (1984). Similarly, a physician's testimony on vocational disability may be discredited as beyond his expertise. Sutton v. Genco, Inc., 15 BRBS 25, 27 (1982); Alley v. Julius Garfinckel & Co., 3 BRBS 212 (1976). See also McDuffie v. Eller & Co., 10 BRBS 685 (1979) (merely asking the claimant and his physician whether he can do another job does not meet employer's burden).

Testimony by a non-expert is not sufficient to show unemployability unless he knows the specific requirements of each job possibility. Villasenor, 17 BRBS at 103. For an example of adequate testimony, the Board upheld a finding that suitable alternate employment was available to the claimant based on the opinions of two longshoremen who considered the claimant's age, physical

condition, and seniority, and whose opinions were backed up by that of a vocational expert. Moore v. Strachan Shipping Co., 13 BRBS 209 (1980).

The ALJ may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985).

[ED. NOTE: *When considering the physical limitation it may be important to consider the claimant's psychological limitations as well. Armfield v. Shell Offshore, Inc., 30 BRBS 122 (1996) (the claimant was unable to perform a secretarial job as she suffered from "hopeless/helpless syndrome" - an inability to work because of difficulty with concentration, anxiety and fatigue, and difficulty in handling stressful situations); White v. Peterson Boatbuilding Co., 29 BRBS 1 (1995) (must consider the mental state of the claimant and the affect of any medication he is taking).]*

In Hogan v. Schiavone Terminal, 23 BRBS 290 (1990), the employer met its burden even though the vocational expert met with the claimant for only one hour, did not personally contact prospective employers, made none of the job opportunities he found known to the claimant, did not test the employee for manual dexterity or intelligence, and did not know if the claimant could read or write.

The Board reiterated that an expert need not examine the claimant, as long as the expert is aware of the claimant's age, education, industrial history, and physical limitations when exploring local job opportunities. As an employer is not required to place a claimant in suitable alternate employment, the fact that the claimant was not informed of the identified positions was found to be irrelevant. The Board also noted that the LHWCA includes no requirement that a vocational expert contact prospective employers directly. Further, the expert's employability assessment of the claimant indicated that the claimant can read and write.

The ALJ should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor, 17 BRBS 99 (1985).

Hence, if the vocational expert is uncertain whether the positions which he identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden. Uglesich v. Stevedoring Servs. of America, 24 BRBS 180 (1991); Davenport v. Daytona Marina & Boat Works, 16 BRBS 196, 199-200 (1984). See Bostrom v. I.T.O. Corp. of Baltimore, 11 BRBS 63, 65 n.2 (1979) (in *dictum*, the Board stated that vocational rehabilitation specialist should test claimant's physical and intellectual capabilities before identifying specific, suitable jobs).

In Brown v. Maryland Shipbuilding & Drydock Co., 18 BRBS 104 (1986), the Board held that the ALJ failed to explain his finding of suitable alternate employment where he did not explain

how the claimant's medical restrictions are compatible with jobs located by the rehabilitation service and he relied on jobs identified by the service without considering the claimant's lack of success in obtaining any of these positions. Similarly, in Stratton v. Travelers Ins. Co., 35 BRBS 1 (2001) (*en banc*), the Board remanded when it found that the ALJ had not compared the duties of the position with the claimant's restrictions, although the record contained sufficient evidence to do so.

In Warren v. National Steel & Shipbuilding Co., 21 BRBS 149 (1988), the Board held that the judge erred in rejecting a doctor's opinion that employee could physically perform alternate employment for the reason that the doctor was not aware that the vocational counselor only considered full-time employment or that the employee would need pre-job search training and work hardening.

The Board reasoned, in Warren, that the doctor's lack of awareness of the counselor's method for identifying suitable alternate employment did not detract from his opinion. Furthermore, the Board found that the judge erred in crediting a vocational counselor's report, which stated that until employee's basic needs such as survival and physical and emotional well-being are met, and her physical pain is alleviated, discussion of vocational possibilities must be postponed. This counselor failed to provide a vocational assessment and instead rendered an opinion beyond her expertise.

If a vocational rehabilitation counselor's evaluation relies on physicians whose opinions are discredited by the judge, and the counselor admits that the credited physician's opinions would preclude the claimant from working, the employer has not demonstrated suitable alternate employment. Dygert v. Mfr.'s Packaging Co., 10 BRBS 1036 (1979).

If the judge finds, based on medical opinions, that the claimant cannot perform any employment, the employer has not established the existence of suitable alternate employment. Lostaunau v. Campbell Indus., 13 BRBS 227 (1981), rev'd on other grounds sub nom. Director, OWCP v. Campbell Indus., 678 F.2d 836, 14 BRBS 974 (**9th Cir.** 1982), cert. denied, 459 U.S. 1104 (1983), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (**9th Cir.** 1983).

If the vocational expert states that no jobs exist which the claimant could reasonably obtain, he is permanently totally disabled. Brandt v. Stidham Tire Co., 16 BRBS 277 (1984), aff'd and rev'd in part, 785 F.2d 329, 18 BRBS 73 (CRT) (**D.C. Cir.** 1986).

If the only suggested job would require six months of unpaid training, it is arguably unavailable. See Sutton v. Genco, Inc., 15 BRBS 25 (1982). Vocational rehabilitation training is not a factor to be considered in determining extent of disability, as neither the LHWCA nor regulations require that the claimant undergo vocational rehabilitation training. Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated on other grounds, 24 BRBS 116 (CRT) (**5th Cir.** 1991); Mendez v. Bernuth Marine Shipping, 11 BRBS 21, 29 (1979), aff'd, 638 F.2d 1232 (**5th Cir.** 1981). See also Perry v. Stan Flowers Co., 8 BRBS 533, 537 (1978); Berkman v. Todd Shipyards Corp., 7 BRBS 933 (1978); Morgan v. Asphalt Constr. Co., 6 BRBS 540 (1977). Cf. Villasenor v. Marine

Maintenance Indus., 17 BRBS 99, 102 (1985) (refusal to engage in rehabilitation evaluation may be considered). See Willingness to Work, *infra*.

Placing the claimant in a vocational rehabilitation program is not sufficient to establish suitable alternate employment; however, on-the-job training might qualify. Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592 (1980). See also Pernell v. Capitol Hill Masonry, 11 BRBS 532, 536 (1979); Love v. W.M. Schlosser Co., 9 BRBS 749 (1978). See generally Dugger v. Jacksonville Shipyards, 8 BRBS 552 (1978), *aff'd*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979).

8.2.4.6 Suitable alternate employment: employee working

A part-time job may be suitable alternate employment. Royce v. Elrich Constr. Co., 17 BRBS 157, 159 (1985). If the claimant is performing it satisfactorily and for pay, barring other signs of beneficence or extraordinary effort, it precludes an award of total disability. Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141 (1980). A claimant's self-employment may also be sufficient. Sledge v. Sealand Terminal, 14 BRBS 334 (1981).

If the claimant is working part-time and attending vocational school part-time, the judge may extrapolate his wage-earning capacity from his part-time wages. Sheek v. General Dynamics Corp., 18 BRBS 1 (1985). See also Bailey v. Southern Auto Parts, 13 BRBS 944 (1981) (student working part-time).

In the case of a claimant who was re-employed by the same employer, then fired for reasons not related to his disability, the claimant will be deemed to be at most partially disabled. This assumes that there was no new injury. In this circumstance, the judge may look to the claimant's earnings in the suitable employment to form the basis for the claimant's wage-earning capacity. Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 39 (1996).

[ED.NOTE: Should the length of the re-employment be considered when determining the legitimacy of the action?]

