BRB No. 13-0492

BRUCE DICKERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: May 23, 2014
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

HALL, Acting Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (2012-LHC-01884) of Administrative Law Judge Larry W. Price 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

It is undisputed that claimant sustained a compensable work-related injury to his lower back on January 28, 2010. Claimant underwent back surgery, and employer voluntarily paid him medical and disability benefits. After claimant's condition reached maximum medical improvement, he returned to work with employer on December 12, 2011, in a modified position earning his pre-injury wages or higher. On February 28,

2012, claimant was terminated by employer for violating a safety policy which caused injury to a co-worker. Although claimant filed a grievance over his termination, an arbitrator ultimately found that claimant violated a safety rule and denied his grievance. Claimant was not eligible for rehire. Claimant sought disability benefits after his termination.

In his Decision and Order, the administrative law judge found that employer met its burden of establishing suitable alternate employment by providing claimant with a job within his restrictions in its facility. The administrative law judge also found that claimant lost the modified position due to his own misconduct. Therefore, the administrative law judge found that any loss of wage-earning capacity claimant suffered was not related to his work injury and, thus, is not compensable under the Act. Decision and Order at 3. Accordingly, the administrative law judge denied claimant's claim for permanent partial disability benefits. *Id*. Claimant appeals the denial of benefits, and employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends he is entitled to permanent partial disability benefits because, although he was performing a modified job at employer's facility at his full wages, his injury caused a loss of wage-earning capacity on the open market following his termination. Claimant also argues that his one month of accommodated work at employer's facility was insufficient to establish his post-injury wage-earning capacity.

Where it is uncontroverted that a claimant is unable to return to his usual work due to his work injury, as here, the burden shifts to his employer to establish the existence of realistically available jobs within the geographic area where the claimant 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. *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also 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). An employer may meet its burden by tailoring a job within its own facility to meet the claimant's specific restrictions so long as the work is necessary to its operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). In order to determine whether a claimant is entitled to permanent partial disability benefits, the administrative law judge must ascertain whether the claimant's actual post-injury earnings from the suitable alternate employment fairly and reasonably represent his post-injury wage-earning capacity.[1] 33

[1] However, if a claimant loses a suitable job in his employer's facility due to his own misconduct and for reasons unrelated to his work injury, the employer need not re-establish the availability of suitable alternate employment and is not liable for total disability compensation. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26

U.S.C. §908(c)(21), (h); *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In this case, claimant does not challenge the suitability of the modified job he held in employer's facility. Rather, he contends, that the short-lived position did not establish his post-injury wage-earning capacity because, when he lost this job, it became evident that he has a loss in wage-earning capacity on the open market due to his injury. In this regard, employer introduced into evidence a labor market survey identifying allegedly suitable jobs that pay between $7.25 and $12.00 per hour, which is less than claimant's pre-injury average weekly wage. EX 16.

Claimant's entitlement to partial disability benefits can be ascertained only by first determining if his actual post-injury earnings were representative of his post-injury wage-earning capacity. Although the administrative law judge acknowledged that claimant's actual post-injury earnings with employer were the same or higher than his average weekly wage, and this is supported by substantial evidence, EX 19; Tr. at 22, 36-37, the administrative law judge did not make a finding that those earnings "fairly and reasonably" represented claimant's wage-earning capacity in his injured capacity.[2] 33 U.S.C. §908(h); *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Mangaliman*, 30 BRBS at 43-44; *see also Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). Claimant's post-injury receipt of the same or higher wages does not preclude a finding that he has a loss of wage-earning capacity. *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). In this respect, this case is similar to *Mangaliman*, 30 BRBS 39.

In *Mangaliman*, the claimant, who had been injured several times at work, was placed on light-duty assignment at his employer's facility, earning his pre-injury wages. Six months later, after receiving multiple notices of unauthorized absences and

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BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

[2] In this respect, we agree with claimant that the administrative law judge erred in finding dispositive the decision of the United States Court of Appeals for the Fifth Circuit in *Cox v. Director, OWCP*, 521 F.App'x 311 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 1307 (2014). This decision is not published and the court's opinion specifically states: "Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4" (precedential for purposes of "doctrine of res judicata, collateral estoppel or law of the case" or "to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like").

unsatisfactory work, he was fired. The administrative law judge awarded the claimant permanent partial disability benefits based on evidence of a post-injury wage-earning capacity of $7.00 per hour on the open market. The employer appealed, arguing that the claimant's loss of a suitable job in its facility for reasons unrelated to his work injury relieved it of liability for permanent partial disability benefits, as the claimant had been earning his pre-injury wages. The Board held, on appeal after remand, that as a claimant's entitlement to partial disability benefits requires a determination of whether the claimant's post-injury earnings reflect his post-injury wage-earning capacity, the administrative law judge should have addressed all relevant wage-earning capacity evidence and need not exclude the open market evidence merely because the employer provided a suitable in-house position at pre-injury wages. However, because the administrative law judge did not address whether the claimant's actual post-injury earnings at his employer's facility established his post-injury wage-earning capacity given the short time the claimant held the position, the Board vacated the award of permanent partial disability benefits and remanded the case for additional findings with respect to factors relevant to Section 8(h). *Mangaliman*, 30 BRBS at 40-44.

As in *Mangaliman*, the administrative law judge's decision here lacks the crucial finding with regard to claimant's post-injury wage-earning capacity. Therefore, we vacate his denial of benefits and remand the case for him to address this issue. *Mangaliman*, 30 BRBS at 43-44; *see also Darby*, 99 F.3d 685, 30 BRBS 93(CRT) (court rejected contention that post-injury job was sheltered, but remanded for finding whether the wages paid represented wage-earning capacity); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). On remand, the administrative law judge should address factors relevant to this determination pursuant to Section 8(h).[3] *See*

[3] Section 8(h) of the Act states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h); *see Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co.*, 905 F.2d 84, 23 BRBS 108(CRT); *Mangaliman*, 30 BRBS at 43-44. If the administrative law judge determines that claimant's wages from his post-injury employment with employer established claimant's post-injury wage-earning capacity, claimant is not entitled to benefits following his termination on February 28, 2012. *See generally Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988) (loss of wage-earning capacity unaffected by discharge). If the administrative law judge finds that claimant's actual post-injury earnings were not reasonably representative of his post-injury wage-earning capacity, he must determine claimant's post-injury wage-earning capacity with reference to all the relevant evidence of record in order to ascertain if claimant is entitled to partial disability compensation. *Mangaliman*, 30 BRBS at 43-44.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

I concur in the result only:

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REGINA C. McGRANERY
Administrative Appeals Judge