

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2012

Case No.: **2011-LHC-00936**

OWCP No.: **06-209970**

In the Matter of:

LAMONT A. BROWN,
Claimant,

v.

SSA COOPER, LLC /
HOMEPORT INSURANCE COMPANY,
Employer / Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party In Interest.

Appearances: E. Paul Gibson, Esq.
For Claimant

Richard P. Salloum, Esq.
For Employer

Before: Daniel A. Sarno, Jr.
Administrative Law Judge

DECISION AND ORDER GRANTING PETITION FOR RECONSIDERATION

On October 5, 2012, the undersigned administrative law judge issued a decision and order granting benefits under the Longshore and Harbor Worker's Compensation Act ("the Act") as amended, 33 U.S.C. § 901, *et seq.* (2000).

On October 18, 2012, Employer submitted a petition for reconsideration. On October 22, 2012, Claimant filed a motion for reconsideration.

Claimant's motion for reconsideration noted a typographical error listing the ordered permanent total disability rate as \$1,047.16 per week, rather than the correct PTD rate of

\$1,194.63 per week. Employer has agreed to this change. Accordingly, the incorrect figure is deleted and substituted with the correct figure of \$1,194.63.

Employer's petition for reconsideration requests that the record be amended to include a letter from Employer's vocational expert, Nancy Favaloro, describing the location of the job opportunities provided in the vocational rehabilitation report previously submitted. Claimant responded to Employer's motion on October 30, 2012, arguing that allowing Employer to supplement the record at this time would deprive Claimant of the opportunity to follow up with the proposed positions and prepare rebuttal testimony. Employer responded to Claimant's opposition on October 30, 2012, stating that admission of the addendum is necessary to prevent manifest injustice. In this case, I find that the addition of the geographic information of the job opportunities provided does not unduly prejudice Claimant, given that all other information was previously submitted and Employer's vocational expert was made available for cross examination at the hearing. The document is thus entered into the record as EX 39.

Suitable Alternative Employment

When supplemented by EX 39, the alternative job opportunities set forth by Employer's vocational rehabilitation report of October 5, 2011 (EX 20) are:

Job/Employer	Location	Requirements	Salary/Hours
Shuttle Driver/Houseman for Homewood Suites by Hilton	Charleston, SC	Mainly standing and walking. Occasional sitting. Occasional lifting up to 50 pounds. Frequent use of hands and arms.	\$8.00 per hour for first 90 days, \$8.25 per hour thereafter.
Vending Route Sales for Coastal Canteen	Charleston, SC	Alternating sitting, standing, and walking. Lifting up to 30-35 pounds. Occasional reaching above shoulders. Some bending.	\$400-\$600 per week.
Cashier for Home Depot	Charleston, SC	Standing and walking. Lifting up to approximately 20 pounds. Use of a handheld cordless scanner for heavy merchandise.	\$8.00 per hour.
Coffee Attendant for Marriot Hotel	Charleston, SC	Standing and walking. Lift and carry objects weighing 10 pounds or less. Frequent use of hands and upper extremities.	\$9.00 per hour.
Forklift Operator/Warehouse	Greater Charleston, SC	Alternates sitting, standing, and walking.	\$10.00 per hour.

Associate for Express Pros		Some positions require lifting up to 50 pounds, others require only operating the forklift.	
Driver for Cactus Carwash	Charleston, SC	Alternate sitting, standing, and walking. Occasional lifting of less than 20 pounds. Occasional bending and stooping.	\$8.00 per hour.
Cashier for Glass Pro Pit Stop	Mt. Pleasant, SC	Primarily standing with some sitting. Occasional lifting of less than 10-20 pounds.	\$8.00 - \$9.00 per hour.

As determined in the underlying decision, Claimant has work restriction in place that prohibit climbing, excessive running, uneven surfaces, and lifting over fifteen pounds and restrict Claimant's ability to bend and stoop, while requiring that he be able to alternate between sitting and standing. Due to his seizure disorder, Claimant must avoid unprotected heights and may be limited in his ability to drive and operate heavy machinery.

In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, as here, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether work is realistically available to and suitable for the claimant. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Restrictions from pre-existing conditions are to be considered in addressing a claimant's ability to work in alternate employment. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). However, disability related to a subsequent non-covered injury is not compensable. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981) (Miller, J., concurring in result) (Smith, C.J. dissenting); *see also Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951). Thus, if a condition is the result of an intervening cause and is severable from the work-related condition, any disability related to that intervening cause is not compensable. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 13 (1997).

In the instant case, the seizure disorder arose after Claimant had ceased his covered employment. The seizure disorder is thus a subsequent non-covered event, and the restrictions from it are severable from those related to the work-related injury. *Cyr*, 211 F.2d 454; *Leach*, 13 BRBS 231. Accordingly, the restrictions on Claimant's work abilities related to his seizure disorder will not be considered.

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 76(CRT) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042–43, 14 BRBS 156, 164–65 (5th Cir. 1981)). To satisfy this burden, the employer must demonstrate that a range of jobs exists that is reasonably available and can realistically be secured and performed by the disabled claimant. The identification of a single job opening does not meet this standard. *Lentz v. Cottman Co.*, 852 F.2d 129, 131, 21 BRBS 109, 112(CRT) (4th Cir. 1988). Additionally, the job opportunities must be located in the relevant labor market. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380–81, 28 BRBS 96, 101–02(CRT) (4th Cir. 1994) (holding that the employer must show availability of employment in the community in which the claimant presently lives). Further, the employer must show the availability of actual, not theoretical, employment opportunities, as well as the nature, terms, and pay scales for the alternate jobs. *Manigault*, 22 BRBS at 334 (citing *Thompson v. Lockheed Shipbldg. Constr. Co.*, 21 BRBS 94, 97 (1988)); *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985); *Moore v. Newport News Shipbldg. & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978).

Of the positions put forth by Employer, Claimant could perform the Glass Pro Pit Stop cashier, Express Pros forklift operator, and the Cactus Car Wash driver positions within his restrictions. The warehouse associate, vending route sales, and shuttle driver positions are all outside Claimant's lifting restrictions. Likewise, the coffee attendant and Home Depot cashier positions are outside of Claimant's restriction requiring his ability to alternate between sitting and standing.

The Cactus Car Wash driver position requires that the worker be able to drive both automatic and manual transmissions. (EX 20, 6) The record is silent, however, as to whether Claimant is capable of driving a manual transmission. The only testimony approaching the subject is that of the vocation expert, who testified that both hustlers and forklifts have automatic transmissions. (TR 82) In her vocational rehabilitation report, Ms. Favaloro stated that Claimant informed her that he had driven tractor trailers on the Port property, but did not possess a commercial driver's license. (EX 20, 2) It is unclear from this whether Claimant referred to driving hustlers or whether the vehicles driven had manual transmissions. Accordingly, Employer has not demonstrated that Claimant could successfully attain or perform this job opportunity.

The cashier position for Glass Pro Pit Stop provides on the job training and a high school diploma is not required. (EX 20, 6) The worker must be customer service oriented. (EX 20, 6) Ms. Favaloro's evaluation of Claimant included the observation that Claimant had performed semi-skilled work, including work involving communicating with people and decision-making. (EX 20, 5) The forklift operator position, not including any position in which Claimant would be required to perform lifting, at Express Pros requires experience driving a forklift (EX 20, 6), which Claimant testified he has. (TR 30) Accordingly, I find that Claimant could successfully attain and perform the job of cashier for Glass Pro Pit Stop or forklift operator for Express Pros.

Once the Employer shows the availability of suitable alternate employment, the burden is on the Claimant to demonstrate that he diligently attempted, but was unable to secure,

employment. *Trans-State Dredging*, 732 F.2d at 201–02, 16 BRBS 74, 76 (CRT). In this case, the Claimant testified that he has not worked anywhere else since his injury, nor has he sought any jobs. (TR at 67) Therefore, I find that the Claimant has not established that he diligently searched for, but was unable to secure, employment.

As stated in the underlying decision, Claimant reached maximum medical improvement of his spine on August 29, 2011. Total disability becomes partial on the earliest date that the employer establishes the existence of suitable alternate employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). In this case, the vocational rehabilitation report was prepared on October 5, 2011. No dates of availability were included on the survey. I thus find that the Employer has established suitable alternate employment as of October 5, 2011, which constitutes the date on which the Claimant’s total disability became partial.

Temporary Total Disability (“TTD”)

The Claimant’s last day of work was November 13, 2010. Claimant reached maximum medical improvement of his spine on August 29, 2011. Therefore, the Claimant is entitled to TTD benefits from November 14, 2010, through August 28, 2011, inclusive. Section 8(b) of the LHWCA provides:

Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

33 U.S.C. § 908(b). Claimant’s pre-injury AWW was determined to be \$1,793.74. Therefore, the Claimant is entitled to TTD benefits at a compensation rate of \$1,194.63 per week¹ from November 14, 2010, through August 28, 2011, inclusive.

Permanent Total Disability (“PTD”)

Claimant’s injury became permanent in nature on August 29, 2011, the date he reached maximum medical improvement. However, Employer did not establish suitable alternate employment until October 5, 2011. Therefore, Claimant is entitled to PTD payments from August 29, 2011 through October 4, 2011, inclusive. Section 8(a) of the LHWCA provides:

Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

33 U.S.C. § 908(a). Accordingly, Claimant is entitled to PTD benefits payments from August 29, 2011 through October 4, 2011, inclusive, at a compensation rate of \$1,194.63 per week.

¹ \$1,793.74 x (2/3) = \$1,194.63

Permanent Partial Disability (PPD)

The Claimant's disability became partial in nature on October 5, 2011, the date suitable alternate employment was demonstrated. Because Claimant injured his lumbar spine, Section 8(c)(21) of the LHWCA, which governs unscheduled injuries, governs the determination of the Claimant's PPD benefits. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985) (holding that an employee who suffers an accidental injury to his back in the course of employment may not receive an award of benefits under Section 8(c)(2) and Section 8(c)(19) of the Act for the partial loss of the use of his leg because the injury to the back was to an unscheduled portion of the body). Section 8(c)(21) of the Act states as follows:

Other cases: In all other cases in the class of disability, the compensation shall be $66 \frac{2}{3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Accordingly, I must determine the difference between Claimant's pre-injury AWW of \$1,793.74 and his wage earning capacity after the injury. Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984).

In this case, the Employer has established that two positions qualify as suitable alternate employment, including that of driver at \$8.00 per hour and forklift operator at \$10.00 per hour. (EX 20, 6) Averaging these wages, I find the Claimant's wage-earning capacity as of October 5, 2011, to be \$360.00 per week.² *See Avondale Industries v. Pulliam*, 137 F.3d 326, 328, 32 BRBS 65, 67 (CRT) (5th Cir. 1998).

When calculating the claimant's benefits, the claimant's post-injury wage-earning capacity must be adjusted downward in order to account for inflation using the percentage change in the national average weekly wage.³ *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

Accordingly, based on the national average weekly wage, the Claimant's post-injury wage-earning capacity in 2010 dollars (the year of the Claimant's injury) is \$349.20 per week.⁴ Thus, when the Claimant's post-injury wage-earning capacity, adjusted downward, is subtracted from his pre-injury AWW of \$1,793.74 and then multiplied by two-thirds, the Claimant's

² Averaging the wages of the jobs would appear as: $\$8.00 + \$10.00 \div 2 = \$9.00$ per hour. $\$9.00 \times 40 \text{ hrs/wk} = \360.00 per week.

³ National average weekly wages can be located at: <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>.

⁴ $\$628.42$ (2010 NAWW) \div $\$647.60$ (2011 NAWW) = .970, thus $.970 \times \$360.00 = \349.20 per week (Claimant's residual wage-earning capacity in 2010 dollars).

compensation rate is \$963.03 per week.⁵ Accordingly, the Claimant is entitled to PPD benefits at a compensation rate of \$963.03 per week from October 5, 2011 and continuing.

In addition to his unscheduled back injury, Claimant also suffered a left ankle injury which both parties have stipulated reached maximum medical improvement on January 24, 2011. For this scheduled injury, Claimant received a 5% impairment rating of the left ankle. Claimant was previously compensated for a 2005 injury to his left ankle with a residual impairment rating of 6%. Accordingly, there is no evidence that the work related injury of November 13, 2010 was anything more than a temporary aggravation of a pre-existing injury. Because there is no permanent damage stemming from the left ankle injury, no separate award is appropriate. Additionally, because Claimant reached maximum medical improvement of his left ankle prior to doing so regarding his low back injury, Claimant's left ankle injury has no effect on the above findings of TTD, PTD, or PPD.

CONCLUSION

I have determined the following based on a complete review of the record in light of the arguments of the parties, testimony of the witnesses, applicable statutory provisions, regulations, and pertinent precedent. Claimant has proven that his back pain and ankle sprain are causally related to his employment. Additionally, Claimant has established that he is entitled to temporary disability benefits from November 14, 2010 to August 28, 2011 and permanent total disability benefits from August 29, 2011 to October 4, 2011. Claimant is further entitled to permanent partial disability benefits from October 5, 2011 to the present and continuing. Finally, as stated in the underlying Decision and Order, Claimant is due and payable medical expenses relating to his back pain and ankle sprain, as allowable under Section 7.

ORDER

It is hereby **ORDERED** that

1. The figure \$1,047.16 contained in Paragraph 2, Page 17 of the underlying Decision and Order is deleted and substituted with the correct sum of \$1,194.63.
2. Employer shall pay Claimant TTD benefits at a compensation rate of \$1,194.63 per week from November 14, 2010, through August 28, 2011, inclusive.
3. Employer shall pay Claimant PTD benefits at a compensation rate of \$1,194.63 per week from August 29, 2011, through October 4, 2011, inclusive.
4. Employer shall pay Claimant PPD benefits at a compensation rate of \$963.03 per week from October 5, 2011 and continuing.

⁵ \$1,793.74 (Claimant's pre-injury AWW) – \$349.20 (Claimant's adjusted average weekly wage-earning capacity) = \$1,444.54, and \$1,444.54 x (2/3) = \$963.03

5. Employer is responsible for medical treatment for Claimant's work injuries in accordance with Section 7 of the Act, to include all necessary and allowable care for his lumbar spine injuries and ankle injuries.
6. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
7. Employer is entitled to a credit for any compensation paid to the Claimant under the State Act, excluding attorneys' contingency fees and costs reimbursement, penalties, and interest.
8. All computations are subject to verification by the District Director.
9. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

SO ORDERED.

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/jrs
Newport News, Virginia