8.2.4.7 Factors affecting/not affecting employer's burden

Incarceration/criminal record

Incarceration does not preclude total disability if there was no suitable alternate employment available during the period of incarceration. Sam v. Lofeland Bros. Co., 19 BRBS 228 (1987); Allen v. Metropolitan Stevedore, 8 BRBS 367 (1978).

Further, a pre-injury criminal record is relevant in determining if jobs are realistically available to a claimant. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988), *rev'g* 19 BRBS 6 (1986); Piunti v. ITO Corp., 23 BRBS 367 (1990). Since the

employee's criminal record and propensity towards absenteeism and tardiness would preclude him from finding a higher-paying job which did not require physical labor, the lower paying jobs were accepted as suitable alternate employment. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

Contra Hairston v. Todd Shipyards Corp., 19 BRBS 6 (1986), rev'd, 21 BRBS 122 (CRT) (an inability to perform suitable alternate employment is not established where the claimant was unable to continue working in the alternate position of maintenance worker in a bank solely because his prior shoplifting record was discovered); Vecchiarello v. W. & J. Sloane, Inc., 5 BRBS 78 (1976) (although in Vecchiarello, the claimant had obtained alternate employment in the past despite his criminal record).

Livingston v. Jacksonville Shipyards, Inc., 32 BRBS 123 (1998). After the claimant's injury, but prior to the date of MMI and the establishment of suitable alternate employment (SAE), the claimant's driver's license was suspended for five years as the penalty for two driving under the influence (DUI) convictions. The Board upheld the ALJ's finding that three driving jobs constituted SAE.

The Board noted the existence of jurisprudence wherein a criminal conviction/record in existence at the time of the work injury can prevent certain jobs from being realistically available to a claimant. [For instance, a convicted felon can not reasonably obtain employment as a bank worker or security guard.] However, the Board distinguished the instant case from other criminal conviction cases in several respects. In the instant case, the DUI convictions were not a prior impediment to the claimant's obtaining employment which was otherwise suitable for him. The Board stressed that the events which the claimant contends make the driving positions unavailable and unsuitable, occurred after he was injured and before the employer engaged the job search. Additionally, in the instant case, claimant's license was suspended only temporarily, whereas other criminal convictions may forever prohibit a claimant from obtaining certain jobs.

Status as an illegal alien

A claimant's status as an illegal alien has no bearing on the determination of suitable alternate employment. Rivera v. United Masonry, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991), aff'g 24 BRBS 78 (1990).

Voluntary withdrawal from labor market

The fact that a claimant withdraws from the labor market following her injury does not affect entitlement if loss of wage-earning capacity is established. Hoopes v. Todd Shipyards Corp., 16 BRBS 160, 162 (1984) (withdrawal to take care of child). See also Schenker v. Washington Post Co., 7 BRBS 34, 39 (1977) (on strike).

Retirement

A claimant does not have the burden of proving by a preponderance of the evidence that he was forced to retire solely because of his work-related traumatic disability. **Harmon v. Sea-land Service, Inc.**, 31 BRBS 45 (1997). Once a claimant establishes the existence of a harm and of an incident at work which could have caused the harm, he has fulfilled his burden of establishing a prima facie case of causation. The claimant must then establish the nature and extent of his disability. To establish a prima facie case of total disability, he must show that he can no longer perform his usual work because of his work-related injury. To limit the extent of a claimant's disability, an employer must then present evidence of alternate employment the claimant can perform given his physical condition and other factors.

Under the LHWCA as amended in 1984, “**retirement**” is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994); Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 160 (1989); Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 46 (1989); 20 C.F.R. § 702.601(c). The determination of whether retirement is voluntary or involuntary is based on whether a work-related condition forced the claimant to leave the workforce. If his departure is due to considerations other than the work injury, his retirement is voluntary. Id.; MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986). **If a claimant voluntarily retires from his employment, and then is impaired by an occupational disease**, his recovery of disability compensation is limited to an award for permanent partial disability based on the extent of his impairment as measured by the *AMA Guides to the Evaluation of Permanent Impairment*. See for example, Morin v. Bath Iron Works Corp., 28 BRBS 205 (1994)(Where claimant, who was diagnosed with asbestos-related pleural disease prior to his retirement, failed to mention to his doctor that he had breathing difficulties in cold weather, this omission constituted substantial evidence in support of the ALJ's finding that claimant retired voluntarily, rather than due to his lung condition.).

If a claimant's retirement is involuntary, the post-retirement provisions of Sections 2(10), 8(c)(23), and 10(d)(1), (2) do not apply, and the claimant is entitled to an award based on his loss of wage-earning capacity; Morin, 28 BRBS at 208; Smith, 22 BRBS at 49; Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987); MacDonald, 18 BRBS at 184.

Employee's non-cooperativeness with employer's vocational expert

A claimant's failure to cooperate with the employer's vocational rehabilitation counselor in evaluating the extent of the claimant's disability will weaken her case. In Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104 (1989), the judge noted that the report and testimony of the employer's counselor indicated the claimant continually raised barriers against cooperating with her and against participating in vocational testing.

The ALJ in Dangerfield concluded that, based on the employee's pattern of resistance, which was not merely ignorance or forgetfulness, she willfully suppressed evidence necessary to the

employer's burden of showing alternate employment. The Board stated that the judge properly considered the claimant's refusal to cooperate with the employer's counselor, and he reasonably concluded that this behavior, which was in the claimant's control, made an award of total disability inappropriate.

Unnecessary surgery

In Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988), the Board reversed the judge's finding that the unnecessary nature of the laminectomy performed on the claimant severed his entitlement to compensation for his ongoing disability, and remanded the case for the judge to determine the nature and extent of the claimant's post-operative disability.

Subsequent lay-offs

An employer is not a long-term guarantor of employment. Olsen v. Triple A Mach. Shops, 25 BRBS 40 (1991); Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991). A person who has regular and continuous post-injury employment "must take chances on unemployment like anyone else." Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 658 (1979). Compare Mendez v. National Steel & Shipbuilding Co., 21 BRBS 22 (1988) (where a claimant works for a period of time in **employer's** facility but is subsequently laid off due to a lack of suitable work, employer has not established suitable alternate employment) and Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981) (compensation not due when **employer's** reduction-in-force prevents the claimant from working).

Nevertheless, a change in wage-earning capacity may support modification pursuant to Section 22. See 33 U.S.C. § 922. Such modifications have been permitted when the claimant's wage-earning capacity has increased. Avondale Shipyards v. Guidry, 967 F.2d 1039 (5th Cir. 1992); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 1228, 18 BRBS 12, 27 (CRT) (4th Cir. 1985), aff'g 16 BRBS 282 (1984). In all cases, the claimant's current wages must be adjusted for inflation back to the date of injury. See Richardson v. General Dynamics Corp., 23 BRBS 327 (1990); see also 33 U.S.C. § 908(h).

Subsequent firing

If a claimant was fired solely for violating a company rule and would otherwise be working for the employer, his disability is partial, not total. Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II), 19 BRBS 171 (1986). (See also Topic 8.2.4.2, supra). Once the employer has made an offer of re-employment, and the claimant is later fired for reasons unrelated to the work-related disability, the employer no longer has a duty to show other suitable alternative employment. Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

[ED.NOTE: Should the length of the re-employment be considered when determining the legitimacy of the action?]

8.2.4.8 Jobs in employer's facility

An employer can meet its burden by offering the claimant a job in its facility, Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984), including a light-duty job, so long as it does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 12-13 (1980). See generally Sheltered Employment, Topic 8.2.3.1, *supra*. The judge need not examine job opportunities on the open market if the employer offers suitable work. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979).

In Swain v. Bath Iron Works Corp., 17 BRBS 145 (1985), the employer's offer of two light-duty clerical jobs which were found not to be mere beneficence, but rather part of the employer's rehabilitation program, allowing the claimant to work back up to his regular employment while earning his pre-injury wages, carried its burden of proving suitable alternate employment. Accord Cason v. Norfolk Shipbuilding & Dry Dock Corp., 11 BRBS 50 (1979); Caldwell v. George Hyman Constr. Co., 10 BRBS 112 (1979).

The Board has also affirmed a finding of suitable alternate employment where the employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224, 226 (1986).

Similarly, where the claimant is still working for the employer, is advancing, and has further prospects of advancement, the employer's burden has been met. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), *aff'g* 16 BRBS 282 (1984). *But see* Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 59-60 (1985) (no suitable alternate employment where the claimant employee was turned down by the employer for alternate positions).

The employer's job offer which is too physically demanding for the claimant to perform is not suitable alternate employment. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Perini Corp. v. Heyde, 306 F. Supp. 1321, 1328 (D.R.I. 1969); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984).

Neither is a job "available" when it is within the employer's exclusive control but the employer refuses to offer it to the claimant, Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231, 234 (1984), or when the employer refuses to alter working conditions in the manner required by all physicians of record to avoid recurrence of the disabling symptoms. Crum v. General Adjustment Bureau, 738 F.2d 474, 479-80, 16 BRBS 115, 123 (CRT) (D.C. Cir. 1984), *rev'g in pertinent part* 16 BRBS 101 (1983). See Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment);

Jameson v. Marine Terminals, 10 BRBS 194, 200 (1979) (offering to try employee in job not meeting medical restrictions is not suitable alternate employment).

Similarly, where the employer fires the employee because of her medical problems, Base Billeting Fund, Laughlin Air Force Base v. Hernandez, 588 F.2d 173, 9 BRBS 634 (5th Cir. 1979), or refuses to rehire a claimant who had quit on his physician's order, Eastern Steamship Lines v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940), it has not shown suitable alternate employment.

A proffered job which is inaccessible to the claimant because he cannot physically handle a long commute is also unavailable. Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 1007-09, 8 BRBS 658, 661-63 (5th Cir. 1978), aff'g 6 BRBS 114 (1977); Sampson v. FMC Corp., Marine & Rail Equip. Div., 10 BRBS 929 (1979).

If the offer is sincere, the employer may meet its burden of establishing suitable alternate employment by offering the claimant her choice of filled positions and promising to fire the person currently holding the position. Beulah v. Avis Rent-A-Car, 19 BRBS 131 (1986).

The employer can meet its burden even if it first introduces evidence of suitable alternate employment at the hearing. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236-37 n.7 (1985). Such a late offer is dubious, however. Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 1007 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1978), aff'g 6 BRBS 114 (1977); Jameson v. Marine Terminals, 10 BRBS 194, 203 (1979). The judge need not credit an offer of light-duty work first made at the hearing, especially if it is a general offer not mentioning any specific, available job within the claimant's capability. Letendre v. Braswell Shipyards, 11 BRBS 56 (1979).

Once the employer has made an offer of re-employment, and the claimant is later fired for reasons unrelated to the work-related disability, the employer no longer has a duty to show other suitable alternative employment. Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

8.2.4.9 Diligent search and willingness to work

If the employer has established suitable alternate employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. Hairston v. Todd Pacific Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988); Fox v. West State Inc., 31 BRBS 118 (1997); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). See also Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d

Cir. 1991) (**Second Circuit** added in this step to the Salzano burden-shifting scheme); Trans-State Dredging v. Benefits Review Bd. (Tarney), 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT) (**4th Cir.** 1984), rev'g 13 BRBS 53 (1980); Royce v. Elrich Constr. Co., 17 BRBS 157, 159 n.2 (1985).

The ALJ does not abuse his discretion by noting the claimant's lack of diligence in seeking employment. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236-37 n.7 (1985). This duty, however, does not displace the employer's **initial** burden of establishing suitable alternate employment. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (**5th Cir.**), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

If the claimant declines to consider a suitable available job, the judge may nonetheless find that it constitutes suitable alternate employment. Dove v. Southwest Marine, 18 BRBS 139 (1986) (the employee showed a lack of due diligence in trying to obtain a job by rejecting jobs paying less than \$25,000.00 a year); Dionisopoulos v. Pete Pappas & Sons, 16 BRBS 93 (1984).

[ED. NOTE: Query: Under the ADA, if a claimant voluntarily tells a potential employer of his disability, is this considered to be a lack of due diligence in securing suitable alternate employment?]

On the other hand, if the claimant is physically incapable of performing the suggested suitable alternate employment, the judge need not reach the issue of willingness to work. Royce, 17 BRBS at 159.

A claimant's testimony that he could perform certain jobs, but that his efforts to obtain one have been futile, does not meet employer's burden. Rieche v. Tracor Marine, 16 BRBS 272, 274 (1984). Moreover, if the claimant demonstrates he diligently tried and was unable to obtain a job identified by employer, he may prevail. See Roger's Terminal, 784 F.2d at 691, 18 BRBS at 83 (CRT).

Where the claimant met with the vocational expert's identified potential employers and was not hired, and the judge took judicial notice that the local unskilled labor market was especially competitive in light of recent immigration of young, able-bodied men from Cuba and Haiti, the Board upheld his finding of permanent total disability. Parris v. Eller & Co., 16 BRBS 252 (1984). See Army & Air Force Exch. Serv. v. Neuman, 278 F. Supp. 865 (**W.D. La.** 1967) (trier-of-fact may consider economic condition in claimant's area).

The claimant must reasonably cooperate with his employer's rehabilitation specialist and submit to rehabilitation evaluations. Vogle v. Sealand Terminal, 17 BRBS 126, 128 (1985). The Board has found this requirement to be consistent with the Turner requirement of demonstrating willingness to work. Villasenor v. Marine Maintenance Indus., 17 BRBS 99, 101-02 (1985). The judge must consider any failure to cooperate in evaluating the expert's testimony. For example, the judge may excuse a vocational rehabilitation counselor's lack of specificity regarding suitable

alternate employment if the claimant was uncooperative. See Pernel v. Capitol Hill Masonry, 11 BRBS 532, 538 (1979).

As part of his general power to direct and authorize discovery, a judge may compel such an evaluation. See 20 C.F.R. § 702.341; Villasenor, 17 BRBS at 102 n.5; Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 325 (1983).

8.2.4.10 Date total disability becomes partial

Cases which have held that total disability becomes partial on the date of maximum medical improvement have been overturned. Seidel v. General Dynamics Corp., 22 BRBS 403 (1989) and Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235-36 n.5 (1985) were overturned by Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991) (An injured employee who establishes an inability to return to his usual employment duties with his employer is entitled to an award of permanent total disability compensation from the date maximum medical improvement is established to the date on which the employer demonstrates the availability of suitable alternate employment.). See also Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155 (1989), rev'd sub nom. Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991). Such a holding ignores the economic aspect of a claimant's disability and assumes that the job market was the same at the time of maximum medical improvement as it was when the job showing was made. Stevens, 909 F.2d 1256.

The Board and those circuits which have spoken on this issue are now in agreement that total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); Director, OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989); Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), rev'g Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155 (1989), cert. denied, 498 U.S. 1073 (1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986).

From the date of maximum medical improvement to the date suitable alternate employment is shown, the claimant's disability is total. Stevens, 909 F.2d 1256.

Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternative employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternative employment existed on the date of maximum medical improvement. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Rinaldi, 25 BRBS 128; Jones v. Genco, Inc., 21 BRBS 12 (1988).