BRB Nos. 06-0174
and 06-0174A

STEVEN M. VALLEE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 10/23/2006
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration and Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Melissa Bowman (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration and Granting in Part and Denying in Part Claimant's Motion for Reconsideration (2004-LHC-01735, 2005-LHC-00001-00004) of Administrative Law Judge Daniel F. Sutton 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a cleaner at employer's shipyard for 16 years. Claimant sustained a series of back and neck injuries beginning in 1989. The most recent injuries, on which this claim is based, were a neck injury on June 9, 2002, and a recurrence of his low back pain in February 2003. Following these injuries, claimant was released for work with restrictions. On March 1, 2004, claimant was examined for his low back pain by Dr. D'Angelo, who stated that claimant could lift up to 40 pounds, but he did not assign restrictions on claimant's movements. Due to continued low back pain, claimant subsequently was examined by Dr. Guernelli, who assigned restrictions on claimant's bending, stooping and twisting at the waist, and against lifting over 20 pounds. Cl. Ex. 13. Employer provided claimant with light-duty work which fit the restrictions assigned by Dr. D'Angelo. Claimant left work in April 2004, testifying he did so in part due to his inability to work within the restrictions accepted by employer. Claimant sought benefits under the Act for his neck and back injuries.

In his decision, the administrative law judge found that claimant established that he is unable to return to his usual employment as a shipyard laborer/cleaner at least in part because of the limitations resulting from his work-related back and neck injuries. The administrative law judge accepted the more restrictive limitations placed by Dr. Guernelli and found that the limitations placed by Dr. Pier in 2003 for claimant's neck condition remained in place. Thus, the administrative law judge found that as employer rejected Dr. Guernelli's restrictions and overlooked the restrictions imposed for the cervical injury in placing claimant in light-duty, the work it offered claimant at its facility was not suitable. Therefore, the administrative law judge found that claimant is totally disabled. The administrative law judge also found that although there are no physicians who state that claimant's conditions have reached maximum medical improvement, his conditions have continued for a significant period of time and appear to be lasting or indefinite in duration. As claimant has not had any medical care since April 2004, the administrative law judge fixed the date of permanency as of April 16, 2004, the date claimant left employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from February 23, 2003 through April 28, 2003, and ongoing permanent total disability benefits commencing April 16, 2004. The

administrative law judge based his determination of claimant's average weekly wage on claimant's wages at the time of the neck injury in June 2002. The administrative law judge found that claimant's average weekly wage is $416.14, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). Lastly, the administrative law judge denied employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), because he found that employer did not establish that claimant's pre-existing psychological condition contributed to his overall disability, or that claimant's prior back injuries constituted pre-existing permanent disabilities.[1]

Employer contends on appeal that the administrative law judge erred in finding that the light-duty work it offered claimant at its facility was not suitable, averring that claimant resigned because of his non-work-related psychological problems and not because he could not perform the assigned duties of the job. Employer also contends that the administrative law judge erred in finding that claimant continues to have restrictions due to his cervical injury. In addition, employer contends that the administrative law judge erred in finding that claimant's condition is permanent. Claimant responds, urging affirmance of the administrative law judge's decision on these issues. Employer also appeals the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds on this issue, urging affirmance of the administrative law judge's denial of Section 8(f) relief. On cross-appeal, claimant contends that the administrative law judge erred in addressing average weekly wage as it was not an issue raised by the parties. Alternatively, claimant contends the administrative law judge erred in calculating his average weekly wage.

Employer first contends that claimant was physically capable of performing his light-duty position when he left work for personal reasons. Employer also contends that the administrative law judge erred in finding that restrictions for claimant's work-related neck injury remained in place at the time he left employment. Thus, employer contends that the administrative law judge erred in finding that it did not establish suitable alternate employment at its facility. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004).

[1] The administrative law judge also found that employer is not liable for Dr. Guernelli's care because claimant did not obtain prior approval for this treatment and had not been denied treatment by employer. However, on reconsideration, the administrative law judge found that employer is liable for Dr. Guernelli's treatment as he was a specialist to whom claimant was referred by his treating physician. Also on reconsideration, the administrative law judge affirmed his finding that suitable alternate employment was not established and that claimant left work in part due to employer's failure to accommodate his restrictions. The administrative law judge also affirmed the average weekly wage calculation and his denial of Section 8(f) relief.

Where, as in the instant case, it is uncontested that claimant is unable to perform his usual duties, the burden shifts to employer to establish the availability of suitable alternate employment, which it may do by providing claimant with a suitable light-duty job at is facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The administrative law judge found that as a result of both claimant's work-related neck and low back injuries, claimant is unable to perform his former work or the light-duty offered by employer. The administrative law judge accorded greater weight to the opinion and restrictions imposed by Dr. Guernelli, which take into account the recurring nature of claimant's lower back injury. The administrative law judge rejected employer's contention that Dr. D'Angelo's opinion that claimant's only restriction is against lifting over 40 pounds must be accorded greater weight because he is a neurosurgeon. Instead, the administrative law judge found the conservative approach to restrictions of Dr. Guernelli to be more consistent with the opinions of claimant's other treating and examining physicians given the nature of claimant's injuries.[2] Decision and Order at 13. This finding is rational and within the administrative law judge's discretion. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982).

[2] For example, the administrative law judge observed that Drs. Bergeron, Mujica and Majorra diagnosed claimant's symptoms as chronic and recurrent.

The administrative law judge also found that the cervical restrictions placed by Dr. Pier remained in place at the time claimant left employment in April 2004. On April 30, 2003, Dr. Pier, a physiatrist, examined claimant to evaluate his complaints of cervical discomfort. Dr. Pier diagnosed C7 radicular symptoms, and assigned restrictions: against working in confined spaces; permitting moderate overhead and climbing work; and permitting lifting up to 40 pounds occasionally and 20 pounds frequently. Emp. Ex. 77 at 404. Dr. Desai, a neurosurgeon in the same practice as Dr. Pier, recommended on July 3, 2003, that claimant continue with work as recommended by Dr. Pier, *i.e.*, with restrictions. Cl. Ex. 9 at 145. The administrative law judge found that the work offered by employer did not account for the restrictions of either Dr. Guernelli or Dr. Pier. Decision and Order at 13. Specifically, the administrative law judge discussed the opinion of employer's in-house physician who testified by deposition that she would honor only Dr. D'Angelos's restrictions. Emp. Ex. 41 at 48; Emp. Ex. 79 at 10-12, 29.

Employer contends that claimant was asymptomatic when he quit work and that his injuries had resolved. The administrative law judge, however, rationally credited claimant's subjective complaints of pain in both his neck and lower back as he found it consistent with contemporaneous statements to his psychiatrist. Decision and Order at 14 n.13; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge rationally found that the neck restrictions that were placed less than a year before claimant left work were not contradicted by any other physician who examined claimant's neck condition. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge also found that claimant's comments to his treating physician six months after he resigned that he was not in pain at that time is not dispositive of his condition at the time he left work or whether the work was suitable. The administrative law judge found that although claimant also had non-work-related problems and familial turmoil before he left work, he resigned in part because he could no longer do his job due to his physical injuries.

We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment in its facility as it is rational and supported by substantial evidence. The administrative law judge rationally relied on the medical opinions of Drs. Guernelli and Pier in determining claimant's restrictions. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *see also Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). It is not relevant that employer now avers it could have tailored the job to fit the stricter restrictions for claimant's lower back and the restrictions for claimant's neck, because it did not offer a position to claimant within his restrictions. *See Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *see generally Shiver v. United States Marine Corps, Marine Base Exch.*, 23

BRBS 246 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In addition, we reject employer's contention that claimant's resignation was due solely to his non-work-related problems which constitute an intervening cause of claimant's disability. The administrative law judge rationally credited claimant's testimony that he resigned, at least in part, due to his work-related neck and back conditions. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). Therefore, as employer did not establish the availability of suitable alternate employment at its facility or on the open market, we affirm the award of total disability benefits. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (1980).

Employer contends that the administrative law judge erred in finding that claimant has a permanent disability, averring that claimant has no disabling conditions as he is not currently in pain from his work-related conditions and his most recent exams were "normal." A disability may be considered permanent where it has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

The administrative law judge agreed with employer that no physician has classified claimant's back and neck conditions as permanent, but he found that claimant has had back problems since 1989 and neck problems since 2002, and that the conditions have waxed and waned over the years. The administrative law judge also found that there are no physicians' opinions that claimant is expected to make a complete recovery or that identified a point in time when claimant will make a significant recovery. Thus, as the medical evidence supports the administrative law judge's finding that claimant's conditions are chronic and recurring, *see, e.g.*, Cl. Exs. 11 at 157; 12; 13 at 162; 20 at 13-14, the administrative law judge did not err in finding they are of a "lasting or indefinite duration." *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 456 F.3d 616 (6th Cir. 2006). The administrative law judge's finding that claimant's condition is permanent is rational and based on substantial evidence of record. Therefore, we affirm this finding. *Id.*

We next address claimant's cross-appeal, wherein he contends that the administrative law judge erred in addressing claimant's average weekly wage because the parties did not indicate in their pre-hearing statements that this issue was contested. Alternatively, claimant contends that the administrative law judge erred in calculating his average weekly wage because Section 10(a) of the Act, 33 U.S.C. §910(a), cannot be utilized, as he worked in only 16.75 weeks of the 52 weeks preceding the injury. In his initial Decision and Order, the administrative law judge noted that claimant requested that his compensation be based on an average weekly wage of $702.90, which claimant

calculated from his earnings during the 52 weeks preceding the September 24, 1999, injury. The administrative law judge also noted that employer did not address the issue of average weekly wage. However, the administrative law judge found that employer submitted evidence of claimant's average weekly wages "computed pursuant to section 10(a)" for the 52 weeks preceding the following dates: December 10, 1992, October 18, 1994, November 14, 1997, September 24, 1999, and June 9, 2002. Decision and Order at 15-16. The administrative law judge found that claimant's average weekly wage should be determined based on his wages at the time of the most recent injury, June 9, 2002, because claimant did not establish a loss of wage-earning capacity as a result of his successive injuries prior to June 9, 2002. Therefore, he relied on employer's wage records to find claimant's average weekly wage was $416.14 in the 52 weeks preceding June 9, 2002. Emp. Ex. 35.

On reconsideration, the administrative law judge affirmed his average weekly wage finding for three reasons. First, he found that claimant was raising the inapplicability of Section 10(a) for the first time on reconsideration. Second, he found that Section 10(a) is not inapplicable merely because claimant lost time from work in the year prior to June 2002 due to his non-work-related problems. Third, he found that claimant did not offer any evidence that his wages in the year prior to June 2002 were not representative of his annual earning capacity. Decision and Order Denying Reconsideration at 6-8.

We agree with claimant that the administrative law judge's average weekly wage calculation cannot be affirmed. Claimant correctly asserts that the parties were not on notice that his average weekly wage was a contested issue. In their pre-hearing statements, each party stated claimant's average weekly wage at the time of the 1999 injury was $702.90. Although there was no agreement or stipulation that this average weekly wage was applicable to any benefits awarded claimant, neither was average weekly wage squarely put into issue by the parties or the administrative law judge. An administrative law judge has the authority to expand a hearing to consider an issue not previously raised, but must give the parties notice that he is raising the issue and hold the record open in order to provide them an opportunity to respond and to offer evidence before he issues his decision. 20 C.F.R. §702.336(a); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). Thus, the administrative law judge erred on reconsideration in stating claimant was belatedly raising contentions concerning average weekly wage and in declining to address the issue because claimant had not put in sufficient evidence at the hearing. As claimant was not on notice of this contested issue, it was appropriate for him to raise his contentions via a motion for reconsideration. Therefore, we must vacate the administrative law judge's award of benefits based on an average weekly wage of $416.14, and remand the case so that the parties have a full opportunity to address the average weekly wage issue. *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000). In addition, we will address generally claimant's contention that Section 10(a) is

inapplicable; claimant's specific contentions should be raised on remand before the administrative law judge.

Section 10(a) looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury as the monetary base for the determination of the amount of compensation due, and is premised on the injured employee's having worked substantially the entire year prior to the injury. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). Section 10(a) requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. This average daily wage is then multiplied by 260 if claimant had been a five-day per week worker or by 300 if claimant had been a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[3] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

We cannot affirm the administrative law judge's finding that the figures representing claimant's average weekly wage submitted by employer were calculated pursuant to Section 10(a). It is evident that the average figures were calculated by dividing claimant's wages in the 52 weeks prior to each injury by the number of weeks claimant worked that year.[4] This is not a Section 10(a) calculation. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). There is no evidence in the exhibits cited by the administrative law judge of the number of actual days claimant worked or whether he was a 5 or 6 day per week worker, both of which are necessary to determine average weekly wage under Section 10(a). *Proffitt v. Service Employers Int'l, Inc.*, ___ BRBS ___, BRB No. 06-0306 (Aug. 14, 2006). Evidence from which the administrative law judge can ascertain if claimant was a five- or six-day per week worker is a prerequisite to the applicability of Section 10(a). *Id.; see also Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS

[3] Section 10(b) may be applied when claimant has not worked substantially the whole of the year but evidence is offered concerning the wages of an "employee of the same class" who worked substantially the whole of the year preceding claimant's injury in the same or similar employment. 33 U.S.C. §910(b).

[4] *See* Emp. Exs. 10; 16; 23; 29; 35; Cl. Ex. 3. For example, claimant earned $12,068.19 in the 52 weeks before June 9, 2002, and employer calculated his average weekly wage as $416.14. This figure is computed by dividing $12,068.19 by 29, the number of weeks in which claimant had earnings.

12(CRT) (5th Cir. 2000). Moreover, the administrative law judge erred in purporting to apply Section 10(a) merely because claimant was a permanent employee. Contrary to his statement on reconsideration, the phrase "substantially the whole of the year" refers to a temporal connection to the employment as well as to the nature of the employment. *See Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). On remand, the administrative law judge must address any average weekly wage issues raised by the parties, and resolve the issues consistent with law. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996). If Section 10(c) is to be applied, the administrative law judge must arrive at a wage figure that reflects claimant's annual earning capacity at the time of injury.[5] *Preston*, 380 F.3d at 609, 38 BRBS at 69(CRT).

Finally, we address employer's contention that the administrative law judge erred in denying it relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In the present case, the administrative law judge found that claimant has a pre-existing permanent partially disabling psychological condition, but not a pre-existing permanent partially disabling neck or back condition. The administrative law judge found that although claimant had suffered a series of injuries to his back, there is no evidence that he received any significant treatment, lost any time from work, or was diagnosed with anything more than temporary strains. Employer contends that the administrative law judge erred in finding claimant's pre-existing back problems are not pre-existing disabilities for purposes of Section 8(f) relief.

To constitute a pre-existing permanent partial disability, a condition must be a lasting and serious condition such that a cautious employer would be motivated either to not hire or to fire an employee because of the "greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *see Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992). The First

[5] The administrative law judge correctly noted that, pursuant to Section 10(c), an administrative law judge may account for earnings lost due to non-recurring events unrelated to the work injury. *See Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

Circuit held in *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991), that the mere fact that a claimant had previous back injuries does not, standing alone, establish that he had a preexisting permanent partial disability. *Id.*, 935 F.2d at 435, 24 BRBS at 211(CRT). As the administrative law judge properly found that employer has offered no evidence that claimant suffered a pre-existing serious and lasting condition, other than that claimant suffered a number of back strains since 1989, we affirm the administrative law judge's finding that claimant did not have pre-existing permanently partially disabling back condition. *Id.; see also Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Therefore, we need not address employer's contention that claimant's pre-existing back condition contributed to claimant's current disability.

The administrative law judge found that the employer established that claimant suffers from a manifest pre-existing psychological disability, but that employer did not establish that this condition contributed to claimant's total disability. Rather, the administrative law judge found that claimant could not work because of employer's failure to accommodate the restrictions in place for claimant's work-related back and neck conditions. Employer contends that claimant's pre-existing psychological problems are the primary cause of claimant's disability and therefore that the administrative law judge erred in finding the contribution element is not met.

To establish the contribution element, employer must show that claimant's subsequent injury alone would not have resulted in his permanent total disability. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). As we affirm the administrative law judge's finding that claimant's total disability is due to employer's failure to provide light-duty work within the restrictions for his back and neck, we also affirm the administrative law judge's finding that claimant is totally disabled due to his current conditions alone, irrespective of claimant's psychological condition. Thus, we affirm the denial of Section 8(f) relief. *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for reconsideration of claimant's average weekly wage. The administrative law judge's Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration and Granting in Part and Denying in Part Claimant's Motion for Reconsideration are affirmed in all other respects.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge