BRB No. 02-0422

ROCCO MISSUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL	)	DATE ISSUED: February 25, 2003
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (99-LHC-0742) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. On April 23, 1998, claimant suffered a slip and fall during the course of performing his TIR duties for employer. Claimant alleged that he sustained injuries to his head, neck, back, right shoulder and right knee. Employer voluntarily paid compensation for temporary total disability from April 24 to June 7, 1998. Claimant unsuccessfully

attempted to return to work as a maintenance man. Thereafter, claimant filed a claim for continuing temporary total disability benefits.

In his initial Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered a work-related injury on April 23, 1998. The administrative law judge found that claimant could not return to his usual work as a maintenance man. The administrative law judge credited employer's offer of continuing employment as a TIR man, an offer which was extended at the formal hearing by Mr. Bolcar, employer's Safety Director, to find that employer established the availability of suitable alternate employment. The administrative law judge then concluded that claimant is entitled to compensation for temporary total disability from April 23, 1998, to the date of the hearing on February 8, 2000. In his Order denying claimant's motion for reconsideration, the administrative law judge found that claimant did not establish that he would have a loss in wage-earning capacity arising from employer's showing of suitable alternate employment as a TIR man. The administrative law judge refused to reopen the record for claimant to submit evidence on this issue.

The Board rejected claimant's contention that the administrative law judge erred in finding that employer established the availability of suitable alternate employment.[1] *Missud v. Howland Hook Container Corp.*, BRB No. 01-0183 (Sept. 25, 2001)(unpub.). The Board held that the administrative law judge did not err in relying on the specific restrictions imposed by Dr. Krishna instead of on his opinion that claimant is totally disabled. The Board also affirmed the administrative law judge's reliance on the opinions of Drs. Nehmer, Merton and Head that claimant was exaggerating his symptoms and could work as a TIR man. *Id.* at 3-4. The Board, however, vacated the administrative law judge's denial of all benefits, and remanded the case to the administrative law judge for further consideration. Specifically, the Board held that the administrative law judge erred in not determining the wages paid by the TIR job, because employer, as part of its burden of establishing the availability of suitable alternate employment, also must establish the general number of hours claimant would be expected to work and a general rate of pay for the position. In this regard, the Board stated that since claimant was not working, his actual earnings were zero, and employer thus bore the burden of establishing an alternative, higher earning capacity to support its assertion that claimant does not have a loss in wage-earning capacity. *Missud*, slip op. at 5. *See* 33 U.S.C. §908(h). The Board, therefore, instructed the administrative law judge on remand to determine the wages which the TIR job would have paid at the time of claimant's injury, and

[1]The Board rejected employer's assertion, made in its response brief, that claimant was able to perform his usual employment, since he could still perform the TIR portion of his usual duties. The Board stated that in view of the administrative law judge's unchallenged finding that claimant worked half the time as a maintenance man and half the time as a TIR man, the administrative law judge properly determined that claimant's inability to work as a maintenance man renders claimant unable to return to his usual employment.

to compare those wages to claimant's pre-injury average weekly wage to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. *Id.*

In his decision on remand, the administrative law judge found that claimant does not have a loss in wage-earning capacity. The administrative law judge found that the evidence of record establishes that claimant was paid the same rate irrespective of whether he worked as a TIR man or as a maintenance man. Furthermore, based on documentary evidence of claimant's earnings, the administrative law judge found that for a 40-hour work week claimant earned $920, or $23 per hour. Thus, the administrative law judge concluded that a full-time TIR job would pay $920 per week, which is the same wages he would have earned had he not been injured.

On appeal, claimant argues that the administrative law judge erred, as a matter of law, in finding that employer made a valid offer of employment to claimant within his restrictions, as employer failed to set out the precise nature and terms of the employment. Alternatively, claimant contends that the TIR job is not suitable as Dr. Krishna opined that claimant could not perform this job. Employer responds, urging affirmance.

The issue of whether the administrative law judge erred in finding that employer offered claimant suitable alternate employment was fully considered by the Board in its prior decision, as was the issue of the administrative law judge's reliance on the restrictions imposed by Dr. Krishna rather than on Dr. Krishna's opinion that claimant remained totally disabled. The Board's holdings on these issues constitute the law of the case, and claimant has not offered any basis for the Board to depart from this doctrine. Thus, we decline to address these issues again. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992)*; Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

As to claimant's contention that employer did not establish suitable alternate employment because the wages of the job were not stated, the Board remanded the case for the administrative law judge to make this finding. On remand, the administrative law judge found that the wages claimant could earn working 40 hours per week as a TIR man are the same wages claimant would have earned had he not been injured – $920 per week in base pay. Claimant does not contest the administrative law judge's finding that he could work a 40-hour week. As to the wages, claimant states summarily that employer did not establish he could earn $920 per week without the Guaranteed Annual Income (GAI) payment.[2] Mr.

[3]In a footnote, the administrative law judge stated that claimant's base rate of pay as a maintenance/TIR man was $920 per week, and that claimant would earn this if he were employed only as a TIR man. The administrative law judge noted, however, that he found claimant's average weekly wage to be $989.08 due to "augmenting" GAI, vacation/holiday and container payments. Decision and Order on Remand at 1 n.2. On remand, the

Bolcar testified that GAI payments are no longer made at the port. Tr. at 95, 112-113. Because claimant's alleged loss of GAI is not due to his work-related injury, *see generally Siminski v. Ceres Marine Terminal*, 35 BRBS 136 (2001), and claimant has not raised any reversible error made by the administrative law judge in finding that he could earn $920 per week without the GAI payment, we affirm the administrative law judge's finding that claimant has no loss in wage-earning capacity. *See generally* 33 U.S.C. §908(c)(21), (e), (h); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002).

Accordingly, we affirm the administrative law judge's Decision and Order on Remand.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

administrative law judge did not address employer's request to supplement the record with evidence to establish the amount of container royalty, holiday and vacation pay to which a TIR worker at employer's facility would be entitled. Employer's Position on Remand at 5. This omission has not been appealed.