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NWLAA Case Law Review

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Attorney Fees – Amount.

ALJ awards \$225/hr because experienced attorneys in west coast ports generally not more than \$225/hr. *Ahuna v. SSA*, 37 BRBS 854 (ALJ Mapes 2003) (John Dudrey and Ray Warns for employers; Charles Robinowitz for claimant).

Mr. Robinowitz sought payment @ \$250.00 per hour but the ALJ awarded \$225.00/hour because even the most experienced Longshore attorneys in Seattle, Portland, and San Francisco, Long Beach, and San Diego have generally not exceeded \$225.00/hour.

Attorney Fees – Entitlement.

Claim made in spite of absence of presumptively valid audiogram. Fee due when controversy withdrawn after receipt of valid audiogram. *Avondale Industries, Inc. v. Craig*, 37 BRBS 109 (5th Cir. 2003).

(See Board decisions, *Craig v. Avondale Industries*, *Alario v. Avondale Industries*, *Howard v. Avondale Industries*, 35 BRBS 164 (BRB 2001).) In three claims claimant forwarded uninterpreted audiogram with a letter requesting compensation and medical services. Employer controverted but subsequently paid compensation after obtaining a second audiogram with an interpretation. Claimant's counsel sought a fee. Employer argued its obligation to respond began only after it had received a valid audiogram and medical report. Its response therefore was timely and in the correct amount and eliminated an entitlement to fees. The Board rejected employer's argument, and the court affirmed.

§28(a) makes no mention of the term "evidence" and does not require evidence be provided when a claim is filed. A claim requires only a writing disclosing an intention to assert a right to compensation. All claims were valid and were controverted. Respondent was entitled to an attorney fee.

Concurrent Disability – AWW Adjustment, PPD/PTD/TD

Concurrent permanent disability awarded. *Carpenter v. California United Terminals*, 37 BRBS 149 (BRB 2003).

On 3/10/98 claimant injured his back, left arm, and right thumb when employed by SSA. On 7/29/00 he injured his back when employed by CUT. The ALJ ordered SSA to pay TTD from 3/10/98 through 12/11/98, TPD from 12/12/98 through 6/30/99, and PPD of \$563.92 as of 7/1/99 based on an AWW \$2,643.10, residual earning capacity of \$1,797.22, and loss of \$845.88 per

week. The ALJ ordered CUT to pay TTD from 7/29/00 through 11/20/00 and PTD of \$1,249.78 (initial rate) as of 11/21/00 based on an AWW of \$1,874.68. Thus:

<u>DOI/Emp</u>	<u>AWW</u>	<u>TTD</u>	<u>Residual</u>	<u>PPD</u>
03/10/98 – SSA	\$2,643.10	\$835.74	\$1,797.22	\$563.92
07/29/00 – CUT	\$1,874.68	\$901.28	\$0.00	\$901.28

This resulted in concurrent weekly disability from 7/29/00 through 11/20/00 (\$563.92 from SSA plus \$901.28 (maximum compensation rate) from CUT and from and after 11/21/00 (\$563.92 from SSA plus \$901.28 with annual adjustments from CUT). CUT appealed, contending the AWW for the second injury at CUT should be \$1,797.22 based on claimant’s residual earning capacity due to his first injury.

The ALJ found that actual earnings from 9/12/99 to 7/29/00 reasonably and fairly represented claimant’s residual earning capacity for the 1998 injury and equaled \$1,874.68. He then adjusted these earnings to its 1998 equivalent of \$1,797.22. Accordingly, the ALJ correctly calculated residual earning capacity in the 1998 claim and AWW in the 2000 claim.

CUT argued that claimant’s combined award (\$1,465.20) exceeded the statutory maximum because it was greater than two-thirds of his AWW for the 2000 injury. A worker with an award of PPD who suffers a second injury which results in PTD may receive concurrent awards but the combined payment cannot exceed the statutory limit in §8(a) for PTD, or 66-2/3% of AWW. Because the AWW in 1998 was \$2,643.10, the ALJ rationally used this higher AWW for purposes of §8(a) and correctly concluded that claimant’s combined awards did not exceed two-thirds of this AWW. In *Price v. SSA*, 31 BRBS 91 (1996), the AWW for the first injury was lower than the AWW at the time of the second injury. The Board stated in that opinion that claimant should not receive more than 66-2/3% of the AWW at the time of the second injury. This case, however, should not be interpreted as a rigid requirement to refer to the second injury for purposes of §8(a).

The Board nevertheless held that claimant’s total award should not exceed the applicable §6(b)(1) maximum. (The maximum compensation rate in 7/00 was \$901.28.) Because CUT aggravated, accelerated, or worsened claimant’s back impairment, CUT was liable for all benefits related to the back as of 7/29/00. The employer at the time of the aggravating second injury assumed liability for all subsequent related medical expenses and compensation. SSA continued to be liable for medical care for claimant’s other injuries (right thumb, left elbow, cervical spine). CUT’s credit was limited to the amount of PPD for claimant’s cervical injury which was solely related to the 1998 injury. On remand if the ALJ determines that the cervical spine injury contributes to claimant’s PPD SSA remain liable for those benefits and CUT will be entitled to an offset for that amount. If the cervical spine injury does not contribute to his PPD then CUT, as the last responsible employer, will be liable for the entire award of benefits, less any necessary reduction for purposes of §6(b)(1).

Employer/Employee – Other

PMA not the employer of longshoreman. *Equal Employment Opportunity Commission v. Pacific Maritime Association*, 37 BRBS 103 (9th Cir. 2003).

The Equal Employment Opportunity Commission (EEOC) on behalf of longshoreman Jones brought an action against the PMA, MTC, and ILWU Local 8 for sexual harassment. Jones settled the claim against MTC. Local 8 was dismissed on summary judgment. After a trial PMA was ordered to pay \$264,000 in lost wages and \$300,000 in compensatory damages because she was subjected to a sexually hostile work environment and was retaliated against for having complained. On appeal the court held that the PMA was not the employer for purposes of sexual harassment claims under the Civil Rights Act of 1964.

PMA did not supervise the longshoremen. It had no power to hire or fire longshoremen. It had no power to discipline longshoremen. It did not supervise the work sites of its member employers. Monitoring and control over the work sites and control of the employees was within the sole province of the member employers. PMA did not own MTC. Accordingly, PMA was not a joint employer and there was no legally sufficient basis for the jury to find a connection with an employment relationship between PMA and Jones.

Exclusions – Aquaculture

Aquaculture worker excluded from coverage. *Monteleone v. Bluepoint International Fisheries, Inc.*, 37 BRBS 818 (ALJ 2003).

Employer processed sea products, including scallops and shrimp, at its facility located near Port Canaveral, Florida. When scallops were being processed he ran a shaker machine or cleared debris and mud generated by the shaker. When scallops were not being processed he did yard work but also, apparently, helped unload shrimp. He sustained an injury when stacking bags of shrimp onto a pallet.

The ALJ concluded that employer was a commercial enterprise involved in processing or cultivation and harvesting of shellfish. Claimant undertook no maritime work while processing scallops or doing yard work. His work with the shrimp boats was limited. Even if he moved bags of shrimp from a chute to a conveyor on three deliveries he was not involved in covered maritime activity because all actions taken to get the product from the dock to the freezer as rapidly as possible was part of processing and therefore was subject to the aquaculture exclusion. Furthermore, this unloading activity was infrequent, episodic, and discretionary and insufficient to establish maritime activity that was to be covered under the LHWCA.

Exclusions – Jones Act

Pile driver was crew member. *Baker v. Manson Construction Co.*, 37 BRBS 724 (ALJ 2003).

Claimant was employed as a pile driver (pile putt) for Manson Construction on a marine pile driving project near the Shell Equilan Refinery Wharf in Martinez, California. The wharf was used to load and unload tankers transporting crude oil and petroleum products. Manson had a contract to salvage and rebuild the wharf's downstream mooring dolphin (pilings driven to the harbor bottom to support a mooring bollard). Claimant worked offshore on a small fleet of special purpose construction vessels, including a derrick barge (*Vasa*), flat material barges, a tug boat (*Point Richmond*), a crew boat (*Bub*), and several small skiffs and boats. The derrick barge had its own power supply, radio, anchors, bilge, buoys, galley, generators, fuel tanks, and lockers and had been to many locations over the years.

Employer ferried the crew on the *Bub* to the *Vasa* where they would change into work clothes and work an 8 hour shift. Claimant worked on the barges, crew boat, and skiffs at all times. He slept on land. The *Vasa* was anchored to the straight bottom, and material barges were tied to the *Vasa*. Claimant occasionally performed jobs akin to those performed by members of a crew at sea such as line handling, rigging and anchoring gear, running anchors, hooking up buoys, and setting up navigational or anchor lights. Claimant was injured onboard the deck of a material barge when a loftsmen aboard the *Vasa* cast a large rubber hose loose from the leads overhead and its coupling struck claimant in the back of the neck.

The ALJ concluded that claimant was a member of a crew. The barges and boats deployed at the project comprised an identifiable fleet of vessels. His duties contributed to the accomplishment of the fleet of vessels' mission of reconstructing the mooring dolphin, and he was subject to the perils of the sea everyday as he handled lines, roared on the crew boat, set up flashers, and was at risk of fire on the vessels and collision from passing vessels. His connection

to the fleet was substantial in duration since he spent 100% of his time working on the fleet of vessels in jobs that were either sea-based or constantly subject to the perils of the sea.

Hearings – Other

Claim of immunity from state court suit not issue in respect of compensation claim. *Hymel v. McDermott, Inc.*, 37 BRBS 160 (BRB 2003).

Claimant Hymell, now deceased, filed a claim for compensation and filed suit in state court against employers and others for negligence and intentional exposure to toxic substances in the work place. Intervenors were executive officers of employer and were named as defendants in the state court suit. When claimant sought to withdraw the LHWCA claim Intervenors filed a petition to intervene in the hearing before the ALJ seeking to have the ALJ conclude that they were immune from suit in tort because claimant sustained a work related injury. The ALJ denied the motion to intervene because the issue raised was not “in respect of” a compensation claim per §19(a). On appeal the Board affirmed. Since intervenors are seeking immunity from suit filed in the Louisiana state court there was no reason intervenor’s claim of immunity could not be addressed by the state courts. The ALJ properly determined that he was without jurisdiction to rule on intervenor’s entitlement to tort immunity in a state court suit as this was not essential to resolving issues relating to claimant’s claim for compensation under the LHWCA.

Insurance – Insolvency

LIGA not liable for fees prior to insolvency of insurer. *Marks v. Trinity Marine Group*, 37 BRBS 117 (BRB 2003).

Claimant successfully sought reinstatement of compensation which employer had terminated and sought a fee for services. Employer filed for bankruptcy protection, and its carrier was placed in liquidation. The Louisiana Insurance Guaranty Association (LIGA) was substituted for the carrier. The district director held that LIGA was not responsible for fees incurred prior to insolvency of the carrier but concluded that the fee should be paid by claimant as a lien against compensation.

The Board held that LIGA’s obligation rests solely on the legislative language establishing LIGA. The statute provides that a covered claim does not include an obligation arising from pre-insolvency obligations. LIGA therefore was not responsible for the fee, but the district director should address claimant’s entitlement to a fee payable by the employer, as employer’s primary liability was not affected by the carrier’s insolvency.

ALJ orders Special Fund to pay comp when employer no longer in business and had no assets. *Reynolds v. Steel Boats, Inc.*, 37 BRBS 657 (ALJ 2003).

Employer was no longer in business and had no assets to pay sums due and did not have a workers’ compensation carrier at the time of claimant’s employment. The ALJ held that the employer’s president was liable per §38 due to the insolvency and the absence of a carrier, but the president also had no income or assets that could be applied for payment of employer’ liability. Therefore the Special Fund should be responsible

Bankruptcy stay did not preclude ALJ from making decision on the merits. *Shepard v. Jeffboat, L.L.C.*, 37 BRBS 890 (ALJ 2003).

After the hearing employer filed for protection under Chapter 11 of the bankruptcy code and requested a stay of all proceedings. The ALJ concluded that a decision on the merits could be rendered pursuant to the police and regulatory power exception and consistent with *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981).

Interest

Interest awarded on costs awarded but unpaid for 28 months. *Ahuna v. SSA*, 37 BRBS 854 (ALJ Mapes 2003) (John Dudrey and Ray Warns for employers; Charles Robinowitz for claimant).

Due to an unsuccessful appeal, costs awarded by the ALJ were unpaid for 28 months. The ALJ noted that there were no published BRB or 9th Circuit decisions allowing interest for delay in payment of costs but because there were many BRB and 9th Circuit decisions holding that interest could be awarded when there were delays in payment of other amounts owed under the LHWCA he awarded 3% interest for the delay in receiving reimbursement for litigation costs.

Medical Services – Other

Employer required to provide 24 hour care. *Carroll v. M. Cutter Company, Inc.*, 37 BRBS 134 (BRB 2003) (John Dudrey for employer/carrier; Meagan Flynn for claimant).

Claimant sustained a serious head injury which resulted in cognitive impairment and PTSD. His treating physician and independent medical examiners agreed he needed 24 hour supervision. The ALJ deferred to employer's expert, a certified life-care planner with a nursing background, who concluded that claimant did not need a paid attendant 24 hours per day. His "supervisor" could be his spouse or family member. The ALJ ordered employer to pay for an average of 14.5 hours of paid care 5 days per week and 48 hours of paid care one weekend per month and two full weeks per year of paid care for vacation. The Board reversed, relying on claimant's expert, and concluding that the ALJ must defer to claimant's treating physician, who concluded without contradiction from other medical experts, that claimant required 24 hour care. As family members are providing the same type of services as the licensed attendant it was improper for the ALJ to commandeer their services for free regardless of their willingness to serve. To the extent they were willing to perform the services employer was obliged to provide claimant's family members were entitled to payment, albeit at a reduced rate.

Miscellaneous

ALJ can consider forfeiture, but BRB lacks jurisdiction to review ALJ's certification of facts to district court. *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (BRB 2003).

The ALJ concluded that claimant had underreported his income on a LS-200 (for a period beginning 1/1/97) and had failed to submit a second form timely. Therefore, claimant forfeited, per §8(j), any benefits due from 1/1/97 to 10/15/01. The ALJ also certified facts to the district court per §27(b) for misstatements.

On appeal, the Board concluded that the ALJ had authority to adjudicate a forfeiture charge.

§27(b) grants the district court authority to punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act but does not authorize a district court to sanction a claimant for contempt for filing a false claim. The 9th Circuit has held that the Board lacks jurisdiction to review the ALJ's certification of facts to the district court (*Phillips I*, 33 BRBS 59 (9th Cir 1999) and *Phillips II*, 37 BRBS 1 (9th Cir 2003)).

Permanent Disability – PTSD

Sheltered employment insufficient to establish earning capacity. *Jelenic v. San Pedro Boat Works*, 37 BRBS 707 (ALJ Gee, 2003).

After an injury which resulted in permanent physical restrictions claimant's employer instructed him to return to work. From 2/6/02 to 10/15/02, when he was laid off, he was put on light duty but

was not assigned a job with a formal job title. He provided advice and instructions to other workers about how to maintain or repair a ship and occasionally helped clean the work area or do other minor tasks. He also spent time in the shop, on the boat, or on the dock without performing any tasks. He did not supervise any workers and did not do any lifting over 35# or climb any ladders or do any repeated overhead lifting. He spent 10-25% of his time giving advice and sometimes went home early or was told not to come due to lack of work. During this period he was paid his pre-injury hourly rate.

The ALJ held that the light duty work employer provided in 2/02 was not necessary to employer, nor was it profitable to employer for claimant to hold a position @ \$21.00 per hour that kept him busy 10-25% of the time with the responsibility of providing advice that could have been provided by other employees, especially considering the slow down in business that made it necessary for claimant to go home early because there were no projects to work on. Thus, the light duty job was sheltered employment. Employer failed to show that there was suitable alternate employment available and therefore awarded claimant PTD from 2/6/02 but allowed employer to take credit for wages paid to claimant from 2/6/02 to 10/15/02.

Permanent Disability – Retired Workers

Post injury retirement did not relieve employer of obligation to present evidence of suitable available employment. *Rodrigues v. United States Marine Corps*, 37 BRBS 902 (ALJ 2003).

Repetitive trauma injuries to shoulders from work led claimant to voluntarily retire in 6/01. Employer offered no vocational testimony because it equated claimant's retirement to a withdrawal from the labor market making vocational testimony unnecessary. The ALJ held that withdrawal from the labor market after an injury did not affect claimant's entitlement to compensation if her wage earning capacity had been permanently diminished. Without proof of suitable alternative employment employer failed in its burden and claimant was awarded compensation for total disability.

Permanent Disability – Unscheduled PPD

ALJ must consider wage usual employment would have paid at time employer established availability of suitable alternate employment. *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (BRB 2003).

In *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 614 (3d Cir 1979), the Third Circuit (in which this case arises), the court held that in determining the loss of wage earning capacity the appropriate comparison would be between the wages claimant would have earned but for the injury and the wages claimant is actually earning in his post injury position. The present evidence was vague regarding the amount claimant's former job as a longshoreman with employer paid at the time his post injury wage earning capacity was determined. Therefore, the Board held that on remand the ALJ could reopen the record to receive the requisite information to make a finding regarding claimant's loss in wage earning capacity.

[Editor's note: in this circuit current wages should be adjusted to the wage rate in effect at the time of injury.]

Responsibility – Hearing Loss Claims

Employer on last day of work responsible for hearing loss. *Parvi v. Kalama Export Co.*, 37 BRBS 671 (ALJ Vittone, 2003) (John Dudrey and Dennis VavRosky for employers; Peter Preston for claimant).

Claimant's last day of work as a longshoreman was 8/31/99, when he worked for Kalama as a hatch tender. His next to last days were 8/28 and 8/29 when he worked for SSA as a crane operator. He filed a claim for hearing loss.

Dr. Hodgson testified that the noise levels and audiogram patterns did not indicate a noise induced hearing loss, but the ALJ invoked the §20 presumption based on other medical evidence and held that Dr. Hodgson's reports did not refute the possibility that claimant's occupational noise exposure could have caused his hearing loss. Also, noise surveys conducted at Kalama were not sufficient to rebut the §20 presumption. Therefore, the claim was compensable.

Because claimant established that he was exposed to injurious stimuli, a level of noise significant enough to cause hearing loss, on his last day of employment, Kalama was responsible for claimant's hearing loss.

Responsibility – Other

Second injury aggravated or accelerated preexisting back condition. *Kuhnhausen v. Marine Terminals Corp.*, 37 BRBS 735 (ALJ Jarvis, 2003) (John Dudrey, Dennis VavRosky, and Robert Babcock for employer/carriers; Megan Flynn for claimant).

On 8/8/96 claimant herniated his L4-5 disk Hall-Buck, resulting in two surgeries but ultimately a release from his surgeon, Dr. Bergquist, to work without restrictions on 7/2/97. An IME thought he had some lifting and bending restrictions. Thereafter, significant chronology was as follows:

- 12/29/97 Work for MTC.
- 12/31/97 Sees Dr. Bergquist and complains of left leg pain.
- 01/02/98 Work for Hall Buck.
- 01/03/98 Work for MTC.
- 01/05/98 MRI reveals recurrent herniation.
- 01/06 – 01/08/98 Work for Hall Buck.
- 01/27/98 Third diskectomy at L4-5
- 07/27/98 Fourth diskectomy

The ALJ concluded that claimant suffered an aggravation or acceleration of his prior injuries while working for MTC which caused him to seek medical attention on 12/31/97. There was no evidence that any aggravation or acceleration occurred during January, 1998 employment for Hall Buck. Accordingly, MTC was ordered to pay compensation from 1/13/98 (when time loss was authorized).

Situs – Navigable Waters

Barge slip construction site on vacant land not a covered situs. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (BRB 2003).

Claimant worked as a welder constructing barge slips on undeveloped land adjacent to the intracoastal waterway. The slip walls were in place and some water would enter into the excavated hole at high tide through a pipe in the wall, but the slips were not completed at the time of injury. When completed the wall of "land" between the excavated area and the waterway would be removed and water would fill the slip permanently. The slips would be used to house ocean going barges. Claimant was injured on the land side of the excavation.

The Board held that the site was not a covered situs. It had never been in navigable waters or any other enumerated site. The site and surrounding land areas were unoccupied. The project was undertaken from the land side of the water. Only after the excavation was complete and the slip walls were in place would navigable water fill the slip. Although the site was suitable for maritime uses, at the time of injury neither the site or the immediately surrounding areas were

used for a maritime purpose. Fifth Circuit decisions contemplate either that at the time of the injury the location have a current maritime use or that the site of the project under construction had been navigable waters or other covered site previously. Neither condition was present here.

Test engineer had status because drowned on navigable waters and not otherwise excluded from act. Discussion of floating platforms. *Morganti v. Lockheed Martin Corporation*, 37 BRBS 126 (BRB 2003).

Employer manufactured sonar transducers for the US Navy. Claimant was a test engineer who spent 30% of his time testing the transducers at Cayuga Lake. He used the Little Toot, a 32 foot shuttle boat, to reach a work station on the Paganelli, a 110 foot barge anchored on the lake, where he conducted the tests. After finishing testing on the Paganelli he fell into the lake and drowned.

Cayuga Lake was a navigable waterway because it was connected to the Erie Canal and was accessible to any destination in the world. The ALJ initially denied coverage under *Perini*, finding that claimant's presence on the water was transient, and the Paganelli was a fixed work platform rather than a vessel. The Board reversed. Death occurred in Cayuga Lake, so he was entitled to coverage unless otherwise excluded. His presence on navigable waters was neither transient or fortuitous.

A structure may be a vessel but not meet the Jones Act test unless it is in navigation. The test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the issue of coverage under *Perini*. There is no requirement that an employee be injured on a vessel to be covered under the Act. He need only be afloat upon, over, or in actual navigable waters at the time of his work injury or death.

Floating platforms have been consistently treated as vessels. The Paganelli floats and was not akin to an island. It was not a fixed work platform and it was not permanently affixed to the floor of the lake or to its shore. It could be moved if movement was required. Time on the Paganelli was time on navigable waters.

Claimant was not employed exclusively to perform office, clerical, secretarial, or data processing work. His work was not performed in a business office and he was exposed to traditional maritime hazards. The ALJ's conclusion that he performed purely clerical or data processing work lacked a rational basis. Use of a computer did not convert a professional engineer into a clerical worker.

Situs – Other

No status when worked on building that would be used in future as yacht servicing facility. *Southcombe v. A Mark, B Mark, C Mark Corporation*, 37 BRBS 169 (BRB 2003).

Ocean Marine had a contract to construct a marina on the Elizabeth River which would include an 80 foot high "megayacht" service facility. Ocean Marine hired employer to supply labor and equipment to install steel, siding, roof deck and other components for the yacht service center and yacht storage building. Claimant was unloading a steel beam from a flat bed trailer when injured. The beams were intended for use as the frame of the yacht service facility. The ALJ held that claimant lacked status because he was not constructing an inherently maritime facility. The Board affirmed.

Claimant was engaged to construct a shipyard building but not engaged to maintain an already functioning shipyard building. He was not constructing a pier or dry dock or other uniquely maritime structure. The warehouse's use as a maritime storage facility was a future, not current, use. He was on the premises solely to construct a building and not maintain or repair a shipyard

facility. A finding of coverage cannot rest on the future use of the facility. A future use is insufficient to confer coverage.

Vocational Rehabilitation

District Director's voc rehab plan affirmed under abuse of discretion standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (BRB 164 (2003) (Del Brennehan for employer/carrier; Terri Herring-Puz for claimant).

Claimant, a diesel mechanic, injured his left shoulder. The VR plan proposed training as a motorcycle mechanic and/or small engine mechanic. Employer objected based on its consultant who concluded that the plan would not increase claimant's earning capacity and labor market surveys which indicated that after training claimant would have a lower earning capacity as a motorcycle mechanic than he presently has without training. Employer appealed the VR plan which District Director Karen Staats had approved.

The Board held that it could set aside the plan only if there had been a clear error of judgment. The employer was not entitled to participate in formulation of the rehabilitation plan. Employer failed to show that the district director abused her discretion or failed to comply with regulatory criteria. Mr. Gann, the OWCP consultant, provided reports which justified the plan. Furthermore, because employer had not submitted its labor market surveys to the district director the Board could not consider the studies. After completion of the program employer was free to prove, if it could, that claimant's wage earning capacity was higher than wages he might actually be earning.

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