BRB No. 00-0419

WILLIAM BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATED ISSUED: Jan. 10, 2001
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Edward C. Burch, Administrative Law Judge, United Sates Department of Labor.

Preston Easley (Law Offices of Preston Easley), San Pedro, California, for claimant.

Roy D. Axelrod (Law Offices of Roy Axelrod), Solana Beach, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (1999-LHC-1192) of Administrative Law Judge Edward C. Burch 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 suffered work-related injuries to his hands and wrists, subsequently diagnosed as bilateral carpal tunnel syndrome, as a result of cumulative trauma while working for employer. Claimant underwent carpal tunnel releases on both of his wrists, and it is undisputed that he is unable to resume his usual employment duties with employer as a journeyman shipfitter. Pursuant to the Act, employer voluntarily paid claimant disability compensation during various periods of time between December 19, 1996 and May 16, 1999.

From November 3, 1997, until August 15, 1998, and between November 1, 1998, and December 7, 1998, claimant was enrolled in a vocational rehabilitation program paid for by employer pursuant to the California Workers' Compensation Act.[1] Upon completion of this retraining program, claimant successfully secured employment as a printing press operator.

In his Decision and Order, the administrative law judge initially determined that, pursuant to *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993), claimant was entitled to temporary total disability benefits from November 3, 1997, through August 15, 1998, and from November 1, 1998, through December 7, 1998, the periods of time during which he was enrolled in a vocational rehabilitation program. 33 U.S.C. §908(b). As claimant was employed as an Instructional Aide from August 16, 1998, to October 31, 1998, the administrative law judge awarded claimant temporary partial disability benefits during that period of time. Next, the administrative law judge accepted the parties' stipulation that claimant reached maximum medical improvement on December 8, 1998; accordingly, as he thereafter found that claimant sustained a 28 percent impairment to his left and right upper extremities and that employer established the availability of suitable alternate employment, the administrative law judge awarded claimant permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(1). Lastly, the administrative law judge concluded that employer was entitled to a credit for all federal and state payments made to claimant as a result of his work-injury.

On appeal, employer challenges the administrative law judge's award of temporary total disability compensation to claimant during the periods of time that claimant was enrolled in a vocational rehabilitation program. Employer additionally alleges that the administrative law judge erred in awarding claimant temporary partial disability compensation based upon the actual wages earned by claimant during his part-time employment as an Instructional Aide, and permanent partial disability compensation for a 28 percent impairment to his upper extremities pursuant to Section 8(c)(1) of the Act. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

[1]During the intervening period, August 16, 1998 through October 31, 1998, claimant's vocational instructors suspended his training while he worked 30 hours per week for them as an Instructional Aide.

TEMPORARY TOTAL DISABILITY COMPENSATION

Employer initially challenges the administrative law judge's decision to apply the Fifth Circuit's decision in *Abbott* to the instant case. Specifically, employer avers that the case at bar is distinguishable from *Abbott* on the basis that claimant was enrolled in a state, rather than a federal, sponsored retraining program. Employer additionally asserts that application of the Fifth Circuit's holding in *Abbott* does not serve the interests of claimant and employer herein since claimant's ultimate relief was obtained by way of the schedule contained in Section 8(c) of the Act, 33 U.S.C. §908(c). Alternatively, employer contends that claimant was capable of part-time employment during the period of his enrollment in a vocational rehabilitation program. For the reasons that follow, we reject employer's contentions of error, and we affirm the administrative law judge's determination that *Abbott* is applicable on the facts of this case.

Where, as in the instant case, it is uncontroverted that claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of specific jobs that claimant can perform, which, given the claimant's age, education, and background, he could likely secure if a diligently tried. *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 also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Claimant, however, can establish total disability if suitable alternate employment is not reasonably available due to his participation in a rehabilitation program sponsored by the Department of Labor (DOL). *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). In *Abbott*, the Board and the Fifth Circuit held that despite employer's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award of total disability was appropriate on the facts presented. In so concluding, both bodies noted that in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), the Fifth Circuit recognized that the degree of disability is not assessed solely on the basis of physical condition; it is also based on factors such as age, education, employment history, *rehabilitative potential* and the *availability of work* that claimant can perform. *Abbott*, 27 BRBS at 204; 40 F.3d at 127, 29 BRBS at 26(CRT) (emphasis added). Moreover, noting that pursuant to *Turner*, 661 F.2d at 1038, 14 BRBS at 164, an individual may be totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that kind of work," the court agreed with the Board that the administrative law judge's award of total disability benefits to Abbott was appropriate because the jobs identified by employer were unavailable and could not reasonably be secured while he was enrolled full-time in the DOL-sponsored rehabilitation program. *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26(CRT). The Fifth Circuit also recognized that

awarding total disability compensation to Abbott served the Act's goal of promoting the rehabilitation of injured workers. *Id.*, 40 F.3d at 127, 29 BRBS at 26-27(CRT); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The court stated that courts should not frustrate the DOL's rehabilitative efforts when they are reasonable and result in lower total compensation liability for the employer and its insurer in the long run. *Id.*, 40 F.3d at 128, 29 BRBS at 26-27(CRT). Under *Abbott*, it is claimant's burden to prove that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *Id.*, 40 F.3d at 128, 29 BRBS at 27(CRT); *see Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).

The Board discussed *Abbott* in two subsequent cases. In *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998), the claimant had a college degree prior to his injury, and employer established that claimant had the capacity post-injury to earn greater than the minimum wage. Nevertheless, the Board held the rationale of *Abbott* applicable as the alternate jobs were not realistically available to claimant during the period of his participation in a full-time DOL-sponsored nursing program and the award of total disability during this period promoted the goal of rehabilitating claimant to the fullest extent possible and in the long term would lower employer's liability. In *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998), however, *Abbott* was held to be inapplicable as the claimant stipulated that she had obtained part-time employment while enrolled in a DOL-sponsored rehabilitation program. Thus, alternate employment was "realistically available" during the rehabilitation period and claimant was limited to a recovery under the schedule for her arm impairment. *Gregory*, 32 BRBS at 267.

In the instant case, in alleging that the administrative law judge erred in awarding claimant temporary total disability compensation during the period of his enrollment in a vocational rehabilitation program, employer initially challenges the administrative law judge's application of the Fifth Circuit's holding in *Abbott* on the basis that the rehabilitation program was state-sponsored, rather than sponsored by DOL. Specifically, employer states that the rationale underlying the Fifth Circuit's decision in *Abbott* has been subsequently applied only in factual situations wherein an employee is enrolled in a federally-sponsored rehabilitation program; employer avers, therefore, that to apply *Abbott* to cases in which an employee is enrolled in a state-sponsored program would expand its liability should it be required to pay for that program.[2] In the instant case, claimant, post-injury, enrolled with

[2]Regarding the rehabilitation of injured workers, the Act provides that the "Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange for the appropriate public or private agencies . . .for such rehabilitation. . . . Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 944 of this title in such amounts as may be

employer's consent in a vocational rehabilitation training program pursuant to the California Workers' Compensation Act. Upon being made aware of claimant's participation in this program, DOL informed employer that it would monitor claimant's program to ensure its timeliness and quality; moreover, employer was informed of DOL's availability to provide technical or monetary resources for implementing a suitable vocational rehabilitation program for claimant. *See* CX 5. Claimant thus was enrolled in a rehabilitation program initially with the knowledge and support of employer and thereafter with the approval of the DOL. Contrary to employer's position, claimant's approved enrollment in a retraining program committing him to a definitive course of rehabilitation, whether in a state- or federally-sponsored program, satisfies the fundamental policies underlying the Act and its humanitarian purposes. Specifically, the Act's goal of promoting the rehabilitation of injured workers, *see Abbott*, 40 F.3d at 127, 29 BRBS at 26-27 (CRT), is clearly served by claimant's approved enrollment in a vocational rehabilitation program. We therefore reject employer's initial contention of error and hold that claimant, pursuant to *Abbott*, may establish that identified suitable alternate employment is not reasonably available due to his participation in a state-sponsored, and DOL approved, vocational rehabilitation program. *See Bush*, 32 BRBS at 213.

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necessary to procure such services . . . ." 33 U.S.C. §939(c)(2). The Act's implementing regulations provide that injured employees will be referred to State Employment Service Offices, or to other agencies at the request of the employee. *See* 20 C.F.R. §§702.501 - 702.508.

We similarly reject employer's assertion that application of the Fifth Circuit's holding in *Abbott* does not further the interests of either employer or claimant herein since, as the instant claim involves an injury under the schedule contained in Section 8(c) of the Act, 33 U.S.C. §908(c), vocational training will not reduce employer's ultimate liability.[3] The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this claim arises, has recognized the Act's interest in facilitating the rehabilitation of injured employees. *See Stevens*, 909 F.2d at 1260, 23 BRBS at 95(CRT). In the instant case, claimant's interests were clearly furthered as a result of his retraining since, as a result of his successful completion of his vocational retraining program, he obtained additional skills which consequently enhanced his ability to resume his place to the greatest extent possible as a productive member of the labor market. Employer's interests were likewise furthered as a result of claimant's nine and one-half month retraining program, since claimant's acquired skills reduced the likelihood that claimant would be unable to obtain suitable alternate employment and thus render employer liable to claimant for total disability compensation. Accordingly, as application of *Abbott* advances the humanitarian purpose of the Act and furthers the interests of both claimant and employer, we reject employer's specific objections in this regard.

Next, citing to *Gregory*, 32 BRBS at 264, employer avers that since claimant actually engaged in part-time employment from August 16, 1998 through October 31, 1998, and further testified that he sought employment each day following the completion of his

[3]In *Abbott*, claimant's retraining resulted in an increase in his subsequent wage-earning capacity; thus, employer's ultimate liability for permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), was reduced. The case at bar, however, involves a scheduled injury and it is well-established that economic factors are precluded from consideration in computing an employee's scheduled permanent partial disability compensation pursuant to Section 8(c) of the Act, 33 U.S.C. §908(c). *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 U.S. 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

vocational rehabilitation retraining classes, the administrative law judge erred in concluding that claimant was incapable of performing part-time employment during the period of his retraining. We disagree. Initially, our review of the administrative law judge's decision reveals that, as claimant was employed as an Instructional Aide between August 16, 1998 through October 31, 1998, the administrative law judge found *Abbott* to be inapplicable during that period and thus awarded claimant temporary partial disability benefits. *See* 33 U.S.C. §908(e). Next, the administrative law judge specifically considered and rejected employer's contention that claimant was capable of part-time employment while he was enrolled in his vocational rehabilitation program; accordingly, the administrative law judge awarded claimant temporary total disability compensation during these periods consistent with *Abbott*. Specifically, the administrative law judge found it to be significant that claimant's retraining program was suspended by his instructors during his period of part-time employment as an Instructional Aide; in this regard, the administrative law judge found that this suspension suggested that claimant's vocational rehabilitation counselors did not believe that he was capable of both participating in his vocational retraining and performing a part-time job. *See* Decision and Order at 8. Additionally, after crediting claimant's testimony that he was exhausted at the end of the each retraining day, the administrative law judge determined that it was unreasonable to expect claimant to arise at 5:30 a.m., attend both classroom work and hands-on training from 7:00 a.m. until 1:00 p.m., and then commence part-time employment. Lastly, the administrative law judge acknowledged that claimant underwent dual carpal tunnel releases during this period of time and that these two surgical interventions resulted in claimant's inability to attend his retraining sessions for several weeks. *Id.* Based upon these rational findings, we affirm the administrative law judge's conclusion that claimant was incapable of working at a part-time job during his participation in a vocational rehabilitation program during the periods of November 3, 1997 to August 15, 1998, and November 1, 1998 to December 7, 1998, as it is supported by substantial evidence and is in accordance with the Fifth Circuit's rationale in *Abbott* that it would be unduly harsh and incongruous to find that suitable alternate employment was reasonably available if claimant demonstrates that, through his own diligent efforts at rehabilitation, he was ineligible for such a job. *See Abbott*, 40 F.3d at 128, 29 BRBS at 27(CRT), *citing Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 6(CRT) (2d Cir. 1991).

TEMPORARY PARTIAL DISABILITY COMPENSATION

Employer next contends that the administrative law judge erred in awarding claimant temporary partial disability compensation based upon the wages claimant earned during the period of August 16, 1998 through October 31, 1998. We agree. An award for temporary partial disability 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(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury

earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). The party contending that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Id.; see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Only if such earnings do not fairly and reasonably represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

In the instant case, we cannot affirm the administrative law judge's summary decision to rely upon the actual wages earned by claimant between August 16, 1998 and October 31, 1998, and, for the following reasons, we vacate the administrative law judge's award of temporary partial disability benefits to claimant and remand the case for reconsideration. Although the parties were in apparent agreement that claimant earned $176.16 per week while working 30 hours per week as an Instructional Aide, claimant's loss of wage-earning capacity during this period was an issue set forth for adjudication before the administrative law judge. In this regard, employer set forth specific employment alternatives which it asserted were available to claimant during the period of August 16, 1998 through October 31, 1998.[4] Without considering employer's evidence, however, the administrative law judge summarily calculated claimant's award of benefits by utilizing claimant's actual wages during this time period without initially determining whether those wages fairly and reasonably represented claimant's post-injury wage-earning capacity. As consideration of this issue is a necessary step, we vacate the administrative law judge's calculation of the amount of benefits due claimant for his controverted post-injury temporary partial disability, and we remand the case for the administrative law judge to reconsider this issue pursuant to Sections 8(e) and (h) of the Act.

PERMANENT PARTIAL DISABILITY COMPENSATION

[4]We note that, as claimant asserts that his post-injury earnings do in fact represent his post-injury wage-earning capacity, employer bears the burden of establishing an alternative reasonable wage-earning capacity.

Employer next asserts that claimant's carpal tunnel injuries are limited to his hands and that, therefore, the administrative law judge erroneously entered an award for permanent partial disability of claimant's upper extremities under Section 8(c)(1), 33 U.S.C. §908(c)(1), rather than Section 8(c)(3), 33 U.S.C. §908(c)(3), of the Act. In support of its contention on this issue, employer contends that there is no credible evidence that claimant sustained permanent disabilities to his arms or upper extremities as a result of his employment with employer. We disagree. It is well-established that injuries to claimant's wrists may be compensated as permanent partial disabilities to his arms under Section 8(c)(1) of the Act if there is evidence in the record which supports a finding of impairment to the arms. *See Stokes v. George Hyman Constr. Co.,* 19 BRBS 110 (1986); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985); *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 886 (1986). In this regard, the Board has held that, where an injury to a lesser member also affects a greater member, the Act provides for compensation equal to the amount which could be received for loss of use of the greater member alone.[5] *See Mason v. Baltimore Stevedoring Co.,* 22 BRBS 413 (1989). Additionally, although use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) is not mandatory in assessing a scheduled injury, those guidelines state that the "wrist functional unit represents 60% of the upper extremity's function." *See* AMA *Guides* (4th ed.), p.35. In the instant case, the administrative law judge found that both Drs. Kennedy and Levine referred to claimant's carpal tunnel injuries as resulting in an impairment of the upper extremities. Specifically, Dr. Kennedy commenced each of his multiple medical report letters with an acknowledgment that claimant had sustained injuries to both upper extremities, *see* EXS 14, 15, while Dr. Levine rated claimant's impairment as one to the upper extremities. *See* CX 6. Thus, pursuant to the reports of these two physicians, the administrative law judge concluded that claimant was entitled to benefits pursuant to Section 8(c)(1) of the Act. As the record, contrary to employer's contention, does in fact contain evidence supportive of a finding that claimant's permanent partial disability should be compensated as a disability of the upper extremities, we affirm the administrative law judge's decision on this issue as it is supported by substantial evidence. *See O'Keeffe,* 380 U.S. at 359.

Lastly, employer challenges the administrative law judge's determination that claimant is entitled to permanent partial disability compensation based upon a 28 percent impairment to each upper extremity. Specifically, employer asserts that the administrative

[5]Similarly, depending on the evidence, an injury to an employee's ankle may be compensated under either Section 8(c)(2), 33 U.S.C. §908(c)(2), or Section 8(c)(4), 33 U.S.C. §908(c)(4), of the Act. *Compare Bluhm Cooper Stevedoring Co.*, 13 BRBS 427 (1981) with *Green v. I.T.O. Corp. of Baltimore,* 32 BRBS 67 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

law judge erred in crediting the opinion of Dr. Levine, claimant's treating physician, over the opinions of Drs. Kennedy and Brigham. In the instant case, the administrative law judge, in awarding claimant compensation for a 28 percent impairment to each of his upper extremities, relied upon the opinion of Dr. Levine, claimant's treating physician. In rendering this determination, the administrative law judge initially stated that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999), a claimant's treating physician's opinion is entitled to special weight. Next, after noting that Dr. Levine treated claimant prior to, during, and after his surgeries, the administrative law judge found claimant's complaints as to his residual symptoms to be consistent and credible and, after reviewing Dr. Levine's clinical findings and the AMA *Guides*, thereafter determined that Dr. Levine's method of computing claimant's impairment was in accordance with those guidelines. The administrative law judge declined to rely upon the opinion of Dr. Kennedy, whose opinion that claimant sustained no residual impairment he found to be unpersuasive, or the opinion of Dr. Brigham, who he noted did not examine claimant. Based upon these findings, the administrative law judge concluded that Dr. Levine's opinion constituted the more credible evidence on the issue of claimant's work-related impairment.

We affirm the administrative law judge's conclusion as it is based on a rational weighing of the medical evidence of record. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and physical effects of his injury in assessing the extent of claimant's disability. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). In the instant case, the administrative law judge weighed the three medical opinions of record regarding the extent of claimant's work-related impairment.[6] Accordingly, as the credited opinion of Dr. Levine constitutes

[6]We reject employer's argument that the administrative law judge erred in citing *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999). The administrative law judge's statement of the principle that a treating physician is entitled to "special weight" is virtually a quote from the court's opinion, and the court's statement is not limited to the medical issue presented in that case. Nonetheless, the administrative law judge did not rely on *Amos* as a basis for crediting Dr. Levine, but fully considered his opinion and its underlying rationale as well as the other medical evidence of record. The administrative law judge's opinion is thus based on a proper weighing of the evidence.

substantial evidence to support the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant suffers from a 28 percent permanent partial disability to his upper extremities. *O'Keeffe*, 380 U.S. at 359; *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

Accordingly, the administrative law judge's award of temporary partial disability compensation is vacated, and the case remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge