BRB Nos. 96-469
and 96-469A

ROBERT C. USHER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JONES OREGON STEVEDORING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
PEAVEY GRAIN COMPANY	)	
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits, Decision and Order on Reconsideration and Order Awarding Attorney's Fees, and Order of Donald B. Jarvis, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for Jones Oregon Stevedoring Company.

Tod A. Northman (Tooze, Shenker, Duden, Creamer, Frank & Hutchison), Portland, Oregon, for Peavey Grain Company and Travelers Insurance Company.

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

PER CURIAM:

Claimant appeals, and Jones Oregon Stevedoring Company (employer) cross-appeals, the Decision and Order-Award of Benefits, Decision and Order on Reconsideration and Order Awarding Attorney's Fees, and Order (93-LHC-2065; 93-LHC-2066) of Administrative Law Judge Donald B. Jarvis 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).[1] 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 has worked as a longshoreman for over thirty years. The present case involves claimant's condition following two separate accidents. On June 6, 1984, while working for Peavey Grain Company, claimant slipped on wet corn dust and fell on his left hip and lower back. Claimant was diagnosed as suffering a compression injury of the lower back superimposed on degenerative arthritis of the lumbar spine. Claimant continued treatment for his lower back, and after several years when his symptoms became progressively worse, claimant underwent back surgery on October 5, 1987. Following the surgery, claimant's treating physician, Dr. Thompson, released claimant for work with restrictions on his climbing, lifting, bending and walking on uneven surfaces. Claimant returned to work where he took positions only as a gang boss or hatch tender. Claimant received temporary total disability benefits from Peavey Grain pursuant to an administrative law judge's award dated September 9, 1988. *See Usher v. Peavey Grain Co.*, 87-LHC-499 (1988), *aff'd*, BRB No. 88-3503 (Jan. 28, 1993)(unpublished).

On December 27, 1988, while working for Jones Oregon Stevedoring Company, claimant fell on his knees on a cement platform as he was walking down a gangway that was not properly secured. Several days later, claimant sought treatment from Dr. Thompson for increasing pain in his knees. Dr. Thompson diagnosed that claimant had acute post-traumatic cynovitis superimposed on degenerative arthritis in both knees. Although claimant was scheduled to return to Dr. Thompson in two weeks, he did not go back until May 15, 1989, with the same symptoms. Claimant ceased working on May 20, 1989 due to his physical problems. Subsequently, under Dr. Thompson's care, claimant underwent hip replacement surgery, as well as right and left knee replacement surgery. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant reached

[1]Employer's request to maintain this case on the Board's docket for an additional 60 days pursuant to Public Law 104-134 is moot in light of the decision herein.

maximum medical improvement after his October 5, 1987 back surgery on April 15, 1988. In addition, the administrative law judge found that claimant's position as gang boss after the back surgery was not "sheltered employment" as the job of gang boss is customary on the waterfront. Thus, the administrative law judge found that claimant was not totally disabled after returning to work on April 15, 1988, that his actual wages were reflective of his true earning capacity, and that he had not suffered a loss in wage-earning capacity resulting from the 1984 injury with Peavey Grain. The administrative law judge also found that there is substantial evidence to conclude that claimant's left hip, right knee and left knee replacements were necessitated by the fall in December 1988. He found that the injury clearly exacerbated the pain and accelerated the need for the joint replacements. The administrative law judge awarded claimant temporary total disability benefits from December 27, 1988 to July 17, 1992, the date of maximum medical improvement, based on claimant's average weekly wage of $1,086.14 prior to the December 27, 1988 injury. Finally, after reviewing the suitable alternate employment evidence presented by employer, the administrative law judge found that employer has shown several actual employment opportunities within the local community that are suitable for claimant given his restrictions. Moreover, as these positions were available in July 1992, claimant's total disability became partial on the date of maximum medical improvement, July 17, 1992.[2]

In a decision on motion for reconsideration, the administrative law judge reaffirmed his findings regarding the issues of average weekly wage and suitable alternate employment and ordered employer to pay medical benefits for the December 1988 injury. In addition the administrative law judge modified the original Decision and Order to reflect the maximum compensation rate under Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1). Lastly, the administrative law judge found that the ILWU-PMA Welfare Plan is entitled to a lien against claimant's disability benefits for the period from May 26, 1989 through May 25, 1990, pursuant to Section 17 of the Act, 33 U.S.C. §917, for reimbursement of disability benefits paid by the plan to claimant in the amount of $18,148, as well as reimbursement of medical benefits provided in the amount of $40,165.70. In an Order dated October 10, 1995, the administrative law judge modified the decision on reconsideration to reflect that claimant is to reimburse ILWU-PMA the amount of $18,148, as employer had paid that amount directly to claimant pursuant to the original decision.

On appeal, claimant contends that the administrative law judge erred in denying claimant permanent partial disability benefits for his 1984 injury and in finding him permanently partially disabled after his December 27, 1988 injury, rather than permanently totally disabled. In addition, claimant contends that the administrative law judge should have remanded to the district director the issue of claimant's schedule of repayment of $18,148 to the ILWU-PMA. Employer responds, urging affirmance of the administrative law judge's finding that claimant was not permanently totally disabled following the December 1988 injury.

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[2]The administrative law judge also ordered Jones Oregon to reimburse Travelers Insurance Company for the costs of the left hip operation plus interest, and granted employer relief from continuing permanent partial disability payments pursuant to Section 8(f), 33 U.S.C. §908(f).

On cross-appeal, employer also contends that the administrative law judge erred in failing to award claimant permanent partial disability benefits as a result of his injury of June 8, 1984. Thus, employer seeks a lower average weekly wage at the time of the second injury as a basis for claimant's loss in wage-earning capacity resulting from the second injury. In addition, employer contends that the administrative law judge erred in awarding temporary total disability benefits from December 27, 1988, through May 19, 1989, as claimant worked his regular hours until that date and never claimed entitlement to benefits prior to May 19, 1989. Lastly, employer contends that the administrative law judge failed to consider claimant's ability and willingness to work after the age of 65 in awarding continuing benefits. Peavey Grain responds to both appeals, urging affirmance of the administrative law judge's decision finding that claimant had no residual disability following his return to work in April 1988.

Initially, claimant and employer contend that the administrative law judge erred in finding that claimant had no residual disability due to his back injury of June 6, 1984, at Peavey Grain following his return to work on April 15, 1988. They contend that Peavey Grain stipulated that claimant had a loss in wage-earning capacity resulting from the 1984 injury. We disagree.

Stipulations are not binding on the parties until received in evidence. *See Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989); 29 C.F.R. §18.51. In the present case, the attorney for Peavey Grain stated in opening and closing statements that Peavey Grain may be liable for a loss in wage-earning capacity of 13.5 percent resulting from the 1984 injury and subsequent back surgery. However, this concession was not presented to the administrative law judge as a stipulation by the parties. Rather, in opening statements, Jones Oregon contended that the resulting disability from the 1984 injury "approaches 80 percent" and claimant contended that the resulting disability was 15 percent. Tr. at 92, 96. Therefore, as there was no agreement among the parties regarding claimant's loss in wage-earning capacity following the 1984 injury, we reject employer's and claimant's contention that the administrative law judge erred in failing to accept Peavey Grain's "stipulation" that claimant suffered a 13.5 percent permanent loss in wage-earning capacity following the 1984 injury.

Employer and claimant also contend that the administrative law judge erred in finding that claimant did not have a residual loss in wage-earning capacity following his return to work in April 1988, and they assert that adjustment of claimant's post-injury 1988 wages to the level paid at the time of the 1984 injury establishes a loss in earning capacity. Section 8(h) provides that, in calculating permanent partial disability under Section 8(c)(21), residual wage-earning capacity is based upon the employee's actual post-injury wages, unless they do not "fairly and reasonably represent his wage-earning capacity," in which case the administrative law judge is to determine earning capacity by,

> having due regard to the nature of [the employee's] 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); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The administrative law judge need not consider every possible factor nor assign each an individual dollar value, as long as his final determination of wage-earning capacity is based on appropriate factors and is reasonable. *Id*. Regarding physical capacity, the administrative law judge may consider whether the employee must seek light work or turns down heavy work. However, if the post-injury work is continuous and stable, the post-injury earnings are more likely to reasonably and fairly represent wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985).

Claimant contends he had a loss in wage-earning capacity because he was unable to return to heavy labor following back surgery. The administrative law judge found that the work as a gang boss that claimant performed after his return to work on April 15, 1988, was a necessary and common position on the waterfront, although it is categorized for older or less able-bodied workers. The administrative law judge noted that claimant did not complain about his ability to do his job and that he was elected by the members of his union local to work solely as a gang boss. Thus, the administrative law judge rationally concluded that claimant's position was not "sheltered employment," and that his actual wages are reflective of his true earning capacity. *See Id*. (objective is to determine wage-earning capacity in injured state). Although the administrative law judge found that claimant had no loss in wage-earning capacity because his increased actual wages after the 1984 injury were representative of his earning capacity, the evidence indicates that claimant worked an average of 37.8 hours in the year prior to his injury in June 1984, and that when he returned from his back surgery in April 1988 until he left work in May 1989 due to the injury in December 1988, he worked an average of 42.4 hours per week. Therefore, although the administrative law judge did not specifically consider the all the relevant factors in determining claimant's wage-earning capacity following the 1984 injury, we affirm the administrative law judge's finding that claimant's wages as a gang boss reasonably and fairly represent claimant's wage-earning capacity following the 1984 back injury and subsequent surgery. Moreover, as claimant's wage-earning capacity is reflected in an increase of hours and not merely as a rise in wage rates, and his work was stable and continuous, we hold that the administrative law judge's failure to specifically

discuss what claimant's post-injury job paid pre-injury is harmless error.[3] *See generally Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

Claimant also contends on appeal that the administrative law judge erred in finding claimant permanently partially disabled after his December 27, 1988 injury, rather than permanently totally disabled. As it is undisputed that claimant cannot return to his usual employment due to his work-related injury, the burden shifted to employer to establish 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. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *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); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). An administrative law judge may credit a vocational expert's opinion even if the expert did not test the employee's capabilities, as long as the expert was aware of the employee's age, education, industrial history and physical limitations when exploring local job opportunities. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Contrary to claimant's contention, he need not be informed of identified positions. *Id.*

In the present case, the administrative law judge found that employer established suitable alternate employment based on the testimony of a vocational counselor, Mr. Ross. In evaluating potential employment for claimant, Mr. Ross considered the physical restrictions imposed by Dr. Thompson, which included limitations on climbing, lifting, excessive bending, stooping, twisting, or walking on uneven surfaces. Mr. Ross concluded that there were a number of positions which would be within the physical restrictions placed on claimant; these positions included cashier jobs at Speed-E Mart and ARCO AM/PM, a job at a cinema, delivery jobs with pizza companies, and an order clerk with Montgomery Ward. Mr. Ross also stated that these positions were available at the time claimant reached maximum medical improvement.

Mr. Ross, however, did not indicate the physical requirements of the specific positions identified, although he stated he took Dr. Thompson's restrictions into account. The administrative law judge impermissibly placed the burden on claimant as he found that there was no evidence to suggest that claimant is not suitable for the positions identified by the vocational counselor, but the burden is on employer to establish job opportunities that are within claimant's physical restrictions.[4] *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498

[3]As we affirm the administrative law judge's finding that the claimant's post-injury wages accurately reflect claimant's wage-earning capacity following the 1984 back injury and subsequent surgery, we reject employer's contention that claimant's average weekly wage prior to the December 1988 injury should be adjusted to reflect an alleged pre-existing "substantial economic and medical impairment."

[4]We note that the administrative law judge discredited Mr. Ross's testimony that claimant was unable to perform the duties of gang boss following claimant's 1984 injury.

U.S. 1073 (1991). In the present case there is no evidence of the physical requirements of the positions listed, other than that they are "sedentary to modified light entry level jobs" paying $3.35 to 4.55 an hour. Thus, there is an inadequate basis for the administrative law judge to determine whether the positions are within claimant's physical restrictions. *See Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). The administrative law judge must compare the specific requirements of the job with claimant's physical restrictions to determine whether they are suitable. With only a vocational counselor's statement that he considered the restrictions, the administrative law judge is unable to fulfill his duty as fact-finder and make this determination. Therefore, we reverse the administrative law judge's finding that the testimony of Mr. Ross is sufficient to establish suitable alternate employment in this case. Moreover, as there is no other vocational evidence of 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, we hold that suitable alternate employment is not established, and thus claimant is entitled to permanent total disability benefits as a matter of law. *See generally Hoard v. Willamette Iron & Steel Co.*, 23 BRBS 38 (1989).

On cross-appeal, employer contends that the administrative law judge erred in awarding temporary total disability benefits from December 27, 1988 through May 19, 1989 as claimant worked his regular hours until May 19, 1989 and has never claimed entitlement to temporary total disability benefits prior to that date. Claimant agrees that his first day of temporary total disability was May 20, 1989. As claimant worked his regular job and hours until May 19, 1989, and the parties do not dispute that he is not entitled to temporary total disability benefits for this period, we reverse the administrative law judge's award of temporary total disability benefits for the period from December 27, 1988 through May 19, 1989.

Employer also contends on cross-appeal that the administrative law judge failed to consider claimant's ability and willingness to work after the age of 65 in awarding benefits. However, the administrative law judge did consider employer's contention and found that while the physicians agreed that claimant would not have been able to do longshore work after the age of 65, he may have been able to perform light or sedentary work after that date. In addition, employer cites no case law to support its proposition, and there is no provision under the Act or implementing regulations to terminate unscheduled permanent disability awards at age 65, or any other age. The only provision in the Act to adjust a continuing award of benefits is the modification procedures under Section 22, 33 U.S.C. §922, and employer does not contend that its request meets the requirements of that section. Moreover, as claimant never made a commitment to retire at the age of 65, we decline to hold that claimant would have quit working as a longshoreman at that time, and thus should have his benefits terminated.[5]

[5]We also reject employer's contention that claimant's inability to continue working as a longshoreman to the age of 65 was directly attributable to the June 8, 1984 injury with Peavey Grain as employer fails to either address the administrative law judge's decision in this regard or identify an error committed by the administrative law judge below. *See Collins v. Oceanic Butler, Inc.*, 25 BRBS 227 (1990); *Carnegie v. C & P Telephone Co*., 19 BRBS 57 (1986). Moreover, we note that

Claimant also contends on appeal that the administrative law judge should have remanded to the district director the issue of claimant's schedule of repayment of $18,148 to the ILWU-PMA. At the hearing, the parties stipulated to a lien of $18,148 to ILWU-PMA Welfare Plan for repayment of disability benefits it had provided to claimant from May 26, 1989 to May 25, 1990, if claimant received disability benefits for that period. The administrative law judge did not include this stipulation in his original Decision and Order, and thus, employer paid this money to claimant. Subsequently, in his Decision and Order on Reconsideration, the administrative law judge corrected this error and ordered employer to pay this amount to the Welfare Plan. In an Order dated October 16, 1995, the administrative law judge modified the decision on reconsideration to reflect that claimant is to reimburse ILWU-PMA the amount of $18,148. The administrative law judge also stated that if claimant is unable to reimburse this amount, the ILWU-PMA is entitled to a lien against claimant's future compensation from the Special Fund.

Section 17 of the Act, 33 U.S.C. §917, provides that if a claimant who has received disability benefits from a trust fund under Section 302(c) of the Labor-Management Relations Act of 1947 is found to be entitled to compensation under the Act, the Secretary can authorize a lien on these benefits in favor of the trust fund. *See MacDonald v. Trailer Marine Transport Corp*., 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987). The parties do not dispute that the ILWU-PMA Welfare Plan is entitled to repayment in this case. Rather, claimant contests the administrative law judge's authority to order claimant to reimburse this amount in whole or suffer a lien on his compensation.

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the administrative law judge weighed the medical evidence of record and rationally found that there is substantial evidence to conclude that claimant's left hip replacement and both knee replacements were necessitated by the December 1988 fall. *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990).

The regulation implementing Section 17, 20 C.F.R. §702.162,[6] provides that the district director or the administrative law judge

shall not order an initial payment to the trust fund in excess of the amount of the past due compensation. The remaining amount to which the trust fund is entitled shall thereafter be deducted from the affected employee's subsequent compensation payments and paid to the trust fund, but any such payment to the trust fund shall not exceed 10 percent of the claimant-employee's bi-weekly compensation payments.

20 C.F.R. §702.162(j). Section 702.162(f) provides that a compensation order in favor of the claimant in a case where a trust fund has paid disability benefits shall establish a lien in favor of the trust fund, which is to be implemented according to Section 702.162(j). 20 C.F.R. §702.162(f), (j). In the present case, the ILWU-PMA Fund paid one year of compensation for the period from May 25, 1989 through May 25, 1990, and claimant is entitled to temporary total disability benefits from May 20, 1989 to July 17, 1992, covering the period of disability previously paid by the ILWU-PMA fund. Therefore, as claimant received 3 1/2 years of back compensation, we affirm the administrative law judge's order that claimant is to reimburse the ILWU-PMA in the amount of $18,148, pursuant to the first sentence of the regulation, as the initial payment to the ILWU-PMA is not in excess of the amount of past due compensation. 20 C.F.R. §702.162(j).

[6]As there is a regulation that specifically addresses repayment of compensation to a trust fund under Section 17, we reject claimant's contention that the administrative law judge is controlled by Section 702.286(c), 20 C.F.R. §702.286(c), and thus does not have jurisdiction to establish a lien on claimant's future compensation.

Accordingly, the Decision and Order-Award of Benefits, Decision and Order on Reconsideration and Order Awarding Attorney's Fees of the administrative law judge finding that employer established suitable alternate employment is reversed, and the decisions are modified to reflect an award for permanent total disability benefits for the period from July 17, 1992, the date of maximum medical improvement, and continuing. In addition, the administrative law judge's award of temporary total disability benefits for the period from December 27, 1988 through May 19, 1989 is reversed. The administrative law judge's decisions are affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge