BRB No. 03-0194

CARLOS LOPEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY DECKING COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INSURANCE COMPANY	)	DATE ISSUED: Nov. 17, 2003
	)	
and	)	
	)	
FRANK GATES ACCLAIM, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), Solana Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-3348) of Administrative Law Judge Richard K. Malamphy 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).

Claimant, a truck driver/crane operator, injured his back at work on March 1, 1998. The parties stipulated that claimant was temporarily totally disabled from March 2, 1998, to August 15, 1999, and reached maximum medical improvement on August 16, 1999. Claimant sought permanent total disability benefits from August 16 through November 14, 1999. Claimant underwent vocational rehabilitation in a customer service program from November 15, 1999, through May 1, 2000, and was paid permanent total disability benefits during this time. Claimant sought additional disability benefits commencing May 2, 2000. Claimant returned to work in July 2000 as a car salesman; he injured his back in this capacity on August 4, 2001.

Relying on jobs identified in a 1999 labor market survey, the administrative law judge found that employer established the availability of suitable alternate employment as a courier, small products assembler, and warehouse worker. For the periods prior to and after claimant's vocational training program, based on the average wages of these jobs, the administrative law judge found that claimant's post-injury wage-earning capacity is $313.20. The administrative law judge found that the positions identified as a painter, pest control technician, and customer service representative are not suitable for claimant. The administrative law judge further concluded that claimant is not judicially estopped from asserting a post-injury wage-earning capacity of less than $500 per week based on pleadings in his state workers' compensation claim, as the doctrine of judicial estoppel is not applicable in the instant case. Consequently, the administrative law judge awarded claimant permanent partial disability benefits from August 16 through November 14, 1999, and from May 2, 2000, and continuing.

Employer appeals, contending that the administrative law judge erred in rejecting some of the jobs it identified in a labor market survey and in determining claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer first argues that the administrative law judge erred in finding that the positions as a painter, pest control technician, and customer service representative identified in employer's labor market survey are not suitable for claimant. Employer contends these positions are suitable, and thus, that claimant has a higher wage-earning capacity than that found by the administrative law judge. Where, as here, claimant is unable to return to his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant can perform considering his age, education, background, work experience, and physical and mental restrictions, are realistically and regularly available in claimant's

community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). A job that claimant is not educationally qualified to perform or that is too physically demanding does not constitute suitable alternate employment. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT)(5th Cir. 1998); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

The administrative law judge found that the jobs of painter and pest control technician are not suitable for claimant because they exceed the restrictions against excessive bending, stooping, lifting, pulling, and climbing imposed by claimant's treating physician, Dr. Maguire.[1] These positions would require reaching and bending in awkward positions, as well as climbing. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment as a painter and pest control technician. *See Cooper*, 33 BRBS 46; *Wilson v. Crowley Maritime*, 30 BRBS 199, 204 (1996); Decision and Order at 9; Emp. Ex. 29 at 196-205; Cl. Ex. 21 at 154, 159; Emp. Exs. 25 at 116; 27 at 135.

The administrative law judge also found that the positions as customer service representative are not suitable because claimant lacked the work experience to hold such an intensely customer-oriented job given his prior experience as a laborer, and, moreover, because claimant was awaiting training in a customer service program. With regard to the period prior to claimant's completion of his vocational rehabilitation program, we affirm the administrative law judge's finding that the customer service representative positions were not suitable as it is rational and supported by substantial evidence. *See Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); Decision and Order at 9; Emp. Ex. 29 at 218-221. We cannot, however, affirm the administrative law judge's rejection of these positions for the period after May 1, 2000, when claimant completed his training, as the administrative law judge's reasoning does not account for the skills claimant obtained through the retraining program. Thus, we vacate the administrative law judge's finding that, after May 1, 2000, the customer service representative positions were not suitable, and we remand this case to the administrative law judge for further consideration of the suitability of these positions. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); Decision and Order at 9; Emp. Exs. 29 at 218-221; 31 at 233-238, 245-247, 253, 259.

[1] On August 16, 1999, Dr. Maguire precluded claimant from very heavy work and stated that claimant had lost approximately ¼ of his capacity to bend, stoop, lift, pull, and climb. Cl. Ex. 21 at 154; Emp. Ex. 25 at 116. On December 26, 1999, Dr. Maguire further restricted claimant from heavy lifting or repeated bending and stooping, and indicated that claimant had lost approximately ½ of his capacity to bend, stoop, lift, pull, and climb. Cl. Ex. 21 at 159; Emp. Ex. 27 at 135.

Employer next argues that the administrative law judge erred in finding that claimant's post-injury wage-earning capacity is $313.20 per week based on the average wages of the jobs he found suitable. Employer contends that the administrative law judge erred in not considering claimant's actual post-injury earnings as a car salesman in the determination of claimant's post-injury wage-earning capacity and in not taking into account the assertion by Ms. Gill, employer's vocational expert, that claimant's post-injury wage-earning capacity is at least $400 per week.

An award for partial disability benefits in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the post-injury wage-earning capacity of a partially disabled claimant shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. 33 U.S.C. §908(h). If they do not, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT)(9th Cir. 1985); *Devillier*, 10 BRBS 649.

The administrative law judge found that claimant's post-injury wage-earning capacity is $313.20 per week based on the average of the hourly wages of the three positions he found suitable. An average of the range of salaries of the jobs identified as suitable alternate employment is a reasonable method for determining claimant's post-injury wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The administrative law judge, however, did not first consider whether claimant's actual post-injury earnings as a car salesman fairly and reasonably represent claimant's post-injury wage-earning capacity or discuss these earning pursuant to Section 8(h).[2] *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 52 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v.*

[2] Post-injury, claimant worked for Colonial (or San Diego) Dodge from July until December 2000, and for Ron Baker Chevrolet from January to February 2001. Cl. Exs. 5 at 9; 6 at 19; 8 at 28-31, 37-39; Emp. Exs. 10 at 23; 30 at 228. Claimant did not work from February 16 to March 14, 2001. Cl. Ex. 5 at 11. Claimant worked at Euro Sports Car from March 18 to April 14, 2001. Cl. Exs. 5 at 11; 6 at 19; 8 at 32; Emp. Ex. 15 at 54. Claimant worked at People's Chevrolet from April 20, 2001 until his injury in August 2001. Cl. Exs. 5 at 11, 12; 6 at 19; 8 at 33-36; Emp. Exs. 14 at 42-45; 15 at 52, 54.

Director, OWCP, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). Consequently, we vacate the administrative law judge's determination that claimant's post-injury wage-earning capacity is $313.20 per week, and we remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must determine if claimant's actual post-injury earnings as a car salesman represent his wage-earning capacity. If they do not, and the administrative law judge again uses the wages of the suitable positions identified in employer's labor market survey to determine claimant's wage-earning capacity he should include the wages paid by any customer service representative positions the administrative law judge finds suitable after May 1, 2000. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). We reject employer's contention that the administrative law judge was required to accept the opinion of its vocational expert, Ms. Gill, that claimant's post-injury wage-earning capacity was at least $400 per week. Ms. Gill's opinion was based on all the positions she identified as suitable for claimant, and we have affirmed the administrative law judge's finding that the positions as painter, pest control technician, and customer service representative prior to May 2, 2000, are not suitable. *See generally Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987).

Employer lastly argues that claimant is judicially estopped from asserting a post-injury wage-earning capacity of anything but $440 per week as he asserted in his state workers' compensation claim that he earned $500 per week in 2001.[3] Application of the doctrine of judicial estoppel requires: 1) an unequivocal assertion of law or fact by a party in one judicial proceeding; 2) the assertion by that party of an intentionally inconsistent position of law or fact in a subsequent judicial proceeding; 3) in order to mislead the court and obtain unfair advantages as against another party. *LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). Judicial estoppel is not implicated unless the first forum accepts the legal or factual determination alleged to be at odds with the position advanced in the current forum. *See Masayesva v. Hale*, 118 F.3d 1371 (9th Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The doctrine applies to administrative workers' compensation proceedings. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996).

We reject employer's argument and affirm the administrative law judge's conclusion that the doctrine of judicial estoppel does not apply in the instant case as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge properly concluded that there is no evidence that claimant succeeded in persuading the California state court to accept his position that his average weekly wage was $500 per week in 2001. *See Masayesva*, 118 F.3d 1371; *Fox*, 31 BRBS 118; Decision and Order at 11-12; Tr. at 37-38. Claimant initially received $426 per

[3] Claimant stated on his California state workers' compensation claim for his 2001 work injury that his actual earnings at the time of injury were $500 per week. Emp. Ex. 3 at 4; *see also* Tr. at 36-37. Ms. Gill, employer's vocational expert, testified that these wages equated to $440 per week at 1998 wage levels. Tr. at 84.

week in his state claim, which indicates that his average weekly wage was determined to be higher than $500 per week, but then ultimately received $585.46 every two weeks, or $292.73 per week, which indicates that it was not determined in his state claim that his average weekly wage was $500 per week.[4] Moreover, the administrative law judge properly concluded that there is no evidence to establish that claimant attempted to mislead the administrative law judge. *See Helfand v. Gerson*, 105 F.3d 530 (9th Cir. 1997); Decision and Order at 11-12; Tr. at 37-38. Thus, claimant is not bound by the average weekly wage he asserted in his state claim for the injury he sustained with the car dealership.

Accordingly, the administrative law judge's findings that that the painter and pest control technician positions are not suitable for claimant are affirmed. The administrative law judge's finding that customer service representative positions are not suitable is affirmed for the period prior to claimant's completion of vocational rehabilitation. With regard to the period after claimant's completion of vocational rehabilitation, we remand the case to the administrative law judge for reconsideration of the suitability of such positions. The administrative law judge's finding that claimant's post-injury wage-earning capacity is $313.20 per week is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4] California state workers' compensation law provides for a compensation rate for temporary total disability at two-thirds of the average weekly wage, the same compensation rate as in longshore cases. Cal. Lab. Code §4653 (West 2003).