BRB No. 91-1991

NEIL ABBOTT, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED:
	)	
Insurer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Order Denying Reconsideration of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

David B. Allen (Samanie, Barnes & Allen), Houma, Louisiana, for claimant.

Collins C. Rossi (Bailey, Rossi & Kincade), Metairie, Louisiana, for the Louisiana Insurance Guaranty Association.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Louisiana Insurance Guaranty Association (LIGA) appeals the Decision and Order on Remand Awarding Benefits and the Order Denying Reconsideration (87-LHC-22) of Administrative Law Judge Robert M. Glennon 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 if they 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. Claimant sustained an employment-related back injury on January 11, 1983. He was diagnosed as having a herniated disc and received conservative treatment from Dr. Gary, an orthopedic specialist, who released him for vocational training with restrictions in April 1984. Claimant sought vocational counseling through the Department of Labor and subsequently began a program training as a medical technician. He completed his retraining in July 1990 and began employment in August 1990 in this field. Employer's insurance carrier, Western Preferred Casualty Company (Western Preferred), voluntarily paid claimant temporary total disability benefits from the January 11, 1983 injury until July 25, 1985, when it became insolvent. Employer then paid claimant compensation benefits until September 15, 1986, when it also became insolvent.

Western Preferred was not authorized to conduct business in the state of Louisiana, so it entered into a contract with Early American Insurance Company (Early American), a company authorized to write insurance in Louisiana, that included a "cut-through" endorsement, whereby Early American agreed to assume Western Preferred's liability for any losses that Western Preferred incurred. Early American, however, also became insolvent. Thus, following the cessation of voluntary payments, claimant sought compensation benefits under the Longshore Act against the Louisiana Insurance Guaranty Association (LIGA), an entity created by the Louisiana legislature to pay claims when the primary insurer is insolvent.

On July 14, 1988, Administrative Law Judge Ben H. Walley issued a decision in which he held LIGA responsible for claimant's continuing temporary total disability benefits. LIGA appealed that decision to the Board,[1] essentially arguing that it had not received adequate notice of the hearing and that the decision deprived it of its right to defend against the "cut-through" endorsement between Western Preferred and Early American, the basis upon which LIGA was held responsible for claimant's compensation.

In its initial March 29, 1990 decision, the Board affirmed the administrative law judge's decision in all respects. *Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990). The Board held that LIGA received adequate notice of the administrative law judge's hearing and that based upon Louisiana law, LIGA was responsible for Abbott's compensation benefits under the Act as a matter of law. The Board also held that LIGA waived its right to contest Abbott's entitlement to temporary

[1]LIGA also sought a stay of claimant's compensation benefits which was denied by the Board. Claimant obtained a supplementary compensation order from the district director which declared the compensation to be in default. Claimant sought enforcement of that order in district court under Section 18(a) of the Act, 33 U.S.C. §918(a). The district court found the supplementary compensation order was issued in accordance with law and ordered enforcement of the order. LIGA appealed the district court order to the Fifth Circuit which held LIGA responsible for the compensation under the supplementary compensation order pursuant to Section 18(a). *See Abbott v. Louisiana Insurance Guaranty Ass'n.*, 889 F.2d 626, 23 BRBS 3 (CRT)(5th Cir. 1989).

total disability benefits because it only appealed the validity of the "cut-through" endorsement.

LIGA filed a motion for reconsideration of the Board's decision. On reconsideration, the Board reaffirmed its original determination that LIGA received adequate notice of the administrative law judge's hearing and that LIGA was liable for claimant's compensation benefits as a matter of law under controlling Louisiana precedent. *Abbott v. Universal Iron Works, Inc.*, 24 BRBS 169 (1991)(Decision on Recon.). The Board, however, modified its original decision in one significant respect, in that it held that LIGA was entitled to a new hearing on claimant's entitlement to benefits under the Act because it had never been given the opportunity to contest the nature and extent of claimant's disability. Finally, the Board denied LIGA a stay of payments and ruled that it must pay claimant continuing temporary total disability compensation during the pendency of the proceedings on remand.

The Board's Decision on Reconsideration was not a final order, in that it remanded the case to the administrative law judge for a new hearing on claimant's entitlement to benefits under the Act. Nonetheless, LIGA filed a petition for review to the United States Court of Appeals for the Fifth Circuit under Section 21(c) of the Act, 33 U.S.C. §921(c), on February 11, 1991. The Director moved to dismiss the petition. The Fifth Circuit granted the Director's motion to dismiss for lack of jurisdiction on April 26, 1991.

The hearing on remand was held on June 26, 1991, before Administrative Law Judge Robert M. Glennon. Initially, the sole issue on remand was the nature and extent of claimant's disability, pursuant to the Board's remand order. LIGA, however, expanded the proceedings on remand to include a request for Section 8(f), 33 U.S.C. §908(f), relief. Claimant sought temporary total disability from the date of his injury to August 27, 1990, when he completed vocational training as a medical technician and obtained employment, and permanent partial disability thereafter. LIGA contended that a November 1984 automobile accident in which claimant was involved was a supervening cause of claimant's disability thereafter. Alternatively, LIGA argued that claimant reached maximum medical improvement in August 1983 and was capable of returning to work at that time at a number of available jobs in the area. LIGA also asserted it was not liable for total disability benefits for the entire duration of claimant's retraining program.

In his Decision and Order on Remand, the administrative law judge rejected LIGA's argument regarding the automobile accident. He determined that claimant reached maximum medical improvement on April 18, 1984, and was entitled to compensation for temporary total disability until he completed vocational training on July 25, 1990, and permanent partial disability compensation thereafter. The administrative law judge further determined that LIGA was not entitled to Section 8(f) relief from continuing compensation liability. LIGA sought reconsideration, generally reasserting the arguments previously raised, but also asserting that it could not be held liable for coverage for this insurance claim as a matter of law. The administrative law judge denied the motion, stating that LIGA's liability under the cut-through endorsement had previously been decided by the Board.

LIGA now appeals, challenging both its liability for the claim and claimant's entitlement to compensation. Specifically, LIGA asserts that it is not liable for claimant's benefits as, since the Board's prior decisions, the Louisiana Legislature amended the definition of "insurance policy" in La. Rev. Stat. §22:1379(8) to exclude "cut-through" endorsements of the type involved here; LIGA argues that this amendment is to be applied retroactively. LIGA further contends that the administrative law judge erred in determining the date of maximum medical improvement, in awarding claimant total disability compensation beyond the date of maximum medical improvement and in calculating claimant's post-injury wage-earning capacity after he began working. Finally, LIGA contests the denial of Section 8(f) relief. Claimant responds, urging that the administrative law judge's Decision and Order On Remand be affirmed.[2] The Director responds, opposing LIGA's contentions, and LIGA replies to the Director's response. The Director has also filed a supplemental response brief.

LIGA's Liability

Initially, we reject LIGA's assertion that it is not liable as the insurer under Louisiana law. We reject the contention that the amended definition of "insurance policy," which precludes liability for certain insurance policies containing "cut-through endorsements," must be given retroactive effect in this case and that accordingly LIGA is not liable for claimant's compensation claim.

The applicable Louisiana statute, as amended in July 1989, which forms the basis of LIGA's appeal provides that:

> "Insurance policy" means an insurance contract as defined in R.S. 22:624, and shall *not* include an agreement whereby an insurer agrees to assume and carry out directly with the policyholder any of the policy obligations of another insurer, *such as cut-through endorsements*, reinsurance endorsements, facultative reinsurance agreements, treaty reinsurance agreements, and other such agreements, *when either insurer is affiliated with the other*. "Affiliated" as used in this Section means that either insurer owns or controls, directly or indirectly, a majority of the voting shares of the other or the controlling interest therein, or that both insurers are so owned or controlled by another.

La. Rev. Stat. §22:1379(8) (1992) (emphasis added). The Louisiana Civil Code states that in the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary. La. Civ. Code Ann. art. 6 (West 1990). If a procedural or interpretive rule operates to disturb vested rights, however, then the law applies prospectively only. *Henderson v. Pacific Marine Insurance Co.*, 611 So. 2d 882 (La. App. 3d Cir. 1992). The Louisiana Civil Code further states that "[n]o Section of the Revised Statutes is retroactive unless it is expressly so stated." La.

[2] Claimant originally filed and then withdrew a cross-appeal in this case, on August 27, 1991, and February 19, 1992, respectively.

Rev. Stat. Ann. §1:2 (West 1987).

A court must ascertain whether the legislature expressed an intention that the legislation be applied retroactively or prospectively only. If it did, the inquiry is at an end. *See generally Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1384 (10th Cir. 1990), *cert. denied*, U.S. , 111 S.Ct. 799 (1991). If it did not, then the court must ascertain whether the legislation is substantive or procedural.[3] *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 182 (5th Cir. 1990). In distinguishing between how changes in the law affect causes of action depending on whether the changes are judicial or legislative, it has been said: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively is familiar to every law student. Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law." *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, U.S. , 110 S.Ct. 1570, 1577 (1990).

The amendment to the definition of insurance policy at issue here does not contain any express provision indicating that it is to be retroactively applied. Accordingly, the relevant inquiry is whether the legislation is procedural and therefore entitled to retroactive effect, or substantive and only to be applied prospectively. *See* La. Rev. Stat. Ann. §1:2 . LIGA cites *H&B Construction Co. of Louisiana v. LIGA*, 580 So.2d 931 (La. App. 4th Cir. 1991), in support of its position that the amendments to the definitions contained in 22:1379 are to be retroactively applied.[4] In *H&B Construction* the court held that the 1989 amendments to the Louisiana Insurance Guaranty Association Law (IGAL)[5], the same amendments at issue in this case, were to be given retroactive effect insofar as they concerned the definition of "ocean marine insurance." The court concluded that jurisprudential history and response of the legislature support the inference that *these amendments* were intended to interpret and clarify the law (emphasis added). Citing La. Civ. Code art. 6, which addresses the retroactive effect of laws, the court concluded that interpretive laws are to be given retroactive effect, and that the law involved in that case was interpretive. 580 So.2d at 933.

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[3]One court has cited a provision of the Longshore Act as an example of legislation containing express language that it should be applied retroactively, *i.e.*, Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L.No. 98-426, §28a, 98 Stat. 1639, 1655 (1984)(Amendments shall apply both to claims filed after effective date and to claims pending on such date). *See West v. Pelican Mgt. Services Corp.*, 782 F.Supp. 1132 (M.D. La. 1992).

[4]Claimant also argues that LIGA is improperly raising the issue of its liability before the Board since that issue was previously decided by the Board and was not before the administrative law judge in the proceeding which the Board is reviewing at this time. While claimant is correct, LIGA is presently raising a slightly different issue: its liability under the amendment, *i.e.*, the amendment's retroactivity.

[5] The court mistakenly cites the section it is interpreting as LSA-R.S. 22:1379(8), while it should be 22:1379(9). *See* 580 So.2d at 932, 933.

On rehearing, the court amplified its rationale, stating that LSA-R.S. 22:1377 had specifically excluded "ocean marine insurance" from coverage since 1970, and that since the protection and indemnity insurance policy at issue was "marine insurance," this kind of policy had actually been excluded from coverage by LIGA for more than 40 years. Therefore, as the 1989 amendments did not change existing law, but merely clarified the terms involved, the court determined that the amended definition of "ocean marine insurance" was interpretive rather than substantive, and should be retroactively applied.

We agree with claimant that *H & B Construction* is distinguishable from the present case. Whereas the court in *H & B Construction* found the amended definition of "ocean marine insurance" entitled to retroactive effect because it merely clarified existing law, we note that the amendment to the definition of insurance policy, which is contained in a different section, 22:1379(8), does not simply clarify existing law, but instead creates a new class of excluded policies which were previously covered. *See, e.g., Wilkerson v. Jimco, Inc.*, 499 So.2d 1245 (La.App. 4th Cir. 1986). Accordingly, we conclude that this legislation is substantive and as such is not to be retroactively applied. *See Lavespere*, 910 F.2d at 182.

We note that the Louisiana Court of Appeals for the First Circuit implicitly recognized that this amendment was substantive in *Johnson v. Vinson Guard Service, Inc.*, 577 So. 2d 64 (La. App. 1st Cir. 1990), *rev'g Johnson v. Vinson Guard Service, Inc.*, No. 17011 (November 16, 1988). In *Johnson*, which was decided after the state legislature had amended the IGAL, the court recognized that it was required to find LIGA liable under the "cut-through endorsement" pursuant to *Martin Lumber, Partnership v. LIGA*, 534 So. 2d 469, 475 (La. App. 3d Cir. 1980), and *Wilkerson*, the same cases which the Board had relied upon in holding that LIGA was liable for claimant's benefits as a matter of law in its initial Decision and Order. *Abbott*, 23 BRBS at 196. The court, however, took solace in the fact that such an arrangement was no longer possible under the amended version of 22:1379(8). In addition, we note that the Louisiana courts have also taken the position that even where the amendments themselves contain provisions which explicitly render them applicable to pending claims, they are not to be given retroactive effect, where, as here, the trial court had rendered judgment prior to the enactment date of the amendments. *See Morris v. Stewart, Rollins Cab Co.*, No. 92-CA-0565 (La. App. 4th, April 15, 1993); *Segura v. Frank*, 615 So. 2d 516 (La. App. 3d Cir. 1993).

Sifers v. General Marine Catering Co., 892 F.2d 386 (5th Cir. 1990), also indirectly lends support to our determination that the amended definition of insurance policy should not be retroactively applied. In *Sifers*, LIGA was arguing that the "protection and indemnity" insurance policies of the claimants involved constitute "ocean marine insurance" which LIGA was exempt from paying under the statute. While the statute exempted LIGA from reinsuring the claims of "ocean marine insurance," this term remained an undefined term of art under Louisiana's insurance code. The court in *Sifers* noted that when LIGA was fashioned by the Louisiana Legislature in 1970, in the event that a member-carrier became insolvent, it was envisioned that LIGA would assume all the benefits and obligations of the direct insurance policies underwritten by the defunct carrier. The court, however, recognized that some notable exceptions, such as life insurance and ocean marine insurance, were carved out of the enabling statute. 892 F.2d at 388. In concluding

that "protection and indemnity" insurance constitutes "ocean marine insurance" under the Louisiana Insurance Code and the IGAL, the court found the Louisiana Supreme Court's decision in *Backhus v. Transit Casualty Co.,* 549 So.2d 283 (La. 1989), to this certified question dispositive. In so doing, the Fifth Circuit specifically noted that because it was basing its decision on *Backhus,* it was not necessary for it to consider LIGA's argument that the 1989 amendments to the IGAL allegedly clarifying the issue are interpretive and therefore entitled to retroactive effect. 892 F.2d at 391. The Fifth Circuit also rejected LIGA's argument that the amendments in question required it to reconsider the Louisiana Supreme Court's decision in *Deshotels v. SHRM Catering Service, Inc.*, 538 So.2d 988 (La. 1989), wherein the court held that "worker's compensation/employment liability" policies are not "ocean marine insurance," and thus LIGA would have to assume such claims. *Sifers*, 892 F.2d at 391. The Fifth Circuit "questioned" whether the Louisiana Supreme Court would conclude that the recent amendments overruled its decision in *Deshotels,* in any event, noting that in *Backhus,* decided well after the state legislature amended the IGAL, the court, while not specifically addressing the effect of the amendments upon *Deshotels,* had recited its holding with approval. *Id.* at 392.

We further note, however, that even if the amendment were accorded retroactive effect it would not necessarily allow LIGA to escape liability for claimant's benefits. As the Director argues, the amendment excludes from the definition of "insurance policy" the obligations of another insurer, such as cut-through endorsements, but only "*when* either insurer is affiliated with the other." La. Rev. Stat. §22:1379(8)(emphasis added).[6] Consequently, if there is no "affiliation" between the two insurers, as defined by the provision, the exclusion of cut-through endorsements from the definition of "insurance policy" does not apply. Inasmuch as the record lacks conclusive evidence which indicates that Western Preferred and Early American were, in fact, affiliated companies as defined in the amendment, it would appear that LIGA would remain liable for claimant's benefits even under the amended statute.

Maximum Medical Improvement

LIGA's assertion that the administrative law judge erred in finding that claimant reached maximum medical improvement on April 18, 1984, rather than in August 1983, is also rejected. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence, and is not dependent on economic factors. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 60-61 (1985). Permanent disability, as interpreted in the case law, is a disability that has continued for a lengthy period and appears to be of

[6]LIGA alleges that the word in the statute is "whether" not "when." Although the 1989-amended version of the IGAL, Act No. 688, had contained the word "whether" in Section 1379(8), the IGAL was again amended by the Louisiana legislature in 1990, Act No. 129, and the word used in the amendment is "when." The word "when" also appears in West's Louisiana Revised Statutes Annotated, which is the official citation for Louisiana statutes, according to *A Uniform System of Citation*, 14th ed. (1988) at 190. (*See* 15th ed. at 185 (1991)).

lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654, *petition for rehearing denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (*per curiam*), *cert. denied*, 394 U.S. 976 (1969). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Even where subsequent treatment (in the form of surgery) does not improve claimant's condition, claimant may not reach maximum medical improvement until medical opinion establishes that the treatment was not successful and further treatment would not improve claimant's condition. *See Brown v. Lykes Bros. Steamship Co., Inc.*, 6 BRBS 244, 247 (1977).

In the instant case, LIGA argues that the administrative law judge erred in concluding that claimant did not reach maximum medical improvement until April 18, 1984, inasmuch as Dr. Gary deposed that claimant's physical condition plateaued in August 1983. LIGA also argues that in concluding that claimant did not reach maximum medical improvement until April 18, 1984, Dr. Gary impermissibly took into consideration the fact that claimant had not yet completed a vocational evaluation, in violation of *Trask*, 17 BRBS at 56, and *Price*, 20 BRBS at 94.

The administrative law judge's finding that claimant reached maximum medical improvement on April 18, 1984, is affirmed, as it is rational and supported by substantial evidence. In finding April 18, 1984, to be the operative date, the administrative law judge specifically acknowledged Dr. Gary's statement that claimant's back condition had remained on a "plateau" between August 1983 and April 1984, but noted that this particular characterization, taken in the context of Dr. Gary's overall testimony, appeared to have been retrospective. The administrative law judge further reasoned that Dr. Gary continued to treat and evaluate claimant between August 1983 and April 1984 and that he did not conclude that nothing further could be done for claimant until April 1984. The administrative law judge accordingly concluded that maximum medical improvement had been reached on April 18, 1984, based on Dr. Gary's opinion to that effect.

Although, as LIGA asserts, Dr. Gary did depose that he considered claimant temporarily disabled between August 1983 and April 1984 because claimant had not yet undergone vocational rehabilitation and training, JX 2 at 42, the fact that it was Dr. Gary and not the administrative law judge who based his permanency assessment on this factor distinguishes the present case from *Trask*, 17 BRBS at 60. In the present case, the administrative law judge reasonably found that claimant did not reach maximum medical improvement until April 18, 1984, based solely on factors relating to claimant's physical condition, *i.e.*, his need for continued medical treatment and the fact that Dr. Gary did not conclude that nothing further could be accomplished until that time. Inasmuch as this finding is rational and supported by substantial evidence in the record, it is affirmed. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Extent of Disability

LIGA's assertion that the administrative law judge erred in awarding claimant total disability compensation beyond the date of maximum medical improvement presents an issue of first

impression for the Board. LIGA argues that because the testimony of its vocational expert, Nancy Favaloro, established that claimant had a "minimum wage" residual wage-earning capacity at the time he reached maximum medical improvement, the administrative law judge erred in finding that claimant remained totally disabled between April 18, 1984 and July 25, 1990, when he completed his vocational retraining program.

Following his medical release for vocational rehabilitation, claimant sought vocational counseling through the Department of Labor and was referred to Jennifer Palmer, a licensed rehabilitation specialist, who believed that claimant was a good candidate for vocational retraining rather than simply minimum-wage job placement. Claimant enrolled in a four-year medical technology degree program at Nicholls State University in the fall of 1985. The Department of Labor paid claimant's tuition and required him to attend school full-time, year-round and maintain a minimum grade point average. Ms. Palmer believed that claimant's school and family pressures were such that he could not have worked even part-time, even if allowed to do so by the Department of Labor. LIGA's vocational specialist, Nancy Favaloro, on the other hand, believed that claimant could have performed light duty employment such as a bank teller, delivery driver or security guard, without the need for vocational rehabilitation. Claimant completed his four-year program at Nicholls State, plus a one year internship, on July 25, 1990. He began working as a medical technician in August 1990, at Southern Louisiana Medical Center, a public hospital.

The Board has not previously addressed the question of whether claimant may receive continuing total disability compensation where, as here, employer has established the availability of suitable alternate employment at a minimum-wage level, but claimant is precluded from working because he is undergoing vocational rehabilitation. We find the administrative law judge's reasoning persuasive in this case. In determining that claimant was entitled to total disability compensation through the time he completed his vocational retraining, the administrative law judge acknowledged that LIGA's vocational expert, Nancy Favaloro, established that claimant had a minimum-wage residual wage-earning capacity as early as April 1984 in that he was able to perform entry level work of a sedentary nature. Nonetheless, the administrative law judge found that by completing his vocational training, claimant increased his earning power well above the minimum-wage level.[7] The administrative law judge observed that while in retrospect, perhaps a different or shorter rehabilitation program could have been devised, the rationale for Ms. Palmer's plan for vocational retraining rather than minimum-wage job placement was sound. The administrative law judge further noted that the Department of Labor had not only endorsed this plan, but had, in fact, paid claimant's tuition. The administrative law judge also found that both employer and its insurance carrier had knowledge of the program, did not object to it, and continued to pay claimant temporary total disability compensation benefits until late 1986, a year after he began the program, when employer became insolvent. Finally, the administrative law judge recognized that claimant showed full diligence in completing the rehabilitation program in the face of academic as well as financial difficulties and that his efforts ultimately did increase his earning power well above the minimum-wage/entry level range, thus benefitting everyone in the long run.

[7]Claimant was only 26 years old at the time of the accident.

We affirm the administrative law judge's award of total disability compensation while claimant was undergoing vocational rehabilitation on the facts presented in this case. As noted by the administrative law judge, the United States Court of Appeals for the Fifth Circuit, within whose appellate jurisdiction the present case arises, stated in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), that the Act does not provide any standard for determining the extent of disability; thus, the degree of disability is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, *rehabilitative potential*, and the *availability* of work that claimant can perform. *Id.*, 661 F.2d at 1037-1038, 14 BRBS at 160 (emphasis added). The court accordingly recognized that an individual may be totally disabled "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." *Id*., 661 F.2d at 1038, 14 BRBS at 164 (CRT). *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). In the present case, while claimant was capable of performing jobs employer's expert identified as available, he could not realistically secure that particular employment due to his participation in his Department of Labor-approved rehabilitation plan.

We hold that although claimant was physically capable of performing entry level minimum wage work of a sedentary nature as of the time he reached maximum medical improvement in this case, the administrative law judge properly determined that this employment was not realistically available to claimant because his participation in the Department of Labor-sponsored program precluded him from working. While the administrative law judge's remedy is not explicitly provided for in the Act, we note that it comports with the fundamental policies underlying the statute and its humanitarian purposes.[8] Depriving claimant of total disability status under these circumstances would effectively place him in the "*Catch 22*" position of being unable to work without being expelled from the vocational training program, yet being unable to collect total disability compensation because of his undisputed ability to perform minimum-wage work. The Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force is clearly served by the administrative law judge's decision. *See Turner*, 661 F.2d at 1042, 14 BRBS at 164; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991).

Moreover, while LIGA will have to pay claimant more in the short term during the period of rehabilitation, we note that LIGA's interests are also served by the administrative law judge's decision. LIGA will ultimately recoup its initial payments and save substantial money in the future, as it will have to pay little, if any, disability compensation because claimant's devoted effort toward rehabilitation resulted in his becoming a productive working member of society. The determination of the extent of claimant's disability is not a mechanical concept. *See Mijangos v. Avondale*

[8] The Act and regulations do provide for the Department of Labor to direct the vocational rehabilitation of permanently disabled employees. *See* 33 U.S.C. §939(c)(2); 20 C.F.R. §§702.501 - 702.508.

Shipyards, Inc., 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). Inasmuch as the administrative law judge's determination that the suitable alternate work identified was not realistically available to claimant during the time that his government-sponsored rehabilitation program precluded him from working, comports with the "common sense standard" for determining job availability set forth in *Turner*, 662 F.2d at 1042, 14 BRBS at 164, we affirm his finding that claimant remained totally disabled through July 25, 1990.[9] *See also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991).

[9] LIGA cites various cases standing for the proposition that claimant is not entitled to total disability compensation where the reason he is unable to work is not due to the work injury. These cases, however, are inapposite to the present case in that claimant's inability to work during the period in question was due to his participation in a vocational rehabilitation program necessitated by the work injury.

The administrative law judge, however, characterized claimant's total disability during the period of rehabilitation, which occurred after claimant reached maximum medical improvement, as temporary. Once claimant reaches maximum medical improvement, the nature of his disability is permanent, regardless of whether the extent of that disability is total or partial. Accordingly, the Decision and Order On Remand is modified to reflect that claimant is entitled to permanent total disability compensation from April 18, 1984 until July 25, 1990, the date he completed his retraining program. *See, e.g., Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g in part* 16 BRBS 231 (1984), and *rev'g* 22 BRBS 280 (1989).

Wage-Earning Capacity

The next issue to be addressed involves LIGA's assertion that the administrative law judge erred in calculating claimant's wage-earning capacity once he completed his rehabilitation program and began working as a medical technician at the Southern Louisiana Medical Center, a public hospital. Pursuant to Section 8(c)(21), an award for permanent 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(c)(21). 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. *Avondale Shipyards*, 967 F.2d 1039, 26 BRBS 30; *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 109 (1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director*, OWCP, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *See Darcell v. FMC Corp., Marine and Rail Equip. Division*, 14 BRBS 294 (1981); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In the present case, the administrative law judge determined that claimant was entitled to permanent partial disability compensation commencing July 26, 1990, based on the difference between his average weekly earnings as a welder at the time of his accident in January 1983 and the wages available to a medical technician at that time. In determining what a medical technician would have earned at the time of claimant's 1983 injury, the administrative law judge credited evidence submitted by LIGA which indicated that medical technicians working in the area's private hospital would have earned $19,323, whereas those working in the area's public hospital would have earned $16,896. Noting that claimant had not been successful in obtaining a job at the private hospital upon completion of his course work and that claimant was apparently content with his lower

paying job at the public hospital, the administrative law judge determined that averaging the two salary figures would provide a fair and appropriate measure of what a trained medical technician could have earned in 1983. He accordingly found that claimant's post-injury wage-earning capacity was $348.26 a week.

On appeal, LIGA argues that inasmuch as claimant could have obtained a private sector job as a medical technician at Terrebonne General Hospital or Lakewood Hospital, the administrative law judge should have calculated the award of permanent partial disability compensation based on his higher earning potential in such employment. The Director responds that inasmuch as the administrative law judge did not specifically conclude that claimant's actual post-injury earnings at the public hospital were not representative of his post-injury wage-earning capacity, and as the evidence in fact showed that claimant had difficulty passing his certification exam and tried but was not successful in obtaining the higher paying private job, the administrative law judge should have calculated claimant's post-injury wage-earning capacity based on his actual post-injury earnings in the public sector.

We conclude that the administrative law judge acted reasonably in calculating claimant's post-injury wage-earning capacity based on the average of the public and private salary figures. In the instant case, the administrative law judge determined that claimant had tried but was not successful at obtaining the private sector job at Terrebonne Hospital. As LIGA asserts, however, claimant also testified that after he started working at Southern Louisiana Medical Center, the director at Terrebonne contacted him on several occasions regarding possible employment. Although Terrebonne had been claimant's first choice when he was initially seeking employment, claimant represented that he was content to stay at Southern Louisiana Medical Center because of its proximity to his house and the fact that he did not have to work weekends. In calculating claimant's post-injury wage-earning capacity based on an average of what a medical technician could have earned in the public and private sector, the administrative law judge accounted for all of these circumstances and implicitly recognized that claimant's post-injury wage-earning capacity was greater than his actual earnings as a medical technician in the public hospital. Because the administrative law judge's calculation of claimant's post-injury wage-earning capacity in this manner complies with the requirements of Section 8(h) and was reasonable on the facts presented, we affirm this determination.[10] *See Sproull*, 25 BRBS at 109-110.

[10]LIGA argues that inasmuch as claimant could have earned $19,323 working in a private hospital, the award of benefits should be reduced to $38.80 [$429.79 average weekly wage minus $371.59 (19,323/52 weeks) x 2/3]. LIGA cites *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990), in support of its position. *Penrod Drilling* is distinguishable from this case. In that case, claimant obtained a degree in criminal justice administration, graduating *magna cum laude* and then earning a master's degree. He worked as a security guard, advancing to chief of security in a state school. Employer submitted evidence of other, better paying jobs available to a person with claimant's credentials, and the administrative law judge relied on this evidence to establish his wage-earning capacity, rather than his actual earnings. The court agreed that the administrative law judge could rely on the higher wages. In the instant case, the evidence

Section 8(f) relief

The final issue to be addressed is LIGA's challenge to the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

In the present case, LIGA sought Section 8(f) relief based on claimant's pre-existing knee injuries in 1975 and 1980. The administrative law judge found that although claimant's pre-existing knee injuries constituted a pre-existing permanent partial disability which was manifest to employer, thus establishing the first two requirements of Section 8(f), LIGA was not entitled to Section 8(f) relief because there was no record evidence sufficient to establish that the prior knee injury contributed in any way to the claimant's current degree of permanent economic disability. In so concluding, the administrative law judge noted that claimant had not identified anything other than his back condition as the cause of his inability to perform his former work and that although Dr. Gary indicated that claimant's overall physical impairment was greater as a result of his pre-existing knee injury, there was no evidence in the record which related this increased physical impairment to an increase in his overall economic disability.

We reject LIGA's argument that the administrative law judge erred in finding Dr. Gary's opinion insufficient to satisfy the contribution requirement of Section 8(f). In response to LIGA's specific inquiries with regard to claimant's degree of disability, Dr. Gary wrote on June 6, 1991, that the combination of claimant's knee and back injuries resulted in total body disability of 11 percent, and that an 11 percent whole body disability is materially and substantially greater than a 5 percent whole body disability. Dr. Gary deposed, however, that claimant continued his work as a shipyard welder until his January 1983 back injury without restrictions resulting from the knee problems. Dr. Gary also testified that when he reviewed claimant's knee injuries as part of his medical history at the time he treated him for back problems in 1983, there was nothing to indicate that claimant needed to undergo a full workup relative to his knee complaint. Dr. Gary treated claimant from early 1983 through part of 1984 and that treatment addressed claimant's back problems only. Additionally, in determining the availability of suitable alternate employment, Nancy Favaloro,

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indicates that claimant had trouble maintaining the required average while in school and then had difficulty passing the certification examination at the time he applied for the higher-paying private institution position.

LIGA's vocational expert, considered only the work restrictions which Dr. Gary had imposed on claimant based on his back condition and his 5 percent whole man disability rating.

In *Two "R" Drilling*, 894 F.2d at 748, 23 BRBS at 34 (CRT), claimant, who had a pre-existing manifest developmental disease of the spine, sustained a back injury at work which rendered him totally disabled. In denying Section 8(f) relief, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, held that employer failed to show that claimant's disability was not due solely to the employment injury. The court rejected the "common-sense" test urged by employer in that case, *i.e.*, that when an employee who has a history of back problems suffers a work-related injury to his back the current disability is not due solely to the employment injury, reasoning that such an approach would read the contribution element out of the law. *Id*., 894 F.2d at 750, 23 BRBS at 35 (CRT).

We agree with the Director that there is no record evidence sufficient to support a finding of Section 8(f) contribution in this case. While Dr. Gary's opinion is sufficient to establish that claimant's permanent physical impairment is greater as a result of the combined knee and back injuries, the administrative law judge properly determined that this opinion does not support a finding of contribution for purposes of Section 8(f), as it does not implicate claimant's prior knee injuries as a contributing factor in his level of permanent disability. *See generally Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 797, 26 BRBS 139, 150 (CRT) (2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1, 7 (CRT) (2d Cir. 1992). Because the administrative law judge's finding that LIGA did not establish this essential element for Section 8(f) relief is rational and supported by the record, we affirm his denial of Section 8(f) relief in this case. *See Sproull*, 25 BRBS at 110-111 (1991).

Accordingly, the administrative law judge's Decision and Order on Remand is modified to provide that claimant is entitled to permanent total disability compensation from April 18, 1984 to July 25, 1990. In all other respects, the administrative law judge's Decision and Order on Remand Awarding Benefits and the Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge