VOCATIONAL PROOF AND LABOR MARKET SURVEYS IN LHWCA CASES

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Vocational proof is critical in most tried general injury cases arising under the LHWCA. It also plays a role in certain scheduled injuries. Labor market surveys are an accepted method of vocational proof used by employers to establish claimant's residual wage-earning capacity. Before discussing vocational proof and labor market surveys, it is helpful to review the statutory basis for disability under the Act. Section 2(10) of the Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Section 8 provides the method for determining disability compensation. Basically, disability is an economic concept based on a medical foundation. *Owens v. Traynor,* 274 F.Supp. 770 (D.Md. 1967) aff'd , 396 F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968). The concept of disability is broad. It requires a careful assessment of the injured person as a whole. While the terms impairment and disability are often used interchangeably, they do not have the same meaning. Impairment is narrow in focus. It deals with an anatomical concept addressed in the AMA Guides to the Evaluation of Permanent Impairment. On the other hand, disability considers a claimant's age, education, work experience, impairment, physical restrictions and other cultural factors. Understanding the difference between impairment and disability is necessary in order to know how and when to use vocational evidence.

I. BURDEN OF PROOF IN ESTABLISHING DISABILITY

The claimant has the burden of establishing nature and extent of disability. *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 59 (1980). The injured worker cannot rely on the Section 20(a) presumption regarding this issue. *Gardner v. Director, OWCP,* 640. F2d 1385, 13 BRBS 101 (1st Cir. 1981), aff g *Gardner v. Bath Iron Works Corp.,* 11 BRBS 556 (1979); *Jones v. Midwest Machinery Movers,* 15 BRBS 70 (1982) (Ramsey, dissenting on other grounds); *Carver v. PEPCO,* 14 BRBS 824 (1981), aff'd mem., 673 F.2d 551 (D.C. Cir. 1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.,* 8 BRBS 141 (1978). The nature of disability refers to whether it is temporary or permanent. Permanent disability is a disability that has continued for a lengthy period and appears to be of lasting or indefinite duration. Temporary disability is one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649, pet. 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). The extent of disability refers to whether it is partial or total. Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment.

Once the claimant has shown that he cannot perform his usual work due to his injury, he has established a *prima facie* case of total disability. The employer must then establish the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Most Circuits have followed this basic test.'

II. VOCATIONAL EVIDENCE: RECOGNIZING WHEN TO USE IT

The employer needs to develop vocational evidence of residual wage-earning capacity whenever a claimant appears unable to return to his usual employment due to a work-related injury . The failure to develop such evidence may result in a finding of total disability even though it appears that claimant can work. The following are situations in which vocational evidence should be considered:

1. General injury where claimant cannot return to his prior employment.

Vocational evidence is commonly used in general injuries when medical opinions support claimant's inability to return to his prior work. In such cases the trier-of-fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.,* 17 BRBS 64, 66-67 (1985); *Berkstresser v. WMATA,* 16 BRBS 231, 233 (1984); *Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691 (1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.,* 9 BRBS 473, 477-480 (1978). The claimant's testimony that he could perform certain jobs but could not locate one is not sufficient to meet the employer's burden. *Rieche v. Tracor Marine, Inc.,* 16 BRBS 272 (1984).

'See the following cases in the various Circuits:

	Miller v. Polerized Ne England Co., 14 BRBS 811 (1981);
1st Circuit:	*Air American, Inc.,* 8 **BRBS** 490 (1978)
	American Stevedores, Inc. v. Salzano, 538 F.2d 933, 4 BRBS 195
2nd Circuit:	*McCabe v. Sun Shipbuilding & Dry Dock Co.,* 602 F.2d 59, 10 BRBS
3rd Circuit:	614 *Trans-State Dredging v. Benefits Review Board,* 731 F.3d 199, 16 **BRBS**
4th Circuit:	74(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*
	[Chappell], 592 F.2d 762, 10 BRBS 81, 86-87
5th Circuit:	*New Orleans (Gulfwide) Stevedore v. Turner,* 661 F.2d 1031, 14 **BRBS** 156 (5Th
	Cir. 1981); *Diamond M. Drilling Co. v. Marshall,* 577 F.2d 1003, 8 BRBS
8th Circuit:	658 *Ridgley v. Ceres, Inc.,* 594 F.2d 1175, 9 BRBS 948
9th Circuit:	*Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660

2. Injury where claimant subjectively complains that he cannot return to his prior employment.

A claimant's credible complaints of pain alone may be enough to meet the employee's burden of establishing an inability to perform his usual employment. *Richardson v. Safeway Stores, Inc.,* 14 BRBS 855 (1982); *Miranda v. Excavation Construction Inc.,* 13 BRBS 882, 884 (1981); *Golden v. Eller & Co.,* 8 BRBS 846 (1978), aff'd 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980); *Mangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), rev'g in pert. part 19 BRBS 15 (1986). Physical injury which leads to psychological injuries including alcoholism or compensation neurosis may also result in a finding of permanent total disability. *Parent v. Duluth, Missabe & Iron Range Railway Co., 7* BRBS 41 (1977); *Mitchell v. Lake Charles Stevedores, Inc.,* 5 BRBS 777 (1977); *Carpenter v. Potomac Iron Works, Inc.,* 1 BRBS 332 (1975), aff'd mem. 535 F.2d 1325 (D.C. Cir. 1976). Accordingly, vocational evidence may be necessary to rebut a permanent total disability claim even when there are no "hard" medical reports to support the claim.

3. General injury where claimant returns to work at "sheltered employment", has a"beneficent employer" or shows an "extraordinary effort".

A claimant can continue to work after his injury and still be totally disabled. *Walker v. Pacific Architects & Engineers, Inc.,* 1 BRBS 145, 148 (1974); *Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). He does not have to be totally incapacitated in order to be found totally disabled. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968). A claimant can be awarded total disability and continue working in situations involving a "beneficent employer,"[2] "sheltered employment"' or "extraordinary effort"[4]. While the Board has cautioned against broad application of these concepts, an injured worker can be employed and remain totally disabled. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 141, 145 (1980) (Miller, dissenting); *Chase v. Bethlehem Steel Corp.,* 9 BRBS 143 (1978); *Ford v. Sun Shipbuilding & Dry Dock Co.,* 8 BRBS 687 (1978). Under the circumstances, one must be careful to evaluate the nature of post-injury employment to determine whether vocational evidence is necessary.

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[2]In a "beneficent employer" situation the claimant's post-injury employment is due to the sympathy of the employer i.e.: creating a position for claimant which would not necessarily be filled if he left. *Walker v. Pacific Architects & Engineers, Inc.* 1 BRBS 145, 147-148 (1974). See also *Aproffitt v. E.J. Bartells Co.,* 10 **BRBS** 435 (1979); *Argonaut Ins. Co. v. Patterson,* 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), aft" g in pert. *Part Patterson V. Savannah Mach & Shipyard,* 15 BRBS 38 (Ramsey, C.J., dissenting).

[3]"Sheltered employment" has been defined as a job for which the employee is paid even if he cannot do the work and which is unnecessary. *Harrod v. Newport News Shipbuilding & Dry Dock Co.,* 12 BRBS 10 (1980).

[4]"Extraordinary effort" is where claimant continues to work due to an extraordinary effort and in spite of excruciating pain and diminished strength. *Haughton Elevator Co. v. Lewis* 572 F.3d 447, 7

BRBS 838, 850 (4th Cir. 1978, aff'g 5 **BRBS** 62 (1976) (Winter, J. concurring }. See also *Richardson v. Safeway Stores, Inc.* 14 BRBS 855, 857-858 (1982).

4. General injury where claimant has returned to employment at a reduced wage-earning capacity.

Often an employer seeks to prove that claimant's post-injury earnings do not reflect his true earning capacity. Vocational opinions are obtained to show that claimant is not employed at his highest and best use. In such cases vocational or employment testimony may focus on a "slow port" or a "change in economic circumstances". It may also address claimant's failure to seek a job commensurate with his level of transferable skills. The party contending that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. 33 U.S.C. 908(h); *Burch v. Superior Oil Co.,* 15 BRBS 423, 427 (1983); *Misho v. Dillingham Marine and Manufacturing,* 17 BRBS 188, 190 (1985); *Spencer v. Baker Agricultural Co.,* 16 BRBS 205, 208 (1984); *Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691, 693 (1980). A full discussion of the factors used in determining post-injury wage earning capacity can be found in *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649, 655 (1979)

5. Scheduled injury that precludes claimant from returning to his prior employment.

Ordinarily a scheduled injury is compensated under Section 8(c) of the Act. The Act provides claimant compensation for a specific number of weeks based on the following multiplication formula:

Compensation Rate X Number of Weeks in the Schedule X % Impairment Rating.

However, if claimant's scheduled injury precludes him from returning to his prior employment, he has established a prima facie case of total disability. When claimant proves permanent total disability, the schedules found in Section 8(c) are not applicable. *PEPCO v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363, 366 n.17 (1980). Accordingly, a claimant can turn a knee, foot, arm, hand or other scheduled injury into a permanent total disability under the proper circumstances. The typical " PEPCO " permanent total disability claimant is an elderly worker with bad knees who has worked since childhood at hard labor and who has few, if any, transferable skills.

III. PROVING SUITABLE ALTERNATE EMPLOYMENT: PRELIMINARY POINTS

Many litigated extent of disability cases center on whether the employer has met its burden of proving suitable alternative employment. The following preliminary points should be noted in evaluating the employer's proposed alternate employment:

A. The employer is not required to rehire the employee. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156, 165 (5th Cir. 1981); *Ferrell v. Jacksonville Shipyards, Inc.,* 12 BRBS 566, 570 (1980)

B. The employer does not have to act as a placement agent for the injured worker. *Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g *Tamer v. Trans-State Dredging,* 13 BRBS 53 (1980); *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156, 165 (5th Cir. 1981); *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 237 n. 7 (1985); *Berkstresser v. WMATA,* 16 BRBS 231, 234 (1984); *Freezor v. Paducah Marine Ways,* 13 **BRBS** 509, pet. rev. dismissed mem., 673 F.2d 1328 (6th Cir. 1981).

C. The employer does not need to show that the employee was offered a specific job. *Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 16 BRBS 74, 75 (CRT) (4th Cir. 1984) rev'g *Tamer v. Trans-State Dredging,* 13 BRBS 53 (1980).

D. The employer must prove the availability of actual, not theoretical, employment by identifying specific jobs available to the injured worker within the local community. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d dd1031, 14 BRBS 156, 164-165 (5th Cir. 1981); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980)

E. The employer must establish claimant's earning capacity by showing the pay scale for such jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co., 7* BRBS 1024 (1978); *DuPuis v. Teledyne Sewart Seacraft,* 5 BRBS 628 (1977).

F. The employer must establish the precise nature and terms of employment. *Rieche v. Tracor Marine, Inc.,* 16 BRBS 272 (1984); *Daniele v. Bromfield Corp.,* 11 BRBS 801 (1980).

G. A part-time job may constitute suitable alternate employment. *Royce v. Elrich Construction Co.,* 17 BRBS 147, 149 (1985); *Shoemaker v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 141 (1980).

H. Self-employment may prove suitable alternate employment. *Sledge v. Sealand Terminal,* 14 BRBS 334 (1981), following remand, 16 BRBS 178 (1984).

IV. VOCATIONAL EVIDENCE AND LABOR MARKET SURVEYS: PROBLEM ISSUES.

Certain issues have created problems for employers in attempting to prove suitable alternative employment. The employer can attempt to prove that a post-injury wage-earning capacity exists only to fail in the endeavor. A labor market survey prepared by a vocational expert does not necessarily prove suitable alternative employment. The careful practitioner will consider the following matters in assessing proof of suitable alternative employment:

1. Who conducted the labor market survey and how was it conducted?

Although the courts will permit the vocational expert to rely upon the opinions and work of others in arriving at an opinion, the careful expert is personally involved in every step of a labor market survey. Often the testifying vocational expert plays only a supervisory role in the creation of the labor market survey. An expert who testifies about jobs researched by an assistant risks being rejected by the court for failure to show that alternate jobs are suitable. The expert who has not conducted a detailed labor market survey risks being shown as unfamiliar with the nature, requirements and pay for the jobs contained in the survey.

2. Reliance on physicians whose opinions are discredited.

Vocational opinions must be based on a solid medical foundation. If a vocational expert relies upon medical opinions discredited by the administrative law judge, there will be inadequate proof of suitable alternate employment. *Dygert v. Manufacturer's Packaging Co.,* 10 BRBS 1036 (1979). Accordingly, reliance at formal hearing only on medical opinions most favorable to the employer can be dangerous. The cautious practitioner will at least elicit vocational opinions based on the medical opinions most favorable to the claimant.

3. The timing of suitable alternate employment studies: Retroactive labor market surveys.

The careful practitioner will document job availability and rates of pay at three basic stages in the case: (1) current survey/trial, (2)date of each medical opinion indicating maximum medical improvement and (3)date of injury. A recent survey conducted after the date of maximum medical improvement establishes a benchmark for determining that total disability has become partial disability. A labor market survey conducted before the date of maximum medical improvement may not be deemed adequate evidence of a permanent partial disability . Hence, it may subject the employer to a finding of permanent total disability. Therefore, it is wise to document wage-earning capacity as of each date of maximum medical improvement in the case. Lastly, conducting a labor market survey as of the date of injury may aid the employer in a showing of temporary partial disability and can clarify any issue of wage inflation.

The retroactive application of labor market surveys has presented a problem for the Board and various Circuits considering the issue. There are a variety of ways to treat the timing of a labor market survey:

(A) Consider it as establishing a residual wage-earning capacity retroactive to the date of maximum medical improvement upon a later showing of suitable alternative employment.

(B) Consider it as establishing a residual wage-earning capacity effective as of the date the survey was performed;

(C) Consider it as establishing residual wage-earning capacity retroactive to the date that suitable alternate employment is found to be first available to claimant, not the date of maximum medical improvement.

The Board originally adopted the first approach in *Berkstresser v. WMATA,* 16 BRBS 231 (1981), holding that total disability becomes partial, retroactive to the date of maximum medical improvement, upon a later showing of suitable alternate employment. That view has been rejected by a number of Circuit courts.[5] The majority view is that a labor market survey can establish residual wage-earning capacity retroactive to the date that suitable alternate employment is found to be first available to claimant. In *Rinaldi vs. General Dynamics Corp.,* 25 BRBS 128 (1991) (decision on reconsideration) the Board held that a showing of available suitable alternate employment could not be applied retroactively to the date of maximum medical improvement. Instead, the Board indicated that it would apply the majority test in all circuits. A claimant's total disability becomes partial as of the earliest date suitable alternate employment is shown to be available. *Rinaldi vs. General Dynamics Corp.,* 25 BRBS 128 (1991) (decision on reconsideration).

4. Is a single job opening enough?

Courts have struggled with whether the employer's showing of a single job opening is enough to show suitable alternate employment. One job may suffice depending on the facts of the case and the Circuit in which the case arises. In *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988) the Fourth Circuit found a single job opening by the employer insufficient to meet its burden of suitable alternate employment. The court noted that the employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. The Fifth Circuit has taken a different approach. The court has held that a single job opening will meet employer's burden where the evidence establishes that the job is reasonably available to claimant in the local community. *P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), reh'g denied, 935 F2d 1293 (5th Cir. 1991), rev'g 23 BRBS 389 (1990) and rev'g in pert. part *Green v. Suderman Stevedores,* 23 BRBS 322 (1990).

The Board has followed *Lentz* whenever possible. Initially, the Board applied Lentz in the Fifth Circuit in *Green v. Suderman Stevedores,* 23 BRBS 322 (1990) and *Hayes v. P & M Crane Co.,* 23 BRBS 389. In *Green* the Board found a single opening as a document

[5]The following cases discuss retroactive labor market surveys in the various Circuits:

D.C. Cir: *Director, OWCP v. Berkstresser,* 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g in part *Berkstresser v. Washington Metropolitan Area Transit Authority,* 16 BRBS 231 (1984).
2d Cir.: *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991)
9th Cir.: *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), rev'g *Stevens*
v. Lockheed Shipbuilding Co., 22 BRBS 155 (1989), cert. denied, 498 U.S. 1073 (1991).

photographer insufficient as a matter of law. In *Hayes* the Board found a single job opening as a marine dispatcher insufficient to establish suitable alternate employment. The Fifth Circuit reversed the Board in both cases, holding that a single job opening will suffice where the evidence establishes that the job is reasonably available to claimant in the local community. Recently, the Board considered whether one employment opportunity, standing alone, may satisfy employer's burden of establishing the availability of suitable alternative employment. The case arose within the jurisdiction of the Third Circuit. The administrative law judge found only one position suitable. The Board reversed, finding that no general employment opportunities were demonstrated and no evidence was presented that claimant had a "reasonable likelihood" of obtaining that one position. *Holland v. Holt Cargo Systems, Inc.,* 32 BRBS 179 (1998). While the Board has favored the *Lentz* view, it does not adhere to a strict rule that one job is never enough. In the post-Lentz case of *Shiver v. United States Marine Corp. Marine Base Exchange,* 23 BRBS 246 (1990) the Board found that the employer met its burden by securing a single job offer for claimant. In *Shiver* the employer identified a specific, actual job as a cone inspector. The claimant was offered the job and was capable of doing the work. The Board found that the concern in *Lentz* that a disabled employee might have difficulty obtaining the one identified job opening was not present. Accordingly, one job opening was deemed sufficient.

5. Particularized surveys vs. general job category labor market surveys.

The judicial trend regarding labor market studies is moving away from particularized surveys toward general job category surveys. Some Board decisions during the 1980's rejected general job category labor market surveys as "theoretical showings" . Such surveys were deemed inadequate proof of suitable alternate employment. In a number of decisions the Board showed a preference for particularized labor market surveys conducted by the vocational expert. A showing of actual, specific job openings with specific employers was deemed necessary. (Failure to identify specific jobs with specific employers deemed "theoretical showing" when only general job categories shown; *Williams v. Halter Marine Serv.,* Inc., 19 BRBS 248 (1987); (Labor market survey based on statewide statistics rather than a personal investigation of actual job openings with specific employers rejected; *Price v. Drava Corp.,* 20 BRBS 94 (1987).

While the Board has shown a preference for particularized labor market surveys, at least one Circuit court has not been impressed by them. The Fifth Circuit has held that an employer may meet its burden of showing suitable alternate employment by demonstrating the availability of general job openings in the local community that are within claimant's physical and mental capacities and which claimant has a reasonable opportunity to secure. The employer does not need to establish the precise nature and terms of specific job openings. An employer simply may demonstrate the availability of general job openings in certain fields in the surrounding areas. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), reh'g denied, 935 F.2d 1293 (5th Cir 1991), rev'g 23 BRBS 389 (1990), and rev'g in pert. part *Green v. Suderman Stevedores,* 23 BRBS 322 (1990).

6. Suitable employment considers the claimant as a whole and not merely the physical restrictions on an OWCP-5.

It was noted earlier that disability is often described as an economic concept based on a medical foundation. *Owens v. Traynor,* 274 F.Supp 770 (D.Md. 1967), aff'd, 396 F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968); *FerMi Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). An OWCP-5 form containing physical restrictions can provide the medical foundation for determining the extent of a claimant's disability. However, one cannot merely find that a claimant has the physical capacity to perform a certain class of work and then conduct a labor market survey to locate jobs in claimant's geographic area. That approach omits an evaluation of the claimant's age, education, experience and other factors which may limit his employability. Suitability requires more than a showing that claimant can physically perform the alternate employment.

7. A list of available jobs does not necessarily constitute suitable alternate employment.

The employer's wage-earning capacity report usually consists of a historical review and a labor market survey. The historical review generally takes into account claimant's work history, educational background, vocational testing, psychological testing, military service, acquired skills, employment records, medical records, physician opinions and physical limitations. The labor market survey typically consists of a list of employers, their job openings, current pay rate and hire date. Usually the name, address and telephone number of the person interviewed is recorded, as is the date of the interview.

Often there is no correlation between the labor market survey and the historical review. In other words, the vocational expert presents a list of jobs that are not reasonably related to the claimant. In such cases the labor market survey may be rejected for failure to prove suitable employment. Mere proof that a job exists does not mean that it is suitable employment.

8. Rebutting the employer's labor market survey by diligently seeking suitable alternate employment.

The injured employee has a complementary burden to seek suitable alternative employment. The claimant must show reasonable diligence in attempting to secure suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available. The employee must establish his willingness to work.

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156, 165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); see also *Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), rev'g *Tamer v. Trans-State Dredging,* 13 BRBS 53 (1980); *Royce v. Elrich Construction Co.,* 17 BRBS 157, 159 n. 2 (1985). The complementary burden does not, however, displace the employer's initial burden of establishing suitable alternate employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79, 83 (CRT) (5th Cir. 1986).

An injured employee who cannot return to his prior employment should seek the services of the U.S. Department of Labor in seeking job retraining. He should complete retraining and diligently seek alternate employment. First, the retraining may provide claimant with a new vocation to replace the one he has lost. Second, even if the employer establishes the availability of suitable alternate employment, claimant can rebut this showing and establish total disability if he diligently tried but was unable to secure employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 6887, 18 BRBS 79 (CRT) (5th Cir. 1986); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 {1988). Thus, it is important that claimant cooperate with vocational rehabilitation and diligently seek suitable alternate employment.

9. Vocational rehabilitation and suitable alternate employment.

Board and Circuit cases have addressed the effect of a claimant's enrollment in a vocational rehabilitation program on the employer's proof of alternate employment. A claimant who is enrolled full-time in a DOL sponsored rehabilitation program which precludes him from working may remain totally disabled until completion of the program. *Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192 (1993), aff'd, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir.

1994). *;Bush v. I.T.O. Corp.,* 32 BRBS 213 (1998). Thus, the claimant can continue to receive full benefits despite a showing of alternate employment. That result is justified by the humanitarian purpose of the Act, the underlying policy in the Act favoring rehabilitation and caselaw requiring a showing of suitable alternate employment. When the employee is enrolled full-time in a DOL sponsored vocational rehabilitation program which precludes employment, alternate employment is not suitable, realistic or available. *Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192 (1993), aff'd, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir 1994); *New Orleans (Gulfwide) Stevedore v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5Th Cir. 1981).

Recent Board cases have refused to extend the protection afforded by Abbott where claimant could not meet the three-prong test of DOL sponsorship, full-time enrollment in a rehabilitation program and a preclusion from work. In *Anderson v. Lockheed Shipbuilding & Constr. Co.,* 28 BRBS 290 (1994) and *Gregory v Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 264 (1998) neither claimant could meet all three necessary parts of the test. Accordingly, the Board did not extend *Abbott* to require the payment of permanent total disability to claimants even though they were enrolled in a full-time course of study.

10. The employer can meet its burden by offering the employee a job in its facility.

Courts interpreting the Act try to encourage the employer to return an injured employee to work . Thus, an employer can meet its burden by offering claimant a job in its facility. *Spencer v. Baker Agricultural Co.,* 16 **BRBS** 205 (1984). Even a light duty or clerical job may meet the employer's burden. *Harrod v. Newport News Shipbuilding & Dry Dock Co.,* 12 BRBS 10, 12-13 (1980); *Swain v. Bath Iron Works Corp.,* 17 BRBS 145 (1985). The administrative law judge need not examine job opportunities on the open market if the employer offers suitable work. *Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996). On the other hand, the Act will not reward an employer who claims that a job is appropriate in order to avoid an award of disability. *Diamond M Drilling Co. v. Marshall,* 577 F.2d 1003, 8 BRBS 658, 661 n.5 (5th Cir. 1978), affg *Kilsby v. Diamond M.*

Drilling Co., 6 BRBS 114 (1977); *Jameson v. Marine Terminals, Inc.* 10 BRBS 194, 203 (1979); *Letendre v. Braswell Shipyards, Inc.,* 11 BRBS 56 (1979). Courts consider factors such as the timing and sincerity of a job offer as well as the availability, nature, necessity and usefulness of the work in determining whether a job in employer's facility is suitable alternate employment.

11. The relevant labor market.

The goal of a labor market survey is to establish the wage that someone with claimant's injuries would earn on the open labor market under normal conditions. *Randall v. Comfort Control Inc., 7* 25 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984), vac'g and rem. 15 BRBS 233 (1983); *Lumber Mutual Casualty Insurance Co. v. O'Keeffe (Sinkkila),* 217 F.2d 720 (2d Cir. 1954); *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649, 655 (1979). While the proper market for a survey is local, the area of coverage occasionally presents problems. The Board has held that the employer need only show suitable alternate employment in the area where the injury took place. *Nguyen v. Ebbtide Fabricators, Inc.,* 19 BRBS 142 (1986);Dixon *v. John J. McMullen & Assocs., Inc.,* 19 BRBS 243 (1986); *McCullough v. Marathon Letourneau Co.,* 22 BRBS 357 (1989); *Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). If the claimant moves for personal reasons, the employer can meet its burden by showing job availability in the area where claimant resided at the time of injury. *Elliott v. C & P Telephone Co.,* 16 BRBS 89, 92 (1984) see *Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1130, 1137 n. 5 (1981); *Jameson v. Marine Terminals, Inc., 10* BRBS 194 (1979) (job available if within area where lived or worked). The Second Circuit agrees with the Board position that the proper market is a local one consisting of the wages available at the place of injury. *Lumber Mutual Casualty Insurance Co. v. O'Keeffe (Sinkkila),* 217 F.2d 720, 723 (2d Cir. 1954). The Board has noted that an employer may also meet its burden by showing suitable alternate employment in the area to which claimant has moved. *Nguyen v. Ebbtide Fabricators, Inc.,* 19 BRBS 142 (1986).

Several Circuits have rejected the Board's holdings, requiring only that the employer show job availability in the community where claimant lived at the time of injury. The Fourth Circuit adopted a factual approach in determining the relevant labor market. *Washington Metropolitan Area Transit Authority,* 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994). The First Circuit also adopted a factual approach for labor market surveys when an injured claimant moves to a new location. *Wood v. U.S. Dept. of Labor,* 112 F.3d 592, 31 BRBS 43 (CRT) (1' Cir. 1997).

12. Wage-inflation in labor market surveys: Rolling forward vs. rolling back.

Inflationary issues appear in labor market surveys when a long time passes between the date of injury and the date of proposed post-injury wage-earning capacity. The problem is that since a post-injury job would have paid claimant less at the time of his injury, he is penalized by wage inflation. Because claimant's average weekly wage remains constant from the time of injury, a method must be used to ensure that claimant's loss of wage-earning capacity is fair. The preferred method is to "roll-back" the wage-rate of the proposed suitable alternate

employment to the time of injury. That factors out the inflationary impact of increased wages. The "roll-back" approach is used by the Board and the First Circuit. It is the majority approach. *White v. Bath Iron Works Corp.,* 812 F.2d 33, 19 BRBS 70(CRT)(Ist Cir. 1987) ; *Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691, 695 (1980); *Turney v. Bethlehem Steel Corp.,* 17 **BRBS** 232, 238 (1985). On the other hand, the Third Circuit uses a "roll-forward" approach. That method compares what the claimant would have earned in his old job but for the injury with the wage rate in the post-injury job at the time of the hearing. *McCabe v. Sun Shipbuilding & Dry Dock Co.,* 602 F.2d 59, 10 BRBS 614, 620 (3d Cir. 1979), aff'g in pert. part 7 BRBS 333 (1977); *Curtis v. Schlumberger Offshore Serv., Inc.,* 23 BRBS 63 (1989), aff d mem. 914 F.2d 242 (3d Cir. 1990). The Board refuses to follow the Third Circuit's "roll-forward" approach.

When the actual wages paid at the time of injury in claimant's post injury job are unknown, the Board has determined that the percentage increase in the National Average Wage should be applied to adjust claimant's post-injury wages downward. see 33 U.S.C. 906(b)(1)-(3). *Richardson v. General Dynamics Corp.,* 23 **BRBS** 327 (1990). In similar fashion, the Board in *Quan v. Marine Power & Equip. Co.,* 30 BRBS 124, 127 (1996) held that the percentage increase in the NAWW for each year should be used to adjust the claimant's post-injury wages downward rather than the percentage increase in the minimum wage.

CONCLUSION

In order to properly handle LHWCA cases, the practitioner must recognize when to employ vocational proof. Moreover, care must be taken to comply with the requirements of vocational proof or the claimant will be deemed totally disabled even though it appears that he may be able to perform some type of work. An employer can best prove post-injury wage-earning capacity exists by rehiring injured workers at modified employment, by supporting vocational rehabilitation programs and by asserting reasonable residual wage-earning figures through credible experts. On the other hand, the injured employee assures a fair award from an administrative law judge by engaging in vocational rehabilitation and by securing employment consistent with his level of impairment and skills.