CARL T. WILLIS	)	BRB Nos. 88-1193, 88-1193A
	)	and 88-1193B
Claimant-Respondent Cross-Respondent Cross-Petitioner	)	
v.	)	
FORTIS CORPORATION	)	DATE ISSUED:
and	)	
UNITED STATES FIDELITY AND GUARANTY COMPANY	)	
Employer/Carrier-Respondents Cross-Petitioners Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner Cross-Respondent	)	
CARL T. WILLIS	)	BRB No. 89-554
Claimant-Petitioner	)	
v.	)	
FORTIS CORPORATION	)	
and	)	
UNITED STATES FIDELITY AND GUARANTY COMPANY	)	
Employer/Carrier-Respondents	)	

CARL T. WILLIS	)	BRB No. 89-2599
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FORTIS CORPORATION	)	
	)	
and	)	
	)	
UNITED STATES FIDELITY AND GUARANTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	Decision and Order

Appeals of the Decision and Order and Memorandum Decision and Order Amending Compensation Order of Robert J. Feldman, Administrative Law Judge, and the Denial of Default of N. Sandra Kitchin, Assistant District Director, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Terry D. Bork (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

Michael S. Hertzig (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and claimant and employer cross-appeal, the Decision and Order (87-LHC-494) of Administrative Law Judge Robert J. Feldman 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). BRB Nos. 88-1193, 88-1193A, 88-1193B. Claimant also appeals the administrative law judge's Memorandum Decision and Order Amending Compensation Order, BRB No. 89-554, and the district director's denial of his motion for default. BRB No. 89-2599.[1] We must affirm the findings of fact and

[1]By order dated November 19, 1990, the Board granted employer's

conclusions of law of the trier-of-fact 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 injured his low back at work on October 23, 1984, while working as a form carpenter. He was treated for a period of time by Dr. El-Bahri, who administered various tests and diagnosed low back strain and possible spinal stenosis. Emp. Ex. B-6. Unable to find an organic cause for claimant's pain, Dr. El-Bahri referred claimant to Dr. Malone, medical director of the Pain Management Center. Dr. Malone found that claimant reached maximum medical improvement on October 31, 1985 without any residual permanent impairment but noted a lifting restriction of fifty pounds. In addition, Dr. Malone indicated that although claimant could work an eight-hour day, he could squat, climb, kneel and twist only intermittently. Thomas Foppiano, a vocational rehabilitation counselor, testified at the hearing concerning his evaluation of claimant and identified 26 available job opportunities which he considered suitable for claimant. Tr. at 32-50. Claimant testified that he could not perform his previous job or work more than four hours per day. Tr. at 13-14, 21, 35.

The administrative law judge determined that claimant suffered from a permanent partial disability of the back to some degree and that employer established the availability of suitable alternate employment through vocational rehabilitation evidence. Accordingly, based on Dr. Malone's permanency assessment, the administrative law judge awarded claimant temporary total disability benefits from October 24, 1984 until October 31, 1985, and permanent partial disability benefits thereafter. In entering the award of temporary total disability benefits, however, the administrative law judge inadvertently stated that temporary total disability benefits should be paid at $396 per week, the same figure as the average weekly wage. Pursuant to employer's request to correct this clerical error, on December 3, 1988, the administrative law judge issued a Memorandum Decision amending his initial Decision and Order to reflect that claimant was entitled to temporary total disability benefits based on 66 2/3 percent of his $396 average weekly wage.

The Director appeals, and claimant and employer cross-appeal,

---

request to consolidate the appeals in BRB Nos. 88-1193, 88-1193A, 88-1193B, 89-544 and 89-2599, for decision only. The term "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

the administrative law judge's initial award of permanent partial disability compensation. In his appeal, BRB No. 88-1193, the Director argues that the administrative law judge applied an incorrect legal standard in finding that employer established suitable alternate employment. The Director further contends that even if employer established the availability of suitable alternate employment, the administrative law judge erred in failing to consider claimant's diligence in seeking such employment. The Director, in addition, challenges the administrative law judge's determination of claimant's post-injury wage-earning capacity, arguing that the administrative law judge failed to adequately explain the basis for this calculation and failed to discuss the factors which are relevant under Section 8(h), 33 U.S.C. §908(h). Finally, the Director asserts that the administrative law judge erred in awarding claimant temporary total disability benefits at the rate of $396 per week, his average weekly wage, as temporary total disability benefits are calculated based on 66 2/3 percent of claimant's average weekly wage pursuant to Section 8(b), 33 U.S.C. §908(b). Employer responds, urging that the administrative law judge's findings regarding suitable alternate employment and claimant's post-injury wage-earning capacity be affirmed. In addition, employer agrees with the Director that the administrative law judge erroneously fixed the weekly temporary total disability compensation rate at $396. The Director replies, reiterating his original argument.

In his cross-appeal, BRB No. 88-1193A, claimant argues that the administrative law judge erred in failing to award him permanent total disability benefits, agreeing with the Director that employer failed to establish realistically available suitable alternate job opportunities. BRB No. 88-1193A. In addition, claimant asserts that he diligently sought, but was unable to obtain, a locksmith position identified by employer's vocational expert. Employer responds, reiterating the arguments previously made in its response to the Director's appeal. In reply, claimant re-states the arguments made in his Cross-Petition for Review.

Employer also cross-appeals, BRB No. 88-1193B, contending that the administrative law judge erred in awarding claimant any permanent disability compensation. Employer agrees with the Director that the rate for claimant's temporary total disability award should be $264 per week based on 66 2/3 percent of his $396 average weekly wage. In response, the Director asserts that employer did not contest the nature of claimant's disability at the hearing before the administrative law judge and contends that if employer satisfied its burden of proving suitable alternate employment, the award of permanent partial disability compensation based on claimant's testimony and the medical evidence in the record should be affirmed. Claimant also responds, asserting that the administrative law judge properly determined that employer did not contest that claimant was disabled and that he established

that he is disabled. Claimant also maintains that based on the wage information furnished by employer, claimant's average weekly wage should be $480.79, thus yielding a compensation rate of $320.53. Employer replies to both claimant and Director.

Initially, we reject employer's argument on appeal that claimant suffered no compensable permanent disability. Although employer argues that claimant's problems were due to alcohol rather than to the work injury, the administrative law judge specifically considered claimant's alcohol problems in assessing claimant's disability due to his back injury. This issue, moreover, must be considered in conjunction with the principle that where an injury aggravates, accelerates, or combines with an underlying condition, the entire resultant disability is compensable. See Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 95 (1991). To establish a prima facie case of total disability, it is claimant's burden to establish that he is unable to return to his former employment due to his work injury. Claimant's credible complaints of pain may constitute substantial evidence to meet his burden of proof. See Thompson v. Northwest Enviro Services, Inc., 26 BRBS 53, 56 (1992); Anderson v. Todd Shipyards Corp., 22 BRBS 20, 21 (1989); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 343 (1988).

In the instant case, although the medical evidence does not state that claimant's injury resulted in any specific degree of permanent disability, the evidence as a whole supports the finding that he is permanently disabled. The administrative law judge found claimant's testimony that he could not perform his previous job or work more than four hours per day was persuasive. The administrative law judge also noted that while Dr. Malone stated that claimant could return to work, he imposed restrictions on claimant's activities, limiting the weight claimant can lift as well as repetitive lifting, bending, squatting, and climbing. The administrative law judge also indicated that while neither Dr. El-Bahri nor Dr. Malone had been able to find any organic explanation for claimant's continued back pain, there was no evidence of psychosomatic or psychological complications and no definitive diagnosis of alcoholism had been made. In addition, Mr. Foppiano, employer's vocational expert, testified that claimant's previous position as a form carpenter involved heavy work and that claimant could not go back to doing this job. Tr. at 49-50. As this evidence supports a finding that claimant cannot return to his usual work, we affirm the finding that claimant suffers some degree of permanent disability to his back.

As claimant thus established a prima facie case of total disability, the administrative law judge properly determined that the burden shifted to employer to establish the availability of suitable alternate employment. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981);

Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), appeal pending, No. 91-70648 (9th Cir. October 24, 1991). In order to meet its suitable alternate employment burden, employer must show the availability of realistic job opportunities within the geographic area where claimant resides, which he could perform based upon his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. See New Orleans (Gulfwide) Stevedores, 661 F.2d at 1031, 14 BRBS at 156; Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

In finding that employer met this burden in the present case, the administrative law judge credited the opinion of employer's vocational expert, Mr. Foppiano, that claimant could obtain employment at a number of positions consistent with his perceived and actual limitations. Mr. Foppiano's company conducted a labor market survey between February 5 and March 2, 1987. After reviewing claimant's medical records and interviewing him, the vocational counselor testified that claimant could perform the light and sedentary work identified in the survey. The labor market survey identified 26 jobs, several of which were available on a part-time basis, and one, as a stacker for Signode Paper Products, which was available for four hours per day, five days per week. Emp. Ex. C. The vocational expert's testimony provides substantial evidence to support the administrative law judge's finding of suitable alternate employment, even if claimant could only work four hours per day.

We reject the Director's and claimant's contrary assertions. The Director argues that employer failed to establish the availability of suitable alternate employment, reasoning that there is no indication in the record that any of the potential employers had actually hired handicapped individuals, the expert who testified at the hearing did not conduct the job survey himself, and the job survey occurred prior to the time that claimant was interviewed. There is no basis, however, for rejection of employer's evidence on these grounds. See Tann v. Newport News Shipbuilding & Dry Dock Co., 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); New Orleans (Gulfwide) Stevedores, supra; Jones v. Genco, Inc., 21 BRBS 12 (1988). Although the Director also asserts that the administrative law judge failed to consider whether the alternate positions identified were geographically available to claimant, we note that the jobs identified by employer's vocational expert were located in the "Jacksonville area," where claimant resided. The Director's argument that employer failed to meet its suitable alternate employment burden because the prospective employers were not made aware of claimant's various medical restrictions also must fail. The Act does not require employer to inform a prospective employer of claimant's physical limitations in order to establish the availability of suitable alternate employment. See Tann, supra;

Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86, 94 (1989).

The Director's argument that the administrative law judge's failure to consider claimant's diligence in securing alternate employment involves prejudicial error is also rejected. Once employer shows that suitable alternate employment is available, claimant can still prevail if he demonstrates that he diligently tried and was unable to secure such employment. See Roger's Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), cert. denied, 479 U.S. 826 (1986). The record reflects that the vocational counselor gave claimant the telephone number and address of a potential employer looking for a part-time locksmith, and various reasons were given regarding why claimant did not obtain the position. Tr. at 37.[2] The record also reflects that claimant testified that his only attempt at securing alternate work was a call made regarding this prospective position. As there is no other evidence concerning claimant's efforts to obtain alternate work and as claimant's one telephone call regarding the locksmith position could not reasonably constitute a diligent effort to find alternate employment, we hold that the administrative law judge's failure to specifically consider this issue is harmless error. The administrative law judge's finding that employer met its burden of demonstrating suitable alternate employment is therefore affirmed. Claimant thus is not entitled to benefits for permanent total disability.

We agree with the Director, however, that the administrative law judge failed to adequately explain his calculation of claimant's post-injury wage-earning capacity.[3] In making this

[2]Claimant testified at the hearing that the potential employer wanted someone who lived closer to the job. Tr. at 15. The vocational counselor testified that claimant told him that the employer wanted someone younger, but that when he called the employer himself, the latter informed him that he wanted someone on social security, because this was a part-time job. Tr. at 38.

[3]Pursuant to 33 U.S.C. §908(c)(21), an award of permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents his wage-earning capacity. See Long v. Director, OWCP, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). The factors to be considered in determining claimant's post-injury

determination, the administrative law judge reasoned that since the suitable alternate positions identified in employer's labor survey paid from $3.35 to $5 per hour, claimant's post-injury wage-earning capacity would be $4.15 per hour or $166 per week. While the administrative law judge adequately explained how he arrived at the $4.15 per hour figure, his use of a 40-hour work week is inconsistent with an earlier finding that claimant's testimony regarding his physical condition was persuasive and that suitable alternate employment was established even if claimant were only able to work four hours per day. Because of these discrepancies in the administrative law judge's factual determinations, we vacate his post-injury wage-earning capacity determination and remand for him to make a specific finding as to the number of hours claimant was able to work post-injury and to recalculate claimant's post-injury wage-earning capacity consistent with this determination.

We now direct our attention to claimant's appeal of the administrative law judge's Memorandum Decision and Order Amending Compensation Order. BRB No. 89-554. In his original Decision and Order, filed March 2, 1988, the administrative law judge found that claimant's average weekly wage was $396 pursuant to Section 10(c) and (d) of the Act, 33 U.S.C. §910(c), (d). In the "Order" portion of his decision, however, the administrative law judge stated that temporary total disability benefits should be paid at $396 per week, the same figure as the average weekly wage, rather than 66 2/3 percent of that figure, as provided by the statute, 33 U.S.C. §908(b).

In response to employer's request to correct this clerical error, the administrative law judge issued a Memorandum Decision and Order Amending Compensation Order on December 8, 1988. Treating employer's request as a timely request for modification pursuant to 20 C.F.R. §725.310, the administrative law judge noted that in accordance with Section 8(b) of the Act, since he found claimant's average weekly wage to be $396, temporary total disability compensation should be based on two-thirds of that amount, or $264 per week. The administrative law judge also rejected claimant's contention that since the case was on appeal to the Board, he no longer had jurisdiction over the case, stating that an administrative law judge is not deprived of jurisdiction over modification proceedings while an appeal is pending. The administrative law judge also found that employer was entitled to

---

wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning potential on the open market, and any other reasonable variables that could form a factual basis for the decision. See Wayland v. Moore Dry Dock, 25 BRBS 53, 57-58 (1991).

a credit for any overpayment arising from the temporary total disability payments previously paid. Claimant filed an appeal of the administrative law judge's memorandum order.

On appeal, claimant argues that the administrative law judge improperly determined the applicable average weekly wage in his original Decision and Order. Claimant contends that as he received three pay raises in the year immediately prior to his injury, his average weekly wage should be based on his wages after he received these raises. Claimant maintains that an average weekly wage of $550.43 is proper, rather than the $396 found by the administrative law judge. Employer responds, urging that the administrative law judge's average weekly wage finding be affirmed. Claimant replies, arguing that the average weekly wage be set at $550.43 or "more properly," raised to $598.86.

After claimant filed his appeal, employer moved to dismiss it on the ground that claimant is raising the issue of an increased average weekly wage of $550.43 for the first time on appeal. The Board by Order issued September 26, 1989, denied the motion and stated it would consider employer's arguments with the merits of the consolidated cases. Having now done so, we agree with employer that this issue is not properly raised.

While the case was before the administrative law judge, claimant argued that the applicable average weekly wage was $420. Although the administrative law judge's decision found that claimant's average weekly wage was $396, claimant did not challenge this determination when he appealed the administrative law judge's initial Decision and Order, BRB No 88-1193A. While claimant did dispute the average weekly wage in his response to employer's appeal, BRB No. 88-1193B,[4] it is well established that the Board will not address issues challenging the administrative law judge's findings that are raised in a response brief. See Labbe v. Bath Iron Works Corp., 24 BRBS 159, 161 n. 1 (1991); Briscoe v. American Cyanamid Corp., 22 BRBS 389, 392 (1989). If claimant wanted to challenge the $396 average weekly wage determination of the administrative law judge, we agree with employer that he was required to do so in his appeal of the administrative law judge's original Decision and Order. Although claimant ostensibly is appealing the administrative law judge's memorandum order for the purpose of correcting the temporary total disability rate, we agree with employer that claimant should not be permitted under the guise of an appeal of this order to contest the average weekly wage finding made by the administrative law judge in his initial Decision and Order. Accordingly, employer's motion to dismiss claimant's appeal in BRB No. 89-554 is granted.

[4]In that brief, claimant asserted his average weekly wage should be $480.79.

Claimant's final appeal, BRB No. 89-2599, concerns the district director's denial of his motion for default. On March 17, 1988, carrier's representative wrote a letter to the United States Department of Labor, stating that based on the $396 average weekly wage finding made in the administrative law judge's initial Decision and Order, it had overpaid claimant temporary total and permanent partial disability in the amount of $2,768.89, which it would recover by subtracting $20 per week from the benefits it was currently paying claimant. See Appendix to employer's response brief. On August 22, 1988, claimant filed a motion for a default order with the district director, seeking to enforce the administrative law judge's initial award of temporary total disability benefits at the $396 rate plus penalties and interest. As discussed, on December 8, 1988, the administrative law judge issued the memorandum order amending the temporary total disability benefits amount consistent with Section 8(b) of the Act. By letter dated July 21, 1989, the district director denied claimant's motion in light of the administrative law judge's amended compensation order. Claimant appeals the denial of his default motion. Employer responds, urging that the district director's order denying claimant's motion for default be affirmed. Claimant replies, arguing that because the administrative law judge's order awarding claimant $396 in temporary total disability compensation was not properly stayed, the district director was without authority to refuse to issue a default order. Employer has also filed a motion to dismiss.[5]

We reject claimant's arguments. Once an award of

[5]In its motion to dismiss, employer challenges claimant's appeal of the denial of its default motion on the basis of the doctrines of the law of the case, res judicata and collateral estoppel. In addition, employer argues that the Board lacks jurisdiction to consider the district director's denial of claimant's motion. Claimant has filed a reply. The Board, by Order dated November 19, 1990, denied employer's motion to dismiss, stating that it may retain jurisdiction of cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring enforcement of that penalty. See Jennings v. Sea-Land Service, Inc., 23 BRBS 12 (1989), vacated on other grounds on recons., 23 BRBS 312 (1990). Employer then filed a motion for reconsideration of the Board's denial of its motion to dismiss, alleging that in its November 19, 1990 Order the Board failed to address employer's arguments with respect to dismissal based on law of the case, res judicata and collateral estoppel. Claimant filed a reply. By Order issued December 2, 1991, the Board indicated that it would consider employer's motion to dismiss on these grounds at the time it considers the case on the merits.

compensation has been entered, employer remains obligated to comply with the terms of the award until a further order alters that obligation or until the claim is formally closed by a settlement. See Richardson v. General Dynamics Corp., 19 BRBS 48, 50 (1986). Accordingly, the Board has held that where an employer unilaterally suspends or reduces payments of compensation prior to the issuance of a new compensation order pursuant to Section 22, 33 U.S.C. §922, it does so at the risk of incurring liability for an additional assessment under Section 14(f), 33 U.S.C. §914(f), if it is ultimately unsuccessful. Id. at 50. In the present case, however, employer was successful; the administrative law judge modified the award of temporary total disability benefits to the statutory rate at which its payments had been made. Moreover, by interim Order issued April 7, 1989, the Board, in response to employer's motion to remand the case to the administrative law judge for modification, determined that remand was not necessary, as the administrative law judge's memorandum order was valid.[6] Employer is not liable for a Section 14(f) penalty on temporary total disability benefits which were not properly due claimant. We therefore reject claimant's Section 14(f) argument; as the district director properly found there was no amount in default, she correctly declined to issue a default order. See 33 U.S.C. §918(a). The district director's denial of claimant's request for a default order is affirmed. In view of our disposition of this appeal, we need not address employer's additional arguments in its motion to dismiss.

Accordingly, in BRB Nos. 88-1193, 88-1193A and 88-1193B, we affirm the administrative law judge's finding that claimant is permanently partially disabled, but remand the case for reconsideration of claimant's post-injury wage-earning capacity in accordance with this opinion. Employer's motion to dismiss BRB No. 89-2599 is granted. In BRB No. 89-554, the district director's denial of claimant's Motion for Default Order is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

[6]The Board found the order valid on the basis that the modification before the administrative law judge does not divest it of jurisdiction over a pending appeal. See Miller v. Central Dispatch, Inc., 16 BRBS 63 (1984).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge