No. 03-72528

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONSTRUCTION CO. AND LIBERTY NORTHWEST INSURANCE CORPORATION,
Petitioners

v.

ROBERT CASTRO
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

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

BRIEF OF THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from Robert Castro's ("Castro") claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) ("Longshore Act" or "the Act"). The Administrative Law Judge ("ALJ") had jurisdiction to hear the claim pursuant to Sections 19(c)-(d) of the Act, 33 U.S.C. § 919(c)-(d). The ALJ's Decision and Order granting Castro benefits was

filed in the office of the District Director on May 23, 2002. (ER at 163).[1] The ALJ subsequently denied Castro's motion for reconsideration on July 10, 2002. General Construction Co. and Liberty Northwest Insurance Corporation (collectively "General Construction") filed a Notice of Appeal of the ALJ's decision with the Benefits Review Board ("Board") on August 9, 2002, within the thirty-day time limit set forth in Section 21(a) of the Act, 33 U.S.C. § 921(a). *See* 20 C.F.R. § 802.206(a) (timely motion for reconsideration suspends appeal time period). General Construction's timely appeal invoked the Board's review jurisdiction pursuant to Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3).

The Board issued its final decision on May 13, 2003, affirming the ALJ's award of benefits. (ER at 181). Aggrieved by the decision, General Construction filed its petition for review with this Court on June 23, 2003, within the sixty-day period prescribed by Section 21(c) of the Act, 33 U.S.C. § 921(c). The Board's order is final pursuant to Section 21(c) because it completely resolved all issues presented and did not include a remand to the ALJ for further factual determinations. *See Nat'l Steel and Shipbuilding Co. v. Director, OWCP*, 626

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[1] References to the Excerpts of Record filed by General Construction with its brief will be designated "ER." Records contained in the Supplemental Excerpts of Record filed by Castro will be referenced by "SER."

F.2d 106 (9th Cir. 1980). Castro sustained his injury in the state of Washington, within this Court's territorial jurisdiction. Thus, pursuant to Section 21(c), this Court has jurisdiction over General Construction's petition for review.

STATEMENT OF THE ISSUES

I. Whether the ALJ properly determined, in accordance with the interpretation of the Longshore Act unanimously adopted by the Fourth and Fifth Circuits, the Board, and the Director, that Castro could receive permanent total disability benefits while participating in an OWCP-sponsored vocational rehabilitation program if his participation in the program rendered him unavailable to take otherwise suitable alternative employment.

II. Whether substantial evidence supports the ALJ's determination that Castro's participation in an approved vocational rehabilitation program prevented him from taking the alternative employment General Construction identified as available.[2]

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[2] General Construction also challenges the ALJ's calculation of Castro's average weekly wage. Because this issue is controlled by this Court's decision in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), the Director will not brief it at this time.

STATEMENT OF THE CASE

While working as a pile driver for General Construction, Castro injured his right knee on November 20, 1998. As a result, he timely sought benefits for permanent partial disability and temporary total disability under the Longshore Act.[3] (SER at 1-4). General Construction voluntarily paid these benefits while Castro was undergoing medical treatment and therapy.

One month after Castro's failed attempt to return to modified (lighter) duty work with General Construction in June and July, 1999, a Vocational Rehabilitation Specialist in the Department of Labor's Office of Workers' Compensation Programs ("OWCP") referred Castro to Carol Williams, a certified vocational rehabilitation counselor. (ER at 1). Williams was responsible for assessing Castro and determining whether he should participate in a vocational rehabilitation plan. (ER at 1-3). After she completed her evaluation, Williams

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[3] Castro originally requested temporary total disability benefits during the vocational rehabilitation period. But the ALJ found that because Castro sought disability benefits for periods after his condition reached maximum medical improvement, his request was, in fact, one for permanent total disability benefits. *See* ER at 165, n.1; *Louisiana Ins. Guar. Assoc. v. Abbott*, 40 F.3d 122, 125 n.2 (5th Cir. 1994) ("the nature of a claimant's disability is permanent once the claimant reaches maximum medical improvement, regardless of whether the extent of that disability is total or partial"). General Construction has not challenged that ruling on appeal.

recommended a plan to train Castro to be a hotel/motel manager. (ER at 48-55). She scheduled the plan period to run from September 2000 to June 2002.[4] (ER at 55). The OWCP Rehabilitation Specialist approved Williams' recommendation on June 30, 2000. (*Id.*).

By letter dated August 3, 2000, General Construction contested the proposed rehabilitation plan. (ER at 56). It asked "for a hearing concerning the appropriateness of rehabilitation, and the length and type of any rehabilitation program." (*Id.*). It also believed the plan unnecessary because Castro likely would be able to replace his wages without rehabilitation. Contemporaneously, General Construction terminated its voluntary payment of benefits.

Castro requested an ALJ hearing by filing a controverted issues form (LS-18) with the District Director on October 26, 2000, and OWCP forwarded the claim to the Office of Administrative Law Judges on November 17 for further proceedings.[5] (ER at 59).

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[4] Castro had already begun preparing for the hotel management course by taking general study courses at Seattle Central Community College beginning in January 2000.

[5] The Secretary of Labor has delegated her authority to administer the Longshore Act to the Director, OWCP. 20 C.F.R. §§ 701.201, 701.202(a). The District Director, in turn, is authorized to process and determine claims for compensation,

The ALJ held a formal hearing on June 20, 2001. He then issued a Decision and Order granting Castro benefits; the decision was filed in the Office of the District Director on May 23, 2002. Based on his evaluation of the medical opinion evidence, the ALJ found Castro entitled to permanent partial disability compensation for a scheduled injury to his right knee based on a 17 percent lower extremity disability rating. *See* 33 U.S.C. § 908(c)(2) (listing scheduled injuries). He thus awarded Castro 48.96 weeks (*i.e.*, 17 percent of the schedule-allowed 288 weeks) of compensation at an average weekly wage of $669.58, for a total of $32,782.64. (ER at 179). The ALJ made his average weekly wage determination pursuant to 33 U.S.C. § 910(a) and this Court's precedent in *Matulic v. Director, OWCP,* 154 F.3d 1052 (9th Cir. 1998).

In addition, the ALJ awarded Castro total disability benefits. He determined that Castro was entitled to temporary total disability benefits from July 14, 1999, until August 13, 2000 (the period after Castro discontinued work due to medical restrictions until he reached maximum medical improvement) and permanent total

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(. . . continued)

20 C.F.R. § 701.301(a)(7), and to refer cases to rehabilitation specialists. 20 C.F.R. § 702.502.

disability benefits from August 14, 2000, to June 7, 2002 (the period of his vocational rehabilitation plan). (ER at 179). Before awarding these benefits, the ALJ evaluated whether there was suitable alternative work available to Castro. He noted that the positions General Construction's vocational experts had identified met Castro's physical restrictions. But, relying on the Fifth Circuit's decision in *Louisiana Insurance Guarantee Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994), and the Board's subsequent decision in *Brown v. National Steel and Shipbuilding*, 34 BRBS 195 (2001) (applying *Abbott* to cases within the Ninth Circuit's jurisdiction), the ALJ concluded that Castro was entitled to total disability benefits because he could not successfully complete his rehabilitation plan and work in the identified positions contemporaneously.

The ALJ conducted a detailed review of the facts before reaching his conclusion on this point. He acknowledged that under *Abbott*, participation in a rehabilitation plan alone was not enough to establish entitlement to total disability. Instead, Castro had to prove that such participation prevented him from working. The ALJ considered an array of factors in deciding this question: 1) General Construction had objected to the rehabilitation plan; 2) the time Castro spent in classes, studying, and commuting to classes, as well as the commute's length and unpredictability, would make it difficult to hold down a job; 3) Castro's relatively slower learning capacity made it unlikely that he could work and successfully

complete his training program simultaneously; 4) Castro had made efforts to secure other employment, including failed attempts to return to General Construction in a lighter-duty position and to hold a paid internship while participating in the rehabilitation program; and 5) Castro's long-term earning potential would be greater after completing the program. Balancing these factors, the ALJ concluded that Castro was entitled to total disability benefits under *Abbott* until the scheduled completion date of his vocational rehabilitation program. (ER at 179).

General Construction appealed the ALJ's decision to the Board. The Longshore Claims Association ("LCA") filed an amicus curiae brief in support of the employer. On May 13, 2003, the Board issued its decision affirming the ALJ's award of benefits in all respects. In its decision, the Board rejected each argument General Construction and LCA posed. First, the Board addressed their challenges to the Fifth Circuit's *Abbott* decision as an invalid extension of the Act. General Construction contended that total disability benefits are not allowed during vocational rehabilitation periods because the Act does not explicitly provide for such awards; thus, *Abbott* was incorrectly decided. LCA asserted that because Congress considered, but did not adopt, a statutory amendment that would have required employers to pay total disability compensation to all Longshore claimants

participating in vocational rehabilitation programs, *Abbott* impermissibly reinserted into the Act a provision Congress explicitly excluded.

The Board was unpersuaded. Noting that the Fourth Circuit had adopted the *Abbott* approach in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286 (4th Cir. 2002) ("Brickhouse"), the Board explained that *Abbott* rested "not on any novel legal concept, but on the well-established principle[s]" governing availability of suitable alternative employment determinations. (ER at 187). Within that framework, the Board reasoned that employment, even where suited to the employee's disability, was not "available" if the employee's rehabilitation plan agreement "prohibits him from extracurricular employment, or if the administrative law judge determines that the rehabilitation schedule prevents" it. Thus, the Board concluded that "*Abbott* does not create a new type of award but permits consideration of factors relevant to claimant's employability consistent with existing case law," law that includes consideration of "economic factors in addition to an injured employee's physical condition." (ER at 188).

The Board also found LCA's legislative history argument unavailing. The Board pointed to a crucial distinction between *Abbott* and the proposed (but not enacted) statutory amendments: the amendments would have made total disability payments during rehabilitation programs automatic. That result, the Board

concluded, was far different from the *Abbott* approach because "*Abbott* requires consideration of a number of factors" in determining benefits entitlement. (ER at 187). Such entitlement is not automatic.

Next, the Board addressed General Construction's challenge to the ALJ's evidentiary weighing on the issue of availability of suitable alternative employment. Reviewing each factor the ALJ considered and the pertinent evidence, the Board concluded that the ALJ had "clearly considered all of the relevant factors and reached a rational conclusion." (ER at 191). It therefore affirmed the ALJ's award of total disability benefits to Castro during his vocational rehabilitation program. (*Id.*).

Last, the Board disposed of General Construction's contention that it had been denied due process because it had unfairly been denied a hearing. Relying on this Court's decision in *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090 (9th Cir. 2000), *cert. denied* 531 U.S. 956 (2000), and similar case precedents, the Board held that General Construction was not entitled to an ALJ hearing on whether Castro should be enrolled in a vocational rehabilitation program. The Board reasoned that because the statute and implementing regulations commit that determination solely to the discretion of an OWCP District Director (the Secretary of Labor's designee), it may only be reviewed via direct appeal to the Board (an appeal General Construction never sought). The Board also rejected General

Construction's related Constitutional argument that it was illegally deprived of its property without a hearing because the employer had received a full hearing on the merits of whether Castro was entitled to total disability benefits before being ordered to pay those benefits. (ER at 14).

General Construction then petitioned this Court for review of the decisions below. LCA has, as it did before the Board, filed an amicus curiae brief in support of the employer.

STATEMENT OF FACTS

Castro began working for General Construction as a pile driver in 1998. (ER at 124). On November 20, 1998, he slipped on a crane step, tearing the anterior cruciate ligament in his right knee. (ER at 125; SER at 1-4). Castro received treatment and eventually had three reconstructive surgeries to his knee. (SER at 7). At the time of his injury, Castro was earning $25.70 per hour. Had he worked in his pile driving position through the end of 1998, his earnings for the year likely would have been in excess of $43,000. In 1996 and 1997, Castro earned wages totaling approximately $40,000. (ER at 67).

From June 14, 1999, through July 13, 1999, Castro returned to a light-duty position for General Construction, but had to discontinue working in this position due to injury-related restrictions and pain. (ER at 126-27). Castro's medical providers and evaluating physicians agreed that he could not return to his former

position with General Construction because of his injury-related disability. (ER at 58). On August 13, 1999, pursuant to Section 39(c)(2) of the Act and the regulations contained at 20 C.F.R. §§ 702.501-702.508, the District Director referred Castro to Carol Williams, a certified vocational rehabilitation counselor, to determine whether vocational rehabilitation was warranted. (ER at 1). To that end, she conducted vocational testing and assessed Castro's medical history, social and financial issues, vocational and educational training, work history and family background. She concluded that Castro was "highly motivated to obtain [a] formal education" and "likely to succeed" in a two-year training program. (ER at 40). While settling on a particular Associate Arts degree program, Castro began taking general courses at Seattle Central Community College in January, 2000. (ER at 41, 46).

Williams determined that Castro would benefit from being retrained in hotel tourism and management. (ER at 46). She estimated that management trainees in larger hotels earned $1100 to $1500 per month and that experienced managers could earn up to $5000 per month. (ER at 53). Thus, on June 16, 2000, she recommended that Castro be enrolled in a two-year course at Highline Community College. (ER at 55). Under the plan, the rehabilitation period ran from September 13, 2000, through June 7, 2002, the date Castro was expected to complete the

course. The OWCP Vocational Rehabilitation Specialist approved this recommendation on June 30, 2000. (ER at 55).

Castro testified before the ALJ that he spent between three and four-and-a-half hours per day commuting from his home on Bainbridge Island to Highline, twenty-five hours per week studying, and fifteen to eighteen hours per week in his classes, for a total of between forty-six and fifty-four hours of vocational training per week. (ER at 136-37).

In the meantime, General Construction offered evidence from its own vocational expert of available alternative jobs that Castro could perform notwithstanding his post-injury permanent physical limitations. These jobs included positions as a courier, cashier, security guard, and production assembler at an average salary of $8.00 to $10.00 per hour, less than half his hourly rate as a pile driver. (ER at 95). Annualized, the salaries for these jobs ranged from approximately $17,000 to $22,000 (ER at 66).

Board certified vocational expert Stan Owings conducted a vocational and lost earnings analysis for Castro based on a variety of assumptions, including Castro's completion of the hotel management course. (ER at 63-73). He noted that Castro could expect to earn about $16,000 a year at the entry level after course completion, but with experience his predicted earnings would rise to approximately $27,500 annually. Owings had no doubt that Castro's injury would

cause long-term income loss. But his analysis demonstrated that Castro's lost earnings would be substantially less if he completed the hotel management course than if he took a position of the sort General Construction pointed to as suitable alternative employment (he predicted Castro would lose only $156,876 in earnings if he completed the program instead of $248,754 if he did not, based on a $40,000 annual salary at the time of injury). (ER at 70, 72).

SUMMARY OF ARGUMENT

In accordance with the Fifth and Fourth Circuit's decisions in *Abbott* and *Brickhouse*, Board precedent, and the Director's interpretation of the Longshore Act, the ALJ properly concluded that Castro was entitled to permanent total disability benefits while enrolled in an OWCP-sponsored vocational rehabilitation program. These benefits are not payable to every claimant in a rehabilitation program where suitable alternative employment is available. Rather, following the well-settled analysis for determining the extent of an injured worker's disability, only those injured workers who are prevented from working contemporaneously because of the demands of their rehabilitation programs may receive total disability benefits.

As the *Abbott* and *Brickhouse* courts have already recognized, this interpretation of the Longshore Act is fully consistent with the statute's terms. The Act explicitly grants the fact-finder broad authority to consider an array of

factors beyond those pertaining to an injured worker's physical capacity in determining his post-injury wage earning capacity. *See* 33 U.S.C. § 908(h). The courts have held that these factors include the employee's age, education, work experience, and rehabilitative potential. Moreover, allowing continued total disability compensation to employees in rehabilitation programs, when appropriate, effectuates another prime statutory directive: the Secretary of Labor shall provide vocational rehabilitation to permanently disabled workers. *See* 33 U.S.C. § 939(c)(2). Thus, read together, these provisions fully support the result the ALJ reached here.

Nor does the Act's legislative history, contrary to General Construction's and LCA's arguments, undermine the *Abbott/Brickhouse* statutory construction. The proposed (but not enacted) amendments LCA points to do not support its case. Both the Supreme Court and this Court have cautioned against drawing conclusions regarding congressional intent from actions Congress chose not to take. And in any event, the proposed amendments LCA cites would have granted total disability benefits to *any* claimant who was in a vocational rehabilitation program of *any* sort. This is a far broader outcome than the much more restricted view that benefits are payable only when a full-time vocational rehabilitation program makes suitable alternative employment temporarily unavailable to the injured worker.

General Construction's fall-back arguments—that its procedural rights were somehow trampled in the proceedings below—are similarly without merit. It could have had the District Director's decision to approve Castro's rehabilitation plan reviewed had it appealed that determination to the Board, the proper procedural path for challenging decisions the Act leaves to the District Director's sole discretion. And General Construction had a full ALJ hearing on whether Castro could perform the suitable alternative employment positions it had identified and, accordingly, on whether Castro was entitled to permanent total disability benefits.

Finally, the ALJ's determination that Castro's participation in an approved vocational rehabilitation program prevented him from working in remunerative employment at the same time is supported by substantial evidence. The ALJ's clear and detailed evidentiary findings on the relevant factors outlined in *Abbott* and *Brickhouse* more than meet the required "substantial evidence standard."

ARGUMENT

I. An Injured Worker Participating In An OWCP-Sponsored Rehabilitation Program May Receive Permanent Total Disability Benefits If His Participation In The Program Prevents Him From Working In Otherwise Suitable Alternative Positions.

A. Standard Of Review

Courts review decisions of the Board for errors of law and adherence to the substantial evidence standard. *Healy Tibitts Builders*, 201 F.3d at 1092; *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999). On questions of law, including interpretations of the Longshore Act, this Court exercises de novo review. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1261 (9th Cir. 2001). As the administrator of the statute, the Director's reasonable statutory interpretations are entitled to deference. *Id.* at 1261-62.

B. The ALJ's Ruling That Castro Is Entitled To Total Disability Benefits While Participating In An OWCP-Sponsored Rehabilitation Plan Accords With The Statutory Language And Relevant Case Law.

The parties agree that Castro's knee injury and three subsequent reconstructive surgeries have rendered him unable to return to his work as a Longshore pile driver. If the injured worker can no longer perform his prior job duties, he is totally disabled unless the employer is able to demonstrate that suitable alternative employment is available to the worker. In this case, General

Construction offered evidence of positions available in Castro's geographic area and generally within his physical limitations. Castro did not take any of these positions, however, because he was participating in an OWCP-sponsored vocational rehabilitation program that precluded him from working contemporaneously. Having found that General Construction failed to demonstrate the availability of suitable alternative employment, the ALJ awarded Castro permanent total disability benefits for his retraining period.

General Construction argues that the ALJ's ruling violates the Act. It argues that the Fifth Circuit's decision in *Abbott*, upon which the ALJ rested his decision, has no basis in law and should not be followed. LCA agrees with General Construction. Focusing on the Act's legislative history, LCA contends that *Abbott* was wrongly decided. Both the employer's and the amicus's arguments are without merit.

The statute fully supports the ruling below. In determining a Longshore claimant's entitlement to total disability benefits, this Court applies a shifting burdens of proof scheme. *See, e.g., Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993), *cert. denied,* 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director*, OWCP, 629 F.2d 1327 (9th Cir. 1980). The claimant bears the initial burden of establishing a *prima facie* case of total disability by demonstrating that his work-related injury renders him unable to return to his prior employment.

Bumble Bee, 629 F.2d at 1329. If the claimant establishes a *prima facie* case of total disability, the burden then shifts to the employer to establish the availability of suitable alternative employment, within the geographic area of the claimant's residence, that the claimant can perform considering his age, education, and background, and a diligent employment search on his part. *See Bumble Bee Seafoods,* 629 F.2d at 1329-30; *Edwards*, 999 F.2d at 1375; *Brown*, 34 BRBS at 196. 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. *Palumbo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991).

In the context of this well-settled wage-earning capacity inquiry, the Fourth and Fifth Circuits, the Board, and the Director unanimously interpret the Longshore Act as permitting a total disability benefits award to an injured worker participating in an OWCP-sponsored vocational rehabilitation program when such participation prevents him from performing otherwise suitable alternate employment. The Act is not, contrary to General Construction's argument, silent on this question; instead, it provides strong support for the decisions of this Court's sister circuits and the decisions below.

First, the Longshore Act plainly compels consideration of more than just an injured worker's medical status in determining entitlement to benefits. It adopts a more flexible scheme that allows the fact-finder to consider all relevant factors that may limit or preclude employment. Section 2(10) of the Longshore Act defines disability in economic terms: it is 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." 33 U.S.C. § 902(10). Thus, one key to determining extent of disability is lost wage-earning capacity.

The statutory provision directly addressing wage-earning capacity reflects the same theme—one supporting a flexible inquiry into all the circumstances surrounding a worker's post-injury status. Section 8(h) of the Act provides that

> if the employee has no actual earnings . . . the [fact-finder] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to 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).[6] Thus, the statute permits the fact-finder broad discretion in determining a reasonable, post-injury, wage-earning capacity for the injured worker. The provision specifically directs the fact-finder to consider the long-term effects of the worker's disability, an inquiry that should naturally include a worker's rehabilitative potential. *See also Edwards,* 999 F.2d at 1375-76, *quoting Randall v. Comfort Control, Inc.*, 725 F.2d 791, 799 (D.C.Cir. 1984) (Act "designed to 'compensate for any injury-related reduction in wage-earning capacity through the claimant's *lifetime.*'") (emphasis added by *Edwards*).

Second, the Longshore Act emphasizes the value of vocational rehabilitation. It provides that "[t]he Secretary [of Labor] *shall* direct the vocational rehabilitation of permanently disabled employees and shall arrange . . .

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[6] Section 8(h) is the only statutory provision addressing how an injured worker's residual wage-earning capacity is calculated. Thus, although Section 8(h) does not refer to Section 8(a), 33 U.S.C. § 908(a) (providing permanent total disability benefits) and instead speaks in terms of injuries compensable under Sections 8(c)(21) and 8(e), 33 U.S.C. §§ 908(c)(21), 908(e) (providing unscheduled permanent and temporary partial disability benefits), the courts have universally applied the concepts it embodies—consideration of a broad range of factors in determining disability—in other contexts, such as the suitable alternative employment inquiry. *See, e.g., Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988) (holding that fact-finder must take into consideration the claimant's technical and verbal skills, age, education, and background in deciding whether an employer has shown suitable alternative employment is available to rebut total disability).

for such rehabilitation." 33 U.S.C. § 939(c)(2) (emphasis added). Exercising her statutorily-mandated rulemaking authority, 33 U.S.C. § 939(a)(1), the Secretary has implemented this provision through regulations. Those 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 vocational 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). Because "[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." *Abbott*, 40 F.3d at 128.[7]

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[7] General Construction asserts that because Castro's injury is compensable under the schedule set forth at Section 8(c)(2), 33 U.S.C. § 908(c)(2), it will receive no benefit from Castro's vocational retraining. (Petitioner's brief at 30, n.8). But a scheduled injury can be, or may later become, totally disabling. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 279 n.17 (1980). If the effects of Castro's 1998 knee injury recur (or worsen) and render him unable to perform his alternative employment, General Construction would again become liable for total

Thus, the Longshore Act directs both that all relevant factors be considered in determining a disabled worker's earning capacity and that the Department promote rehabilitation of disabled workers. Reading these provisions together, the Longshore Act authorizes an ALJ—where the totality of the circumstances so warrants—to award total disability benefits during a disabled worker's participation in an OWCP-sponsored vocational rehabilitation program, notwithstanding the existence of other positions the worker could assume based upon his residual physical capacity to work alone.

The Director's construction of the Act comports with its fundamental underlying policies. *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, Inc. v. Caputo*, 432 U.S. 249, 268 (1977) (recognizing the Act's remedial purpose). The Director's construction

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disability benefits unless it again demonstrated suitable alternative employment was available. The employer's ability to make this showing would be enhanced once Castro successfully completes his rehabilitation program because his vocational abilities and the number of jobs he could assume would be significantly expanded.

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*, 661 F.2d at 1042. *Accord Stevens v. Director, OWCP*, 909 F.2d 1256, 1260 (9th Cir. 1990). By providing an adequate financial base for the disabled worker whose rehabilitation makes alternate employment unavailable, the worker is able to devote his full attention to his long-term rehabilitation.

Both circuit courts that have addressed this issue have agreed with the Director's statutory construction. In *Abbott*, 40 F.3d 122, the Fifth Circuit 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. The decision is anchored in the Longshore Act's specific provisions. Writing for a unanimous panel, Justice Byron White first observed that the Act provides no strict formula for calculating a worker's post-injury earning capacity. *Id.* at 126-27. Rather, consistent with Section 8(h) of the Act, 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).

The Fifth Circuit also focused on the statute's emphasis on vocational rehabilitation. Recognizing that the statute "does not explicitly provide for" continued benefits during vocational rehabilitation, the court nevertheless believed that result correct because it was consistent "with 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." *Id.* at 127. The court concluded that "'[i]t would be 'unduly harsh and incongruous'"—or, in other words, contrary to the Supreme Court's instruction in *Perini N. River Assocs.*—"'to find that suitable alternative employment was reasonably available if the claimant demonstrates that, through his own diligent efforts at rehabilitation, he was ineligible for such a job.'" *Id.* at 128, *quoting Palombo,* 937 F.2d at 73.

The Fourth Circuit recently reached the same conclusion in *Brickhouse*, 315 F.3d at 286.[8] Upholding an ALJ's award of total disability benefits to a claimant whose participation in a vocational rehabilitation program made suitable alternative work unavailable, the court held that "[t]he Director's interpretation of the Act is reasonable and must be sustained." *Id.* at 295. The court based its

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[8] General Construction neither cites nor discusses the Fourth Circuit's *Brickhouse* decision in its opening brief.

holding on the same two principles Justice White laid out in *Abbott*. First, the court pointed to the Act's focus on a disabled worker's "economic security in the *long-term*" as evidenced by both Section 2(10) and Section 8(h). *Id.* at 295 (emphasis in original). Quoting this Court's decision in *Edwards*, 999 F.2d at 1374, the Fourth Circuit concluded that "the Act carries with it the 'long-term remedial purpose [to] compensate for any injury-related reduction in wage earning capacity through the claimant's *lifetime.*'" *Brickhouse*, 315 F.3d at 295 (internal quotation marks omitted).

Second, the Fourth Circuit recognized the Act's vocational rehabilitation emphasis, noting that "the Director possesses wide latitude in his development of vocational rehabilitation programs so that disabled employees are able to be productive members of the work force." *Id.* After surveying the implementing regulations, the court determined that "the Act, and the legal principles under which it is implemented, mandate that vocational rehabilitation be an important tool in returning disabled employees" to the workforce and ensuring "a measure of long-term economic security" for them. *Id.* Accordingly, the court concluded that "in appropriate circumstances, suitable alternative employment is reasonably unavailable due to his participation in an approved rehabilitation program." *Id.*

Finally, the Board has consistently agreed with the Director's construction of the statute on this issue. *Brown*, 34 BRBS 195; *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).

Thus, far from positing a "concocted" or "reckless" (to use General Construction's terms) statutory interpretation, the *Abbott* and *Brickhouse* decisions, in accord with the Director's interpretation of the Act, set forth a cohesive construction of the statute as a whole.

C. The Act's Legislative History Does Not Undermine The Director's Interpretation Of The Statute Or The *Abbott* And *Brickhouse* Decisions.

General Construction and LCA vigorously contend that had the Fourth and Fifth Circuits "been able to consider" the legislative history snippets from the 1984 Longshore Act amendments LCA cites, the courts "would likely have uncovered Congress' true intent" and, as a result, the proverbial error of their ways. (Amicus brief at 25, 27). LCA and the employer point to certain amendments proposed, but not enacted, that would explicitly have required awards of total disability benefits to all workers participating in vocational rehabilitation plans. *See* H.R. 7610, 96th Cong. (1980) (Amicus brief, Ex. 2); Longshoremen's

and Harbor Workers' Compensation Act Amendments of 1982, S. 1182, 97th Cong. (1982) (Amicus brief, Ex. 3); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1983, S. 38, 98th Cong. (1983). From this, they argue that *Abbott* and *Brickhouse* improperly add a provision to the statute that Congress chose to exclude.

The Supreme Court, however, has warned of the inherent unreliability of interpreting Congress' failure to pass a proposed amendment, stating that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citations omitted); *United States v. Wise*, 370 U.S. 405, 411 (1962). This Court has similarly noted that "[a]ny inference drawn from Congress' failure to act is generally unreliable." *Chen v. I.N.S.*, 95 F.3d 801 (9th Cir. 1996).

This unreliability can be seen in the paucity of evidence LCA offers regarding Congress' reasons for not passing these amendments. LCA's purportedly strongest indication of congressional intent is drawn from the section entitled "Individual Views of Hon. John N. Erlenborn," attached to House Report 98-570 (1983). (Amicus brief, Ex. 5). This section includes a laundry list of

provisions that the House Committee on Education and Labor's majority, without the minority's agreement, chose not to adopt, including an automatic guarantee of continuing benefit payments during vocational rehabilitation programs. There is no explanation for why the majority rejected the provision as proposed. Perhaps the language was unclear—perhaps it was overly broad in its blanket award of benefits to all claimants in vocational rehabilitation, or perhaps (in a situation suggested by the Supreme Court in *Central Bank of Denver*) Congress thought the amendment was unnecessary because it saw the possibility of awarding benefits to appropriate claimants under the existing provisions of the Act. Many of the decisions allowing consideration of a variety of factors in the suitable alternative employment context were already in place by the time Congress considered the 1984 amendments. *See, e.g., Bumble Bee Seafoods*, 629 F.2d at 1330; *Turner*, 661 F.2d at 1037-38; *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1005-06 (5th Cir. 1978).

As the Supreme Court has indicated, Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). It is a no less persuasive interpretation of Congress' intent in not passing the global vocational rehabilitation benefits amendment that

Congress believed appropriate awards of disability benefits would be made pursuant to the already existing provisions of the Longshore Act.

In any event, even if a rejected amendment carries some persuasive force in a statutory construction context, the amendments Congress rejected here would have led to a different result than that reached by the courts. As the Board stated, "[a]lthough Congress considered and rejected awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right, the failure to enact that proposal does not establish that *Abbott* runs counter to congressional intent." (ER at 185). General Construction suggests this reasoning is "illogical," but it is not. A blanket grant of total disability benefits to anyone in vocational rehabilitation is a far different matter than allowing the fact-finder, on a case-by-case basis, to consider an injured worker's participation in a rehabilitation program as one factor (among others) in determining whether suitable alternative employment is available to that worker. Even General Construction grasps this elemental difference. (Petitioner's brief at 27).

Thus, the legislative history cited by LCA is unpersuasive. It does not provide any actual insight into Congress' intent regarding the payment of total disability benefits to a particular claimant who is undergoing

vocational rehabilitation and who, as a result of the rehabilitation program, cannot practically perform suitable alternative employment.

LCA also cites Section 8(g) of the Act in support of its contention that the only money Congress intended be provided to the claimant during vocational rehabilitation is a $25 maintenance stipend paid by the Section 44 special fund. 33 U.S.C. §§ 908(g), 944. But here, LCA commits the same error it attributes to the Director and the *Abbott* and *Brickhouse* courts: it ignores the plain language of the statute. Section 8(g) expressly states that an injured worker in vocational rehabilitation who is being rendered fit for remunerative occupation "shall receive *additional* compensation necessary for his maintenance, but such *additional* compensation shall not exceed $25 a week." 33 U.S.C. § 908(g) (emphasis added). Congress' use of the word "additional" demonstrates its intent that the maintenance fee be paid in addition to—not instead of—other compensation payable. It also demonstrates Congress' understanding that a claimant might be receiving compensation, other than the $25 stipend, under the terms of the Act during the vocational rehabilitation process. Thus, far from undermining the *Abbott/Brickhouse* rationale, the language of Section 8(g) serves as further support for it.

In the end, it is the Director's reasonable interpretation of the Act—not General Construction's or LCA's—that is entitled to "'considerable weight.'" *Gilliland*, 270 F.3d. at 1261-62, *quoting Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 1172 (9th Cir. 1996). Although the Director's construction of Sections 2(10), 8(h) and 39(c)(2) on the point at issue here is not contained in a regulation, it nevertheless is entitled to deference because he maintained the same litigating position during the agency adjudication and has consistently advanced his position. *Id.* Indeed, since *Abbott* was litigated (and decided in 1994), the Director has steadfastly held to the statutory interpretation he posits here before both the courts and the Board. *See, e.g., Abbott*, 40 F.3d at 127-128; *Brickhouse*, 315 F.3d at 295-96; *Brown*, 34 BRBS 195. Because the Director's construction of these provisions is reasonable, uncontradicted by any other terms of the Act or *clear* legislative history, and consistent with the broad remedial intent of the Longshore Act and the intended functions of the provisions at issue, the Director urges the Court to follow the lead of its sister circuits and defer to the Director's interpretation.

D. General Construction's Procedural Rights Were Not Abrogated During The Adjudication Of Castro's Claim.

With little citation to particular statutory provisions, General Construction broadly asserts that even if *Abbott* was correctly decided, its rights under the

Longshore Act and the Administrative Procedure Act were violated because it was improperly denied its right to an ALJ hearing on the propriety of the OWCP-approved vocational rehabilitation plan. (Petitioner's brief at 21-25). It further contends that its due process rights were violated because it was not afforded a "pre-deprivation of property hearing" before Castro's vocational rehabilitation plan began and thus established "a set period of time for Castro's total disability compensation." (Petitioner's brief at 25-27).

General Construction's procedural arguments are fundamentally flawed. The employer confuses its rights and obligations concerning two distinct decisions that the Act commits to different decision makers. The first is the OWCP District Director's decision to approve Castro's vocational rehabilitation program. The second is the ALJ's determination that Castro is entitled to total disability benefits while enrolled in a vocational rehabilitation program because he was unable to perform suitable employment while participating in the program. On both scores, General Construction's procedural rights were fully protected.

General Construction has no right under the Longshore Act to an ALJ hearing to review the Secretary's determinations regarding vocational rehabilitation. The Secretary's discretionary determination concerning the vocational rehabilitation of an injured worker is directly reviewable only by the

Board. Because General Construction did not properly seek such review, its challenge cannot now be heard.

The Longshore Act grants to the Secretary of Labor the exclusive authority to direct the course of vocational rehabilitation of injured workers. As noted above, Section 39(c) (2) of the Act states in relevant part that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies...such rehabilitation." 33 U.S.C. 939(c)(2). Such discretionary determinations are directly reviewable only by the Board under an abuse of discretion standard. *See Meinert v. Fraser, Inc.*, ___ BRBS ___, 2003 WL 22866806 (2003)(on employer's direct appeal, Board upheld OWCP-approved rehabilitation plan's terms as within District Director's discretion); *Olsen v. Gen. Engineering & Mach. Works*, 25 BRBS 169 (1991) (on claimant's direct appeal, Board upheld District Director's denial of rehabilitation services); *see also Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997) (where Longshore Act specifically vests the Secretary alone with authority to change a claimant's treating physician, the Secretary's decision is discretionary in nature and only reviewable on direct appeal to the Board).

General Construction nevertheless contends that Sections 19(c) and (d) of the Act entitle it to a hearing before an ALJ regarding the vocational rehabilitation

determinations in this claim. The employer has simply misread the Act. Longshore Sections 19(c) and (d) provide for a transfer of the deputy commissioners' pre-1972 statutory hearing authority to the ALJ. As noted above, however, the statute gives the Secretary of Labor, and not the deputy commissioner, the authority to direct the course of vocational rehabilitation. As such, the transfer of hearing authority in 19(d) has no bearing on the Secretary's statutory powers. Indeed, as this Court has held, the Act "does not necessarily require an evidentiary hearing before an ALJ on all contested issues" and Section 19(d) of the Act "does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues." *Healy Tibbitts Builders*, 201 F.3d at 1094 (citations omitted). *See generally Ingalls Shipbuilding Division, Litton Sys., Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), *overruled on other grounds sub nom. Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984) (en banc.).

The Board has recognized this point in rejecting a similar employer challenge seeking ALJ review of the Secretary's vocational rehabilitation determinations. In *Cooper v. Todd Pacific Shipyards Corporation*, 22 BRBS 37 (1989), the Board held that an ALJ had no authority to review determinations

regarding reimbursing an employer for vocational rehabilitation expenses.[9] The Board stated:

> Employer's arguments that resolution of this issue is within the authority of administrative law judges cannot be accepted in view of Section 39(c)(2) and the Secretary's delegation of authority . . . . Section 19(d) . . . withdrew from deputy commissioners the power to conduct adjudicative hearings and transferred this power to administrative law judges. . . . By contrast, Section 39 of the Act focuses on the Secretary of Labor, whose discretionary authority has been delegated to deputy commissioners.

Id. at 39-40.

Thus, the Board concluded that discretion over issues regarding vocational rehabilitation remained in the hands of the Secretary (and the Secretary's delegees), even after the transfer of hearing authority to the ALJ, and that any challenge to the Secretary's discretionary determinations regarding vocational rehabilitation "should be made to the Board, rather than to an administrative law judge, as the deputy commissioner's determination in this regard will constitute a discretionary act and will thus be appealable directly to the Board." (citation omitted). *Id.* at 41 n.4.

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[9] This Court has favorably cited the *Cooper* decision as standing for the proposition that "discretionary acts of a deputy commissioner are only appealable directly to the Board." *See Healey Tibbitts*, 201 F.3d at 1095.

General Construction's failure to file a direct appeal to the Board regarding the Secretary's rehabilitation determination "forecloses all rights to review by the Board with respect to the . . . matter in question." 20 C.F.R. § 802.205(c). Thus, whatever challenge, Constitutional or otherwise, General Construction now raises should not be heard because the employer failed to present it through the appropriate procedural channel. Its decision to seek a hearing before the ALJ rather than a direct appeal to the Board is fatal to its challenge of the District Director's determinations regarding the Claimant's vocational rehabilitation program.

General Construction's related due process claim is similarly bereft of merit, chiefly because the employer was fully heard on the very issue at the heart of this case: whether Castro should receive total disability benefits under the well-established suitable alternative employment inquiry. When the issue of disability compensation appropriately arose with Castro's filing of an LS-18 form, the District Director properly forwarded the matter to the OALJ for further handling. (ER at 59).

Thereafter, the ALJ held a full hearing on the merits of the claim for disability benefits; both parties participated. The hearing provided General Construction notice and an opportunity to submit evidence and argument in

advance of the ALJ's decision awarding compensation as well as in advance of any required payment on its part. General Construction's liability for total disability compensation does not stem from a lack of due process; rather, it bears liability simply because it was unable to convince the ALJ that Castro was able and available to perform suitable alternative employment.

In order to justify its claim that its due process rights were violated, General Construction asserts that *Abbott* improperly allows "a functionary of the OWCP" (presumably a vocational counselor) to impose compensation liability on the employer. (Petitioner's brief at 25). This totally misperceives the effect of *Abbott* and the process by which Castro was awarded benefits during his vocational rehabilitation program. The mechanism for awarding benefits to Castro was identical to that followed in every other case in which a claimant's attempt to obtain such benefits is contested by his employer; *Abbott* does not purport to remove from the ALJ or give to the OWCP the authority to impose benefits liability on an employer. Rather, *Abbott* provides that in making such determination, the ALJ must consider, as one factor in determining the availability of alternative employment, whether the injured worker is enrolled in an OWCP-sponsored rehabilitation plan and the effect participation in the plan has on his availability for other work. *Abbott*, 40 F.3d at 128 (directing fact-finder to ascertain whether "[the claimant] could not reasonably secure that employment

under the statutory scheme because his participation in his rehabilitation plan approved by the Department of Labor precluded him from working.").

Thus, *Abbott* and *Brickhouse* merely added an additional factor for an ALJ to consider in determining a claimant's availability for suitable alternative employment. And in the proceeding determining that issue, General Construction fully participated. Thus, its constitutional rights were not violated.

II. Substantial Evidence Supports The ALJ's Determination That Castro's Enrollment In An OWCP-Sponsored Rehabilitation Plan Precluded Employment During That Period.

A. Standard Of Review.

As noted above, the Court reviews the Board's decision "for compliance with the substantial evidence standard." *Gilliland*, 270 F.3d at 1261. This Court has made it clear that "the Board may not substitute its views for those of the administrative law judge or engage in a de novo review of the evidence, and it must accept the administrative law judge's factfindings if they are supported by substantial evidence." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990); *Bumble Bee Seafoods*, 629 F.2d at 1329.

B. The ALJ Rationally Concluded, Based Upon His Review Of The Evidence In Light Of The Relevant Factors Set Forth In Abbott And Brickhouse, That Castro Was Entitled To Total Disability Benefits While Participating In The Vocational Rehabilitation Program.

Consistent with the provisions of the Longshore Act, its implementing regulations, and relevant case law, the ALJ properly determined that Castro was entitled to total disability benefits due to his practical unavailability while enrolled in the OWCP-sponsored hotel management vocational rehabilitation program. *See Abbott*, 40 F.3d at 128, *Brickhouse*, 315 F.3d at 294.[10]

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[10] General Construction alleges that the *Abbott* doctrine should not apply here because Castro's knee injury resulted in a disability compensable under the "schedule" set forth at Sections 8(c)(1)-(20), 33 U.S.C. §§ 908(c)(1)-(20). (Petitioner's brief at 30, n.8) As the Supreme Court has recognized, however, an injury that falls under the schedule for permanent partial disability may still give rise to total disability pursuant to Section § 8(a), 33 U.S.C. § 908(a), as "determined in accordance with the facts." 33 U.S.C. § 908(a); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. at 279, n.17. The Court stated that "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.*; *see also Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197, 198 (5th Cir. 1979). Accordingly, the Board has held that because "the same standards apply to the issue of total disability in both scheduled and non-scheduled injury cases," a claimant who suffered a scheduled arm injury compensable under Section 8(c)(2) is entitled to receive total disability benefits during vocational rehabilitation "unless employer establishes that there are suitable alternate jobs *available* which claimant can realistically secure." *Gregory*, 32 BRBS at 265 (emphasis in original).

The *Abbott* court discussed a general doctrine outlining factors that may be considered in determining whether a claimant is entitled to disability benefits while enrolled in a vocational rehabilitation plan. *Abbott*, 40 F.3d at 127-128. These 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. *Abbott*, 40 F.3d at 127-128. The Fourth Circuit clarified in *Brickhouse*, however, that in a proper assessment of the *Abbott* elements, "an ALJ should not base his decision on any single factor." *Brickhouse*, 315 F.3d at 295.

Here, the ALJ evaluated the relevant evidence and concluded that Castro was entitled to permanent total disability benefits until June 7, 2002, the date he was scheduled to complete his hotel management course. First, it was undisputed that OWCP sponsored and approved the plan. Second, the ALJ noted that General Construction objected to the rehabilitation plan and to continuing the payment of benefits, but recognized that this fact alone was not sufficient to defeat Castro's entitlement.

Third, the ALJ reviewed the facts relevant to Castro's diligence in pursuing vocational rehabilitation and whether the demands the program placed on him precluded other employment. In concluding that Castro could not work and successfully complete his retraining program simultaneously, the ALJ relied on Castro's uncontradicted testimony that he spent between forty-six and fifty-four hours per week pursuing his vocational rehabilitation program. (ER at 176). He also considered Castro's testimony regarding the extra effort he had to expend to learn the material (a fact confirmed by his vocational counselors), and his laudable overall grade point average in the program. The ALJ was impressed by the fact that despite the rehabilitation program's demands, Castro had attempted to secure employment and had even worked briefly (albeit unsuccessfully) during a paid internship.

And fourth, the ALJ considered the economic impact the training program would have on Castro's life-long wage earning capacity.[11] Although the starting

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[11] In some circumstances, this factor could be so intimately tied to the rehabilitation plan or a claimant's entitlement to rehabilitation services in the first instance that only the District Director may consider it. *See supra* p. 34-36 (discussing Secretary of Labor's exclusive authority to direct vocational rehabilitation); 20 C.F.R. § 702.506 (vocational rehabilitation allowed where restoring or increasing injured worker's wage-earning capacity is anticipated). But the ALJ here properly limited his consideration of Castro's wage-earning

salary in hotel management was comparable to the salary in the jobs General Construction had identified, the ALJ recognized that Castro's "vocational advisors reasonably determined that being trained in hotel management gave Castro the best long-term earning potential." (ER at 177). Indeed, Castro's vocational counselor, Carol Williams, estimated that Castro could earn between $30,000 and $40,000 annually in the hotel industry. And although the ALJ recognized that Castro could get an entry-level hotel position without any training, he concluded that by completing the rehabilitation program, Castro would have "greater potential to achieve a higher-paying management job" within the hotel industry. (*Id.*).

Having considered these factors, the ALJ rationally concluded that General Construction failed to demonstrate Castro's availability for suitable alternative employment while he participated in a vocational rehabilitation program. The Court should affirm this finding as supported by substantial evidence.

(. . . continued)

capacity to his evaluation of whether suitable alternative employment was available to Castro.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision upholding the ALJ's determination that Castro was entitled to permanent total disability benefits through June 7, 2002.

Respectfully submitted.

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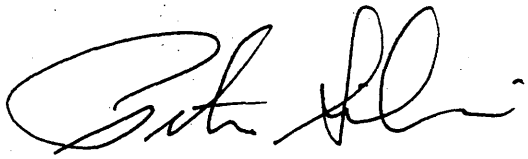

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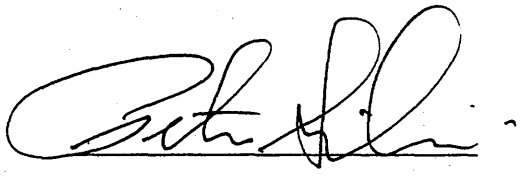

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 03-72528

I certify that Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of Times New Roman, 14 points or more in MSWord and contains 9,114 words.

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