BRB Nos. 96-1781
and 96-1781A

JESSE J. FOX	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WEST STATE INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and Amended Decision and Order on Granted Motion for Reconsideration of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

J. R. Perkins, III, The Dalles, Oregon, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs, LLP), Seattle, Washington, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order - Award of Benefits and Amended Decision and Order on Granted Motion for Reconsideration (95-LHC-66) of Administrative Law Judge Ellin M. O'Shea 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).

Prior to the injury which is the subject of the current appeal, claimant sustained a

work-related back injury on December 28, 1984, while working for Alcoa Machine as a machinist in employment covered by California workers' compensation. After undergoing surgery for a herniated disc on July 12, 1985, claimant was released to work without restrictions on November 3, 1986. After a period of self-employment, claimant underwent vocational rehabilitation and was retrained to work as a CNC machinist, which involved lighter work than his previous job. In May 1990, claimant settled his state workers' compensation claim against Alcoa. Shortly thereafter, claimant began working as a CNC machinist with various employers. In October 1990, claimant suffered a non work-related stroke, but he continued to work. In November 1991, he had cardiac arrhythmia serious enough to require the insertion of a pacemaker. In addition to these conditions, claimant has a life-long history of fainting.

The present claim arose after claimant began working part-time for employer as a journeyman machinist on August 11, 1992. He was subsequently laid off for various periods but in January 1993, was rehired to work the weekend shift.[1] On August 17, 1993, claimant alleged that he sustained an aggravation of his prior back injury as a result of the work he performed for employer. Thereafter, claimant's attendance at work was irregular, and on November 20, 1993, claimant stopped working entirely, alleging that he could no longer continue because of his back pain. Claimant sought temporary total and permanent total disability benefits under the Act.

In her original Decision and Order - Award of Benefits dated January 18, 1996, the administrative law judge concluded that claimant suffered an aggravating injury to his lumbar spine which arose out of his 1993 work for employer. She further found that although claimant established a *prima facie* case of total disability, employer demonstrated the availability of suitable alternate employment. Thus, claimant was awarded temporary partial disability benefits from November 21, 1993, until August 2, 1994, the date Dr. Rosenbaum found his condition was permanent, and continuing permanent partial disability compensation thereafter.[2] The administrative law judge based this award on an average

[1]Claimant worked 12 hour shifts on Friday, Saturday and Sunday nights, or a total of 36 hours per week.

[2]In the Order portion of the administrative law judge's initial Decision and Order, the administrative law judge mistakenly stated the award was for temporary partial disability from November 21, 1993 to March 25, 1994, and permanent partial disability benefits thereafter. The correct date is August 2, 1994.

weekly wage of $551, relying on claimant's actual earnings in the 52-week period prior to August 17, 1993.

In response to motions for reconsideration filed by both parties, the administrative law judge issued an Amended Decision and Order on Granted Motion for Reconsideration on August 29, 1996. In this decision, she found that employer did not meet its burden of establishing suitable alternate employment because it failed to elicit testimony from its vocational expert sufficient to establish that the alternate jobs identified would be realistically available to someone with claimant's prior history of stroke and cardiac problems in addition to his back injury. The administrative law judge also reconsidered the wage records submitted and recalculated claimant's average weekly wage, finding it was $479.57. The administrative law judge accordingly awarded claimant temporary total disability benefits from November 21, 1993 to March 25, 1994, and permanent total disability benefits thereafter.

Employer appeals, raising the issues of average weekly wage, judicial estoppel and suitable alternate employment. Claimant cross-appeals the administrative law judge's determination of his average weekly wage and responds to employer's appeal, urging that employer's judicial estoppel and suitable alternate employment arguments be rejected. Both employer and claimant filed reply briefs.

Suitable Alternate Employment

Once claimant establishes a *prima facie case o*f total disability by establishing his inability to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that employer must demonstrate that specific job opportunities exist which claimant could perform considering his age, education, work experience, and physical restrictions and which are realistically and regularly available in his community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In the present case, in her initial Decision and Order, the administrative law judge awarded claimant partial disability benefits, finding that employer established the availability of suitable alternate employment through job opportunities for a CNC machinist, grinder-polisher, copier, security guard and parking lot attendant which its vocational expert, Ms. Ohlstein, had identified. In her Amended Decision, however, the administrative law judge determined upon reconsideration that although these jobs were physically suitable for claimant after the August 17, 1993, back injury and his prior cardiac condition and stroke did not result in any physical impairment, employer had not met its burden of establishing suitable alternate employment because it failed to elicit any testimony from its vocational expert sufficient to establish that these jobs were realistically available to claimant given claimant's history of cardiac and stroke problems.

On appeal, employer asserts that the administrative law erred in finding that it failed

to account for claimant's prior cardiac and stroke conditions in identifying alternate jobs which were realistically available, given that she specifically found that these conditions were non-disabling and did not functionally affect claimant's ability to perform the work. In his motion for reconsideration of the administrative law judge's initial decision finding employer's evidence sufficient to meet its burden, claimant did not argue that these prior conditions affected his physical ability to perform the alternate jobs identified; he argued that the jobs were not shown to be realistically available to a person with these prior conditions in addition to his back problems. We agree with employer that the administrative law judge erred in finding that employer did not meet its burden of establishing the availability of suitable alternate employment on the sole basis that the vocational expert was not explicitly asked whether the suitable jobs would be available to a person with claimant's history of stroke and cardiac problems.[3]

In order to meet its burden of demonstrating suitable alternate employment, employer must demonstrate specific jobs which claimant is capable of performing given his physical restrictions. *See Bumble Bee,* 629 F.2d at 1329, 12 BRBS at 662. The administrative law judge must also determine whether there is "a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.,* 849 F.2d 1194, 1196, 21 BRBS 122, 123(CRT) (9th Cir. 1988). In making this determination, pre-existing limitations must be addressed in determining whether a job is realistically available. In *Hairston*, claimant's prior criminal record, which resulted in his termination as a bank guard, rendered such work unavailable to him, and employer thus could not rely upon such jobs in order to meet its burden. In the present case, claimant's history of stroke and cardiac problems are prior conditions which must be considered in determining the availability of suitable alternate employment. In this case, the administrative law judge found that the specific jobs relied upon by employer are suitable given claimant's physical restrictions from his work-related

[3]Employer also argues that the administrative law judge's finding that employer did not meet its suitable alternate employment burden is contrary to applicable law because the Act does not require employer to prove that each potential alternate employer would not act in violation of the Americans with Disability Act, 41 U.S.C. §1201 *et seq.,* and discriminate against claimant because of his prior stroke and cardiac problems. This argument is being raised for the first time on appeal, *see Shaw v. Todd Pacific Shipyards Corp.,* 23 BRBS 96, 100 (1989); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988), and need not be addressed in any event due to our disposition of this case.

injury as well as his prior conditions. Employer therefore argues that it accounted for claimant's prior condition and thus met its burden of demonstrating the availability of suitable alternate employment. We agree.

In her Amended Decision, the administrative law judge found that employer's vocational expert accounted for claimant's prior cardiac and stroke history as well as the effects of his 1993 work-related back injury in identifying specific available suitable alternate employment opportunities. Moreover, she found that claimant's stroke and cardiac conditions did not impair his ability to perform the alternate jobs identified and noted that in the past claimant had been hired by a number of employers despite having these conditions. In addition, she rejected Dr. Eramus's March 1995 medical opinion that claimant's pre-existing conditions combined with his August 17, 1993 industrial injury to render him totally disabled, finding that it was lacking an evidentiary foundation as there was no credible evidence in the record that claimant's cardiac or stroke conditions combined with his industrial injury either functionally or in any way so as affect his wage-earning capacity. Rather, the administrative law judge concluded that any limitations that claimant had either functionally or in relation to his wage-earning abilities were due to the August 17, 1993, industrial injury. The specific jobs which the expert demonstrated were available thus were suitable given claimant's physical capabilities, and their suitability was unaffected by claimant's prior conditions.

In finding that employer had nonetheless not met its burden of establishing the availability of suitable alternate employment, the administrative law judge required employer to elicit specific testimony from Ms. Ohlstein that the suitable alternate jobs identified were realistically available to claimant given his prior history. In so concluding, the administrative law judge imposed an additional burden upon employer. Where a vocational expert testifies that specific jobs are available which are suitable given claimant's age, education, history and restrictions, it is implicit in such evidence that the jobs are reasonably available to the claimant. Where the expert's testimony meets these criteria, it establishes that claimant has the qualifications necessary to realistically compete for the job.

The thrust of claimant's argument in this case is that claimant must disclose all of his prior conditions to a prospective employer, and once he does so, it is not likely that he will be hired. Claimant asserts that employer did not question its vocational expert about the likelihood that claimant would be hired because it knew the answer would be adverse to its position. However, the vocational expert testified to suitable jobs available given claimant's restrictions, and claimant had no restrictions due to his prior conditions. The administrative law judge rejected specific evidence that claimant's prior conditions in combination with his 1993 work injury rendered him totally disabled. She found that claimant's stroke and cardiac conditions did not impair him or affect his wage-earning capacity and specifically noted that claimant obtained employment despite his prior conditions up until his 1993 injury. Although claimant thus lacked credible affirmative evidence that his prior conditions affected his enployability, he persuaded the administrative law judge that the vocational evidence was insufficient to meet employer's burden because the expert did not explicitly

state claimant would realistically be hired given his history.

We hold that the case law does not require this type of testimony where the evidence of suitable alternate employment is otherwise sufficient to meet employer's burden. The burden imposed by the administrative law judge here is tantamount to requiring employer to demonstrate that claimant would be hired despite his prior history. It is well-established, however, that employer is not required to act as an employment agency for the employee. *See, e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042, 14 BRBS 156, 164-165 (5th Cir. 1981); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1979). In this regard, we note that once employer meets its burden of demonstrating that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. *See, e.g., Edwards*, 999 F.3d at 1376 n.2, 27 BRBS at 84 n.2 (CRT). Evidence that claimant's prior history makes his obtaining a job unrealistic is relevant to this complementary burden borne by claimants. If, in fact, employers will not hire applicants with claimant's history of stroke and cardiac problems, it will be apparent when a claimant demonstrates that his diligent job search was unsuccessful. In this case, however, there is no evidence that claimant in fact diligently sought employment within the jobs shown to be available.

In summary, we hold that employer met its burden of establishing the availability of suitable alternate employment by introducing credible testimony from a vocational expert who identified specific available jobs which were suitable given claimant's age, education, and physical limitations. As the expert accounted for claimant's prior conditions in identifying suitable jobs, her testimony is sufficient to meet employer's burden. We therefore reverse the administrative law judge's award of permanent total disability benefits and hold that claimant is limited to an award of partial disability benefits. *See Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd,* 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991).

Remand for the administrative law judge to determine the extent of claimant's permanent partial disability is not necessary in this case. In her Amended Decision and Order, the administrative law judge restated her findings regarding the extent of permanent partial disability as an alternative. Claimant is thus entitled to temporary partial disability compensation from November 21, 1993 until August 2, 1994, and permanent partial disability benefits thereafter based on a loss of wage-earning capacity of $111.57 per week, based on the difference between his average weekly wage of $479.57 and the $360 per week he could have earned in the CNC machinist jobs identified by Ms. Ohlstein. We modify the administrative law judge's decisions consistent with these findings.

Judicial Estoppel

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a

litigant from `playing fast and loose with the courts.'" *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (*quoting Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991)). Because of its purpose and equitable nature, invoking the doctrine of judicial estoppel is discretionary. *Russell*, 893 F.2d at 1037.

On appeal, employer contends that because claimant previously argued in his state claim for his 1984 injury against Alcoa that he was permanently totally disabled from returning to his work as a machinist, he should be precluded under the principle of judicial estoppel from arguing in the present case that at the time of his injury with employer he had no restrictions from working as a full duty machinist and that his actual earnings in that job were indicative of his annual earning capacity. As employer is making this argument for the first time on appeal, we need not address it. *See Shaw v. Todd Pacific Shipyards Corp.,* 23 BRBS 96, 100 (1989). We note, however, that judicial estoppel would not apply, in any event, on the facts in this case because the settlement between claimant and Alcoa approved by the California Workers' Compensation Appeals Board was premised on claimant's having sustained no permanent disability from his 1984 back injury. *See* Employer's Exhibit 8. Judicial estoppel is not implicated unless the first forum accepts the legal or factual determination alleged to be at odds with the position advanced in the current forum. *See Masayesva v. Hale,* 118 F.3d 1371 (9th Cir. 1997).

Average Weekly Wage

In her original decision, the administrative law judge determined that claimant's average weekly wage should be calculated pursuant to Section 10(c), 33 U.S.C. §910(c).[4] Thereafter, she noted that although the parties appeared to be in agreement that claimant's wages for the 52-week period ending November 29, 1993, totaled $22,964.43, the correct period for determining claimant's average weekly wage was the 52-week period prior to August 17, 1993. Based on the wage records submitted, the administrative law judge determined that claimant's total wages during this period were $19,869.67. Partially crediting claimant's testimony that he would have worked for other employers during the intermittent periods he had been laid off by employer but for back pain resulting from his prior injury, the administrative law judge excluded five of the ten weeks that claimant claimed he would have worked during the relevant period from the divisor, and dividing claimant's actual earnings by 36 weeks, determined that claimant's average weekly wage was $551. *See generally Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

In response to employer's motion for reconsideration, the administrative law judge reconsidered claimant's wage records and found that claimant actually earned $24,937.38

[4]The administrative law judge's use of Section 10(c) as the applicable subsection for calculating claimant's average weekly wage is not challenged on appeal.

and had worked several additional weeks in the year preceding the August injury. Moreover, upon further reflection she agreed with employer that she erred in excluding five of the ten weeks claimant argued that he would have worked but for his back pain from the divisor based on claimant's self-serving representations. Accordingly, dividing claimant's $24,937.38 in earnings by 52 weeks, the administrative law judge determined that claimant had an average weekly wage of $479.57. Employer appeals and claimant cross-appeals the administrative law judge's average weekly wage calculation.

On appeal, employer contends that the administrative law judge erred in relying on claimant's actual pre-injury earnings as a full duty machinist to calculate his average weekly wage as these earnings were not representative of his annual earning capacity. Employer specifically contends that because claimant returned to this work against the advice of his doctor, was performing the work in pain, and was essentially being carried by his employer and co-workers, his actual pre-injury earnings as a full duty machinist overestimate his true annual earning capacity. Employer suggests that instead of basing the average weekly wage calculation on claimant's actual earnings in the 52-week period prior to the injury, the administrative law judge should have instead used $360, the amount that claimant would have earned as a CNC machinist, the job for which he was re-trained following his 1984 injury.

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part,* 600 F.2d 1288 (9th Cir. 1979). Accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

We affirm the administrative law judge's finding that claimant's actual earnings as a full duty machinist in the year prior to his injury are a reasonable representation of his annual earning capacity. The administrative law judge specifically considered and rejected employer's argument in her initial Decision and Order, noting that although there is evidence that employer made accommodations for claimant because of his post-surgical limitations and claimant was medically advised earlier not to perform such exertions, he nonetheless performed this work successfully for a significant period of time in 1993. Decision and Order at 12. Inasmuch as the administrative law judge rationally found based on claimant's successful performance of this work for a significant period that his earnings in that job reasonably represented his annual earning capacity, we affirm that determination and reject employer's arguments to the contrary. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985)(same standard applicable in determining wage-earning capacity under 33 U.S.C.§908(h)).

On cross-appeal, claimant argues that the administrative law judge's calculation of his average weekly wage based on his earnings in the 52 weeks prior to August 13, 1993, instead of the 52-week period prior to November 29, 1993, when he stopped working, is an error of law pursuant to *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).[5] We note that this argument conflicts with the position claimant advocated regarding the average weekly wage while the case was before the administrative law judge.[6] In any event, the administrative law judge correctly

[5]We are unable to consider the evidence of claimant's earnings in the year prior to his injury while working for Cascade General which he has affixed to his brief, as this evidence was not part of the record before the administrative law judge. *See Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985).

[6]In his Post-Hearing memorandum, claimant urged application of August 17, 1993 as the date of injury, although he argued that November 21, 1993 was the date of his disability. Thereafter, however, in a March 4, 1996, letter to the administrative law judge responding to employer's argument on reconsideration, claimant states, "Given claimant's spotty work history after August 17, 1993, claimant does not dispute the administrative law judge's approach in determining the appropriate average weekly wage by excluding wages after the `date of the accident' of August 17, 1993." Moreover, in a June 7, 1996, letter written to the administrative law judge relating to the arguments raised on reconsideration, claimant stated that although he had previously relied on *Johnson* in presenting evidence relevant to determining claimant's average weekly wage, the only difference of opinion he

determined in her Amended Decision that *Johnson* does not apply on the facts in this case; claimant described his work pattern subsequent to his August 17, 1993, injury as "spotty" and *Johnson* only sanctions the use of claimant's earnings at the time of his disability to determine his average weekly wage where the effect of a traumatic injury is latent. *See generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Claimant's remaining argument is that because he provided unrebutted testimony that he would have worked but for his back pain in each of the twelve weeks in which he did not work in the 52 weeks prior to his injury, the administrative law judge erred in overturning her prior decision to exclude five weeks from the divisor in her Amended Decision and Order. We disagree. The administrative law judge is free to accept or reject all or any part of any witness's testimony as she sees fit. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In her Amended Decision, the administrative law judge rationally reconsidered her evaluation of the testimony, concluding that she was unwilling to credit claimant's self-serving statements regarding the time he lost from work in light of his prior irregular work history, his failure to obtain medical treatment, and his receipt of unemployment compensation during the times he claimed he would have worked had he been able to do so. Claimant has failed to demonstrate any reversible error by the administrative law judge in evaluating the conflicting evidence and making credibility determinations. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Inasmuch as the administrative law judge's formula for calculating claimant's's average weekly wage based on a 52-week divisor is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of injury, we affirm her determination in her Amended Decision and Order that claimant's average weekly wage is $479.54. *See Hicks,* 14 BRBS at 549.

Accordingly, the administrative law judge's finding that employer failed to meet its burden of establishing suitable alternate employment is reversed, and her Amended

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currently had with the methodology that the administrative law judge used in calculating the average weekly wage in the initial Decision and Order was her exclusion of only five of the ten weeks claimant claimed that he would have worked but for his back pain from the computation. In the concluding line of this letter, claimant states that while he feels that the deduction of five weeks as non-earning time is not justified, he accepts the $551 average weekly wage figure, which the administrative law judge had determined initially based on the 52-weeks prior to August 17, 1993, as one of the possible correct determinations.

Decision and Order on Granted Motion for Reconsideration is modified to reflect that claimant is entitled to temporary partial disability benefits from November 21, 1993 until August 2, 1994, and permanent partial disability benefits thereafter based on a loss in wage-earning capacity of $111.57 per week. In all other respects, her Decisions are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge