BRB Nos. 07-0935
and 07-0935A

L.R.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: 06/30/2008
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (1998-LHC-02090) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Board for the second time.

Claimant, while working for employer on October 22, 1997, sustained injuries to his left arm, neck, and back which caused him to miss work until May 1, 1998. Claimant was thereafter assigned various longshore jobs, but on September 28, 1998, he stopped working due to numbness on the left side of his face, jaw, and tongue, which was diagnosed, on October 2, 1998, as neck-tongue syndrome. Claimant returned to work on December 2, 1998, with permanent work restrictions of no climbing, minimal lifting over 35 pounds, and minimal pushing or pulling over 50 pounds. Claimant underwent non-work-related carpal tunnel surgery for his right hand on January 29, 1999, and for his left hand on April 9, 1999. Claimant returned to work after the latter surgery on June 5, 1999.

On August 5, 1999, claimant, while at work, had an onset of neck-tongue syndrome symptomatology, which prompted the union secretary, on or about July 11, 2000, to inform claimant that he could not return to work until his treating physician released him for work with no physical restrictions. Employer voluntarily paid claimant compensation for temporary total disability from October 23, 1997 to March 3, 1998, June 2 to 3, 1998, August 6, 1999 to February 22, 2001, and for permanent partial disability at a rate of $615 per week from August 13 to November 26, 2001.

In his initial decision, the administrative law judge found that claimant was, as a result of his 1997 work injury, incapable of performing his usual work as a longshoreman, and thus, entitled to temporary total disability benefits for periods from October 23, 1997 to May 1, 1998, September 29 to December 1, 1998, and from August 6, 1999 to July 11, 2000.[1] He additionally determined that claimant sustained a loss in wage-earning capacity and was entitled to an award of temporary partial disability benefits from May 4 to September 28, 1998, but that he had no loss in wage-earning capacity during his return to work from December 2, 1998 to August 5, 1999. Moreover, the administrative law judge found, based on Dr. Won's opinion that claimant could return to work as of July 11, 2000, subject to a restriction of no repetitive lifting over 20 pounds, that claimant's inability to return to work thereafter was due solely to the requirement imposed by claimant's union that his treating physician provide an unrestricted release to return to work due to his neck-tongue syndrome. The

[1] Based on the parties' stipulation, the administrative law judge attempted to calculate claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), but found the record evidence insufficient to make an average weekly wage determination under that provision. Nonetheless, the administrative law judge concluded that claimant's average weekly wage is $1,037.04, the amount at which employer had been voluntarily paying benefits, as he found that figure "favorable" to claimant.

administrative law judge concluded that, under these circumstances, employer is not liable for any compensation after July 11, 2000.

Claimant appealed, challenging the administrative law judge's findings regarding the extent of claimant's disability and the average weekly wage calculation. Employer cross-appealed, challenging only the administrative law judge's calculation of claimant's average weekly wage. In its decision, the Board, pertinent to the issues raised in the instant appeals, vacated the administrative law judge's denial of disability benefits after July 11, 2000, as well as his average weekly wage finding, and remanded the case for reconsideration as to whether employer met its burden to establish the availability of suitable alternate employment from that date, and for a recalculation of claimant's average weekly wage based on evidence of record. [*L.R.*] *v. Stevedoring Services of America*, BRB Nos. 03-0529/A (April 29, 2004) (unpub.). Additionally, the Board instructed the administrative law judge that if, on remand, he finds claimant is not entitled to an award based on a present loss of wage-earning capacity, he must address claimant's entitlement to a *de minimis* award. *Id.* Both parties moved for reconsideration, which resulted in the Board's *en banc* affirmance of its decision. [*L.R.*] *v. Stevedoring Services of America*, BRB Nos. 03-0529/A (Feb. 28, 2005) (unpub. Order)(*en banc*) .

At the hearing on remand, claimant testified that he had returned to work as a longshoreman on December 3, 2001, that a non-work-related back injury kept him off work for the first quarter of 2002, that he returned to work on April 3, 2002, that his work during the second quarter of 2002 was fairly irregular, and that thereafter he worked regularly upon becoming an A-registration longshoreman on August 31, 2002. In his decision, the administrative law judge initially found, pursuant to Section 10(c), that claimant's average weekly wage is $877.96. The administrative law judge next found that employer established the availability of suitable alternate employment from July 12, 2000, to December 2, 2001, based on the labor market survey of Roy Katzen, and that claimant's return to longshore work on December 3, 2001, similarly constituted suitable alternate employment. Accordingly, the administrative law judge found claimant entitled to permanent partial disability benefits at varying rates for the periods from July 12, 2000 to December 2, 2001, and from December 3, 2001 to August 30, 2002, and that thereafter claimant was entitled to an ongoing *de minimis* award of permanent partial disability benefits.[2]

[2] The administrative law judge found that claimant had a loss of wage-earning capacity of $601.16, from July 12, 2000, through December 2, 2001, a loss in wage-earning capacity of $374.93, from December 3, 2001, through August 30, 2002, and that claimant was thereafter entitled to a one percent *de minimis* award of permanent partial disability benefits.

On appeal, claimant challenges the administrative law judge's findings regarding the extent of claimant's disability and the calculation of claimant's average weekly wage and post-injury wage-earning capacity, and further argues that the administrative law judge did not issue his decision on remand in a timely fashion. BRB No. 07-0935. Employer cross-appeals the administrative law judge's award of disability benefits for the period from July 12, 2000, to December 2, 2001. BRB No. 07-0935A. In all other respects, employer responds, urging affirmance.

We first address claimant's arguments on appeal regarding his average weekly wage. Claimant asserts that the administrative law judge's use of the 1997 average earnings of all B-registration longshoremen in claimant's local union to calculate claimant's pre-injury average weekly wage as $877.96 is inappropriate under Section 10(c) because it does not fairly and accurately represent what claimant would have earned absent his injury. Claimant maintains that his average weekly wage should have been calculated based on the earnings of the three highest paid B-registration longshoremen in claimant's local union since, like claimant, they were highly motivated to secure regular and continuous longshore work.[3]

In his initial decision, the administrative law judge based his average weekly wage determination on that applied by employer on the basis that it was more favorable to claimant than his calculation from the best data in the records.[4] As it was unsupported by evidence, the Board vacated the average weekly wage figure of $1,037.04 and remanded the case for further consideration of this issue. In particular, the Board instructed the administrative law judge to render "a determination of claimant's average weekly wage based on the evidence of record" by using, as agreed to by the parties, Section 10(c), and that he should allow "for the admission of evidence into the record if appropriate."

[3] Claimant also asserts that the administrative law judge made a significant procedural error by failing to give the parties notice of his intent to not use the lowest average weekly wage figure urged by employer which was $963.61. We initially reject this contention, as the administrative law judge in his first decision found that an average weekly wage of $877.96 was supported by the best data available. He chose not to utilize this figure in favor of that upon which employer based its payments. On remand, therefore, it was appropriate for the administrative law judge to consider his prior calculation, and neither party can claim surprise in this regard.

[4] In addressing average weekly wage in his initial decision, the administrative law judge commented that the record "clearly is incomplete" on the issue of claimant's average weekly wage, and moreover, observed that employer's average weekly wage determination of $1,037.04, "seems to have no basis in the record," and "apparently relies on evidence not in the record." Decision and Order at 21.

[*L.R.*], slip op. at 5. The Board also instructed the administrative law judge to factor vacation pay, as well as a four percent raise claimant received shortly before his October 1997 work injury, into the calculation of claimant's average weekly wage.

On remand, the parties submitted additional evidence regarding claimant's earnings from the date he returned to longshore work, December 3, 2001, through September 30, 2005. CX 45. The administrative law judge initially rejected claimant's argument that his average weekly wage should be based on only the earnings of the three highest-paid B-registered longshoremen in claimant's cohort. The administrative law judge found that claimant's basis for relying on the earnings of these employees while excluding others was claimant's "self-serving representation," supported by that of a fellow employee, Mr. Stykel, that claimant and the selected employees were "highly motivated" workers. The administrative law judge rejected this contention, finding it was not supported by the earning records of the employees.[5] Decision on Remand at 4. The administrative law judge, in compliance with the Board's instructions, next appropriately concluded that the 1997 earnings upon which he based claimant's average weekly wage included vacation and holiday pay, as well as the contractual wage increase received by claimant four months prior to the injury.[6] Decision on Remand at 5; *see also* 33 U.S.C. §902(13); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *modified on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Siminiski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). The administrative law judge found most probative the 1997 average earnings of all of the B-registered longshoremen in claimant's cohort as these wages

[5] In this regard, the administrative law judge found that R.E., whom claimant characterized as not one of the highly motivated workers, HT at 50, was the fourth highest earner in claimant's group for the period in question, and N.E., who was represented as being at the hiring hall "all the time," HT at 51, and thus, seemingly very motivated, earned less than half of what the highest earners made in the week claimant actually worked as a B-registered longshoreman in 1997. Moreover, the administrative law judge found that claimant's actual earnings during the period in question belie his position that he was one of the highly motivated workers, for he earned less in 1996 than any of the other longshoremen in his group.

[6] Regarding the four percent wage increase, the administrative law judge found it went into effect only on June 28, 1997, four months prior to claimant's injury. Given that the raise was union-wide, the four months of increased earnings were reflected in his average weekly wage calculation based on the earnings of the B-registered longshoremen. In addition, although not specifically noted by the administrative law judge, the data utilized would also include any guarantee income.

cover a full year's earnings for a large comparable group of workers. The administrative law judge thus divided the average annual wages of all 63 B-registered longshoremen who worked in 1997, $45,654, by 52 to arrive at a pre-injury average weekly wage of $877.96.

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. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). Initially, we hold that it was rational, given the evidence in this case, for the administrative law judge to use the earnings of comparable workers to calculate claimant's average annual earnings pursuant to Section 10(c). 33 U.S.C. §910(c); *see generally Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). On remand, the administrative law judge fully considered the Board's instructions as well as the parties' contentions. He gave rational reasons for relying upon the earnings of all B-registered longshoremen. As the result he reached is reasonable, supported by substantial evidence and consistent with the goal of Section 10(c), his findings on this issue are affirmed. *See Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Hicks*, 14 BRBS 549. Accordingly, we affirm the administrative law judge's finding that claimant's pre-injury average weekly wage is $877.96.

Claimant next argues that the administrative law judge erred in finding that he was not entitled to total disability benefits for the period between July 12, 2000, and December 3, 2001. Claimant maintains that his decision not to seek non-longshore work during the period between July 12, 2000, and December 3, 2001, was due to his fear of losing his longshore registration status and that the administrative law judge should, therefore, limit his consideration of the availability of suitable alternate employment for that period to the longshore positions identified by employer.

The "law of the case" doctrine holds that the Board will not reconsider issues previously settled in its prior consideration of the case. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002). As the Board rejected this argument in its prior decision, [*L.R.*], slip op. at 8, n. 4, we need not reconsider claimant's contention. *See, e.g., Boone*, 37 BRBS 1; *Ravalli*, 36 BRBS 47; *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002). Moreover, we note that the pertinent issue concerns the availability of suitable work and claimant's wage-earning capacity. Employer need not

actually place claimant in alternate employment or obtain a position for him. *See generally Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992).

Claimant further avers that it was incorrect for the administrative law judge to adjust his post-injury wages for the period spanning his return to longshore work on December 3, 2001, until the date he obtained his A-longshoreman's status, August 30, 2002, to the hourly rate paid at the time of his injury rather than to the average hourly rate in the year prior to injury on which the administrative law judge based the average weekly wage. The Act contemplates that the current dollar amount of post-injury "wage-earning capacity" be adjusted downward to account for post-injury inflation. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). The Board has consistently held that the adjustment in post-injury wages should be made to reflect the wage rates in effect for the post-injury job at the time of the injury. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *see also Richardson*, 23 BRBS 327; *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 238 (1985).

The administrative law judge appropriately considered the effects of inflation for the period in question by adjusting claimant's post-injury earnings downward to reflect the wages paid at the time of his injury. Specifically, his comparison of the hourly wage rate that claimant was paid at the time of his October 22, 1997, injury, to the hourly wage rate that claimant received upon his return to suitable alternate longshore employment on December 2, 2001,[7] is a reasonable means for arriving at an inflation factor.[8] *Sestich*,

[7] The administrative law judge divided claimant's wage rate in effect at the time of his October 22, 1997, injury, $25.68, by the wage rate, $27.68, at which claimant worked from December 3, 2001 through August 30, 2002, to arrive at an inflation factor of .928. He then multiplied claimant's post-injury wage-earning capacity for this period of time, $520.37 ($13,009.34 actual earnings divided by the 25 5/7 weeks worked) by the inflation factor of .928 to conclude that claimant's post-injury wage-earning capacity, as factored for inflation, was $503.03 per week. Comparing this to claimant's average weekly wage of $877.96, the administrative law judge concluded that claimant was entitled to permanent partial disability benefits for the period between December 3, 2001, and August 30, 2002, based on a $374.93 loss of wage-earning capacity.

[8] Claimant's reliance on *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649, 657 (1979), in support of his position that the average hourly wage rate for the entire

289 F.3d 1157, 36 BRBS 15(CRT); *Richardson*, 23 BRBS 327. Consequently, we affirm the administrative law judge's findings regarding claimant's loss in wage-earning capacity and resulting entitlement to permanent partial disability benefits for the period between December 3, 2001, and August 30, 2002, as they are rational, supported by substantial evidence, and in accordance with law. *Id.*

Lastly, claimant argues that the administrative law judge's delay of 17 months in issuing the decision on remand in this case violated Section 19(c) of the Act, 33 U.S.C. §919(c),[9] and resulted in prejudice to claimant's case as the administrative law judge "forgot" significant testimony regarding claimant's strong work ethic, which was offered to support claimant's position that his average weekly wage should be based on earnings of only "comparable B-longshoremen." As we have discussed, the administrative law judge considered the relevance of claimant's pre-injury motivation as it pertains to the calculation of his average weekly wage, Decision and Order on Remand at 4, and provided a sufficient rationale for rejecting claimant's "highly motivated" argument.[10]

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one-year period prior to the injury should be used rather than the wage rate at the time of injury, is misplaced. While claimant correctly observes that *Devillier* states "it is important that earning capacity be measured against wage levels at the time upon which average weekly wage is based," claimant neglects the well-settled principle that an employee's average weekly wage is to be determined as of the time of the injury. *Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pert. part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); 33 U.S.C. §910.

[9] Section 19(c) of the Act, in part, requires that the administrative law judge issue an order within twenty days of the hearing accepting or rejecting the claim. 33 U.S.C. §919(c). The Board, however, has held that the "twenty day rule" set forth in the Act and at 20 C.F.R. §702.349 is not mandatory. Rather, a failure to issue a decision within twenty days requires remand only where the aggrieved party shows that it was prejudiced by the delay. *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

[10] Claimant correctly notes that the administrative law judge did not discuss the testimony of John Miller, who testified both regarding the motivation issue as it pertains to average weekly wage and claimant's ability to work as a longshoreman. The administrative law judge discussed similar testimony from Mr. Stykel and rejected it in considering average weekly wage and finding claimant was capable of performing longshore work based on the medical evidence. Thus, any error in not discussing Mr. Miller's testimony is harmless.

Consequently, claimant has failed to demonstrate prejudice due to the delay.[11] *See Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

In its cross-appeal, employer urges the Board to modify its prior decision by reinstating the administrative law judge's original denial of compensation for the period from July 12, 2000, through December 2, 2001, when the union and not employer prevented claimant from returning to work. Employer also asserts that the administrative law judge's failure to address the availability of suitable alternate employment by virtue of the Americans With Disabilities (ADA) program adopted by the union and PMA as of January 19, 2001, resulted in too great a loss in wage-earning capacity. Employer maintains that the inclusion of longshore jobs in the calculation of claimant's post-injury wage-earning capacity would result in a diminished compensable loss in wage-earning capacity for claimant.

In its prior decision, the Board vacated the administrative law judge's finding that claimant was not totally disabled for the period in question because it was premised, in large part, on the administrative law judge's conflicting statements regarding claimant's ability to work, [*L.R.*], slip op. at 6, and inability to recognize employer's renewed burden to establish the availability of suitable alternate employment due to the particular circumstances in this case.[12] Moreover, the Board stated that the administrative law judge "summarily credited employer's November 13, 2001, labor market survey" without identifying which specific jobs were suitable for claimant. *Id.*, slip op. at 8. Consequently, the Board remanded the case with instructions for the administrative law judge to "discuss in fuller detail the evidence relating to suitable alternate employment." *Id.* We will not revisit this issue, as the Board's decision constitutes the law of the case. *Boone*, 37 BRBS 1. Moreover, the underlying flaws in the administrative law judge's

[11] We note that claimant raised a similar "extreme delay" argument in his prior appeal to the Board, which the Board rejected on the ground that claimant's assertions of error in the administrative law judge's weighing of the evidence were "insufficient to establish prejudice by virtue of the delay" in the administrative law judge's decision. [*L.R.*], slip op. at 8, n. 5, *citing Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *see also* 33 U.S.C. §919(c); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981); 20 C.F.R. §702.349.

[12] Specifically, the Board held that, as it was employer's burden to establish the availability of suitable alternate employment and such work was unavailable to claimant, these jobs could not meet employer's burden, particularly since "the unavailability of the suitable jobs claimant performed after his initial work injury is due solely to the effects of that injury and not to any misconduct on claimant's part." [*L.R.*], slip op. at 7; *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

original evaluation of the evidence relating to the suitable alternate employment issue for the period in question warranted the Board's action in vacating the administrative law judge's initial decision on this issue.

Turning to the Board's remand of the case for reconsideration of suitable alternate employment, the administrative law judge acknowledged that the Board "directed me to consider employer's evidence regarding suitable alternate employment subsequent to July 11, 20X0," which, he observed, constituted the reports and testimony of a vocational rehabilitation counselor, Roy Katzen, who opined that there are numerous jobs, including many longshore jobs, which claimant was physically capable of performing from that date. Decision and Order on Remand at 5-6. The administrative law judge nonetheless stated that he would consider only the non-longshore jobs identified by Mr. Katzen since the longshore work was unavailable to claimant.[13] *Id.*

The administrative law judge in this case adequately complied with the Board's instructions regarding suitable alternate employment on remand, concluding that suitable alternate jobs in the longshore industry were not shown to be available. With regard to the ADA program, the Board instructed the administrative law judge to determine whether employee established the availability of "actual suitable jobs" by virtue of this program. The evidence upon which employer relies on appeal to establish that claimant was capable of being placed in longshore work as of January 19, 2001, is too vague to establish the actual availability of such work.[14] HT at 165. Consequently, as the administrative law judge sufficiently followed the Board's remand instructions in considering the availability of suitable alternate employment during the period between July 12, 2000, and December 2, 2001, we affirm his findings regarding claimant's disability as they are rational, supported by substantial evidence and in accordance with the law.

[13] In addition, the longshore jobs listed in Mr. Katzen's labor market survey dated November 13, 2001, had lifting requirements of up to 35 pounds which exceeded the July 11, 2000, work limitation imposed by Dr. Won of no lifting over 20 pounds.

[14] The testimony cited by employer of union representative Mr. Leal Sundit falls short of establishing that claimant obtained ADA accommodated longshore work. First, counsel's question to Mr. Sundit involved the time frame in 2001 and 2002, beyond the scope of the time frame in question, and moreover, Mr. Sundit's response, that the "joint dispatcher may have accommodated [claimant]," is far from conclusory. HT at 165. Given claimant's testimony regarding his work history, any accommodation most likely would have occurred after his return to longshore employment on December 3, 2001, and thus, would fall beyond the scope of the pertinent time frame that the Board instructed the administrative law judge to consider on remand.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge