BRB Nos. 97-1291
and 97-1291A

JESUS HERNANDEZ	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: June 16, 1998
Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Preston Easley, San Pedro, California, for claimant.

Barry W. Ponticello (England, Trovillion & Inveiss), San Diego, California, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Awarding Benefits (96-LHC-1039) of Administrative Law Judge Edward C. Burch rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a rigger for employer, was injured on June 5, 1989, when he was struck on

the side of his head by a crane's 300-pound "headache ball," while working to unload steel beams from a railroad car. As a result, claimant was caught among the steel beams and was extricated by emergency crews. He was taken to the University of California San Diego Medical Center, where he was diagnosed with a large left flank defect with degloving injury, left scalp laceration, and comminuted left open tibia/fibula fracture. He underwent two operations that day and numerous additional surgical procedures in the following days and weeks. He continued follow-up care for his leg and flank wounds, and also experienced pain in his back once he began walking. Claimant's treating physician, Dr. Greenfield, opined on June 23, 1991, that claimant had achieved permanent and stationary status based on scars, drainage, atrophy and loss of motion of his left leg, and pain in his leg and lower back. Claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on June 23, 1991. As employer conceded that claimant is unable to return to his usual job as a rigger due to his injury, the administrative law judge reviewed the evidence of suitable alternate employment. The administrative law judge found that the labor market surveys performed by Ms. Gill lacked credibility and were not reliable indicators of claimant's wage-earning capacity. Thus, as no other evidence of suitable alternate employment was presented, the administrative law judge found that employer failed to rebut claimant's *prima facie* case of total disability, and he awarded claimant permanent total disability benefits.

In addition, the administrative law judge found that employer is entitled to a credit of $2,400 for advances made against compensation due pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j). Lastly, the administrative law judge found that employer is entitled to an offset under Section 33(f), 33 U.S.C. §933(f), against compensation due in the amount of claimant's entire net third-party recovery, including $186,425.67 paid to the judgment creditors, Jose and Carlos Cruz, pursuant to their lien on the proceeds claimant received in a third-party suit.

On appeal, claimant contends that the administrative law judge erred in finding that employer is entitled to an offset against future compensation payments for the portion of claimant's third-party recovery attached by the judgment creditors' lien. Employer responds, urging affirmance of the administrative law judge's finding on this issue. However, on cross-appeal, employer contends that the administrative law judge erred in finding that employer has not established suitable alternate employment, and that, therefore, claimant is entitled only to scheduled permanent partial disability benefits for his lower extremity impairment. Claimant responds, urging affirmance of the administrative law judge's findings on this issue.

Claimant contends on appeal that the administrative law judge's finding that employer

is entitled to offset future compensation due against the sum received by non-party judgment creditors in the third-party suit is a violation of Section 16 of the Act, 33 U.S.C. §916, as it allows an indirect lien on claimant's compensation. Claimant contends that inasmuch as the third-party recovery is intended to replace compensation benefits, to permit employer an offset for the amount attached by the judgment creditors is to lessen his recovery in violation of Section 16.

As a result of his injury, claimant filed a civil suit against a number of third-party defendants which resulted in a jury trial and a judgment in claimant's favor. As a result of this action, claimant recovered a total judgment in the amount of $520,584.54, from which an attorney's fee of $208,233.81 and costs of $35,643.05 were paid to claimant's counsel.[1] *See* Cl. Ex. 15. Out of the remaining recovery, the pre-existing judgment creditors received $186,425.67. This debt predated the work-related injury on June 5, 1989. Claimant received the remaining $52,755.50. The administrative law judge held that Section 16 does not apply in the instant case as there is no provision in the Act against "indirect" or "de facto" liens. Decision and Order at 11. Moreover, the administrative law judge found that although claimant never gained physical possession of the $186,425.67, he did gain the benefit of this sum because it served to discharge a debt he owed to the Cruzes, which is a form of income recognized by the Internal Revenue Code, 26 U.S.C. §61(a)(12).

We must reject claimant's contention that Section 16 is applicable in the instant case and serves to block employer from receiving an offset for the amount seized by the judgment

[1]In the disbursement of the judgment, employer received $37,525.67 for a lien against compensation already paid under the Act.

creditors.[2] Section 33(f) of the Act, which serves to avoid claimant's receiving a double recovery, provides in pertinent part:

> [T]he employer shall be required to pay as compensation under this chapter a sum equal to the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount *shall be* equal to the amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

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[2]Section 16 states:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. §916.

33 U.S.C. §933(f) (1994) (emphasis added). The language of this section refers to employer's liability for sums in excess of the "net amount *recovered*," not the net amount retained by claimant or even the net amount received by claimant.[3] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that Section 33(f) provides that an employer may offset "the net amount recovered against such third person" for the injury compensable under the Act. The "net amount" is defined as the actual amount of the recovery less litigation expenses; Section 33(f) provides for no other deduction from the "net amount." *Force v. Director*, OWCP, 938 F.2d 981, 984, 25 BRBS 13, 17 (CRT)(9th Cir. 1991) (holding there is no apportionment of employer's credit among the types of damages received by claimant); *see also Force v. Kaiser Aluminum & Chemical Corp*., 30 BRBS 128, 132 (1996). If the language of the statute is clear, the inquiry is ended. *See generally Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Moore v. Harborside Refriferated, Inc.*, 28 BRBS 117 (1994). Given the clear, mandatory language of Section 33(f) defining the phrase "net amount," we affirm the administrative law judge's finding that application of the plain language of Section 33(f) in the instant case provides employer an offset against future compensation due in the amount of the entire net recovery, $239,181.17, including the amount attached by the judgment creditors.[4] *See generally Estate of Padilla v. Charter Oaks Fire Ins.*, 843 S.W.2d 196 (Tex. Ct. App. 1992) (holding that spending of third-party proceeds on house, pool and van does not make the employer liable for deficiency compensation before the proceeds would have been exhausted based on the compensation rate in effect).

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[3]Contrast, for example, the language of Section 3(e), 33 U.S.C. §903(e), which provides employer a credit for "amounts paid to an employee" under another workers' compensation law or the Jones Act.

[4]We need not decide whether the proceeds of third-party litigation are properly subject to attachment under Section 16. In a case arising under the New York workers' compensation law, which has a statutory provision nearly identical to Section 16, a court held that the net proceeds from a third-party suit arising out of a work injury are exempt from judgment creditors. *Scheer v. City of Syracuse*, 53 Misc.2d 80, 277 N.Y.S.2d 866 (Sup. Ct. 1967). The court stated that while proceeds of the settlement were not literally "compensation" benefits within the meaning of the statute in that they did not come from employer, "they were obtained in an action authorized by the statute, their disposition was regulated by statute and they took the place of benefits due under the statute." *Scheer*, 53 Misc.2d at 82, 277 N.Y.S.2d at 868. The fact, however, that the trial court in this case may have erred in allowing the Cruzes' lien does not affect employer's right to a mandatory credit under Section 33(f) of the Act for the sum at issue.

On cross-appeal, employer contends that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment. As it is undisputed that claimant cannot return to his usual work, the burden shifted to employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). In order to meet this burden, employer must show the availability of actual job opportunities in the local community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The administrative law judge must compare the specific requirements of the jobs identified with claimant's physical restrictions to determine whether they are suitable. *See generally Fox v. West State Inc.*, 31 BRBS 118 (1997).

In the present case, the record contains two labor market surveys performed by Joyce Gill in 1993 and 1997. In the report dated 1993, Ms. Gill identified two positions within claimant's physical restrictions, those of eyeglass lens cutter and parking lot attendant. Emp. Ex. E. However, in a deposition given in 1991 for the civil trial, which was based on the same medical and vocational evidence, Ms. Gill testified that claimant was not "placeable" because of his age and because claimant is unskilled, he has a limited education and cannot read or write in English, he had drainage from the wound site, and he was facing additional surgery. *See* Cl. Exs. 20, 21. Thus, given the contradictions between the testimony and the report, which were based on the same restrictions, the administrative law judge gave the 1993 labor market survey no weight. This finding is rational and is therefore affirmed. *See generally Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991).

Ms. Gill also did an extensive labor market survey in 1997. She stated she took into account all the old medical and vocational reports, as well as reports by two physicians authored after the 1993 survey. In June 1993, Dr. Dodge stated that claimant "has a disability precluding very heavy work, which comes to the loss of approximately one-half of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, climbing or other activities involving comparable physical effort." Emp. Ex. D. He further stated that he observed claimant on a videotape, and that based on this, claimant is "capable of walking, bending, stooping, squatting and kneeling without a great deal of difficulty. I believe he could certainly perform this type of work, at least on an occasional basis." *Id*.

Claimant was examined by Dr. Levine at the request of his own attorney in March 1996. Dr. Levine notes that claimant stated it had been several years since he had had any

drainage from his injuries. Cl. Ex. 10. Dr. Levine stated claimant cannot do his usual work, but gave a disability assessment only with regard to claimant's back condition. He stated claimant has a "disability precluding very heavy work" and has lost one-quarter of his pre-injury ability to perform such activities as bending, stooping, lifting, pushing, pulling, climbing or other activities involving comparable physical effort. *Id.*

Ms. Gill stated at the hearing that, based on the opinions of Drs. Levine and Dodge, claimant's physical condition is much improved and that he can perform work in the sedentary, light, or medium categories set forth in the *Dictionary of Occupation Titles*. She stated she identified jobs that do not require reading skills, that claimant's limited education would not be a problem, and that claimant possesses sufficient mathematical skills such that he can make change or count money if the register rings up the change amount. Tr. at 78-81. She also noted that claimant no longer faces surgery. Based on the restrictions of Drs. Levine and Dodge, Ms. Gill felt claimant capable of performing the jobs of painter's apprentice, janitor, and grinding machine tender. Based on the earlier, more restrictive limitations place by physicians in 1991, she also identified the positions of parking lot attendant/cashier and merchandise deliverer as suitable for claimant, Emp. Ex. P, and she identified actual job openings, the jobs' requirements and both the current salaries and salaries paid at the time of injury. She also attempted to establish that the particular employers had openings over the years.

The administrative law judge also discredited this survey. In identifying the painter's assistant as an appropriate job, the administrative law judge found that Ms. Gill either ignored or misinterpreted the restrictions imposed by Dr. Dodge, who stated that claimant was capable of walking, bending, stooping, squatting and kneeling "at least on an occasional basis," as all of the painting jobs she identified required "frequent" walking. The administrative law judge also stated "Ms. Gill's explanation for changing her opinion between 1991 and 1997 reveals her reliance on assumptions with little or no basis in fact." Decision and Order at 9. These "erroneous assumptions" are that claimant was familiar with grinding operations, that claimant could read, and that claimant was not facing additional surgery.

We cannot affirm the administrative law judge's rejection of Ms. Gill's 1997 labor market survey. Although claimant did state, contrary to Ms. Gill's belief, that he had no familiarity with grinding operations, Ms. Gill stated that the positions are entry level positions that would provide on-the-job training. Tr. at 113. Thus, the administrative law judge's basis for finding that this position is not suitable is not valid. In addition, although Ms. Gill stated that she no longer is certain if claimant can or cannot read, it does not appear that reading ability is necessary for some of the jobs identified. Lastly, with regard to future surgery, while not completely ruled out, there is no evidence that surgery is in anyway imminent. Ms. Gill reported that claimant's condition is very stable according to the recent medical opinions so this factor should not affect his employability.

The administrative law judge also took issue with Ms. Gill's statement that claimant could perform work requiring frequent standing, when the 1991 vocational evaluation expressly limited claimant's standing tolerance. Ms. Gill stated, however, that it was her opinion, based on the newer medical evidence, that claimant's condition was much improved and therefore she was not limited by the 1991 evaluation. She stated she found the most recent reports most convincing, but nonetheless also searched for lighter duty jobs based on earlier medical and vocational evaluations.

The administrative law judge also found Ms. Gill's opinion flawed as she relied on the opinions of Dr. Dodge. The administrative law judge rejected Dr. Dodge's opinion dated 1997 that claimant's back condition is not work-related, because he misreported at that time the onset of claimant's back complaints. However, as Ms. Gill did not have Dr. Dodge's 1997 opinion when she did her survey, this is not a valid concern. *See* Tr. at 111. The administrative law judge also discredited Dr. Dodge's 1993 report and thus Ms. Gill's reliance on it, because Dr. Dodge misapplied the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the AMA *Guides*) in applying his objective findings to the *Guide's* criteria.[5] As the administrative law judge did not specifically determine claimant's restrictions based on Dr. Dodge's opinion, his decision to discredit Ms.

[5]The administrative law judge stated that Dr. Dodge assigned "whole person" impairment values to the loss of flexion and sensory loss before he took into account claimant's other impairments. The administrative law judge also found that Dr. Dodge erred in finding a 1 percent leg impairment instead of 2 percent leg impairment based on another miscalculation. Decision and Order at 10.

Gill's opinion on this point is not rational, nor is it rational to discredit Dr. Dodge's opinion absent evidence that the error in the impairment ratings are relevant to claimant's work restrictions.

The Board generally will not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See, e.g., Pimpinella v. Universall Maritime Service Inc.*, 27 BRBS 154 (1993). However, the Board is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder,* 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). As we hold that the administrative law judge provided invalid reasons for rejecting the labor market survey performed by Ms. Gill in 1997, we vacate the administrative law judge's finding that the evidence is insufficient to establish suitable alternate employment. We remand the case to the administrative law judge to first explicitly determine and state what physical restrictions claimant has as a result of his work injury. Then, the administrative law judge must reconsider the suitability and availability of the alternate work identified by employer consistent with claimant's restrictions and other relevant factors. *See, e.g., Hairston,* 849 F.2d at 1194, 21 BRBS at 122 (CRT); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). In this regard, we note employer's contention on appeal that if suitable alternate employment is established, claimant is limited to an award under the schedule for his leg injuries, as it contends that claimant's back problems are not related to the work injury. Therefore, if on remand the administrative law judge finds that suitable alternate employment is established, he must also consider the issue of whether claimant's back condition is work-related. 33 U.S.C. §920(a); *see generally Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Accordingly, the Decision and Order of the administrative law judge finding employer entitled to an offset against future compensation in the amount of the net third-party recovery is affirmed. However, the administrative law judge's finding that the evidence is insufficient to establish suitable alternate employment is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge