U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 23-0028
and 23-0028A

MICHAEL B. MORGAN)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
TEKNOTHERM, INCORPORATED)
)
and)
)
ALMA MUTUAL)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents)
)
BOWMAN REFRIGERATION)
)
and) DATE ISSUED: 08/15/2024
)
SIGNAL MUTUAL INDEMNITY)
ASSOCIATION, LIMITED)
)
Employer/Carrier-)
Respondents)
Cross-Respondents)
)
LUDYBROS WELDING, LLC)
)
and)

	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Section 8(f) Relief of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Amie C. Peters and Amanda E. Peters (Blue Water Legal PLLC), Edmonds, Washington, for Claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Teknotherm, Inc., and ALMA Mutual.

Scott E. Holleman (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Bowman Refrigeration and Signal Mutual Indemnity Association, Ltd.

James R. Babcock (Law Office of James Babcock, LLC), Lake Oswego, Oregon, for Ludybros Welding, LLC, and Alaska National Insurance Co.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer, Teknotherm, Inc., appeals, and Claimant cross-appeals, Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits and Section 8(f) Relief (2020-LHC-00234) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002); 20 C.F.R. §702.201(a).

substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant is a marine welder who was working for Teknotherm on May 7, 2015, when he injured his right shoulder while lifting a heavy pipe overhead. Hearing Transcript (TR) at 44-47; Jt. Exhibit (JX) 1 at 1; TX 9 at 213. Though in pain, he did not immediately seek medical treatment and continued working the next two and a half weeks to finish the job. TR at 46-47. Once the job was completed on May 27, 2015, Claimant was laid off, Teknotherm Exhibit (TX) 9 at 213, and he sought a referral from his primary care provider to his former orthopedic surgeon, Dr. Lawrence Holland.[2] TR at 47-48; JX 2 at 6. On August 21, 2015, Dr. Holland performed an arthroscopic labral repair, acromioplasty, and removal of loose bodies on Claimant's right shoulder. JX 2 at 64. Dr. Holland considered Claimant's right shoulder condition to be at maximum medical improvement on February 1, 2016, and released him to return to "unrestricted" work, effective March 15, 2016. JX 2 at 79.[3]

Claimant returned to work for Teknotherm on April 11, 2016, earning $35 per hour, but was laid off after three weeks. TR at 65, 67-68; JX 5 at 282; TX 9 at 214. In June or July 2016, he started working as a welder for Bowman Refrigeration (Bowman), earning $34 per hour plus travel time and mileage. TR at 73-75; TX 9 at 215-216. He was laid off for a few weeks in December 2016, returned to work for Bowman in January 2017, and then was laid off in June 2017 for what he testified "seemed to be a really long time." TR at 78.

During this layoff period, Claimant returned to Dr. Holland on July 27, 2017, with progressive right shoulder pain. Dr. Holland suspected it "may, unfortunately, be garden variety osteoarthritis" and ordered a right shoulder MRI to rule out a rotator cuff tear. JX 2 at 112-113, 115. Upon review of the August 4, 2017 MRI, Dr. Holland opined the results

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[2] Dr. Holland previously performed two surgeries on Claimant's right shoulder: a Bankart repair following a wrestling injury in 1992, Claimant's Exhibit (CX) 8 at 475, 479; TX 22 at 445, and acromioplasty and debridement on July 13, 2012, CX 8 at 479; TX 22 at 451. In 2012 and 2014, Claimant saw Dr. Holland for persistent left shoulder pain associated with a partial thickness rotator cuff tear. TX 22 at 458.

[3] Dr. Holland testified "unrestricted" meant he expected Claimant would use "common sense" and "would just learn to do things with his hands below the plane of his shoulder" and not "do things overhead." CX 8 at 477, 480; *see also* TR at 64 (Claimant testified Dr. Holland told him not to do activities that cause pain).

were "consistent with some glenoid osteoarthritis." *Id.* at 123.[4] On September 21, 2017, Dr. Holland opined Claimant "clearly [has] a permanent impairment" but could "do a job that does not require that he use his hands away from the side of his body." He recommended Claimant "consider occupationally something other than being a laborer." *Id.* at 127; CX 8 at 481.

On January 8, 2018, Dr. Holland formally assigned permanent restrictions of no pushing and pulling more than 50 pounds, no lifting more than 25 pounds, no reaching for more than two hours, and no overhead work. JX 2 at 138; *see also* TR at 80. Intermittently and with restrictions, Claimant continued working for Bowman as a welder through 2020, TR at 75, 78-80, 82-88; JXs 3, 4, 6, and performed a five-week welding job for Ludybros Welding LLC (Ludybros) in November and December 2020, TR at 88, 91-92; JX 9.

Teknotherm voluntarily paid Claimant temporary total disability benefits from May 28, 2015, through March 15, 2016, based on an average weekly wage of $1,360 and a weekly compensation rate of $906.67. JX 1 at 2-3.[5] On December 14, 2017, Claimant filed a claim against Teknotherm for additional benefits for the May 2015 work injury. Bowman Exhibit (BX) 1 at 29. Teknotherm moved to join Bowman and Ludybros as parties on the grounds that Claimant's post-injury employment with them aggravated his right shoulder condition. The ALJ granted the motions and held a two-day hearing on November 5 and 8, 2021.

In his September 19, 2022 Decision and Order Awarding Benefits and Section 8(f) Relief (D&O), the ALJ found Claimant's May 7, 2015 work incident permanently aggravated his preexisting right shoulder condition and Claimant's post-injury welding work for Bowman and Ludybros did not aggravate his shoulder condition. D&O at 40, 42-46. He next found Claimant established a prima facie case of total disability because he could not perform his usual employment unaccommodated, Teknotherm identified suitable alternate employment via a labor market survey, and Claimant did not rebut the availability of the suitable alternate employment. *Id.* at 52-59.

Having found Claimant's post-injury welding work unsuitable, the ALJ calculated Claimant's retained wage-earning capacity using the labor market survey jobs the ALJ

[4] In comparing the August 4, 2017 right shoulder MRI with the June 2, 2015 right shoulder MRI, the radiologist noted the level of glenohumeral osteoarthritis "slightly increased" and described the rest of the findings as "unchanged." JX 2 at 121-122.

[5] Teknotherm terminated disability compensation based on Dr. Holland's work release. JX 1 at 3; *see also* JX 2 at 79 (Dr. Holland treatment notes); CX 8 at 477, 480 (Dr. Holland deposition testimony).

deemed suitable. D&O at 58-59. He awarded Claimant compensation for temporary total disability from May 28, 2015, through January 31, 2016, permanent total disability from February 1, 2016, through April 10, 2016, and permanent partial disability beginning April 11, 2016, and continuing.[6] *Id.* at 61, 67-68. Finally, he calculated Claimant's average weekly wage based on the wages he earned in "approximately the year preceding the May 7, 2015 injury." *Id.* at 60-61.[7]

Teknotherm appeals, BRB No. 23-0028, and Claimant cross-appeals, BRB No. 23-0028A, the ALJ's decision. Each responds to the other. Additionally, Bowman responds to both Teknotherm's appeal and Claimant's cross-appeal, and Ludybros responds to Teknotherm's appeal. Teknotherm and Claimant each filed reply briefs.

In its appeal, Teknotherm contends the ALJ erred in finding Claimant did not sustain an aggravation of his right shoulder condition while working for his subsequent employers. Teknotherm Br. at 14-27. In addition, it challenges the ALJ's finding Claimant cannot perform his usual employment as a welder as well as the ALJ's retained earning capacity determination. *Id.* at 27-31. Bowman and Ludybros respond, urging affirmance of the ALJ's determination that Teknotherm is the last responsible employer but agreeing with Teknotherm that Claimant can return to his usual work. Bowman Resp. at 12-24; Ludybros Resp. at 3-12.

Claimant responds, asserting the ALJ correctly determined he cannot return to his usual employment as a welder, and urges affirmance of the ALJ's retained earning capacity determination. Cl. Cross-Appeal and Resp. Br. at 7-15. In reply, Teknotherm argues Claimant's continued welding work is equivalent to his usual work or constitutes suitable alternate work, and thus the wages from that work reflect his retained earning capacity. Teknotherm Reply at 2.

On cross-appeal, Claimant contends the ALJ's average weekly wage determination is not supported by substantial evidence. Cl. Cross-Appeal and Resp. Br. at 15-20. Teknotherm and Bowman respond, urging affirmance of the ALJ's average weekly wage

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[6] The ALJ also awarded all reasonable and necessary medical care for the May 7, 2015 work injury, to be paid by Teknotherm as the last responsible employer. D&O at 61-62.

[7] As the ALJ determined Teknotherm is entitled to Section 8(f) relief, 33 U.S.C. §908(f), he ordered the Special Fund to assume disability compensation payments after Teknotherm paid Claimant 104 weeks of permanent partial disability benefits. D&O at 67.

determination. Teknotherm Resp. at 3-8; Bowman Cross-Appeal Resp. at 2-3. Claimant filed a reply brief. Cl. Reply.

Aggravation and Last Responsible Employer

Teknotherm first contends the ALJ erred in determining Claimant did not sustain a permanent aggravation of his right shoulder condition while working intermittently for Bowman from 2016 through 2020 and Ludybros in November and December 2020. It asserts he ignored "the low threshold for aggravation" set forth in *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co. [Price]*, 339 F.3d 1102 (9th Cir. 2003), irrationally discredited Dr. David Naibert's opinion, erred in finding Claimant was credible, and erred in failing to infer there was an aggravation of the underlying injury from the MRI evidence and Claimant's hearing testimony.

To assign liability in cases involving cumulative trauma with multiple employers, the "aggravation rule," "last responsible employer rule," or "two-injury rule" applies as follows:

> [I]n cases where the disability is a result of cumulative traumas, so-called "two-injury" cases, the responsible employer depends upon the cause of the worker's ultimate disability. If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability, we have held that the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer.

Price, 339 F.3d at 1105; *Foundation Constructors, Inc. v. Director, OWCP [Vanover]*, 950 F.2d 621, 624 (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). Thus, the predominate inquiry under the aggravation rule is "which injury ultimately resulted in the claimant's disability." *Kelaita*, 799 F.2d at 1311; *see also Buchanan v. Int'l Transp. Servs.*, 33 BRBS 32, 35-36 (1999).

In *Price*, the United States Court of Appeals for the Ninth Circuit held an injured worker's "disability" and whether it resulted from an aggravation is not determined based on whether the injured worker suffered a "diminished earning capacity." Instead, the court set forth a "bright line rule" that focuses on whether the worker suffered a "physical harm" by looking at "identifiable work activities at particular times" to determine whether those work activities "aggravated," "harmed," "worsened," or "contributed" to the original work injury. *Price*, 339 F.3d at 1106-1107; *Vanover*, 950 F.2d at 624-625; *Kelaita*, 799 F.2d at

1312. The court affirmed the ALJ's conclusion that the claimant's subsequent employer was liable for benefits because his injuries with that employer, though "not predominantly responsible," resulted in a "minor but permanent increase in the extent of his disability and increased his need for knee surgery." *Price*, 339 F.3d at 1107.

Initially, we reject Teknotherm's assertion that the ALJ misapplied *Price*. In addressing the responsible employer issue in this case, the ALJ discussed both *Price* and *Kelaita*. D&O at 41-42.[8] He found Claimant did not have any acute traumatic incidents and characterized the alleged injury as a cumulative trauma.[9] Pursuant to *Price*, the ALJ considered Claimant's work activities involving overhead welding and back-and-forth movement required for Tungsten Inert Gas (TIG) welding and determined there was "some evidence" these activities caused instances of pain and aggravated the underlying condition. *Id.* at 42-43. However, based on his weighing of the medical evidence presented, the ALJ rationally found *Kelaita* unsupportive of Teknotherm's argument given the lack of medical opinion evidence in the present claim establishing that Claimant's instances of pain in his subsequent employment aggravated his work-related condition caused by his employment with Teknotherm. *Id.* at 42. The ALJ also rationally distinguished *Price* on the basis that the issue in *Price* was "the amount of change necessary for aggravation," whereas this case "comes down to whether there was any evidence to support even a microscopic change due to Claimant's overhead work." *Id.* at 45.

Thus, unlike in *Price* and *Kelaita*, the ALJ found there was insufficient evidence to support finding an aggravation occurred. Because the ALJ's analysis comports with law

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[8] In *Kelaita*, the claimant claimed a right shoulder injury against one employer and filed another claim for his right shoulder against a subsequent employer. The Ninth Circuit determined there was substantial evidence to support the ALJ's finding that "each flare-up of pain" the claimant experienced as he continued to work "represented cumulative trauma and aggravated the underlying injury." *Kelaita*, 799 F.2d at 1311-12. In significant part, the court upheld the ALJ's application of the "two-injury rule" in cases involving cumulative trauma. *Id.*: *Price*, 339 F.3d at 1105 (citing *Kelaita* to support reasonableness of analyzing cumulative trauma cases as two-injury cases).

[9] When addressing the Section 20(a) presumption, 33 U.S.C. §920(a), and whether the May 7, 2015 work injury permanently aggravated Claimant's preexisting and ongoing right shoulder condition, the ALJ evaluated Claimant's shoulder condition in terms of the various possible ways it could have been aggravated: loose bodies, the instability of his glenoid labrum, a rotator cuff tear, and the role of surgery. D&O at 35-38. He addressed subsequent aggravations and the last responsible employer issue the same way. *Id.* at 42.

and is supported by substantial evidence, discussed *infra*, we reject Teknotherm's contention that the ALJ "ignored" or misapplied *Price*.

Teknotherm next contends the ALJ's decision to assign less weight to Dr. Naibert than Dr. Holland and Dr. Patrick N. Bays was irrational and not supported by substantial evidence. We disagree.

Orthopedic surgeon Dr. Holland stated in a March 2, 2021 letter that he would expect Claimant to have "occasional aggravations" because it is "impractical for a person to always work with their hands below the plane of the shoulder." JX 2 at 258-259; *see also* CX 7. Although he further stated "[a]ny overhead work is likely to result in an aggravation of [Claimant's] underlying condition," he clarified at his deposition that "[e]verything" Claimant does "above the plane of his shoulder makes him hurt more" but does not "worsen[] the condition." He also stated that Claimant's welding work "would result in a progression of his pain complaints" but would not "result in a worsening of his arthritis." CX 8 at 479, 481.[10]

Dr. Bays, also an orthopedic surgeon, opined in his report that Claimant's post-injury work caused expected "periodic exacerbations of a temporary nature to the preexisting glenohumeral degenerative pathology" due to his "progressive, moderate to severe arthritic process." TX 14 at 288; *see also* TX 11. He testified it would be "completely normal" and "expected" for Claimant to have additional pain or "exacerbations of a temporary nature when doing certain activities," TX 34 at 890, but that his shoulder condition would have been the same regardless of his post-injury work, *id.* at 897.

Conversely, Claimant's pain management physician, Dr. Naibert,[11] testified Claimant's post-injury work worsened his chronic pain and permanently aggravated his shoulder condition. CX 14 at 518, 521; *see also* CX 13.

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[10] Dr. Holland further testified that, as of his examination of Claimant in 2017, "any increased complaints of pain" following Claimant's May 2015 work injury and August 2015 shoulder surgery were the result of doing things above the plane of his right shoulder. However, he did not have an opinion on whether Claimant's pain "permanently increased" after 2017 because he has not examined Claimant since then. CX 8 at 483.

[11] Claimant has been treating with Dr. Naibert for pain management for his chronic conditions since 2011. CX 14 at 516-517.

When discussing whether Claimant's post-injury work for Bowman and Ludybros aggravated his right shoulder condition, the ALJ assigned more weight to Drs. Holland's[12] and Bays's[13] opinions than to Dr. Naibert's.[14] The ALJ did so because Dr. Naibert is a pain management specialist whereas Drs. Holland and Bays are orthopedic surgeons. D&O at 31, 44-45. The ALJ also found Dr. Naibert was the only physician of record to opine that Claimant's shoulder condition was permanently worsened by his subsequent overhead work, based on the mechanics of Claimant's underlying condition.[15] However, as the ALJ observed, this was "a view the orthopedists disagreed with." D&O at 31, 45.[16]

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[12] The ALJ assigned Dr. Holland's opinion "considerable weight," particularly with respect to the effects of Claimant's continued work on his shoulder condition. D&O at 30.

[13] The ALJ found Dr. Bays credible and gave his opinion weight because of his qualifications as an orthopedic surgeon and his "well-reasoned" and "well-documented" report. D&O at 31.

[14] The ALJ found Dr. Naibert credible and assigned weight to his opinion regarding Claimant's pain levels as well as the reasonableness and necessity of Claimant's pain medication. D&O at 30.

[15] As discussed, the ALJ acknowledged there is "some evidence" that overhead work and TIG welding caused increased pain and aggravated Claimant's shoulder condition. However, he rationally credited Claimant's testimony that these specific work activities did not permanently worsen his symptoms and he was able to, and planned to, continue working despite the temporary pain flare-ups. D&O at 42, 44-45; TR at 86, 95-97, 134-135, 138; TX 28 at 540-541.

[16] Specifically, the ALJ wrote:

> Of the orthopedists, two found that overhead work did not permanently worsen Claimant's condition, and one appeared to find aggravation but, when deposed, appeared to include temporarily increased pain that was not incapacitating within his meaning of "aggravation." Permanently worsened pain, no matter how slightly, even without any change to the underlying condition could amount to an aggravation. But Dr. Naibert's opinion about permanently worsened pain rested on his opinion that the work permanently worsened Claimant's underlying shoulder issues, a view the orthopedists disagreed with. Weighing clear opinions that work did not aggravate a condition in a way that contributed to Claimant's permanent disability

In light of the relevant medical evidence of record, the ALJ's rationale for giving more weight to the opinions of Drs. Holland and Bays over that of Dr. Naibert based on the physicians' respective qualifications is not "inherently incredible or patently unreasonable." *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1321 (9th Cir. 1990) (citing *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999) (per curiam) (ALJ has discretion to credit one witness's testimony over that of another); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 173 (1996); *see also Massey v. E. Assoc. Coal Corp.*, 7 BLR 1-37 (1984) (physicians' qualifications relevant in weighing conflicting medical opinions). Consequently, we affirm the ALJ's credibility determinations.

We likewise reject Teknotherm's argument that the ALJ erred in finding Claimant "highly credible." Teknotherm Br. at 22-27. In particular, the ALJ determined Claimant's testimony regarding his work accident and shoulder pain was "highly credible" because it was consistent internally and with the medical opinions in the record. D&O at 29. Contrary to Teknotherm's assertions, while the ALJ recognized there were "occasional discrepancies" between Claimant's deposition and hearing testimony, *id.* at 29 n.4, and a potential for Claimant to be biased in favor of Ludybros,[17] the ALJ did not rely on Claimant's testimony in determining the last responsible employer issue. Rather, the ALJ implicitly disregarded what he found were "occasional discrepancies" between Claimant's deposition and hearing testimony concerning instances of increased pain, *id.* at 29, in favor of the medical evidence addressing Claimant's pain. *Id.* at 44-46. He then rationally determined the medical evidence was "not sufficient to support aggravation" with either Bowman or Ludybros. *Id.* at 45-46. Because the ALJ maintains the discretion to accept or reject all or any part of a witness's testimony, and because the ALJ thoroughly addressed Teknotherm's arguments, we see no error in the ALJ's determination and thus affirm it. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *John W. McGrath Corp.*

> against an opinion that, at most, equivocally supports aggravation, I find no aggravation by a preponderance of the evidence.

D&O at 45.

[17] In this regard, the ALJ noted the possibility Claimant "may be downplaying" the effects of his employment with Ludybros, given Ludybros's "relative goodwill" towards him. But the ALJ correctly stated Claimant "does not get to choose which employer is liable" and specifically relied on the medical evidence to resolve the aggravation question. D&O at 45-46.

v. Hughes, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

Finally, Teknotherm contends the ALJ ignored material evidence in his aggravation analysis. Specifically, it asserts the ALJ failed to consider the August 4, 2017 right shoulder MRI showing loose bodies and increased osteoarthritis, as well as portions of Claimant's testimony which, it asserts, undermine the ALJ's conclusion that Claimant's continued welding work did not aggravate his shoulder condition. Teknotherm Br. at 21-22. We disagree.

Claimant testified his shoulder pain progressed in the months following his August 2015 shoulder surgery and continued to progress after he returned to work. TR at 49, 83. Approximately one year after he returned to work, Claimant followed up with Dr. Holland and underwent a right shoulder MRI. JX 2 at 112; TR at 119-120. The August 4, 2017 MRI showed Claimant's glenohumeral osteoarthritis had "slightly increased since 2015," but the rest of the MRI findings, including the "[l]arge osteochondral bodies in the subcoracoid recess," were "unchanged" from Claimant's previous June 2, 2015 MRI. JX 2 at 121-122.

Dr. Holland, whose opinion the ALJ gave considerable weight as to the effect of Claimant's work on his shoulder, D&O at 30, acknowledged the MRI showed a progression of Claimant's arthritis but stated the degree of arthritis "doesn't always correlate with the amount of pain that a person has." CX 8 at 482; *see also* JX 2 at 127, 139. He testified Claimant's welding work would cause "a progression of pain complaints," but he could not say "it would result in a worsening of his arthritis," even at a microscopic level. CX 8 at 481; *see also* JX 2 at 132.

Dr. Bays, whom the ALJ found "credible" and "well-qualified" as an orthopedic surgeon, D&O at 31, opined Claimant's preexisting degenerative arthritis "will continue to worsen over time." TX 14 at 287-288. He testified the MRIs taken before and after the May 2015 work injury showed the same arthritic changes that were present before the work injury. TX 34 at 896.

Drs. Holland and Bays both agreed the loose bodies observed in Claimant's shoulder preexisted the May 2015 work injury, although Dr. Bays thought the loose bodies were temporarily exacerbated by the May 2015 work injury whereas Dr. Holland did not. *Compare* TX 34 at 888-889, *with* CX 8 at 476.[18] Beyond a temporary exacerbation,

[18] The surgery Dr. Holland performed on Claimant's right shoulder in 2012 included removal of loose bodies, which Dr. Holland testified was done to alleviate "intermittent catching and pain" caused by their presence. BX 1 at 35; CX 8 at 479-480.

however, neither physician opined that Claimant's preexisting loose bodies changed following his surgery and return to work.

In his summary of the evidence, the ALJ thoroughly discussed the August 4, 2017 MRI report, Dr. Holland's interpretation of the MRI's results, Claimant's testimony regarding his post-injury work activities, and Drs. Naibert's and Bays's opinions regarding the effect of Claimant's welding employment on his shoulder conditions. D&O at 15-23, 35-40, 42-46. Although the ALJ did not again expressly discuss the August 4, 2017 MRI findings or Claimant's hearing testimony[19] when addressing the last responsible employer issue, this evidence – in conjunction with the relevant, credited medical evidence in the record – does not conflict with the ALJ's findings and does not support Teknotherm's argument. To the contrary, it substantiates the ALJ's determination that there was insufficient evidence to support the conclusion that Claimant's continued welding employment permanently aggravated his shoulder conditions. Because the ALJ's inferences are reasonable, and his finding that Claimant's post-injury welding work for Bowman and Ludybros did not aggravate his right shoulder condition is supported by substantial evidence, we affirm it. *Global Linguist Sols. v. Abdelmeged*, 913 F.3d 921, 923 (9th Cir. 2019); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-945 (5th Cir. 1991)

Disability

Teknotherm next contends the ALJ erred in determining Claimant is disabled. Specifically, it argues his finding that Claimant has been incapable of welding since May 28, 2015, is not supported by substantial evidence. It points to evidence that Dr. Holland released Claimant to "unrestricted activities" on February 1, 2016, Claimant returned to welding in an unrestricted capacity for more than one year before Dr. Holland assigned formal work restrictions on September 27, 2017, Claimant continued welding through 2020 under Dr. Holland's work restrictions, and Claimant intended to continue the same work

[19] Claimant's hearing testimony that Teknotherm contends the ALJ failed to consider does not support its argument. When asked at the November 8, 2021 hearing how his shoulder felt in the two weeks before the hearing, Claimant responded it felt like there was "gravel" inside that audibly "grinds and pops" with movement. TR at 104. But this testimony does not clearly establish whether there was a progression of Claimant's shoulder condition, and if so, when that progression occurred, how it occurred, or whether it was due to Claimant's post-injury welding work.

in the future. Teknotherm further asserts the pain Claimant experiences from his welding work does not render welding work unsuitable. Teknotherm Br. at 27-31.[20]

Under the Act, disability is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. §902(10). To establish a prima facie case of total disability, a claimant must demonstrate an inability to perform his usual employment due to his work injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1328 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). "Usual employment" is the employee's regular duties at the time he was injured. *Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011); *Diosado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70, 73 (1997) (affirming the ALJ's finding that the claimant established he could not return to his regular employment where credible evidence demonstrated the claimant's post-injury work for the employer was not analogous to the work he was performing at the time of his injury); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982).

To determine whether a claimant has demonstrated total disability, the ALJ must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *See Obadiaru*, 45 BRBS at 21; *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985). In the instant case, the ALJ credited Claimant's testimony regarding the physical requirements of his pre-injury welding work and his inability to perform those tasks unaccommodated, TR at 46-47, 55-56, 64-65, 67-68; TX 9 at 213-214; TX 28 at 549, as well as Dr. Holland's recommendation that Claimant consider a different occupation, JX 2 at 127; *see also* CX 8 at 477. The ALJ thus found Claimant has been unable to perform his usual, pre-injury welding work since May 28, 2015 and established a prima facie case of total disability. D&O at 52.[21]

Teknotherm seemingly argues the ALJ erred in finding Claimant established a prima facie case of total disability because Claimant returned to welding in 2016, and continued welding through 2020. To the extent Teknotherm's argument is that Claimant's post-injury welding is analogous to the welding work he was doing at the time of his work injury, we

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[20] As noted, Ludybros agrees with Teknotherm's arguments regarding the ALJ's disability determination.

[21] Based on Dr. Holland's opinion, CX 8 at 477; JX 2 at 127, and Claimant's and Teknotherm's stipulation, Cl. Post-Hearing Br. at 31; Teknotherm Post-Hearing Br. 22-23, the ALJ also found Claimant's condition reached maximum medical improvement on February 1, 2016. D&O at 51.

reject it. Substantial evidence supports the ALJ's finding of a distinction between Claimant's pre- and post-injury welding work.

Claimant testified that prior to the work injury, he was required to do overhead welding and heavy lifting, TR at 55-56; TX 9 at 213-214; TX 28 at 549, and that doing the same work was "uncomfortable" and painful when he returned to work for Teknotherm in 2016. TR at 63-68; TX 9 at 214.[22] He testified, however, that his post-injury welding work for Bowman and Ludybros required minimal overhead welding and heavy lifting, and both employers generally accommodated his physical restrictions. TR at 75-76, 83-87, 91-93, 95-97, 124-125, 137-139; TX 9 at 215-216; TX 28 at 537-538, 540, 546-549; Ludybros Exhibit (LX) 12 at 296-297; *see also* BX 4. Thus, although Claimant briefly returned to his usual employment after being released by Dr. Holland with "common sense" restrictions, substantial evidence supports the ALJ's finding that Claimant has been unable to perform the full extent of his regular duties as a welder since May 28, 2015. *Diosado*, 31 BRBS at 73. Therefore, we affirm the ALJ's finding that Claimant established a prima facie case of total disability and his award of total disability benefits from February 1, 2016, through April 10, 2016.

Nevertheless, we agree with Teknotherm's contention that the ALJ's overall disability determination is not supported by substantial evidence. When a claimant establishes he is unable to perform his usual employment, as in this case, the burden shifts to the employer (here, Teknotherm), to prove suitable alternate work is available in the community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993); *Bumble Bee Seafoods*, 629 F.2d at 1329 (employer must point to specific jobs the claimant can perform). If it does so, the claimant is, at most, partially disabled.

In January 2021, vocational expert Jennifer Kabacy conducted a labor market survey identifying eight jobs in Claimant's community. In her vocational assessment report, she stated the labor market was "somewhat limited" due to COVID-19; however, she emphasized Claimant was "still working" as a marine welder for Bowman and Ludybros when work was available within his restrictions and he was probably earning as much or more than he would in the broader labor market. TX 27 at 525.

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[22] On one occasion, Claimant tried to carry and load an XMT welding machine but needed assistance from his fitter because he was unable to carry it on his own. TR at 65. On the same occasion, he experienced pain while trying to use a "chain come-along," and required his colleagues' help so he could weld. TR at 67. Additionally, Claimant's last welding job with Teknotherm was cancelled and he was laid off because he was required to move several 60-to-80-pound bags of sugar but was unable to do so. TR at 67-68.

Claimant's vocational expert, Cloie Johnson, disagreed with Ms. Kabacy's assessment of Claimant's earning capacity and instead believed Claimant would earn more in steady alternate employment than in intermittent welding work offered by "benevolent employers." CX 5 at 448. Ms. Johnson stated that because there are fewer opportunities for welding work available within Claimant's restrictions, he is earning less than before his injury. *Id.* at 456.

When addressing the issue of suitable alternate employment, the ALJ found five of the eight jobs in Ms. Kabacy's 2021 labor market survey were suitable and available as of April 11, 2016, when Claimant returned to modified welding work. D&O at 57-58. The ALJ therefore shifted the burden to Claimant to demonstrate he diligently sought alternate employment. Because Claimant did not attempt to secure any of the suitable labor market survey jobs and was instead doing work that was "not necessarily suitable," the ALJ determined he failed to rebut "the availability of the alternate employment." *Id.* at 58-59.

Although the ALJ adequately addressed the suitability of the labor market survey jobs, he did not properly consider whether Claimant's post-injury modified welding work was suitable alternate employment. Teknotherm correctly asserts the ALJ erred in dismissing welding "as suitable employment entirely." Teknotherm Reply at 2. The ALJ acknowledged Claimant "in fact worked for years after the 2015 injury" and "made some efforts" to find available welding work when he was laid off in 2020. However, when addressing why he found the suitable labor market survey jobs identified in 2021 were available in 2016, the ALJ simply remarked that Claimant was performing modified welding work that "was not necessarily suitable." *See* D&O at 58-59.

Even if we presume this statement was intended as a finding that Claimant's modified welding work was not suitable, it cannot be affirmed because the ALJ did not explain his rationale or the evidence he relied upon. A claimant's continued employment may not be suitable if his complaints of pain are credible and "the level of pain described is so severe, persistent, and prolonged that it significantly interferes" with his ability to do his work. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 936 (9th Cir. 2020); *see also Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989). However, the ALJ did not indicate whether Claimant's credible complaints of pain interfered with his ability to continue performing his modified welding work.[23]

[23] The ALJ's finding that suitable alternate employment was available when Claimant returned to modified welding in April 2016, and his award for permanent partial disability benefits as of that date, implies that Claimant's modified welding work was, at least at that time, suitable and available. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35, 40 (2011) (claimant's diligence in seeking work is irrelevant prior

Accordingly, we vacate the ALJ's award of permanent partial disability benefits and remand the case for him to address whether Teknotherm identified suitable alternate employment by virtue of the modified welding work Claimant performed from 2016 through 2020.[24] *Ramirez v. Sea-Land Services*, 33 BRBS 41, 45-46 (1999). On remand,

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to employer's identification of suitable alternate employment). The fact that Claimant was consistently performing modified welding work through June 2017 further suggests it was both suitable and available for some time. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6-7 (1988); *Darcell v. FMC Corp., Marine and Rail Equip. Division*, 14 BRBS 294, 297-298 (1981). Likewise, his belief "that he could, and wants to, continue to perform the accommodated work," D&O at 55, indicates he was not performing his post-injury *modified* work only through "extraordinary effort" or that his level of pain was "so severe, persistent, and prolonged" that it interfered with his ability to perform his *modified* work, at least for some time. *Jordan*, 973 F.3d at 936.

Furthermore, Claimant's declaration states:

> My work activity for Bowman Refrigeration has not worsened my symptoms. Since my injury while working for Teknotherm, I have continued to have the same type and level of symptoms. My symptoms, while always present, will wax and wane. However, my symptoms have not been affected by my work at Bowman Refrigeration.
>
> Bowman Refrigeration has been very accommodating of my physical restrictions and does not make me do any activity that would hurt my shoulder or that I cannot do. The employees at Bowman Refrigeration have aided me so I have been able to work within my physical restrictions. I am not required to go beyond those restrictions at Bowman Refrigeration.

BX 4; *see also* CX 8 at 477 (Dr. Holland testifying he "had no reason to believe" Claimant would not return to his job and would "just learn to do things with his hands below the plane of his shoulder"); TX 13 at 260 (Dr. Burns's November 15, 2018 evaluation: Claimant reported he had been working for Bowman since 2016, his work restrictions had been accommodated, and he felt he was able to "manage his current job well."); TX 14 at 289 (Dr. Bays's July 30, 2020 evaluation: Claimant can "return to his job as a welder with precautions.").

[24] No party disputes the ALJ's finding that Teknotherm established the availability of suitable alternate employment in 2021 with Ms. Kabacy's labor market survey. We affirm that finding as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); *but see infra* note 26.

the ALJ must consider Claimant's capabilities, work restrictions, and the physical requirements of the modified welding work he performed since April 2016 to determine whether that work was and is suitable. *See Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 307 (1992). If it is suitable, the ALJ must determine whether Claimant's modified welding work is necessary to his employers, *see Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 227-228 (1986) (continued employment due solely to the beneficence of an employer may be considered "sheltered employment" and insufficient to demonstrate suitable alternate employment), and "realistically and regularly available" to him "on the open market," and explain his rationale. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993); *see also Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42-44 (1996).

Post-Injury Wage-Earning Capacity

Finally, Teknotherm contends the ALJ erred in calculating Claimant's retained wage-earning capacity because he did not consider the actual wages Claimant earned performing modified welding work. Teknotherm Br. at 32; Teknotherm Reply at 2. It further challenges the ALJ's factual findings regarding Claimant's future retained wage-earning capacity as speculative and not supported by substantial evidence.

Compensation payable for unscheduled permanent partial disability is based on the difference between a claimant's average weekly wage and his wage-earning capacity in the same or other employment. 33 U.S.C. §908(c)(21). Under the Act, a claimant's wage-earning capacity "shall be determined by his actual post-injury wages" if these earnings "fairly and reasonably represent his wage-earning capacity." 33 U.S.C. §908(h).[25] The

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[25] Section 8(h), 33 U.S.C. §908(h) provides:

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

party contending the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188, 190 (1985); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 693 (1980).

If the ALJ determines the claimant's actual wages do not fairly and reasonably represent his wage-earning capacity, the ALJ may calculate a dollar amount which reasonably represents what the claimant would be paid under normal employment conditions post-injury. *Long v. Director, OWCP*, 767 F.2d 1578, 1582 (9th Cir. 1985); *Mangaliman*, 30 BRBS at 41-42. In determining whether a claimant's post-injury earnings reasonably represent his wage-earning capacity, factors to be considered include the beneficence of a sympathetic employer, the claimant's earning power on the open market, whether the claimant is required to expend more time, effort, or expertise to achieve pre-injury production or to earn pre-injury wages, and any other reasonable variables that could form a factual basis for the decision. *See Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 1246-1248 (9th Cir. 2001); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 1549-1551 (9th Cir. 1991); *Long*, 767 F.2d at 1582-1583; *Todd Shipyards Corp. v. Allan*, 66 F.2d 399, 402 (9th Cir. 1982); *Bethard*, 12 BRBS at 693; *Harrod v. Newport News Shipbuilding and Dry Dock Co.*, 12 BRBS 10, 15-16 (1980); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). An ALJ's findings as to wage-earning capacity will be affirmed if they are supported by substantial evidence. *Long*, 767 F.2d at 1582.

It is apparent Claimant retains some capacity to earn wages, and the ALJ found he did "in fact work[] for years after the 2015 injury." D&O at 58. As discussed *supra*, Claimant returned to his pre-injury welding job on April 11, 2016, and subsequently performed modified welding work for various employers from June 2016 until at least the end of 2020. The ALJ found Claimant's wage-earning capacity is $533.93 based on the average of the lower range of the suitable labor market survey job salaries. In addition to Dr. Holland's recommendation that Claimant consider a different line of work, the ALJ cited the effects that Claimant's disability may have on his earning-capacity in the future. In other words, although he found insufficient evidence of an aggravation due to Claimant's post-2015 work, the ALJ credited evidence that Claimant's progressive condition "has gotten worse" over time, his pain medication allowing him to continue welding will eventually be ineffective, and he will likely need shoulder surgery in the future. *Id.* The ALJ did not, however, consider whether Claimant's post-injury earnings from modified welding work fairly and reasonably represented his post-injury wage-earning capacity nor did he consider those earnings in his wage-earning capacity calculation.

Based on a review of the record, the ALJ's wage-earning capacity determination cannot be affirmed. Regardless of his calculation of what Claimant might earn on the open market and in the future, the ALJ made no explicit findings to resolve the first inquiry required under Section 8(h): whether Claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity.[26] 33 U.S.C. §908(h); *Allan*, 666 F.2d at 402; *Devillier*, 10 BRBS at 660 (citing *Lumber Mutual Casualty Insurance Co. v. O'Keefe*, 217 F.2d 720, 273 (2d Cir. 1954) (a finding that actual earnings do not fairly and reasonably represent wage-earning capacity is a prerequisite to an award based on Section 8(h) factors)).

Though the effects of Claimant's disability on his future wage-earning capacity is one of many relevant factors, it is not the only factor evidenced in the record. The record in this case contains evidence of actual and ascertainable post-injury earnings that the ALJ did not consider in his discussion of Claimant's wage-earning capacity.[27] Indeed, as

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[26] Nor can we affirm the ALJ's application of the 2021 labor market survey findings retroactively. If a claimant establishes a prima facie case of total disability, partial disability may not commence until the date suitable alternate employment is shown. *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). While the employer may submit evidence to show jobs were available at an earlier date, it must provide substantial evidence supporting its position. *Id.* at 1260. In this regard, we note Ms. Kabacy's labor market survey report, TX 27, states the jobs she found represent "current" openings but does not say the jobs were available in 2016. *See Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990) (ALJ's determination that suitable alternate employment was "undoubtedly" available at earlier date was not supported by substantial evidence).

[27] Evidence of Claimant's post-injury wages reveals he earned $1,050 doing a three-day welding job for Pacific Pipe & Pump in 2016. JX 3; JX 4; JX 7; TR at 68-69, 118. While working for Bowman, Claimant earned $41,505.50 in 2016, $29,775.50 in 2017, $23,371 in 2018, $19,448 in 2019, and $8,021.52 in the first quarter of 2020. JX 3; JX 4; JX 6; *but see* TR at 122-123 (testifying he last worked for Bowman in September 2020). While working for Ludybros in November and December 2020, he earned $16,850 in self-employment wages. JX 9; TR at 88-91, 121-122. Moreover, he earned $5,041.80 in gross wages (138.45 hours) during his post-injury work for Teknotherm. JX 5 at 282.

While working for Bowman from June 2016 through May 2017 (the first year he returned to welding work after his injury), Claimant earned $69,589.50 in gross wages. JX 3 at 263-264; JX 4 at 267; JX 6 at 295-296; *see also* D&O at 48 (ALJ finding 2017 layoff period was significant in relation to his usual work patterns). In sum, Claimant earned a total of $75,681.30 working for Teknotherm, Pacific Pipe and Pump, and Bowman during

discussed, "where claimant is employed and his employment is regular, continuous and necessary to employer, that job is sufficient to establish his wage-earning capacity and it is not necessary for the administrative law judge to consider the open market." *Mangaliman*, 30 BRBS at 43 (citing *Cook*, 21 BRBS at 6).

The record also contains evidence regarding the physical requirements of Claimant's post-injury welding work, instances where he worked with and without pain, his medical restrictions, how subsequent employers generally accommodated his restrictions, and the necessity of Claimant's modified welding work to his employers. *See, e.g.*, TR at 65-76, 83-97, 102-105, 124-125, 137-139; TX 9 at 215-216; TX 28 at 537-538, 540, 546-549; LX 12 at 296-297; *see also* BX 4. Finally, there is evidence of the circumstances (both related and unrelated to his work injury and resulting disability) surrounding certain layoff periods and periods where Claimant earned minimal or no wages.[28]

The factors and considerations relevant to both the suitable alternate employment analysis and wage-earning capacity analysis overlap. *See Devillier*, 10 BRBS at 655-660. As it relates to actual post-injury employment, the basic considerations under the suitable alternate employment analysis are whether the employment is suitable and "realistically and regularly available." *Edwards*, 999 F.2d at 1375; *Armfield*, 25 BRBS at 307. Under the wage-earning capacity analysis, the question is whether actual wages earned in post-

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the first year he returned to welding after his injury. JX 3 at 263-264; JX 4 at 267-268; JX 5 at 282; JX 6 at 295-296; JX 7 at 300.

[28] In this regard, the ALJ's findings are unclear. Specifically, he wrote:

> Claimant continued to work for Bowman, when there was work, until 2020, and worked for Ludybros for one month in 2020. Claimant believes that he could, and wants to, continue to perform the accommodated work he performed for Bowman and Ludybros and attributes his lack of work since then to the limited number of players in the region's marine welding industry, a high percentage of whom are now involved in this claim, to possible discrimination against him for having brought this claim, and to the economic implications of the COVID pandemic. Regarding the advisability of continuing with welding work, although Dr. Holland recommended that Claimant seek a different line of work, he ultimately indicated that it was up to Claimant whether he wanted to continue.

D&O at 55 (citing TR at 140-41).

injury employment "fairly and reasonably represent the claimant's wage-earning capacity." 33 U.S.C. §908(h).

On one hand, post-injury earnings from *suitable* work may represent a claimant's wage-earning capacity, provided the work is "regular, continuous, and necessary." *Mangaliman*, 30 BRBS at 43 (citing *Cook*, 21 BRBS at 6).[29] On the other hand, post-injury wages may not fairly and reasonably represent the claimant's earning capacity when the claimant is working with pain and limitations, the continuing employment is due solely to the beneficence of an employer, or the employment is short-lived. *Gross*, 935 F.2d at 1551; *Edwards*, 999 F.2d at 1375; *O'Keefe*, 217 F.2d. at 723.

Because of these overlapping factors, our review of the ALJ's wage-earning capacity determination is constrained by his lack of requisite findings with respect to the suitability and availability of Claimant's post-injury modified welding work. We therefore vacate the ALJ's calculation of Claimant's post-injury wage-earning capacity. On remand, in addition to determining whether Claimant's post-injury modified welding work constitutes suitable alternate employment, the ALJ must also conduct a Section 8(h) analysis to determine whether Claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity, discussing the relevant factors and evidence he considers.

While the labor market jobs may be suitable and may represent Claimant's wage-earning capacity as of the date those jobs were available in 2021, on remand the ALJ must reconsider Claimant's post-injury wage-earning capacity from April 11, 2016, when he began modified welding work, giving due regard to Claimant's actual wages and any other factors or evidence relevant to the Section 8(h) analysis.[30]

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[29] In *Mangaliman*, the Board held the ALJ erred by failing to determine whether the claimant's post-injury job "was sufficient to establish a true earning capacity or factor it into his wage-earning capacity calculation, despite his statement that the job would meet employer's burden of demonstrating suitable alternate employment." *Mangaliman*, 30 BRBS at 43.

[30] Under certain circumstances, it is reasonable to conclude a claimant's post-injury wage-earning capacity may change, resulting in multiple post-injury wage-earning capacity findings and different amounts of compensation awarded at different times. *See generally Metro. Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121 (1997) (*de minimis* award permitted where there is evidence a claimant's condition will deteriorate); *Metro. Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291 (1995) (modification due to change in wage-earning capacity); *Raymond v. Blackwater Sec. Consulting*, *L.L.C.*, 45 BRBS 5

Average Weekly Wage

On cross-appeal, Claimant contends the ALJ's average weekly wage determination is not rational or supported by substantial evidence. Claimant asserts the ALJ did not consider his entire earning history while working for Teknotherm, explain why he chose the 12-month period with the lowest earnings, or address other pertinent evidence such as Claimant's time off for earlier injuries and his earnings in May 2015. Cl. Cross-Appeal and Resp. Br. at 16-20.[31] In response, Teknotherm contends the ALJ's approximation of Claimant's average weekly wage based on earnings in the year preceding the work injury is both reasonable and supported by substantial evidence because Claimant's previous earnings were sporadic and there was no evidence establishing Claimant missed work because of his earlier injuries. Teknotherm Resp. at 4-7.

Section 10 of the Act sets forth three methods for determining a claimant's average annual earnings, 33 U.S.C. §910(a)-(c), from which average weekly wage is computed pursuant to Section 10(d), 33 U.S.C. §910(d)(1) ("The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."). Where subsections (a) and (b) cannot be "reasonably and fairly" applied, such as when a claimant's employment is intermittent or irregular, *e.g.*, *Palacio v. Campbell Indus.*, 633 F.2d 840, 842 (9th Cir. 1980), or the evidence is insufficient to establish the number of

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(2011), *aff'd sub nom. Blackwater Sec. Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013) (implicit approval of award of different amounts of partial disability benefits for different periods of time prior to vacating the ALJ's *de minimis* award which was based on an event yet to happen and improperly limited the duration of the claimant's entitlement to permanent disability benefits); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990) (layoff from suitable alternate employment and inability to find work due to injury resulted in changing from partial to total disability benefits).

[31] In his reply brief, Claimant alleges the ALJ did not comply with the Administrative Procedure Act because he failed to discuss Claimant's wages before May 1, 2014; from April 30, 2015, to May 7, 2015; and from May 7, 2015 to May 27, 2015. Claimant contends his May 7, 2015 injury was continuously aggravated through May 27, 2015, and first became disabling on May 28, 2015. Therefore, under the aggravation doctrine, Claimant argues the ALJ should have considered his wages from May 1, 2015, through May 27, 2015, and either calculated his average weekly wage as of his last day of work or "stated with particularity why he did not use this date." Cl. Reply at 2, 9. Claimant further contends the ALJ did not discuss the "time of injury," and his consideration of wages up to April 30, 2015, *de facto* makes April 30, 2015, the "time of injury." *Id.* at 10.

days a claimant worked, *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999), the ALJ may apply subsection (c), 33 U.S.C. §910(c), to arrive at a sum that "reasonably represent[s]" the claimant's earnings at the time of the injury. 33 U.S.C. §910.

In the Ninth Circuit, there is a presumption that Section 10(a) or (b) applies rather than Section 10(c). *Stevedoring Services of America v. Price*, 366 F.3d 1045, 1050-1051 (9th Cir. 2004). In the instant case, however, the ALJ rationally found Claimant's work patterns were "irregular" and there was no evidence establishing the number of days he worked during the year preceding his injury. D&O at 60-61 n.12. Consequently, the parties agreed and the ALJ found Section 10(c) applies. *Id.*; *see Duhagon*, 169 F.3d at 618.

When Section 10(c) applies, as here, the ALJ has broad discretion in determining average annual earnings. His determination will be upheld if it "reasonably represent[s]" the claimant's earnings, is based on substantial evidence, and is in accordance with law. *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290, 292 (1977), *rev'd on other grounds*, 600 F.2d 1288 (9th Cir. 1979); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 286-287 (1980). When applying Section 10(c), the ALJ may, but is not required to, consider the claimant's earnings within the year immediately preceding the injury. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1030-1031 (5th Cir. 1998) (such wages may be excluded if they do not reasonably represent the claimant's earnings at the time of injury). The ALJ may also consider a claimant's earning history over a period of years, but in doing so, he must consider all wages during that period. *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981).

Claimant worked sporadically but exclusively for Teknotherm in the year preceding his May 7, 2015 work injury, earning $34 per hour plus overtime. JX 3 at 264-265; JX 4 at 268; JX 5 at 274-278; *see also* JX 6 at 295; TR at 54-59. Before the ALJ, Claimant asserted he earned $55,132.89 while working for Teknotherm from July 1, 2014, through May 27, 2015, resulting in an average weekly wage of $1,060.25.[32] He argued this period of earnings best represents his average annual earnings at the time of his injury because he underwent right shoulder surgery in July 2012 and received medical treatment for his left

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[32] Claimant divided his actual wages from July 1, 2014, through May 27, 2015, ($49,963) by 0.9062 (90.062% of the year or 47 weeks and one day) to arrive at average annual earnings of $55,132.89. He then divided this sum by 52 weeks to arrive at an average weekly wage of $1,060.25. Cl. Post-Hearing Br. at 30 n.8; D&O at 60 n.11; *but see* Cl. Pre-Hearing Stmt. at 3 (dividing actual wages by 47.2857 weeks (47 weeks and two days) then dividing by 52 weeks to arrive at an average weekly wage of $1,056.62); D&O at 60 n.11.

shoulder and left knee conditions in 2014, "both of which affected his earning capacity for a time." Cl. Post-Hearing Br. at 30-31.[33]

Teknotherm argued Claimant's average weekly wage should be $809.04 based on the $42,185.50 in wages he earned while working for Teknotherm from May 1, 2014, to April 30, 2015.[34] Teknotherm Post-Hearing Br. at 27. It argued Claimant's wages during this period best represented his average annual earnings at the time of his injury because they were "generally consistent" with his earnings in previous years. It also asserted the absence of wages in June 2014 should be included in Claimant's average weekly wage calculation because his employment was seasonal, and this and other periods without wages reflected his frequent lay-offs and a loss in earning capacity due to his preexisting injuries. *Id.* at 27-28.

The ALJ accepted Employer's method for calculating Claimant's average weekly wage, finding May 1, 2014, through April 30, 2015, was an "appropriate" and "representative" period of Claimant's pre-injury earnings. He rejected Claimant's proposed period of earnings, instead finding the May and June 2014 wages excluded from Claimant's calculation accurately represented his earnings given his "normal lay off[s]" and the "irregular" nature of his work. Consequently, the ALJ determined Claimant's pre-injury annual earnings were $42,185.50, and his pre-injury average weekly wage was $809.04. D&O at 59-61.[35]

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[33] Claimant's proposed calculation includes post-injury earnings from May 2015 ($10,897) but excludes his pre-injury earnings from May 2014 ($3,986.50) and June 2014 ($0). JX 5 at 274.

[34] Teknotherm indicated it divided Claimant's gross wages, $42,185.50, by 365 days, then *divided* by seven days. Teknotherm Trial Br. at 27 n.7. However, it appears Teknotherm *multiplied* the daily rate sum ($115.58) by seven days, to arrive at a total average weekly wage of $809.04. We note the same mathematical result is reached by dividing Claimant's gross wages by the period of weeks between May 1, 2014, and April 30, 2015, (52.1429), or 52 weeks and one day.

[35] The ALJ specifically wrote:

> Claimant continued to work in Q2 2015 after his injury through May 27, 2015, so Claimant's calculation includes earnings after Claimant's May 7, 2015 work injury. I could take a blend of the two approaches – use Claimant's earnings between July 2014 and April 30, 2015 and divide by the percentage of the year. However, that would only be warranted if May and June 2014 were unrepresentative of Claimant's earnings. But given the

We reject Claimant's contention that the ALJ did not adequately consider his previous earnings or the effects his previous injuries had on his earnings. The ALJ considered both Claimant's and Teknotherm's proposed periods of earnings from which to calculate Claimant's average weekly wage and rationally found the difference between the parties' calculations "stems from Claimant's irregular work patterns," as Claimant sought to exclude June 2014 (when he earned no wages) and include May 2015 (when Claimant earned significant post-injury wages), whereas Employer sought to include June 2014 and exclude May 2015. D&O at 60. Presented with the two proposed periods from which to calculate Claimant's average annual earnings, the ALJ reasonably calculated Claimant's average annual earnings based on his earnings in "approximately the year preceding the May 7, 2015 work injury." D&O at 60. In doing so, the ALJ also considered Claimant's prior injuries but found the timing of the injuries and the irregular nature of Claimant's work, "regardless of injury," did not warrant excluding his earnings in May and June 2014. D&O at 61.

Because the ALJ's finding that Claimant's May and June 2014 earnings were representative of his irregular work pattern and typical layoffs is supported by substantial evidence in the record,[36] we affirm the ALJ's inclusion of those earnings in his average weekly wage calculation. *See Abdelmeged*, 913 F.3d at 923 ("Although other evidence in the record might adequately support a different conclusion, that evidence does not negate or nullify the substantial evidence supporting the ALJ's conclusion.").[37]

> timing of these injuries and the care for these injuries and given the fact that Claimant's work was irregular – regardless of injury, it was "kind of normal" for him to be "laid off when the boats leave," HT at 56 – I find that the period from May 2014 through April 2015 is an appropriate, and representative, period to use to calculate Claimant's average weekly wage.

D&O at 60-61.

[36] Claimant testified during his depositions and at the hearing that he was frequently laid off when the fishing boats left, usually twice per year, sometime in January or February and sometime in June or July. TR at 56-60; TX 9 at 212-213, 216-217; TX 28 at 547. Additionally, Claimant's pre- and post-injury wage records, showing months where he earned no wages, reflect a similar layoff pattern. JX 5 at 272-274, 277; JX 6 at 291-297.

[37] We reject Claimant's argument that the ALJ failed to consider that he was unable to perform offseason work available to him in 2014, Cl. Cross-Appeal and Resp. Br. at 19, as he presented no evidence to support the assertion that he missed work in the year preceding his May 2015 work injury due to earlier injuries or that he missed offseason

Alternatively, Claimant argues the ALJ should have used his May 2015 earnings in calculating his average weekly wage and did not sufficiently explain why those earnings were not included. The record establishes Claimant was injured on May 7, 2015, continued working after the injury to complete the job, was laid off on May 27, 2015, and earned a total of $10,897.00 in May 2015. TR at 45-47, 116; TX 9 at 204, 213, TX 28 at 537; JX 5 at 274-278. While post-injury events and earnings may be relevant in determining average annual earnings where previous earnings "do not realistically reflect … true earning potential," *Palacios v. Campbell Indus.*, 633 F.2d 840, 843 (9th Cir. 1980), substantial evidence supports the ALJ's finding that Claimant's actual pre-injury earnings from May 2014 through April 2015 do realistically reflect his earning potential at the time of his injury. *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1164-65 (9th Cir. 2010) (earnings after date of injury "may, not must" be considered). And, as the ALJ found, none of the wage evidence in the record demonstrates the days Claimant worked. D&O at 60 n.12; *see* JXs 3-7. Because the ALJ's exclusion of Claimant's May 2015 earnings in this context is both reasonable and a proper exercise of his broad discretion under Section 10(c) of the Act, 33 U.S.C. §910(c), we affirm his average weekly wage determination.[38]

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work opportunities because of his preexisting injuries. To the contrary, Claimant testified he had been working with pain and sought pain management treatment so he could continue working. TR at 51-52, 57. Dr. Naibert's treatment notes state Claimant had chronic left shoulder pain since September 2012, for which he was considering surgery in April 2014, and chronic left knee pain since January 2013, for which he was considering seeing a specialist in April 2014. Dr. Naibert did not assign work restrictions for Claimant's left shoulder and knee pain or increase his medication. In fact, Dr. Naibert confirmed Claimant's then-current medication regimen "allow[ed] him to be more functional and active." TX 21 at 397. In addition, the testimony Claimant cites indicates his supervisors always offered him offseason work when it was available because he performed his job well. TR at 57. This, along with his testimony that it is "kind of normal" for him to be "laid off when the boats leave," *id.* at 56-57, supports the ALJ's finding that Claimant's lack of wages in June 2014 represented a typical layoff during the offseason "regardless of injury." D&O at 61.

[38] We decline to consider Claimant's remaining contentions, *supra* note 31, as they were first raised in his Reply to Teknotherm's and Bowman's Briefs and were unresponsive to their responses to his cross-appeal arguments. 20 C.F.R. §802.213; *see also Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Board will not consider newly raised theory of a case that was not initially raised before the ALJ).

Accordingly, we vacate in part the ALJ's decision and remand the case for further consideration of the suitable alternate employment and post-injury wage-earning capacity issues in accordance with this decision. In all other respects, we affirm the ALJ's Decision and Order Awarding Benefits and Section 8(f) Relief.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge