U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 15 June 2004

CASE NO.: 2003-LHC-1109

OWCP NO.: 01-186209

IN THE MATTER OF:

THOMAS COLELLA

Claimant

v.

ELECTRIC BOAT CORPORATION

Employer

APPEARANCES:

SCOTT N. ROBERTS, ESQ.

For The Claimant

EDWARD W. MURPHY, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Thomas Colella (Claimant) against Electric Boat Corporation (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on October 8, 2003, in New London, Connecticut. All parties were afforded a

full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 14 exhibits, Employer proffered 45 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer by the brief due date of December 1, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Act applies to this claim.

2. That Claimant was injured on April 25, 1997.

3. That Claimant's injury occurred during the course and scope of his employment with Employer.

4. That there existed an employee-employer relationship at the time of the accident/injury.

5. That Employer was timely notified of the accident/injury.

6. That Employer filed a timely Notice of Controversion.

7. That an informal conference before the District Director was held on January 8, 2003.

8. That Claimant received temporary total and temporary partial disability compensation benefits.

9. That Claimant's average weekly wage at the time of injury was $767.33.

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

10. That medical benefits for Claimant have been paid in the amount of $8,484.21 pursuant to Section 7 of the Act.

11. That Claimant reached maximum medical improvement on October 19, 2000.

12. That Claimant has not returned to his usual job.

13. That Claimant has engaged in alternative employment with Collaborative Resources, Inc. (CRI) at $9.00 per hour.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant's residual earning capacity has increased since the Decision and Order issued by ALJ Joseph E. Kane on April 26, 2002, awarding temporary partial disability benefits?

2. Whether the additional employment opportunity identified by Employer is "sheltered" employment?

3. Whether Claimant has used due diligence and made an adequate effort in attempting to perform the job identified by Employer given his learning disability?

III. STATEMENT OF THE CASE

The Procedural History

On April 26, 2002, ALJ Kane issued a Decision and Order finding and concluding that Claimant's former job with Employer as a painter involved "substantial" physical requirements which, given his physical restrictions, Claimant can no longer perform. Accordingly, it was determined that Claimant had established a **prima facie** case of total disability. (CX-1 and EX-1, pp. 10-11).

Based on physical restrictions of no lifting greater than 20 pounds and "no repetitive lifting," it was further concluded that Employer had established full-time suitable alternative employment with jobs as a dispatcher, a hotel PBX operator and as a rubber goods inspector paying an hourly wage range from $6.75 to $9.00. (CX-1, p. 13).

Judge Kane decided that Claimant had "failed to demonstrate the requisite diligence in his search for employment in that he did not follow-up on any of his employment applications nor did he apply for any jobs outside of the labor market survey. Claimant did not apply for the dispatcher or rubber goods inspector positions. It was also determined that Claimant demonstrated an unwillingness to work. (CX-1, pp. 14-15).

Thus, Judge Kane found and concluded that Claimant was not totally disabled, but capable of performing suitable alternative employment. Since Employer discontinued paying temporary total disability benefits to Claimant on November 3, 2000, Judge Kane awarded "temporary partial" disability benefits commencing November 4, 2000 at a compensation rate of $303.55 per week.

Although the parties stipulated in the instant matter that Claimant reached maximum medical improvement on October 19, 2000, no discussion of maximum medical improvement is evident in Judge Kane's Decision and Order. The parties did not appeal the Decision and Order which Employer argues, and I find, is the "the law of the case."

The Testimonial Evidence

Claimant

Claimant was 45 years of age at the time of the instant hearing. He left high school while in the 11th grade and testified he did not do well in school. (Tr. 21-22). He was retained in the second grade and stated he did not take tests well. (TR. 23-24). He attended summer school every summer and at age 16 worked as a school janitor. (Tr. 24).

After leaving school, he worked at a crane service digging ditches, carrying pipes and bricks and other labor work. He stated he has been doing physical work "my whole life." He worked in a plastic factory for almost ten years doing heavy labor picking rolls off a machine, wrapping them and throwing them onto a pallet. (Tr. 26-27).

In 1987-88, Claimant moved from New York to Connecticut to help his Mother. He worked a couple of years for Coca-Cola filling orders for delivery trucks. (Tr. 27-28). He was able to complete orders by looking at numbers and words and asking people the location of the product. He testified that since he

"never could read" and "I don't write," he was "never afraid to ask anybody what anything said." (Tr. 28-29).

His friend "Richie" helped him get a job at Employer and filled out the application for Claimant. Claimant was hired as a painter. (Tr. 29). He stated there was not much reading involved, if there was he would ask somebody "what it said," such as postings on tanks. His supervisor, Mike Chance, knew he could not read and "helped me out all the time." (Tr. 31).

Claimant reviewed his job accident which caused his back injury and subsequent restrictions. (Tr. 32). He returned to Employer but exacerbated his back condition by bending over to pick up a bucket of paint. He never returned to Employer afterwards. (Tr. 33).

Dr. William Cambridge, Claimant's treating physician, released him to "some work" and Claimant confirmed that he "could probably do something." (Tr. 33). Claimant has never had surgery for his back condition, but takes Darvocet, a pain medication, which causes sleepiness. (Tr. 35). He takes one pill in the morning and also at bedtime, and depending on his activities, he may take another pill. He tries to cut the lawn with his riding lawnmower. He "tends" to his two children while his wife works. (Tr. 36-37).

Claimant described his limitations as not being able to sit or stand long, not bending over, no tight spots, trying not to do anything over his head and stretching hurts. (Tr. 37). He did not think he could do any of his past jobs because of the physical requirements. (Tr. 38).

Claimant testified that he has taken the GED test at least three times and, despite preparation courses, failed to achieve a passing score each time. (Tr. 38-39; CX-2). Claimant has not worked anywhere since Judge Kane's Decision and Order. (Tr. 41).

Claimant received an application from Expediter Corporation and, with assistance from his wife, read, completed and returned the application. Claimant stated he "only signed it." (Tr. 42). He had an over-the-phone interview with a woman from CRI in which he informed her that he could not read or write. In response, he was told that his insurance company represented that he could read and write. (Tr. 43). He was hired by CRI and sent a box of equipment, manuals, forms and supplies. (Tr. 44-45). A separate phone line was installed for business use

and his contact person was identified as Ms. McDonough who trained him over-the-phone. (Tr. 46). The training consisted of "telling me how to . . . fill all this stuff out, make calls . . . I have to read whatever it said on the thing. Since I had trouble reading it, we tried cutting it down a little bit so I wouldn't have to use so many words." He told Ms. McDonough that he had problems with reading and writing. (Tr. 46-47).

Claimant testified his job involved verifying names and addresses of all the list of companies provided by CRI. He stated he could not read a lot of the names and the addresses were very hard to read. He was unable to spell a contact person's name. (Tr. 48). After reporting his difficulties in reading the list, Ms. McDonough provided a "list with all easy names of companies, but the addresses were the killer . . . I couldn't figure half of them out. Very embarrassing, frustrating, when you're trying to do something like that." (Tr. 49).

He testified that he was to ask each company contacted if they would be interested in a service to help them with their customers and business, but he "did not know what to say" when asked what kind of service/business would be provided. He stated he was not told during training what CRI did or the nature of CRI's business, so he made up a response. (Tr. 50).

Claimant was instructed to work eight hours a day "non-stop . . . constantly calling." He stated the work would "drive me nuts . . . trying to read it all. Trying to talk to people on the phone. Supposed to be a business and here I can't even read the names and the addresses. Too embarrassing. Very embarrassing. Frustrating. Trying to figure out a word and you're supposed to be a business, trying to talk to these business people. I feel like a jerk because I can't, can't read it." (Tr. 52-53). He limited himself to one hour of calling a day, because it was too frustrating and gave him a headache. He informed Ms. McDonough that he could not work 40 hours a week and was trying his best. (Tr. 53).

Claimant testified that he also sent in his paperwork incorrectly or mixed up and would be yelled at for doing so. He stated he had never done paperwork like that in this life. (Tr. 54). Claimant stated he was told to call businesses between eight a.m. and eight p.m. He has continued to receive his compensation benefits and received checks from CRI. (Tr. 55).

On cross-examination, Claimant acknowledged that he has not worked anywhere since his work injury in 1997 other than for a short period with CRI and tending to his children at home. He has not made a job application for any jobs other than jobs identified in the labor market survey discussed in Judge Kane's Decision and Order. (Tr. 56). After his children leave for school in the morning, Claimant tries to "do the dishes," "vacuum a little bit," "try to do the yard" and once his "back starts getting too bad, I eat a pill and lay down." (Tr. 57). He stated the more pain he is in, the less he does. (Tr. 58).

Claimant testified that he "very rarely" uses a computer because he "can't type nothing in" or use the keyboard. He acknowledged he has used the Internet in the past on a limited basis researching his beer stein collection. (Tr. 59-60).

Claimant further acknowledged that Dr. Cambridge is his treating physician for his back condition and that he "signed off" on Claimant's orthopedic capacity to work for Expediter. (Tr. 60-61; EX-2).

Claimant stated he can add and subtract simple numbers and can try to use a calculator for more complex numbers. He scored a 205 on his last GED exam, but was unsure whether 225 was a passing score for the GED in Connecticut. (Tr. 61-62).

Claimant was shown and acknowledged his signature on EX-17, a report of accident and injury, but denied his handwriting otherwise appeared on the document. (Tr. 63). He denied completing EX-18, his job application, which he stated was filled out by his friend Richie. (Tr. 64-65). He verified his signature on EX-19, but denied completing the document. His handwriting appears on EX-20, a document regarding his job contacts from the prior labor market survey. (Tr. 65). He denied the handwriting on EX-21 was his, but verified EX-31 may be his handwriting and EX-33 only reflects his signature. (Tr. 66). He acknowledged EX-14 (list cleanup forms) and EX-15 (timesheets) reflect his handwritings. (Tr. 66-67).

Claimant testified that he is mechanically inclined and in the past worked on motorcycles and bicycles. (Tr. 67). He was able to learn physical tasks assigned to him in past employments. (Tr. 68). He gets along with most people and worked well with his co-workers at Employer. (Tr. 69).

Claimant affirmed that Ms. McDonough might have asked him to call her every morning to discuss his previous day's work,

but he did not do so because he got very frustrated talking to her. (Tr. 69-70, 81). He would not agree that Ms. McDonough spent many hours working with him and training him, noting that he talked to her for two hours initially which was his training. (Tr. 71). He agreed that Ms. McDonough was a resource available to him if he had a problem, but the only problem he had was "reading everything." (Tr. 71).

Claimant stated he became very frustrated when he was not able to read or write something and when "people who are very smart [tell] me they can't believe you can't do something when you're trying to." He worked "at least one hour a day, if not more, but once it gets too frustrating, I'm not doing it no more." He confirmed he worked for CRI at $9.00 an hour, from August 14, 2003 until his termination on September 24, 2003, less than a month before the instant hearing. (Tr. 72).

Claimant testified regarding the revised contact list that he was told to "work down the list one-by-one, and it was no easy ones." He noted he could have skipped around on the list, but would have been "yelled at for not doing the proper paper work." (Tr. 73).

Claimant confirmed that he scored only 32 on the writing skill of the GED which is a task he had to use while employed by CRI.[2] (Tr. 77). He clarified that his signature was his only handwriting on EX-31 (job application to Dicenzo Personnel Specialists). (Tr. 79). He stated he was told by Ms. McDonough that his services were no longer required by CRI because he was not up to their expectations, he was not working the expected 40 hours per week and not doing his paperwork right. (Tr. 82-83). He stated he constantly told CRI he had problems reading and writing, but he was told that his application stated he could read and write. (Tr. 83). He denied receiving any further training from Ms. McDonough other than the initial two hour period. (Tr. 84).

Claimant acknowledged receiving letters from CRI before his termination criticizing his work performance. (Tr. 84). He did not think he would be fired by CRI because he was doing the best he could in his job performance. He received verbal and written warnings from CRI that he was not sending in his paperwork in proper order, papers were mixed up and he was not putting names of contacts down. (Tr. 85).

---

[2] A standard score of 40 must be achieved in writing skills to pass the GED in the State of Connecticut. (CX-2).

Claimant testified that he was not able to write an essay which was required for the GED test and the teacher read a lot of the questions to him and he "had to try writing them [answers] down." (Tr. 87-88).

Linda Katherine McDonough

Ms. McDonough, who testified at the hearing, is employed by CRI as human resource manager. CRI has 17 employees based in five states and began operations on July 14, 2003, three months before the instant hearing. CRI is a telesurvey company which offers information gathering via surveys through telephonic contact. (Tr. 119). According to Ms. McDonough, the service offered is valuable because it provides companies with information to be used to increase sales volume, generate business, for name recognition and as a marketing tool. Most of CRI's work force is home-based. (Tr. 120).

Many of CRI's employees are subsidized by the time-of-injury employer or insurance carrier for a certain number of weeks or months before the employee "becomes completely on the payroll of CRI." CRI obtains its employees from a referral agency such as the Expediter, the Veteran's Administration and the Pennsylvania Job Center. The range of subsidized hours is between 500 and 800 hours. (Tr. 121, 129-130, 155). The general public can also apply for employment with CRI. (Tr. 121-122).

Ms. McDonough's duties and responsibilities are twofold: supervisory, in that she works with the staff, interviewing, training and supervising the human resource aspect of CRI; and business development with clients of CRI. She works at the home office as well as from her home. She achieved a Master's Degree in human resource management with a specialty in training and development and has spent the last six years in human resource management as well as teaching the subject as an adjunct professor for the University of Phoenix. (Tr. 122-123). She also "completed a course called Literacy" and has literacy certification counselor training. She worked for Bidwell Training Center where underemployed, unemployed and disadvantaged individuals were trained. (Tr. 123). She designed the curriculum to enhance the job skills of such individuals. The record does not establish whether such individuals were illiterate. (Tr. 124).

Ms. McDonough testified that she has had success working with individuals who have low reading and spelling levels. (Tr. 124, 170). One such person "had tremendous difficulty in reading," but now runs her own business with three clients. (Tr. 124-125).

An employee of CRI is expected to develop skills working with people, communication skills and marketable skills which can be used in the customer service industry. (Tr. 125). Ms. McDonough has refused to hire individuals referred by Expediter when the individual is "completely lacking, devoid of verbal skills, if they have an impediment that would severely restrict their work on the telephone such as stuttering . . . [or] individuals who were extremely antagonistic in the course of the interview." She hired and supervised Claimant at CRI after his referral from Expediter. (Tr. 126-127).

Claimant was hired on August 14, 2003, over the telephone during which he was very personable and displayed nice phone skills. (Tr. 127; EX-8; EX-25). Claimant was offered a full-time position, 40 hours a week at $9.00 per hour. Ms. McDonough denied that Claimant had to work eight hour increments because all employees are offered a flexible schedule in which they can choose to work anywhere from 8:00 a.m. to 8:30 p.m., seven days per week.[3] (Tr. 128). Assignments on the west coast would allow an employee to call customers into the evening hours.[4] (Tr. 129). Claimant's treating physician, Dr. Cambridge, approved his employment at 40 hours a week from an orthopedic standpoint. (EX-2). Once an individual completes the subsidy period, continued employment with CRI is the expectation. (Tr. 130-131).

Ms. McDonough stated Claimant was provided "a good two-hour" block of training and received "additional training" in the form of "reviewed the flexible work schedule, reviewed the time sheet, reviewed the daily report sheet, went over the inconsistencies in his work."[5] (Tr. 132-133). She would not

---

[3] The job analysis signed by Dr. Cambridge reflects work "over an 8-hour period" and describes the position as "working 8-hour shifts, 40 hours per week." Contrary to Ms. McDonough's testimony, accommodations are available "as medically required" such as "flex-time." (EX-2; EX-25).

[4] The record does not reveal any assignments to Claimant involving west coast locations. (See EX-13).

have continued the training if Claimant was "completely unable to perform the position." She stated "although he expressed frustration and anger at being - - at having to do a job and to do this job," Claimant was cooperative, responsive and "was able to read," but "not fluently." She noted Claimant was "able to read words." (Tr. 133). Her chronology of communications with Claimant are set forth in EX-5[6], her training checklist is reflected at EX-6 and comments by Claimant and additional observations are included in her notations at EX-7. (Tr. 134).

She described Claimant's duties of filling out a time sheet at the end of a two-week period as adding up his total hours and mailing the sheet to CRI. (EX-15). She stated Claimant was successful in this task "for the most part," since there were a "couple of inconsistencies in that some of the times he would take the time to total them, but in other times he would not total them and I believe I had to do that and confirm it."[7] (Tr. 135).

Claimant was required to fill out a daily report sheet as he was working on the telephone. (EX-16). He was able to fill out the daily reports "on certain occasions," but on other occasions he would leave out information such as start and stop times.[8] (Tr. 136).

---

[5] This "training" is more in the nature of performance criticism, which in Claimant's case did not appear to motivate or be constructive. Claimant's initial training checklist reflects that Claimant reported he "will not be able to work 40 hours per week due to his disability/he sleeps 4 hours a day because he does not sleep much at night." (EX-6). Attached notes regarding Claimant's training were not appended to EX-6.

[6] At the initial training session, Ms. McDonough noted that Claimant was able to demonstrate "some reading ability," but Claimant reiterated that he does not know how to write. She encouraged Claimant to try the position and that she would work with him throughout the process. (EX-5, p. 4).

[7] Contrary to Ms. McDonough's testimony, on September 5, 2003, Claimant was evaluated as not meeting expectations with respect to completing daily time sheets. (CX-10, p. 2).

[8] Regarding this task, Claimant was also rated as not meeting expectations on September 5, 2003. (CX-10, p. 2).

Claimant was also required to complete a survey form or script of a clean-up list. (EX-14). He was to fill out information as he spoke to customers to verify or clarify names and addresses and ask survey questions.[9] There was no prohibition against varying the calling list to get to an address that Claimant felt more comfortable pronouncing or that actually answered the telephone, according to Ms. McDonough. (Tr. 137). Claimant was not responsible for doing any sales work in his position which is telemarketing work as opposed to telesurvey work.[10] (Tr. 138).

Ms. McDonough testified that Claimant was not assigned a productivity quota, but was expected to engage in a good faith effort of being on the telephone line for 30 minutes per hour as a standard. (Tr. 140). An additional standard was to complete 5 to 10 surveys an hour. (Tr. 141).

Ms. McDonough stated that she made numerous attempts to reach Claimant after his initial training session and requested Claimant contact her each morning to review his work from the previous day, which through repetition may alleviate his frustrations with the job tasks. (Tr. 141-142). However, Claimant did not call her each morning. She noted Claimant only attempted to work for 45 minutes daily after the initial training and she asked that he try to work one hour each in the morning, afternoon and evening. Claimant did not do so which was frustrating for CRI and was one of the reasons Claimant was terminated. (Tr. 142).

On August 20, 2003, CRI issued a warning letter to Claimant noting that he was hired for a 40-hour week and provided a flexible work schedule.[11] (EX-8).

---

[9] With respect to this paperwork task, Claimant was again rated as not meeting expectations on September 5, 2003. (CX-10, p. 2).

[10] The record does not clearly establish that variance in calling/contact procedures was ever communicated to Claimant. Based on his actions and testimony, he did not think he could vary contacts without being chastised for doing so.

[11] The flexible work schedule is not detailed in any exhibit proffered by Employer. Claimant introduced Expediter's Telecommunications Employment Opportunities which describes "flex time" as working "an hour, rest an hour over a 13 hour

On September 5, 2003, Claimant was sent another letter advising him that he was not following proper procedures regarding his reports. (EX-9)[12].

On September 8, 2003, Ms. McDonough prepared a memorandum regarding her discussion with Claimant about his failures and inconsistencies completing various forms required by CRI during which Claimant persisted in his inability to read and understand. (EX-10). Ms. McDonough expressed concern over Claimant's lack of work time in that he took off a week for a funeral and took off one day for personal reasons without utilizing work time at other times or on weekends. (Tr. 143-144). Secondly, Claimant was inconsistent in completing his reports. Accommodations were extended to Claimant such as a flexible schedule, a hands-free telephone headset and a simpler calling list, but he did not increase his work time or improve his work product. (Tr. 144-145).

On September 11, 2003, Claimant was sent another letter regarding his failure to work the required hours or to call Ms. McDonough to review his daily work. (EX-11; Tr. 145-146).

On September 24, 2003, Claimant was sent a letter terminating his employment because he had made only minimal efforts to perform his position satisfactorily. (EX-12; Tr. 146-147). Ms. McDonough testified that CRI was spending time and energy trying to make Claimant acceptable in a position that he was not interested in doing. (Tr. 147).

---

period . . . [and] allows you to take breaks, rest periods, medical appointments, etc., as well as start and end your work day at different times and possibly work 7 days a week." (CX-5, p. 9). Ms. McDonough's notes of August 19, 2003 and August 25, 2003 suggested Claimant use the flexible work schedule "to try to get in some hours during this week" when he missed work because of his brother-in-law's death and funeral. (EX-5, pp. 2-3). She further noted Claimant informed her that "this kind of work drives me nuts." (EX-5, p. 3).

[12] Claimant's Exhibit No. 10, p. 2, apparently the attachment omitted from EX-9, reveals Claimant was not meeting job expectations in hours worked; medical documentation for missing work; accuracy in daily report sheets, time sheets and survey forms; attitude and disposition; availability for communication; and following required format for returned work.

According to Ms. McDonough, the telesurvey job for which Claimant was hired would have paid the same hourly wage rate in 1997, when he suffered his injury, as it did when he was hired in 2003. (Tr. 148). She stated that Claimant's failure to perform his position with CRI was due to a lack of good faith effort rather than a lack of an ability to read and spell. (Tr. 148). She further testified that she believed Claimant had the basic skills, with commitment and a willingness to perform the position, to be successful with CRI all the way through the subsidization period and continuing. (Tr. 150). A potential of a 50-cent wage raise in the future was possible. (Tr. 151). She added that Claimant had the ability to earn wages as a telesurvey worker with CRI and other competitors. (Tr. 151-152).

Ms. McDonough testified that home-based telesurvey work was not "busy work or make work" and that subsidized employment is not unique to CRI or other companies within their industry. (Tr. 152-153). She denied yelling at Claimant about his work although she understood he was frustrated over "having to be out in a work situation." (Tr. 154).

On cross-examination, Ms. McDonough clarified that of the 17 employees of CRI only three are not injured workers: herself, owner Dan DeMarco and an office worker. (Tr. 159). She recognized that Claimant has limitations in terms of his reading, but stated such individuals are trained through repetition, assistance and adjustments to scripts. She believed Claimant had the intellectual ability to learn. (Tr. 159).

Ms. McDonough explained that subsidized employment is financed by the time-of-injury employer/carrier which, in this case, paid Expediter, the referral agency, which in turn paid CRI for wages paid to Claimant. (Tr. 165, 168). Claimant was released and approved for 40 hours of work for a seven-day week, however CRI has also accommodated individuals released on a part-time basis for 20 hours per week. (Tr. 166, 173-174). She stated that it would be unfair to accept subsidized payments of less than 40 hours per week for an individual released to work 40 hours per week who "is obviously not working out." (Tr. 166-167). Her experience with Claimant was that he was able to read and give back some of the training manual. (Tr. 171). Although she did not know the specific time spent training Claimant, she estimated "five plus hours." (Tr. 172).

Ms. McDonough affirmed that Claimant informed her during the initial interview that he was "illiterate and had no reading

and writing ability at all, and no grade spelling level." (Tr. 174). She noted in her report that Expediter approved Claimant for referral based on a reading level of "fourth to sixth grade," however Dr. Tolsdorf indicated Claimant had a fourth grade equivalency in reading and a sixth grade arithmetic equivalency. (Tr. 174-175; EX-22).

Albert Sabella

Mr. Sabella, who testified at the hearing, is a vocational counselor employed by Rehabilitation and Reemployment and is certified by the Department of Labor, OWCP, as a vocational or rehabilitation counselor. (Tr. 90-91). On September 24, 2003, he performed a vocational assessment interview of Claimant and administered academic achievement testing. (Tr. 92).

Mr. Sabella stated he tried to administer the Nelson-Denny Reading Test, which is a standardized nationally known test assessing a person's ability for vocabulary, reading comprehension and reading rate, but Claimant was unable to get beyond the practice problems reflecting a lack of reading and vocabulary ability "to even start the test." Accordingly, Mr. Sabella gave the Wide Range Achievement Test (WRAT) which consists of three sub-tests of reading recognition, spelling and arithmetic. (Tr. 93-94).

Based on the results of the WRAT, Mr. Sabella concluded that Claimant was illiterate since his reading was less than the second grade level and less than the first percentile compared to the general adult population, spelling was at the first grade level and less than the first percentile and his arithmetic scores were at the third grade level at one percentile. (Tr. 94). Mr. Sabella observed that Claimant engaged in word attack skills in an attempt to phonetically sound out words which is similar to the observation of Dr. Tolsdorf in 1998 testing. (Tr. 95-96).

Mr. Sabella agreed with Dr. Tolsdorf's opinion that Claimant was able to handle a basic trade school or focused training course as long as it did not require writing or higher level math. He observed Claimant "has [a] good [average range] intelligent quotient," is "basically a hands-on learning type of person," has a "significant learning disability" and is more of a functional person than an academic person. (Tr. 97-98, 104).

Mr. Sabella testified that he is familiar with companies that market themselves for work at home which is "almost a

sheltered workshop type of situation rather than a real competitive employment situation." (Tr. 98). Mr. Sabella opined that Claimant would be unable to read and comprehend the lists provided by CRI without help and that Claimant "basically gave up because he became too frustrated." (Tr. 99-100). He further opined that Claimant may be able to do very simple assembly or packaging types of work in a homebound setting that would allow him to sit and stand at his own discretion with limitations on lifting, bending and stooping. (Tr. 100, 101).

On cross-examination, Mr. Sabella opined, based on his vocational assessment, a review of medical reports and a lack of specific functional capabilities, that Claimant would not be able to meet the requirements for everyday work on a competitive basis outside of homebound work. (Tr. 100). Claimant would have excessive absenteeism and a hard time making persistence of pace and maintaining a work product. Mr. Sabella stated that all homebound or home-based employment is not competitive employment. (Tr. 102). He further stated that Claimant's best option is employment in a home-based or homebound program. He disagreed with Judge Kane's findings that Claimant could perform work as a dispatcher, hotel telephone operator and rubber goods inspector. (Tr. 103).

Mr. Sabella testified that Claimant's result on the WAIS test administered by Dr. Tolsdorf on "the reading test was basically the same at the first percentile" while he was a little less than the first percentile on the WRAT test. (Tr. 109; EX-22, p. 69). In terms of grade equivalency, Claimant was at the fourth grade level on the WAIS test while Mr. Sabella placed him at the second grade on the WRAT test. He stated that such a difference was not material in view of a range of scores within a standard error of measurement. (Tr. 110). Although Claimant scored at the third grade level on the WRAT and at the sixth grade on the WAIS, Mr. Sabella testified that there was not really much of a difference "percentile-wise" from first to seventh percentile, respectively. (Tr. 111). Mr. Sabella observed a consistency in Claimant's efforts throughout his testing and GED results. (Tr. 112).

Mr. Sabella agreed with Dr. Tolsdorf that Claimant is able to read newspapers, magazines and most common work forms, but disagreed that he could do so to a functional degree. (Tr. 112-113). Mr. Sabella noted that Dr. Tolsdorf indicated Claimant had a weakness in mental computation of orally presented word problems which could affect his ability to follow instructions and to do the type of paperwork he was asked to do. Dr.

Tolsdorf also indicated Claimant had problems with sustained concentration and may have a secondary disorder such as attention deficit or hyperactive disorder which may affect his ability to focus and concentrate on one-on-one conversations and at the same time write information down. (Tr. 114).

Dr. Tolsdorf also reported that Claimant had a strong preference for practical tests and "showed no inclination towards artistic or office-related skills" which Mr. Sabella opined would be the type of work Claimant was asked to do by CRI. (Tr. 115).

Mr. Sabella testified that Claimant attempted to do the math testing by using coping skills such as counting marks "to come up with the answer," which he stated reflected an attempt to complete the test in an accurate manner rather than "sand bagging" the results of the test. (Tr. 116-117).

In rebuttal, Mr. Sabella reiterated that subsidized employment is not "real employment" because it does not pass the tenets of employability in that "pretty much any accommodation will be made to keep the employee" such as working for an hour, "be off for an hour, take an extra break, pretty much work whenever they work." The tenets of employability in a true competitive employment or regular employment would include regular attendance, punctuality, work pace, maintaining quality and being able to perform consistently on a day-in and day-out basis. (Tr. 179).

Christopher Tolsdorf, Ph.D.

Dr. Tolsdorf is a licensed clinical psychologist who is Board-certified in Clinical Neuropsychology. On November 13, 1998, he performed a psychoeducational evaluation of Claimant. (EX-22). Claimant was referred for evaluation of his intellectual aptitude, vocational interest and academic achievement. Dr. Tolsdorf reviewed Claimant's employment and family history which is consistent with Claimant's testimony in the instant hearing. A battery of tests was administered which included the Wechsler Adult Intelligence Scale-III (WAIS), Wide Range Achievement Test (WRAT) and the Holland Vocational Interest Inventory.

Dr. Tolsdorf observed that Claimant's verbal I.Q. was lowered due to weakness in mental computation of orally presented word problems and weaknesses in his span of attention involving reciting back strings of orally presented numbers.

(EX-22, p. 3). Weaknesses were also noted involving working with numbers especially if it required sustained concentration which may be due either to a deficit in sustained concentration, secondary to a disorder such as Attention Deficit/Hyperactivity Disorder (AD/HD) or a more specific learning disability in working with numbers. Id.

On the WRAT, Claimant scored in the one percentile or fourth grade equivalency in reading, fourth percentile or first grade equivalency in spelling and seventh percentile or sixth grade equivalency in arithmetic, all of which revealed a significant learning disability according to Dr. Tolsdorf. His scores were "significantly below what would be expected with someone with normal intelligence (which he has)." Claimant's spelling was very limited but he could spell three-letter words such as "cat" and "run," but immediately had difficulty with words longer or more complex like "kitchen" and "grown." Claimant's reading level was enhanced "primarily due to a better ability to phonetically decode words." Dr. Tolsdorf opined that Claimant was "able to read newspapers, magazines, and most common work forms and memos to a functional degree." (EX-22, p. 4).

On the interest inventory test, Claimant showed a strong preference for practical tasks which he could perform with his hands using tools, machinery and materials. "He showed no inclination towards artistic or office related skills."

Dr. Tolsdorf concluded that Claimant had intact intellectual skills with a significant learning disability in math and spelling. Claimant's "biggest obstacle to retraining will be his learning disability." Id. It was determined that Claimant should seek work in areas which tap his strengths, specifically, his strong mechanical ability, intact reasoning and problem solving skills, good interpersonal skills and willingness to learn. (EX-22, p. 5). Dr. Tolsdorf also opined that Claimant may be able to handle a basic trade school or focused training course as long as it did not require writing or higher level math. He noted Claimant should seek placement in sales, light manufacturing or a vehicle maintenance setting where he can receive on-the-job training and where he can apply his pre-existing mechanical knowledge. Id.

The Medical Evidence

At the July 18, 2001 formal hearing before Judge Kane, the parties introduced medical records and reports of (1) Dr.

William Cambridge from May 2, 1997 through March 7, 2001, (2) Dr. W. Jay Krompinger from September 2, 1997 through May 20, 1999 as well as his deposition of April 29, 1998, (3) Dr. Halperin of February 20, 1998 and (4) Dr. Myron Shafer of August 30, 2000. Employer has re-introduced Dr. Cambridge's note of September 15, 1998 (EX-37), Dr. Shafer's report of August 30, 2000 (EX-39), and Dr. Krompinger's reports of September 2, 1997 (EX-40), April 14, 1998 (EX-41), May 20, 1999 (EX-42) and his deposition of April 29, 1998 (EX-44). Additional medical evidence offered at the instant hearing is reviewed below.

Dr. William Cambridge

On December 5, 2001, Dr. Cambridge again examined Claimant for his three month follow-up noting that not much had changed. His range of motion remained decreased about 40%-50% with spasm of the lumbar paravertebral muscle groups. Claimant was continuing in school but had yet to pass the GED because of his learning disability. (CX-4, p. 1).

On June 12, 2002, Claimant returned to Dr. Cambridge with continued complaints of low back pain and stiffness. He persisted with decreased range of motion and lumbar spasm. Dr. Cambridge opined that Claimant had reached maximum medical improvement with a permanent partial disability rating of 12.5%. (CX-4, p. 2).

On September 11, 2002, Claimant complained to Dr. Cambridge of left leg pain, low back pain and muscle spasm. Dr. Cambridge opined that Claimant's combination of back problems and his learning disability made it "virtually impossible for meaningful or gainful employment." It was noted that Claimant had been trying for the last three years to obtain his GED because without it he could not be retrained. (CX-4, p. 3). On December 11, 2002, Claimant's condition was essentially unchanged with decreased low back dynamics. (CX-4, p. 4).

On March 19, 2003, Dr. Cambridge noted that Claimant returned with continuing complaints of back and leg pain with marked decrease in low back dynamics and lumbar spasm. It was further observed that Claimant was unable to read or write and cannot obtain his GED. (CX-4, p. 5).

On June 17, 2003, Claimant's condition was unchanged. Dr. Cambridge reported that Claimant was a functional illiterate with an inability to read or write. He opined the job outline sent to Claimant by Expediter "would be difficult for Tom to do

under the circumstances. Although physically the job is obviously not demanding, Tom's problem is going to be reading and writing." (CX-4, p. 6).

On August 20, 2003, Dr. Cambridge noted that Claimant had tried working at a desk job but reported "not doing very well at it because of the constant phones, taking messages, etc." Claimant continued to complain of low back pain which was exacerbated a couple of weeks before this evaluation. He also complained of chronic neck pain and headaches for which Dr. Cambridge recommended a cervical MRI. (CX-4, p. 7).

The Contentions of the Parties

Claimant concedes he is partially disabled and argues he is entitled to permanent benefits because he has reached maximum medical improvement which is a change in his physical condition. He thus seeks modification of Judge Kane's award of temporary partial to permanent partial disability.

Claimant contends he could not perform telesurvey work for CRI because of his learning disability and inability to complete the necessary paperwork required by CRI. He asserts he put forth his best effort but was terminated for poor performance, lack of effort and not performing at even the minimal level. He claims Employer has not established suitable alternative employment and thus has failed to identify his wage earning capacity. He further argues that his "post-injury earnings" should be adjusted for inflation pursuant to Richardson v. General Dynamics Corporation, 23 BRBS 327 (1990).

Claimant also contends that his "chosen employment" is as a caregiver for his two children for which Employer failed to establish a wage earning capacity.

Employer contends that Claimant has a greater wage earning capacity than the $310.00 weekly earning capacity found by Judge Kane since it has shown the telesurvey job at CRI paid $9.00 an hour for 40 hours per week ($360.00 per week). Employer claims that there has been no documented change in Claimant's physical condition to warrant a modification petition, notwithstanding Claimant having achieved maximum medical improvement.

Employer asserts that the telesurvey job at CRI was within the physical capabilities of Claimant as affirmed by Dr. Cambridge and that Claimant did not make a good faith effort to perform the job. The lack of effort is highlighted by

Claimant's failure to call Ms. McDonough daily and working only 45 minutes per day.

Alternatively, Employer contends that it should continue to pay partial disability benefits on a permanent basis from October 19, 2000 when Claimant reached maximum medical improvement based on Judge Kane's finding of residual wage earning capacity.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Modification

Section 22 of the Act provides the only means for changing otherwise final decisions. Section 22 permits any party-in-interest to request modification of a compensation award for mistake of fact or change in physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act. Congress intended Section 22 modification to displace traditional notions of res judicata,

and to allow the fact-finder, within the proper time frame after a final decision and order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. Hudson v. Southwestern Barge Fleet Services, 16 BRBS 367 (1984).

It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. See Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997).

The administrative law judge, as trier of fact, has broad discretion to modify a compensation order. O'Keefe v. Aerojet-General Shipyards, 404 U.S. 254, reh'g denied, 404 U.S. 1053 (1972). The administrative law judge has the authority to reopen the record and correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted. Id.

Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. Universal Maritime Service Corporation v. Spitalieri, 226 F.3d 167, 34 BRBS 85 (CRT) (2d Cir. 2000) (claimant reached maximum medical improvement).

The Board has held that an employer may attempt to modify a disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternative employment. See Delay v. Jones Washington Stevedoring Co., 31 BRBS 197, 204 (1998); Lucas v. Louisiana Insurance Guaranty Association, 28 BRBS 1, 8 (1994). An employer, however, is not entitled to modification as a matter of course merely because it offers evidence of suitable alternative employment. Jensen v. Weeks Marine, Inc., 33 BRBS 97 (1999). The evidence offered must demonstrate that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. Compare Lombardi v. Universal Maritime Service Corporation, 32 BRBS 83 (1998) with Delay, 31 BRBS at 204.

1. Change in Physical Condition

Judge Kane previously determined that Claimant suffers from a compensable injury and that he sustained a loss of wage earning capacity resulting in an award of temporary partial

disability compensation at a rate of $303.55 per week based on suitable alternative employment established by Employer on or about November 4, 2000.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996).

A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 60 (1980). Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

Although no specific finding was made that Claimant had reached maximum medical improvement on October 19, 2000, as stipulated to by the parties in the instant matter, Claimant was clearly medically able to seek work before that date based on his treating physician's opinion. Thus, evidence of specific job openings at any time during critical periods when a claimant is medically able to work is sufficient to establish suitable alternative employment. Bryant v. Carolina Shipping Company, Inc., 25 BRBS 294, 296 (1992). Judge Kane so found and awarded temporary partial disability.

In the present matter, the parties have stipulated that Claimant reached maximum medical improvement on October 19, 2000. Having reached MMI, Claimant achieved a stable plateau in his condition which, I find, constitutes a change in his physical condition. See Universal Maritime Service Corporation v. Spitalieri, supra at 170. It is apparent that Claimant continues to suffer from residual restrictions and pain associated with his work-related back injury. Accordingly, Claimant's disability became permanent when he reached maximum medical improvement and I so find. Therefore, he is entitled to permanent partial disability benefits commencing October 19, 2000.

2. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as found by Judge Kane, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and **mentally** do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and **mentally** capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and **mental** restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra.

Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Unlike the cases introduced and relied upon by Claimant, suitable alternative employment has already been established for Claimant by Employer effective November 4, 2000. Claimant has also been determined to have a residual wage earning capacity and has been found to have failed in a diligent search for employment.

Having previously established suitable alternative employment, Employer now seeks to demonstrate that Claimant's residual wage earning capacity has increased since Judge Kane's Decision and Order to $360.00 per week based on the $9.00 an hour full-time job provided to Claimant by CRI. The pivotal issue is whether the CRI telesurvey job constitutes suitable alternative employment. For the reasons discussed below, I find and conclude that Employer has not established suitable alternative employment with the CRI job nor has Claimant achieved an increased residual wage earning capacity.

Claimant credibly testified about his poor formal education, inability to read or write functionally and documented learning disability. He developed practical coping skills to accommodate his shortcomings. Claimant failed the GED test three times by April 2000, well before he was hired by CRI in 2003. He credibly testified that he needs and obtains assistance in completing job applications and work forms. He explained his frustration with the tasks assigned by CRI and his inability to properly and completely fill out the required forms. Writing and spelling are obstacles for Claimant, but critical to successfully completing his job tasks at CRI.

Claimant affirmed that he is mechanically inclined and can and has learned physical tasks in the past. He has never had to do paperwork as a job task in any of his past employments. Moreover, Claimant credibly testified that he gave his best effort to do the CRI telesurvey job, but could not accomplish the administrative tasks to expectation. I find that Claimant engage in due diligence and put forth a good faith effort to meet the job requirements of the telesurvey job with CRI.

Dr. Cambridge opined that a combination of Claimant's low back problems and his learning disability makes it "virtually impossible for meaningful or gainful employment." He further prophetically opined after Judge Kane's Decision and Order that the job outline submitted for review by Expediter in 2003 would be difficult for Claimant to do "under the circumstances," emphasizing Claimant's problem with reading and writing.

Vocationally, after an interview and testing, Mr. Sabella concluded Claimant was illiterate with reading, spelling and arithmetic levels at or less than the first percentile. He and Dr. Tolsdorf agreed that Claimant had developed coping skills to phonetically decode words. Claimant was considered a "hands-on learning type of person" and was more functional than academic.

Having familiarity with companies similar to CRI, Mr. Sabella opined that Claimant would be unable to read and comprehend the lists provided by CRI without assistance. He further concluded Claimant basically gave up because he became too frustrated with the work. He opined that Claimant may be able to do simple assembly or packaging jobs in a homebound setting.

Mr. Sabella further opined that Claimant would not be able to perform or sustain work functions outside a home-based environment where the tenets of competitive employability would prevail.

Mr. Sabella's opinions are corroborated in major part by the conclusions of Dr. Tolsdorf, who noted Claimant's weaknesses in mental computation of orally presented work problems, span of attention in recitation of strings of orally presented numbers and sustained concentration.

Dr. Tolsdorf concluded Claimant has a significant learning disability but was able to read a newspaper and magazines to a functional degree, about which Mr. Sabella disagreed. Like Mr. Sabella, Dr. Tolsdorf's test results revealed Claimant had a strong preference for practical tasks performed with his hands using tools, machinery and materials. Claimant has no inclination for office related skills which, in Mr. Sabella's opinion, CRI required in its taskings. He recommended that Claimant seek employment in sales, light manufacturing or vehicle maintenance where he could apply his mechanical knowledge.

Ms. McDonough's testimony was not favorably persuasive or convincing that a telesurvey job and its attendant administrative taskings were suitable for Claimant. I am not convinced that Claimant received five hours of "training," and, if he did, whether it was constructively useful to him given his inherent shortcomings with concentration, attention span, reading and writing. Claimant credibly testified he had to respond to questions and did not know what to say in answer, thus he made up a response. Ms. McDonough acknowledged Claimant could not read "fluently" which contrasts with CRI's expectations.

Notwithstanding Ms. McDonough's testimony that Claimant had the basic skills to be successful with CRI or its competitors with a possible wage increase in the future, her opinion is belied by the multiple warning letters regarding his failure to meet the expectations of CRI and his ultimate termination. Claimant's failure to contact Ms. McDonough on a daily basis was adequately and credibly explained by Claimant as a frustrating encounter. He only worked an hour a day because of the same frustrations of having to do paperwork associated with his telephone contacts.

Accordingly to the probative evidence of record including the vocational and psychoeducational evaluations, Claimant does not possess the intellectual or vocational ability to meet the minimum requirements of the telesurvey job with CRI. Claimant has no prior telecommunications experience and nothing in his past vocational background suggests that he has the necessary capabilities for telecommunications work. None of Claimant's prior jobs required extensive paperwork, writing skills or telephonic verbal interaction with people. Claimant consistently complained to Ms. McDonough that he did not have the skills or ability to perform the telesurvey job. I find and conclude that the telesurvey job and its attendant requirements required reading, writing and organizational skills that Claimant did not possess.

Claimant clearly could not satisfy performance requirements of the telesurvey job even with accommodations. His performance warnings and termination reinforce and buttress my findings that the telesurvey job exceeded Claimant's capabilities and the job is not suitable alternative employment. Employer offered no other employment opportunities as alternative employment.

Accordingly, Employer's contention that Claimant had an increased wage earning capacity based on the telesurvey job with

CRI is hereby rejected. Employer continues to be responsible for compensation benefits to Claimant for permanent partial disability at adjusted rates explicated below.

Having determined that the telesurvey job is not suitable alternative employment, I find it unnecessary to decide whether it constitutes sheltered employment.

Claimant's contention that his "chosen employment" is as a caregiver for his children and that Employer failed to establish a wage earning capacity for such a position is also rejected. This alleged position is not a competitive one, pays no wage and clearly is at the beneficence of his alleged "employer." In effect, Claimant has taken himself out of the competitive labor market to fulfill a familial obligation.

Mr. Sabella's disagreement with the Decision and Order of Judge Kane that Claimant cannot perform the jobs found to be suitable alternative employment is also rejected. Section 22 modification is not available for strictly legal errors. Thus, it is generally not available when an issue could have been raised at the original proceedings and was not. Stokes v. George Hyman Construction Co., 19 BRBS 110 (1986). A modification proceeding is not intended as a method for a party to re-litigate an issue or to "correct errors or misjudgments of counsel." General Dynamics Corp. v. Director, OWCP [Woodberry}, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982); Kinlaw v. Stevens Shipping and Terminal Co., 33 BRBS 68 (1999).

3. Rate Adjustments under Richardson

When alternative employment is shown, as here, the post-injury wages must be adjusted for inflation to represent the wages that would have been paid at the time of injury. Richardson v. General Dynamics Corp., supra at 330. The Board has determined that it would be unfair to allow an employer to use wages earned in later years to offset a claimant's diminished earning capacity. Id.

Judge Kane did not adjust the wages of the positions found to be suitable alternative employment on November 4, 2000. Without explication, he determined that Claimant's compensation rate was $303.55.

To render justice under the Act, it is necessary to adjust the weekly wage earning capacity derived from the suitable alternative employment positions. Calculating backwards from

the compensation rate, the difference between Claimant's average weekly wage and the potential wage earning capacity based on the identified suitable alternative employment is $312.00 ($303.55 ÷ 2 = $151.77 x 3 = $455.33 results when subtracting $312.00 from the average weekly wage of $767.33).

In Richardson, the Board instructed that the wage rate for suitable alternative employment be adjusted downward to the level it would have been at the time of the claimant's injury. Thus, using the percentage increase of the National Average Weekly Wage (NAWW) calculations of the United States Department of Labor, Claimant's wage earning capacity for 2000, when he reached permanency, and thereafter must be adjusted downward to reflect his 1997 wages.

The NAWW for April 1997, the time of Claimant's injury, was $400.53. The NAWW for October-November 2000, the year in which suitable alternative employment and MMI were established, was $466.91. The NAWW for 1997 should be divided by the NAWW for 2000. The results should then be multiplied by the weekly wage earning capacity for the same years resulting in an adjusted wage rate for the wages Claimant could have earned from November 4, 2000 and thereafter. Claimant's suitable alternative employment wage rate should be adjusted as follows: $400.53 ÷ $466.91 = .8578% x $312.00 = $267.63. Thus, the adjusted compensation rate is $333.10 ($767.33 - $267.63 = $499.10 x .6666 = $333.10).

Therefore, Claimant is entitled to permanent total disability benefits from October 19, 2000 to November 3, 2000, and permanent partial disability benefits from November 4, 2000, when suitable alternative employment was established, to present and continuing at an adjusted compensation rate of $333.10 per week.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board

concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[13] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

---

[13] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **January 22, 2003**, the date this matter was referred from the District Director.

1. Claimant's request for Section 22 modification is hereby **GRANTED.**

2. Employer shall pay Claimant compensation for permanent total disability from October 19, 2000 to November 3, 2000 based on Claimant's average weekly wage of $767.33, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay Claimant compensation for permanent partial disability from November 4, 2000 and continuing based on two-thirds of the difference between Claimant's average weekly wage of $767.33 and his reduced adjusted weekly earning capacity of $267.63 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer shall continue to pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 25, 1997 work injury, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 15th day of June, 2004, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge