BRB Nos. 92-1668
and 92-1668A

FRED A. FORSELL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

David W. Ballew (Davies, Roberts & Reid), Seattle, Washington, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits and Order Denying Reconsideration (89-LHC-1217) of Administrative Law Judge Thomas Schneider 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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).

On September 5, 1987, claimant, a longshoreman, who worked out of the Pacific Maritime Association hiring hall, allegedly slipped and fell, landing on his buttocks and lower back in an unwitnessed accident while working for employer as a side-runner. Claimant has not returned to gainful employment since this alleged accident. Employer voluntarily paid claimant temporary total disability benefits from the date of the accident until October 3, 1988, and made weekly payments of $38.02 thereafter in anticipation of its liability for permanent partial disability compensation. Claimant sought permanent total disability compensation under the Act commencing October 4, 1988.

The administrative law judge found that although claimant established a *prima facie* case of total disability, employer met its burden of establishing suitable alternate employment burden by demonstrating that claimant could perform the work of a witness driver and button-man.[1] The administrative law judge accordingly awarded claimant permanent partial disability compensation commencing February 8, 1988, based on two-thirds of the difference between his stipulated average weekly wage of $741.87 and his $276.79 post-injury wage-earning capacity in these positions. In calculating claimant's post-injury wage-earning capacity, the administrative law judge determined, based on wage records submitted by employer, that Lee Baublits, an employee who performs witness driving almost exclusively, would earn $22,282 in 1990, or $409.53 per week in 1987 dollars, and if that job had to be shared equally with the claimant, claimant would have the capacity to earn $204.76 as a witness driver. The administrative law judge similarly noted that two employees, Louis Guillory and Paul H. Conner, performed 530 hours of button-man work in 1989, and determined that if claimant were to share this work, each man would average 176.67 hours per year. As the hourly wage for a button man in 1987 was $21.20, the administrative law judge determined that claimant could earn $3,745.40 per year, or $72.03 per week as a button-man.[2] He then combined the $204.76 which claimant could earn as witness driver with the $72.03 he could earn as button-man to arrive at a post-injury wage-earning capacity of $276.79. Employer's motion for reconsideration was summarily denied.

[1]Apparently, witness drivers are hired in lieu of truck drivers on the dock, but they do not actually drive and occasionally direct truck traffic. Jt. Ex. 33 at 5-6. Button-men move controls on a console to direct the flow of wood chips into different spaces in holds of ships.

[2]This figure was calculated by multiplying the 176.67 hours of work found to be available times $21.20 per hour and then dividing this figure by 52 weeks.

On appeal, employer challenges the calculation of claimant's post-injury wage-earning capacity. Employer contends that since the administrative law judge incorrectly assumed that Mr. Baublits performed all of the witness driver work available in the Port of Port Angeles and that Louis Guillory and Paul Conner performed all of the available button-man work in making this determination, he failed to account for all of the work actually available to claimant in these positions. Employer further asserts that because claimant could also perform the work of a checker and the administrative law judge failed to consider this occupation in determining his post-injury wage-earning capacity, the case must be remanded for reconsideration on this basis. Claimant responds that the administrative law judge properly determined that claimant would have to share the available witness driver work and button-man work with the union members who were already performing these jobs and that employer's contention accordingly should be denied. Employer replies, reiterating the arguments it made in its petition for review.

On cross-appeal, claimant argues that in making the award of permanent partial disability compensation, the administrative law judge wrongfully assumed that he was capable of working as a witness driver on February 8, 1988, the date of maximum medical improvement. Claimant asserts that in fact, he could not perform this work until 1990, when the position was modified and operating a small hook-up tractor-trailer was no longer required. Claimant accordingly asserts that as he was only able to perform button-man work from the date of maximum medical improvement until the time of the hearing, the administrative law judge erred in including his potential earnings as a witness driver in the calculation of his post-injury wage-earning capacity during this period. Employer responds that because claimant's vocational expert testified at the June 5, 1990, hearing that the witness job position had been modified "years ago," the administrative law judge rationally found that claimant could perform this work as of the time he reached maximum medical improvement. Claimant replies that because the administrative law judge's finding that claimant could perform the work of a witness driver was premised on the hearing testimony of claimant's vocational expert, Mr. Shervey, who opined that claimant was capable of performing this job as it exists today, employer failed to meet its burden of establishing that the witness driver position was suitable for claimant at any time prior to the June 5, 1990, hearing.

We first address employer's contention that the administrative law judge erroneously calculated claimant's wage-earning capacity.[3] Under Section 8(c)(21), an award for 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 earnings fairly and reasonably represent his

[3]Employer also asserts that because claimant was able to return to his usual occupation as a longshoreman, the burden of establishing the availability of suitable alternate employment never shifted to employer in this case. In this case, however, as the medical evidence credited by the administrative law judge establishes that claimant is no longer capable of performing the side-runner job he was performing at the time of his injury, the administrative law judge properly found that the burden shifted to employer to establish suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980).

wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). If they do not, or the claimant has no actual earnings, the administrative law judge must calculate a dollar amount which reasonably represents his wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). If the administrative law judge determines claimant's wage-earning capacity based on the wages claimant could earn in suitable alternate employment, the wages which the alternate job would have paid at the time of injury are compared to claimant's pre-injury average weekly wage to determine whether claimant sustained a loss of wage-earning capacity. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

We agree with employer that the administrative law judge's calculation of claimant's post-injury wage-earning capacity, which was based on the assumption that Mr. Baublits performed all of the witness driver work available, and that Mr. Conner and Mr. Guillory performed all of the button-man work available, cannot stand. Employer correctly asserts there is record evidence which indicates that additional hours were available in these job categories. Kermit Guenkel, marine terminal superintendent for the Port of Port Angeles, testified that as of October 1989, 2209 witness driver hours had been performed at the port.[4] Jt. Ex. 33 at 4. Mr. Guenkel deposed that he expected the amount of this type of work to remain the same over the next few years. Jt. Ex. 33 at 7. Inasmuch as Mr. Baublits worked 120.5 hours as a witness driver during the last 4 months of 1989, this would amount to 361.5 hours projected over the year. Accordingly, approximately 2,000 witness driver hours remained available for other workers, such as the claimant. George Schoenfeldt, the union dispatcher, testified that people other than Mr. Baublits do witness driving work as well, but that he gets the job if his name comes up in rotation because the job is not in great demand. Tr. at 126. Although, as claimant maintains, Mr. Schoenfeldt did testify that if other employees wanted to do the witness driver job, they would have to share the hours available, he did not say that Mr. Baublits worked all the available hours in this job category. *See* Tr. at 126-127, 142.

[4]Mr. Guenkel deposed that the job of witness driver is also known as truck rider job. Jt. Ex. 33 at 6.

With regard to the button-man job, Duwayne Eshom, employer's office manager at the port, testified that button-men are necessary on chip ships and that chip ships come into the port about once a month and stay for three to six days. Tr. at 157, 159-160. As two workers per shift are required and there are three shifts per day, it would appear that there is substantially more button-man work available than the 530 hours performed by Mr. Guillory and Mr. Conner which the administrative law judge relied upon in making his post-injury wage-earning capacity calculation.[5] Moreover, as Mr. Conner and Mr. Guillory worked primarily in other skill categories, *see* Jx. 18, 22, and inasmuch as Mr. Conner only works part of the year because he is in the legislature, *see* Tr. at 210, employer correctly asserts that the hours worked by these employees were not, in any event, representative of the work opportunity available to a full time, twelve-month employee such as claimant. Because the administrative law judge failed to account for all of the work available to claimant in making his post-injury wage-earning capacity calculation, we vacate this finding and remand for reconsideration of this issue in light of all of the relevant evidence of record consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *see also Wayland v. Moore Dry Dock*, 25 BRBS 53, 57-58 (1991). In reconsidering claimant's post-injury wage-earning capacity on remand, the administrative law judge also should address whether claimant could work as a checker; this argument was raised by employer below, but not addressed in the administrative law judge's decision.[6]

Citing *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), claimant argues on cross-appeal that the administrative law judge erred in concluding that claimant was capable of working as a witness driver as of February 8, 1988, the date of maximum medical improvement. Claimant asserts that the testimony of his vocational expert, Mr. Shervey, establishes that it was not until 1990 that the witness driver job was modified to a degree that it became suitable for claimant. Accordingly, claimant avers that because he was able to perform only the button-man job from the date of maximum medical improvement until the time of the hearing, his potential earnings as a witness driver should not have been included in the calculation of his post-injury wage-earning capacity during this period. Claimant accordingly asserts that he is entitled to additional permanent partial disability compensation during this period based on two-thirds of the difference between the stipulated average weekly wage of $741.87 and the $72.93 post-injury wage-earning capacity for the button-man job.

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[5]Employer asserts that Mr. Eshom's testimony establishes there are between 144 to 299 button-man hours available per month or 1,728 to 3,456 hours per year. Tr. at 152. Employer further asserts that there are 2,304 hours of button-man work available annually in the Port of Port Angeles and that inasmuch as Mr. Guillory and Mr. Conner worked only 530 hours there are approximately 1,228 and 2,936 hours available to other longshoremen.

[6]There is evidence in the record with regard to the physical requirements of this job, Jx. 33 at 9; Tr. at 137-138, and employer raised this argument in its post-hearing brief. Emp. Post-Hearing Br. at 13-14.

It is employer's burden to establish the availability of suitable alternate employment once claimant establishes he cannot perform his usual work. *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, 1329, 12 BRBS 660, 662 (9th Cir. 1980). In *Stevens*, the United States Court of Appeals for the Ninth Circuit, in which circuit this case arises, held that a showing of suitable alternate employment may not be retroactively applied to the date of maximum medical improvement absent a showing that the suitable alternate work was available at that time. 909 F.2d at 1259, 23 BRBS at 95 (CRT). In so concluding, the court recognized the fact that the statutory definition of disability which encompasses an economic wage-earning capacity aspect, supports using the date of available suitable alternative employment as the indicator for when claimant's total disability becomes partial. 909 F.2d at 1258, 23 BRBS at 93-94 (CRT). Although claimant does not contest the administrative law judge's finding that his disability became partial as of the date of maximum medical improvement based on claimant's ability to perform the button-man job, he challenges the conclusion as to the degree of his disability based on the date when the witness driver job became available. The rationale in *Stevens* applies to claimant's argument.

At the June 5, 1990 hearing, Mr. Shervey testified that the witness driver position was modified "several years ago," and that witness drivers were no longer required to operate a small yard tractor or "bull-pup," and hook up cable. Tr. at 175. When questioned later, however, as to whether the requirements of this job were compatible with claimant's physical restrictions, Mr. Shervey indicated that it would depend on the year because while witness drivers are not required to operate trucks at the present time, they were required to do so a year ago. Tr. at 187. Ultimately, Mr. Shervey opined that perhaps there were witness driver jobs that claimant could do as that job existed at that time. Tr. at 187. As Mr. Shervey's testimony suggests that the witness driver job may not have been suitable for claimant as it existed on the date of maximum medical improvement and inasmuch as the administrative law judge failed to consider this testimony in relating his finding that this job was suitable back to the date of maximum medical improvement, we vacate this finding. On remand the administrative law judge should reconsider the suitability of the witness driver job as it existed on the date of maximum medical improvement in light of Mr. Shervey's testimony. If, on remand, the administrative law judge determines that claimant could not perform the witness driver job as it existed at that time, he should determine when this job became suitable for claimant; consistent with *Stevens*, it is only then that claimant's potential earnings as a witness driver can be viewed as affecting his post-injury wage-earning capacity. *See also 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 Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989), and 16 BRBS 231 (1984).

Accordingly, the administrative law judge's post-injury wage-earning capacity determination is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge