No. 01-2401

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioners
v.
RONALD H. BRICKHOUSE
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Petition for Review of a Final Order
of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

EUGENE SCALIA
Solicitor of Labor

JOHN F. DEPENBROCK
Associate Solicitor
for Employee Benefits

SAMUEL J. OSHINSKY
Senior Appellate Attorney

SARAH C. CRAWFORD
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite S-4325
Washington, D.C. 20210
(202) 693-5342

Attorneys for the Director, OWCP

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case arose when Ronald Brickhouse ("Claimant") filed a claim for temporary total disability compensation for an employment-related injury under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) ("Longshore Act or LHWCA"),[1] against his employer, Newport News Shipbuilding and Dry Dock Company

[1] Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, c. 509, 44 Stat.1424, as amended, 33 U.S.C. §§ 901-950.

("Employer"). Joint Appendix ("JA") 482. The Administrative Law Judge ("ALJ") had jurisdiction to resolve the dispute with respect to Brickhouse's claim for benefits under § 19(c)-(d) of the Longshore Act. 33 U.S.C. § 919(c)-(d). The Benefits Review Board ("Board") had jurisdiction of the Employer's timely appeal pursuant to § 21(b)(3) of the Longshore Act. 33 U.S.C. § 921(b)(3).

This Court has jurisdiction to review final orders of the Board under § 21(c) of the Longshore Act, which provides in pertinent part:

> [A] person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition . . . .

33 U.S.C. § 921(c).

Brickhouse was injured in the State of Virginia, within this Court's territorial jurisdiction. JA 482. The Board's October 26, 2001, Decision and Order, is a final order under § 21(c) of the Longshore Act, and the Employer timely filed its Petition for Review on November 20, 2001, within 60 days of issuance of the Board's decision. JA 211, 482. Thus, this Court has both subject matter and appellate jurisdiction to review the Board's decision.

STATEMENT OF THE ISSUE

> Whether the Board properly found that the Employer was foreclosed from demonstrating the availability of suitable alternative employment for a five month period while the Claimant was completing a vocational retraining program sponsored by the Department of Labor which was intended to increase the disabled worker's job skills and long-term employment opportunities.

STATEMENT OF THE CASE

Brickhouse filed a claim for temporary total disability benefits under the Longshore Act for an alleged work-related back injury. The Administrative Law Judge ("ALJ") held a formal hearing on January 15, 1998. JA 480. In a Decision and Order granting benefits, filed in the Office of the District Director on April 13, 1998, the ALJ found that the Claimant had been permanently and totally disabled since the issuance of permanent work restrictions on April 17, 1995. JA 83, 482. He also found that the job offered by the Employer in January 1997, while within the Claimant's physical restrictions, was not available, suitable, alternative employment because the Claimant was enrolled in a program sponsored by the Department of Labor's Office of Workers' Compensation Programs ("OWCP"). JA 39-40, 488-490. Accordingly, the ALJ granted permanent total disability benefits in the amount of $392.14 per week from January 6, 1997, to December 29, 1997, the date at which the Claimant began his first post-injury job. JA 490.[2]

The Employer timely appealed the ALJ's decision to the Board pursuant to § 21(b)(3) of the Longshore Act. 33 U.S.C. § 921(b)(3); JA 187. However, in the interim, Brickhouse filed a motion for modification with the ALJ alleging a change in his economic condition – the loss of his job – and moved to dismiss the Employer's appeal to the Board. JA 187, 191A-191C, 478. The Board granted Brickhouse's motion to dismiss the appeal. JA 187.

On modification, the ALJ affirmed the grant of permanent total disability benefits in the amount of $392 per week from January 6, 1997, to December 29, 1997, and modified the award to provide permanent partial disability benefits thereafter. JA 191D-191G, 478. Thus, the ALJ granted additional benefits in the amount of $182.62 per week for the period from December 30, 1997, and continuing. JA 191G.[3]

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[2] Pursuant to § 8(a) of the Longshore Act, the amount of the award was determined by multiplying the Claimant's pre-injury wage rate of $588.21 per week by two-thirds. 33 U.S.C. § 908(a).

[3] Pursuant to § 8(c)(21) of the Longshore Act, the amount of the award was determined by subtracting the Claimant's post-injury wage rate of $314.28 per week from his pre-injury average weekly wage rate of $588.21 per week and multiplying the difference by two-thirds. JA 191F-191G; 33 U.S.C. § 908(c)(21). The ALJ amended his original award, provided at JA 191G, to correct a typographical error, thereby awarding permanent partial benefits as of December 30, 1997, rather than December 30, 1998.

On appeal, the Board affirmed the award of disability benefits, including the ALJ's finding that the Claimant's enrollment in an OWCP vocational rehabilitation program justified an award of total disability benefits for that period. JA 197-200. However, the Board remanded for further fact-finding on the calculation of the Claimant's average weekly wage, based on evidence that Brickhouse had been earning higher wages since March 10, 1999, when he began his second post-injury job. JA 201.

On remand, the ALJ lowered the amount of disability benefits based on an increase in the Claimant's post-injury wage-earning capacity. JA 205-208. The ALJ lowered the award from $182.62 to $152.10 per week for the period from March 10, 1999 and continuing. JA 207.[4] On October 26, 2001, the Board affirmed the ALJ's decision on remand and held that the Board's initial decision constituted the law of the case. JA 211-215.[5] On

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[4] The amount of the award was determined by subtracting the Claimant's post-injury wage rate of $360 per week from his pre-injury wage rate of $588.21 per week and multiplying the difference by two-thirds. JA 191F, 191G; 33 U.S.C. § 908(c)(21).

[5] Thus the Board affirmed the award of permanent total benefits in the amount of $392.14 per week from January 6, 1997, to December 29, 1997, the award of permanent partial benefits in the amount of $182.62 per week from December 30, 1997, to March 9, 1999, and $152.10 per week from March 10, 1999, and continuing. JA 191G, 207, 211-215, 490.

November 20, 2001, the Employer timely filed a Petition for Review with this Court under § 21(c) of the Act, 33 U.S.C.§ 921(c).

STATEMENT OF FACTS

The ALJ's findings-of-facts, discussed below, are largely undisputed. Brickhouse began working for Newport News Shipbuilding in April 1982. JA 75, 482. In 1993, he worked as a senior quality inspector, which required him to physically climb into nuclear reactors and test the systems. JA 72-73. The Claimant sustained a work-related back injury on September 21, 1993, which resulted in permanent disability. JA 72-73, 83, 482. The Employer began paying disability benefits at that time, based on Brickhouse's pre-injury average weekly wage rate of $588.21 per week. JA 73, 482. In April 1994, Brickhouse underwent back surgery. JA 73, 482. On April 17, 1995, his treating physician, Dr. Wallace Garner, issued permanent restrictions, which restricted Brickhouse from continuous overhead work, continuous working in tight spaces, and climbing in excess of one hour per day. JA 83, 482. Due to these permanent restrictions, Brickhouse has been unable to return to his pre-injury job. JA 83, 413, 458-461, 482.

The Department of Labor's OWCP assigned Brickhouse to a vocational rehabilitation counselor. JA 28, 482. The counselor proposed a vocational rehabilitation plan for Brickhouse, who had worked as a commercial artist between 1978 and 1982, to attend college for the purpose of obtaining an associate degree in graphic communications. JA 29, 31, 74, 482. This vocational rehabilitation proposal was substantiated by a job analysis, vocational test scores, and a labor market survey, which revealed nearly 100 local companies that hired individuals with graphic communications skills. JA 29-30, 48, 398-399, 458-461, 482-483. OWCP approved the plan and paid the tuition and a portion of the cost of books and fees. JA 76, 483. Newport News Shipbuilding was aware of the vocational rehabilitation plan, raised no objections at the outset, and in fact, continued to pay the Claimant's total disability benefits. JA 33, 76, 401-402, 481, 483, 489. Brickhouse began his coursework in May 1995. JA 32, 483. The vocational counselor monitored Brickhouse's progress on a monthly basis. JA 32, 483.

In December 1996, when Brickhouse needed only two additional courses to obtain his associate degree, the Employer sought to interview the Claimant for positions at Newport News Shipbuilding. JA 34, 483-484. Brickhouse initially declined to interview in December, but shortly thereafter, interviewed with the Employer in January. JA 34, 78, 483-484. By letter dated February 3, 1997, the Employer confirmed a verbal offer of a senior engineering analyst position at a salary of $31,068. JA 484-485, 550.

The letter containing the offer stated that the job could be "terminated with or without notice, at any time, at the option of the Company . . . ." JA 550. Furthermore, the Employer refused to offer part-time work or flexible hours to accommodate the Claimant's coursework. JA 35. Brickhouse declined the job offer in February, but stated that he would accept the offered position upon completion of his course of study in May. JA 83-84, 485. The Employer refused this request and terminated Brickhouse's benefits effective January 6, 1997. JA 67-68, 485.

On May 14, 1997, Brickhouse graduated from his vocational rehabilitation program with an associate degree in graphic communications. JA 85, 485. After a diligent job search, he secured a graphic designer position in December 1997 with Virginia Newspapers at a wage of $314.28 per week. JA 41-43, 207, 485. After working for a year in this position, the Claimant lost this job when the newspaper closed on December 31, 1998. JA 191B-191C, 478. On March 10, 1999, the Claimant started a full-time job as a graphic designer with Harris Publishing at a rate of $360 per week. JA 206.

SUMMARY OF ARGUMENT

The Board properly affirmed the ALJ's decision that Brickhouse was entitled to permanent total disability benefits while enrolled in an OWCP-sponsored vocational rehabilitation program. JA 211-215. The ALJ's ruling below is fully consistent with his broad grant of authority under § 8(h) of the Longshore Act to consider all relevant circumstances in determining an injured worker's post-injury earning capacity. 33 U.S.C. 908(h). The ALJ's ruling also effectuates a prime statutory directive that the Department of Labor direct the vocational rehabilitation of disabled workers. 33 U.S.C 939(a).

The Director's statutory construction of both provisions, read together, is that the Longshore Act authorizes an ALJ – where the totality of the circumstances so warrant – to award total disability during a disabled worker's enrollment in an OWCP-sponsored vocational rehabilitation program, notwithstanding the Employer's offer of an otherwise bona-fide job during that time period. That construction comports with the fundamental policies underlying the statute and its humanitarian purposes. *See e.g., Director, OWCP v. Perini N. River Assocs.,* 459 U.S. 297, 315-16 (1983); *Northeast Marine Terminal Co., Inc., v. Caputo*, 432 U.S. 249, 268 (1977). The Director's construction promotes the rehabilitation of injured employees enabling them to resume their places, to the greatest extent possible, as productive members of the work force. *Turner, supra*, 661 F.2d at 1042; *accord Stevens v. Director, OWCP*, 909 F.2d 1256, 1260 (9th Cir.

1990). The Director's construction advances the laudable goal of vocational rehabilitation by temporarily providing the disabled worker with full compensation benefits, and thus an adequate financial base, where appropriate, permitting him to devote his full attention to his long-term rehabilitative potential.

The Director's statutory construction in support of his position was adopted by the only court of appeals to have considered this issue. *Abbott v. Louisiana Insurance Guaranty Association*, 40 F.3d 122, 127-128 (5th Cir. 1994) (holding that an award of total disability during the pendancy of a claimant's vocational rehabilitation fully accords with the fact-finder's discretionary authority as well as the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force). The Director's position has also been consistently employed in subsequent administrative proceedings. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *accord Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

In this case, the ALJ properly relied on *Abbott* and the principles enunciated therein to find that the Claimant was entitled to total disability benefits during his retraining program. JA 488-490. Consistent with the *Abbott* analysis, the ALJ grounded his determination on the fact that OWCP sponsored the Claimant's vocational rehabilitation, the Employer knew about the proposed program and did not object, the Claimant's diligent pursuit of his degree precluded outside employment, and the vocational rehabilitation program was designed to increase his wage-earning capacity. JA 488-490. Moreover, the ALJ's ruling simply precluded the Employer from proving the existence of alternative employment for a period of approximately five months—from the time of its single job offer during the Claimant's last semester until his graduation. JA 82-83, 484-485, 550. Unlike this job offer, the Claimant's vocational rehabilitation program provided a reasonable assurance of long-term employment. JA 489-490. For these reasons, the Board properly affirmed the ALJ's award of disability benefits. JA 197-200.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE CLAIMANT WAS ENTITLED TO PERMANENT TOTAL DISABILITY BENEFITS WHILE ENROLLED IN AN OWCP-SPONSORED RETRAINING PROGRAM.

A. Standard of Review

This Court reviews decisions of the Board for errors of law and for adherence to the substantial evidence standard that governs the Board's review of ALJ factual determinations. 33 U.S.C. § 921(b)(3). The issues presented on appeal are mixed questions of fact and law. To the extent that the Employer's petition questions the validity of the ALJ's findings of fact, the statute explicitly provides that "the findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3); *Maryland Shipbuilding and Drydock Co. v. Director, OWCP,* 618 F.2d 1082, 1084 (4th Cir. 1980). This Court may not disregard the ALJ's findings on the "basis that other inferences might have been more reasonable." *Director, OWCP v. Newport News Shipbuilding (Carmines),* 138 F.3d 134, 140 (4th Cir. 1998), *quoting Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (1983).

B. Deference

The petition also raises questions of law, over which this Court exercises plenary review. *Humphries v. Director, OWCP,* 834 F.2d 372, 374 (4th Cir. 1987*), cert. denied,* 485 U.S. 1028 (1988). This Court routinely accords the Director deference for his administrative construction of the Longshore Act's terms unless it is unreasonable or contrary to Congressional intent. *E.g., Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999), *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum I),* 8 F.3d 175, 179 (4th Cir. 1993*); Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258 (4th Cir. 1991); *Newport News Shipbuilding and Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209, 210-11 (4th Cir. 1990). Accordingly, although this Court certainly remains the final authority on questions of statutory construction, the Director's constructions of the Longshore Act, and articulations of administrative policy, should be accepted as controlling unless they are unreasonable, contrary to the purpose of the statute, or contrary to clearly expressed legislative intent on the point in issue. *See generally, e.g., Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-5 & nn. 9, 11 (1984*); Chemical Manufacturers Ass'n v. NRDC,* 470 U.S. 116, 125-6 (1985).

The Employer suggests that the Director will seek deference "not [for] the interpretation for the statute, but rather [for], a broader interpretation for Fifth Circuit case law." Pet.'s Brief at 11-12. The Director, however, does not seek deference for interpretation of the *Abbott* decision. Rather he seeks deference for his statutory interpretations of (1) the scope of the ALJ's discretion, under § 8(h), in determining a worker's post-injury earning capacity, and (2) the mandate to the Secretary, under § 39(a), to direct the vocational rehabilitation of permanently disabled employees. 33 U.S.C. §§ 908(h), 939(a).

Moreover, the Employer purports to rely on *Bowen v. Georgetown University Hospital* in asserting that the Director is not entitled deference for his litigating position; however, *Bowen* holds only that deference should not be given "to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." 488 U.S. 204, 212 (1988). In fact, the Director's statutory constructions at issue here have been consistently advanced beginning with the *Abbott* decision, and, as addressed below, are in no sense the post hoc rationalizations of agency counsel for agency action. *Abbott*, 40 F.3d at 127-128; *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Kee v. Newport News Shipbuilding*

& Dry Dock Co., 33 BRBS 221 (2000); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

Since its ruling in *Bowen,* the Supreme Court clarified that the considered litigating positions of the agency *are* entitled to deference when the agency performs its statutory duties with respect to the construction, implementation, and enforcement of the statute, even when those positions have not been promulgated or announced in advance of the pending litigation. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). By contrast, the *Bowen* rule applies only to positions advanced before a court that are "merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court," for agency *action that was not based on* any such construction by the agency itself:

> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "post hoc rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

Auer v. Robbins, 519 U.S. 452, 462 (1997).

The Supreme Court further clarified its approach to deference in *United States v. Mead Corp.*, 533 U.S. 218 (2001), affirming that an agency administrator's interpretation of the "statutory scheme [he] is entrusted to administer . . . 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.* at 228, *quoting Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). Where, as here, the Director advances an interpretation of the Longshore Act in a litigation brief, that interpretation merits *Skidmore* deference, not absolute deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Because the Director's construction is fully reasonable, is not contradicted by any terms of the Act (or express legislative history), has been advanced in prior litigation, and is consistent with the broad remedial intent of the Longshore Act and the intended functions of the provisions at issue, the Court should accept the Director's construction. Though deserving closer scrutiny than formally promulgated rules, the Director's positions advanced in the litigation of claims are entitled to the limited deference due an agency's considered judgment on the scope of statutory provisions for whose administration it is politically accountable. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). As in *Auer*, "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.*

C. The Director's position that a claimant may be entitled to total disability benefits while enrolled in an OWCP-sponsored vocational rehabilitation program, a position affirmed in the *Abbott* decision, is firmly grounded in both the language and underlying policies of the Longshore Act.

In determining a claimant's entitlement to total disability benefits under the Longshore Act, this Court applies shifting burdens of proof. *See e.g., Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board (Tarner)*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762, 764 (4th Cir. 1979).[6] The Claimant bears the initial burden of establishing a *prima facie* case of total disability, demonstrating that he is unable to return to his prior employment due to a work-related injury. *Chappell,* 592 F.2d at 764. If the Claimant establishes a *prima facie* case of total disability, the burden then shifts to the Employer to rebut this showing by demonstrating the

[6] Other Circuits also follow this burden-shifting scheme. *See, New Orleans (Gulfwide) Stevedore v. Turner*, 661 F.2d 1031, 1038 (5th Cir. Unit A 1981); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1328-1329 (9th Cir. 1980); *American Stevedores, Inc. v. Salanzo*, 538 F.3d 933, 935-36 (2d Cir. 1976); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 478 (D.C. Cir. 1984).

availability of suitable alternative employment within the geographic area where the Claimant resides, which the Claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing and could secure if he diligently tried. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381 (4th Cir. 1994); *Tann, supra,* 841 F.2d at 542. If the employer makes such a showing, the claimant may nevertheless be entitled to total disability benefits if he demonstrates that he diligently tried but was unable to secure alternate employment. *Tann*, 841 F.2d at 542.

In this case, consistent with the provisions of the Longshore Act, its implementing regulations, and relevant case law, the Board properly affirmed the ALJ's decision that the Claimant is entitled to total disability benefits while enrolled in the OWCP-sponsored vocational rehabilitation program. JA 211-215. The Employer argues that "no basis exists in the Act or in existing law" for the ALJ and the Board to consider Brickhouse's enrollment in an OWCP-sponsored vocational rehabilitation program (which the ALJ found precluded employment for that period) in ascertaining Brickhouse's post-injury earning capacity. Pet.'s Brief at 12. However, the Longshore Act provides strong statutory support for the decisions below, which fully accord with the Director's statutory construction.

First, § 8(h) of the Longshore Act provides that an injured worker's "reasonable" post-injury wage earning capacity may be calculated based on:

> the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances . . . which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h). Thus, the statute permits the fact-finder broad discretion in determining a reasonable, post-injury, wage-earning capacity for the injured worker. *Id.* The provisions specifically directs the fact-finder to consider the long-term effects of the worker's disability, which should reasonably include the right to consider the worker's rehabilitative potential. *Id.* The wide latitude that the fact-finder is afforded under the Longshore Act directly refutes the Employer's suggested rigidity in formulating the Claimant's post-injury earning capacity based on a single job offer.

Second, the Longshore Act emphasizes the value of vocational rehabilitation, in providing that "[t]he Secretary *shall* direct the vocation rehabilitation of permanently disabled employees and shall arrange . . . for such rehabilitation." 33 U.S.C. § 939(c)(2) (emphasis added). The implementing regulations state that the purpose of rehabilitation is "to return permanently disabled persons to gainful employment commensurate with their physical or mental impairments, or both, by reevaluation or redirection of their abilities, or retraining in another occupation, or selective job placement assistance." 20 C.F.R. § 702.501. In fact, the regulations give advisors significant flexibility in devising such training programs, stating that training programs "shall be developed to meet the varying needs of eligible beneficiaries, and may include courses at colleges . . ." 20 C.F.R. § 702.506(b).

Indeed, the leading treatise on workers' compensation extols the benefits of vocation rehabilitation:

> It is too obvious for argument that rehabilitation, where possible, is the most satisfactory disposition of industrial injury cases, from the point of view of the insurer, employer and public as well as of the claimant. Apart from the incalculable gain to the worker himself, the cost to insurers and employers of permanent disability claims under a properly adjusted system is reduced; and, so far as the public is concerned, it has been said on good authority that for every dollar spent on rehabilitation by the Federal Government it has received back ten in the form of income taxes on the earnings of the persons rehabilitated. It is probably no exaggeration to say that in this field lies the greatest single opportunity for significant improvement in the benefits afforded by the workmen's compensation system.

2 A. Larson, LAW OF WORKMEN'S COMPENSATION § 95.05.

Thus, the Longshore Act directs both that all relevant factors be considered in setting a disabled worker's earning capacity and that the Department promote the rehabilitation of disabled workers. The Director's statutory construction of both provisions, read together, is that the

Longshore Act authorizes an ALJ – where the totality of the circumstances so warrants – to award total disability during a disabled worker's enrollment in an OWCP sponsored vocational rehabilitation program, notwithstanding the Employer's offer of an otherwise bona-fide job during that time period.

That construction comports with the fundamental policies underlying the statute and its remedial purposes. *See e.g., Director, OWCP v. Perini N. River Assocs.,* 459 U.S. 297, 315-16 (1983) (recognizing that the Longshore Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results"); *Northeast Marine Terminal Co., Inc., v. Caputo*, 432 U.S. 249, 268 (1977) (recognizing the Longshore Act's remedial purpose). The Director's construction promotes the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force. *Turner, supra*, 661 F.2d at 1042. *Accord Stevens v. Director, OWCP*, 909 F.2d 1256, 1260 (9th Cir. 1990). The Director's construction advances the laudable goal of vocational rehabilitation by providing the disabled worker with full compensation benefits, and thus an adequate financial base, where appropriate, to enable him to devote his full attention to his long-term rehabilitative potential.

The Director's construction of the Longshore Act has been consistently applied in administrative practice before the Board. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Bush v. I.T.O. Corp*., 32 BRBS 213 (1998); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998). The Director's position is reasonable, consistent with both the statutory language and Congressional intent, and thus should be accorded deference. *Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum I),* 8 F.3d 175, 179 (4th Cir. 1993); *Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258 (4th Cir. 1991); *Newport News Shipbuilding and Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209, 210-11 (4th Cir. 1990).

The only court to have considered the issue has endorsed the Director's statutory construction. *Abbott v. Louisiana Insurance Guaranty Association*, 40 F.3d 122, 128 (5th Cir. 1994). In *Abbott*, the court held that under the totality of the circumstances, a claimant was entitled to receive continuing permanent total disability benefits while enrolled in an OWCP-sponsored rehabilitation program. *Id.* The rule in *Abbott* was well grounded within the framework of the Longshore Act. First, the court observed that the Act provides no strict formula for calculating a worker's post-injury earning capacity. *Id.* at 127. Rather, the court recognized that post-injury earning capacity is determined "not only on the basis of physical condition but also on factors such as age, education, employment history, *rehabilitative potential*, and the availability of work that the claimant can do." *Id*. at 127, *quoting New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981) (emphasis added). This language is derived directly from the language of § 8(h) of the Longshore Act, which directs the ALJ to examine all relevant circumstances in formulating an injured worker's "reasonable" post-injury wage earning capacity. 33 U.S.C. 908(h).

The *Abbott* court also recognized that allowing a claimant to increase his wage-earning capacity through rehabilitation serves to benefit the Employer by reducing its long-term compensation liability. 40 F.3d at 128. Again, the court relied on the Longshore Act's specific directive to promote rehabilitation of disabled workers. *Id.* Thus, the court reasoned that "[t]he Act gives the Department of Labor the authority to direct rehabilitation programs; courts should not frustrate those efforts when they are reasonable and result in lower total compensation liability for the Employer and its insurers in the long run." *Id.* at 127-128.

In *Abbott*, the court promulgated a doctrine outlining the factors to consider in determining whether a claimant is entitled to disability benefits while enrolled in a vocational rehabilitation plan. 40 F.3d at 127-128. The factors include, but are not limited to: (1) whether the Department of Labor approved the rehabilitation plan, (2) whether the Employer was aware of the Claimant's participation in the program and agreed to continue making total disability benefits, (3) whether the Claimant's diligent pursuit of his studies precluded employment, and (4) whether completion of the program would increase the Claimant's future wage-earning capacity. 40 F.3d at 127-128.

Thus, as the Fifth Circuit recognized in *Abbott*, claimants may receive continuing permanent total disability benefits under the Longshore Act while enrolled in OWCP-sponsored rehabilitation programs. 40 F.3d at 127-128. A determination that vocational rehabilitation is appropriate to return a disabled worker to long-term gainful employment is fundamentally grounded in the Act and its implementing regulations. 33 U.S.C. § 939(c)(2); 20 C.F.R. § 702.501.

D. The Board properly affirmed the ALJ's application of the *Abbott* doctrine by awarding permanent total disability benefits while Brickhouse was enrolled in his vocational rehabilitation program.

As addressed below, in consideration of these factors, it is clear that the *Abbott* doctrine applies to the instant case, and the Board properly affirmed the ALJ's award of permanent total disability benefits while the

Claimant was undergoing rehabilitation. JA 215, 489-490.

1. OWCP sponsored the vocational rehabilitation program

Consistent with statutory directives, OWCP concluded that rehabilitation was necessary to return the Claimant to gainful employment. 33 U.S.C. § 939(c)(2); JA 29, 31, 74, 483, 489. OWCP acted reasonably in approving Brickhouse's vocational rehabilitation plan, which was structured to increase his earning capacity. JA 462, 482-483, 546-547. After the Claimant's work injury, he was unable to return to his pre-injury job. JA 482. His doctor placed him on permanent restrictions which limited the availability of alternative employment. JA 482. OWCP assigned the Claimant to a vocational rehabilitation counselor, who prepared a retraining plan. JA 482-483. The plan was substantiated by vocational test scores, a labor market survey identifying numerous available jobs in the field of graphic communications, a study of the Claimant's abilities and wage earning capacity, and a job analysis approved by his doctor. JA 482-483. Pursuant to the Longshore Act's statutory directive, OWCP approved this rehabilitation plan with the reasonable and appropriate aim of returning the Claimant to long-term gainful employment and thereby reducing the Employer's long-term compensation liability. JA 482; 33 U.S.C. § 939(c)(2); 20 C.F.R. § 702.501.

Contrary to the Employer's assertion that it is being forced to "subsidize the Claimant's personal vocational choice" of vocational rehabilitation, Pet.'s Brief at 4, under no circumstances does an injured worker have the unilateral right to pursue Departmentally-sponsored vocational rehabilitation. Rather, the ultimate determination as to the propriety of implementing a vocational rehabilitation plan rests with the Department of Labor, based on the criteria outlined above. Apart from the necessity of Departmental approval, the Claimant's rehabilitation program was, in fact, the result of a cooperative effort between the Claimant, his doctor, his rehabilitation counselor, and OWCP. JA 482-483. Here, these parties collectively determined that the vocational rehabilitation program was necessary and appropriate to return the claimant to gainful employment, in consideration of the Claimant's medical condition, his prior experience, his vocational test scores, a job analysis, and a labor market survey identifying available positions. *Id*; JA 29-30, 48, 398-399, 458-461.

2. The Employer knew of the proposed vocational rehabilitation plan and raised no objections at the outset.

The Employer's failure to raise objections at the outset of the retraining program also justifies the award of permanent total disability benefits for the duration of the program. 40 F.3d at 127; JA 76, 401, 481, 483, 489. Substantial evidence supports the ALJ's finding that the Employer was aware of the proposed vocational rehabilitation plan, raised no objections nor made any attempt to demonstrate suitable alternative employment when the program was implemented, and, in fact, continued to pay disability benefits. JA 76, 401, 481, 483, 489. It was not until a year and a half later, as the Claimant was nearing graduation, that the Employer objected to the retraining program with the offer of a single job. JA 401, 483-485.

Given the Employer's delay in objecting, Brickhouse again did not simply make a "personal choice" to seek vocational rehabilitation. On the contrary, it was undisputed that Brickhouse was unable to return to his former employment and the Employer failed to demonstrate evidence of suitable alternative employment available at that time; in sum, the record demonstrates that the Claimant was unemployable at that time. JA 482. Therefore, his choice to seek vocational rehabilitation from the Department of Labor was, not as the Employer intimates, a whimsical one, but inherently reasonable and sound under the circumstances. Indeed, it may have been the Claimant's only reasonable option at time to return to some form of gainful employment. Thus, as the facts in this case amply demonstrate, an employer's objection to a disabled worker's enrollment in vocational rehabilitation, at the very least, must be timely to be meaningful. As the ALJ held:

> [I]t would be unfair to sustain the cut off of benefits in this case. . . It was unfair of the shipyard to allow Claimant to be retrained for almost two years and, with only a few months to go, give him a choice of wasting his retraining or cutting off his workers' compensation.

JA 489. In short, substantial evidence supports the ALJ's conclusion that the Employer failed to raise objections at the outset of the Claimant's vocational rehabilitation program, when such objections should be made. JA 489.

3. The Claimant diligently pursued his studies, which precluded outside employment.

Substantial evidence supports the ALJ's finding that the Claimant's diligent studies precluded outside employment and enabled graduation within the mandated two-year time frame. JA 191E, 546. OWCP required the Claimant to enroll as a full-time student in each semester, including summer sessions, to attend classes regularly, to maintain a 2.0 grade average, to submit a transcript of grades at the end of each semester, and to complete the program within two years, on or before the expiration of the OWCP grant. JA 401-402, 546. OWCP ensured Brickhouse's diligence by assigning a rehabilitation counselor to monitor his progress and prepare monthly reports to OWCP. JA 32, 261-396, 483.

The Employer argues that Brickhouse failed to meet his burden of demonstrating that taking the job precluded his pursuit of the associate degree. Pet's Brief at 19-20. In particular, the Employer argues that the Claimant could have pursued his degree at night. Pet.'s Brief at 18-20. As the ALJ found, however, the greater weight of the evidence proved this to be an unfeasible option. JA 191E.

The Claimant could not have taken the required courses at night during the 1997 spring semester in order to graduate by May 1997, as OWCP required. JA 84-85, 191E, 213, 537. During the 1997 spring semester, the Claimant was required to complete coursework for a class he had taken the previous semester, and he enrolled in two additional day courses. One of these courses was not offered in the evening during the 1997 spring semester. JA 539. The other, a required course, was offered in the evening, but the deadline to register for this class passed as of January 7, 1997, prior to the Employer's February 1997 written job offer. JA 162, 539. Thus, substantial evidence supported the ALJ's finding that the Claimant could not have completed his required coursework at night by May 1997. JA 191E.

Moreover, the rehabilitation counselor asked the Employer if Brickhouse's class schedule could be accommodated by permitting him to work part-time or after regular working hours, but the Employer refused this reasonable request. JA 35, 79. The Employer merely replied that the Claimant would have to pursue his coursework on his own time after his full-time work hours. JA 35.

In any event, as a matter of policy, OWCP discourages claimants from working, even part-time, while enrolled in a full-time vocational rehabilitation program. *See Louisiana Insur. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 124, 127 (5th Cir. 1994). The *Abbott* court specifically endorsed that policy as a sensible means of ensuring the success of the vocational rehabilitation program. *Id.* In *Abbott*, an OWCP-referred vocational counselor determined that school and family pressures would have precluded the Claimant from working, even on a part-time basis, had the Department of Labor allowed him to do so. 40 F.3d at 124. The court concluded that the Department acted reasonably pursuant to its statutory authority to direct rehabilitation programs in determining that Abbott's rehabilitation plan precluded him from working. *Id.* at 128.

Similarly, in the instant case, the Claimant's educational program involved lab work and homework that demanded his full attention. JA 191E. As such, it is unreasonable to expect an individual under medical restrictions to work full-time, attend a three-hour class three nights a week, and complete the required homework and lab work satisfactorily. JA 191E.

For these reasons, substantial evidence supports the ALJ's conclusion that the "Claimant's pursuit of his degree precluded employment at the shipyard, at least temporarily. The record is clear that Claimant would not have been able to pursue his degree by taking night courses, which were not available." JA 39-40, 489

4. The rehabilitation program will likely increase the Claimant's long-term wage-earning capacity.

Due to the uncertainty of the Employer's job offer, the ALJ concluded that the rehabilitation program was more likely to increase the Claimant's wage-earning capacity in the long-term. JA 489-490. The ALJ placed particular weight on the evidence that the Employer's single job offer provided no long-term guarantees. JA 489. The offer expressly stated, "Your employment is not for any specified period of time, and may be terminated with or without notice, at any time, at the option of the Company or yourself." JA 484, 489, 550. The ALJ concluded:

> It is important to note that the shipyard's offer included no guarantee of long-term employment. . . . The uncertainty of the offer insofar as employment security is concerned is a crucial element in my concluding that the shipyard's actions were unfair and should not be sustained. Therefore, I conclude that Claimant is entitled to the benefits that he seeks.

JA 489-490.

The Employer mistakenly contends that there is no legal basis for the ALJ to consider the Claimant's prospect of long-term employment. Pet's Brief at 20-22. To the contrary, the Longshore Act specify directs the ALJ to consider "the effect of disability as it may naturally extend into the future." 33 U.S.C. § 908(h). Moreover, the Employer itself cites to the language of *Abbott* in asserting that courts should focus on a vocational rehabilitation program's potential to limit "compensation liability for the employer and its insurers *in the long run*." Pet.'s Brief at 17, *citing* 40 F.3d at 127-128 (emphasis added). Additionally, the leading treatise in the field of workers' compensation lends further support for the consideration of job security. 2 A. Larson, LAW OF WORKMEN'S COMPENSATION § 57.51(a). The treatise provides, "if the post-injury employment lacks permanence and if it can fairly be said that, should he lose that job, claimant would have a hard time getting new work, a finding of disability is in order." *Id.* Thus, the Longshore Act, the relevant case law, and the leading workers' compensation treatise confirm that the ALJ was not only permitted, but obliged to consider the Claimant's long-term employment prospects.

The Employer also mistakenly contends that the Claimant's prospect of long-term employment is irrelevant due to Virginia's at-will employment doctrine. Pet.'s Brief at 20-21. However, the fact that the Claimant could be discharged from a job at any time for any reason actually *reinforces* the importance of developing the Claimant's marketable job skills through vocational rehabilitation. Vocational rehabilitation qualified the Claimant for a broad range of jobs, rather than a single job with an uncertain future.

The Employer also argues that the ALJ erroneously applied the *Abbott* doctrine, because in *Abbott*, the employer relied upon a labor market survey of minimum wage jobs to suggest that the claimant had a minimum wage earning capacity during his vocational rehabilitation program, while in the instant case, the Employer offered a job at a salary that exceeded the Claimant's pre-injury salary. Pet.'s Brief at 15, *citing Abbott*, 40 F.3d 122.[7] Nothing in *Abbott* suggests, however, that the court's ruling turned on the employer's minimum wage showing. Rather, the court merely considered it as a factor in ultimately deciding that vocational rehabilitation was a reasonable pursuit under the facts presented. Likewise, here, although the

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[7] Although the ALJ found the Employer's job offer to be bona fide, he made no determination as to whether the proffered wage-rate was actually representative of the job, and consequently Brickhouse's earning capacity. 33 U.S.C. § 908(h); *Darby v. Ingalls Shipbuilding, Inc.* 99 F.3d 685 (5th Cir. 1996). The ALJ would also be required to factor out the effects of inflation by adjusting any post-injury wage-rate back to its time-of-injury equivalent. *White v. Bath Iron works Corp.,* 812 F.2d 33, 35 (1st Cir. 1987); *Walker v. Washington Metro Area Transit Auth.,* 793 F.2d 319, 323 (D.C. Cir.) *cert. denied,* 479 U.S. 1094 (1986); JA 485, n. 12 (ALJ found that the senior engineer analyst position would have paid less in September 1993 than in January 1997).

ALJ considered the wage of the Employer's job offering, he found that fact outweighed by the other evidence of record. JA 489-490. The ALJ's weighing of the evidence was clearly within his fact-finding authority generally and within the specific grant of authority under LHWCA § 8(h) which provides the ALJ broad discretion to consider all relevant circumstances in determining a claimant's wage earning capacity. 33 U.S.C. 908(h). Pursuant to this broad grant of authority, the ALJ properly determined that the Employer's single job offer did not establish the Claimant's "reasonable" wage earning capacity. JA 489-490. The ALJ properly considered the possibility that if the Claimant lost this job – no matter what the wage it paid – his subsequent wage-earning capacity would be minimal without the benefit of vocational rehabilitation. *Id.* If the Claimant had been forced to withdraw from his educational program prior to receiving a degree and then subsequently lost his job with Newport News Shipbuilding, the Claimant would have been unable to offer marketable skills on the open job market.

The Employer attempts to cast doubt upon the efficacy of the Claimant's vocational rehabilitation, in citing the difficulties the Claimant has experienced on the job market. Pet.'s Brief at 21. In fact, the evidence proves to the contrary. After graduation, Brickhouse secured his first post-injury job within seven months. JA 43, 218, 231. When that employer went out of business, Brickhouse was again able to secure employment at a higher salary within two-and-a-half months. JA 191B-191C, 207, 478.

Moreover, whatever Brickhouse's difficulties, in evaluating the benefit of the vocational rehabilitation program, the appropriate comparison must be against Brickhouse's employment prospects had he not received such training. First, the Employer's failure to demonstrate suitable alternative employment, during the greater part of Brickhouse's vocational training program – and at no time on the open labor market –evidences the limited opportunities available to the Claimant without the skills he was able to obtain through vocational rehabilitation.[8] All that the Employer proffered, some one-and-a-half years after Brickhouse's enrollment, was a

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[8] It should be noted, that an offer of employment from the liable employer should be viewed with skepticism as a possible attempt to extinguish that employer's liability, rather than a bona-fide offer of employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330 n.4 (9th Cir. 1980); S. REP. NO. 1988 (1938), incorporating H.R. REP. NO. 1945 (1938). The legislative history reflects Congress' concern that an unscrupulous employer could attempt to re-hire a claimant at his pre-injury wage rate simply to terminate the employer's liability for disability benefits. *Id.* If the employer discharged the claimant after the expiration of the limitations period to modify an award of benefits, the claimant would be ineligible for further disability benefits. *Id.* Without vocational rehabilitation, the claimant may also be ineligible for employment on the open labor market. *Id.*

single job offer within its own employ, lacking long-term stability, and which was no longer available to Brickhouse immediately after graduation.

The Employer's attack on the value of Brickhouse's vocational rehabilitation is grounded on the unstated premise that the Employer could meet its burden once and for all with evidence of its single job offer. That is certainly not the case. As addressed above, based on uncontradicted evidence, the ALJ found that there was no long-term guarantee that Brickhouse would have remained employed in the position offered by the Employer. JA 489-490. If and when that job became unavailable or unsuitable for Brickhouse, the Employer's burden of proving suitable alternative employment would have resumed.[9]

[9] In fact, had the ALJ accepted the Employer's offer as evidence of suitable alternative employment, and further found that Brickhouse suffered no current loss of earning capacity, *but see* n. 7, *supra*, it would have been reasonable to consider the propriety of an ongoing "nominal" award to protect Brickhouse against a statute of limitations problem had the employer's job ended for any reason. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 123 (1997). A nominal award has been sanctioned by the Supreme Court where an injured worker suffers no current loss of earning capacity from his injury but there is a significant likelihood of a future loss – for any reason, including diminished future employment prospects. *Id.* Given that the single Employer's job offer here had no long term guarantee, the ALJ, at the very least, would have been well within his authority in granting a nominal award to protect Brickhouse against a future foreclosure of benefits to which he would be otherwise entitled. *Id.* And, in that event, the Employer's job offer would not have been sufficient to meet its burden once and for all. *Id.*

The Claimant was enrolled in a vocational rehabilitation program for only two of the nearly nine years since the 1993 work injury. JA 482-485. The Employer could have attempted to reduce or terminate its liability with proof of available suitable alternative employment at any point in the nearly seven years since the Claimant's completion of the vocational rehabilitation program, but the Employer failed to offer such evidence.[10] JA 482-485. Under these circumstances, the ALJ properly rejected the contention that the Employer's single job offer was available suitable alternative employment, on the grounds that the Claimant was in his last semester of an OWCP-sponsored vocational rehabilitation program. JA 489-490.

In any event, the efficacy of the vocation rehabilitation must not be judged on the basis of short-term data alone. 40 F.3d at 128; JA 489. As the ALJ concluded, "[t]here is no evidence as to what salary increases Claimant could have expected in the future; so, any projection of future wages or salary in either job would be speculation." JA 489. The short-term employment difficulties experienced by a recent graduate may be due in part to unforeseeable economic conditions that could change in the near future

[10] Pursuant to LHWCA § 22, the Employer is entitled to seek modification of the award at any time and to decrease its liability upon a showing of suitable alternative employment available to the Claimant at a higher wage - rate than the one that serves as the basis for the current award. 33 U.S.C. § 922.

and thus do not necessarily predict long-term earnings. JA 489. Whatever the future holds, Brickhouse's employment opportunities have been enhanced by his vocational rehabilitation.

CONCLUSION

For the foregoing reasons, the Board's decision should be affirmed. The Claimant was entitled to total disability benefits during his retraining program because OWCP sponsored the Claimant's vocational rehabilitation, the Employer knew about the proposed program and did not object, the Claimant's diligent pursuit of his studies precluded employment, and the training program was designed to increase the Claimant's wage-earning capacity. Thus, the Board properly affirmed the ALJ's application of the

Abbott doctrine to award permanent total benefits from January 6, 1997, to December 29, 1997, and permanent partial benefits thereafter.

Respectfully submitted,

EUGENE SCALIA
Solicitor of Labor

JOHN F. DEPENBROCK
Associate Solicitor for Employee Benefits

SAMUEL J. OSHINSKY
Senior Appellate Attorney

SARAH C. CRAWFORD
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW/S4325
Washington, DC 20210
Suite S-4325

Attorneys for the Director, OWCP

REQUEST FOR ORAL ARGUMENT

Because this case presents an issue of first impression in the Fourth Circuit, the Director contends that oral argument is necessary in this case and would greatly benefit the Court in reaching the proper determination.

Insert certificate of compliance

CERTIFICATE OF SERVICE

I hereby certify that on this sixteenth day of May 16, 2002, a true and correct copy of the foregoing was duly served upon the following by U.S. Mail, postage prepaid:

Jonathan Walker
Mason, Cowardin & Mason, P.C.
First Union Centre
11742 Jefferson Avenue, Suite 260
Newport News, VA 23606

John Klein
Montagna, Breit, Klein, Camden
200 Bank of Hampton Roads Building
415 St. Paul's Boulevard, Suite 700
Norfolk, VA 23510

LaWanda J. Hamlin
U.S. Department of Labor
Paralegal Specialist