8.9 WAGE-EARNING CAPACITY

8.9.1 Generally

"Wage-earning capacity" refers to "an injured employee's ability to command regular income as the result of his personal labor." Seidel v. General Dynamics Corp., 22 BRBS 403, 405 (1989) (citing 2 Larson, The Law of Workmen's Compensation § 57.51 at 10-164.64 (1987)). The "wage-earning capacity" concept is relevant to awards of compensation pursuant to Sections 8(c)(21) and 8(e) of the LHWCA. 33 U.S.C. § 908(c)(21), (e). Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. An award for temporary partial disability under Section 8(e) is also based on the difference between the claimant's average weekly wages before the injury and his wage-earning capacity after the injury. For a determination of the factors used in calculating the average weekly wage reference §§10 and 2.19.

In determining whether a claimant has lost wage earning capacity due to a work-related injury, the "time of injury" for a traumatic injury case is the date before the actual injury rather than when the claimant was aware of a disability. Deweert v. Stevedoring Servs. of America, ___ F.3d ___ (No. 00-71273) (**9th Cir.** Nov. 29, 2001). In Deweert, the **Ninth Circuit** noted that although the LHWCA defines "time of injury" for occupational disease cases, it does not do so for accidental injuries. See Port of Portland v. Director, OWCP, 192 F.3d 933 (**9th Cir.** 1999), cert. denied, 529 **U.S.** 1086 (2000).

Section 8(h) of the LHWCA provides:

> **(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided*, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner 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 in the case 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).

Where the claimant seeks benefits for **total** disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. See Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984). **[**See, however, **Topics 8.9.2, 8.9.3**, infra**]**. Where suitable alternate employment is not established and an award of permanent total disability is made, a permanent loss of all wage-earning capacity is presupposed. See Korineck v. General Dynamics Corp. Elec. Boat Div., 835 F.2d 42, 43, 20 BRBS 63, 64 (CRT) (**2d Cir.** 1987) (claimant not entitled to permanent partial disability benefits for permanent hearing loss after already receiving award for permanent total disability due to back injuries); Hoey v. Owens-Corning Fiberglass Corp., 23 BRBS 71, 73 (1989) (where claimant received lump sum settlement for permanent total disability due to asbestosis, claimant could not establish additional loss of wage-earning capacity due to subsequent employment-related stomach cancer because settlement award presupposed permanent loss of all wage-earning capacity).

Section 8(h) mandates a **two-part analysis** in order to determine the claimant's post-injury wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The **first** inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (**D.C. Cir.** 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the **second** inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. Devillier, 10 BRBS at 660.

The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the **burden** of establishing an alternative reasonable wage-earning capacity. See Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (**9th Cir.** 1990); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 190 (1985); Spencer v. Baker Agric. Co., 16 BRBS 205, 208 (1984); Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980).

The ALJ must establish a **precise dollar amount** for post-injury wage-earning capacity. La Faille v. Benefits Review Bd., 884 F.2d 54, 61, 22 BRBS 108, 118 (CRT) (**2d Cir.** 1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 345-46 (1988); Cook v. Seattle Stevedore Co., 21 BRBS 4, 7 (1988); Guthrie v. Holmes & Narver, Inc. 30 BRBS 48, 52 (1996) rev'd on other grounds sub nom. The Wausau Ins. Companies v. Director, OWCP, 114 F.3d 120, 31 BRBS 41 (CRT) (**9th Cir.** 1997) (affirming an ALJ's use of a night shift job to establish a wage differential for determination of the claimant's post-injury wage earning capacity). The Board has recently held, in conformance with Edwards and Walker, that a judge should look to both the alternate employment advanced by the employer and any other suitable jobs which the employer has not raised, yet the claimant is capable of performing, in determining the post-injury wage-earning capacity. Mangaliman v. Lockheed Shipbuilding Company, 30 BRBS 39, 43, (1996).

A finding of **a percentage loss of wage-earning capacity is not proper**; it is error to calculate a percentage loss which corresponds to the claimant's permanent impairment rating. Jennings v. Sea-Land Serv., 23 BRBS 312, 315 (1990), vac'g 23 BRBS 12; Wayland v. Moore Dry Dock, 21 BRBS 177 (1988). Hence, where the judge expresses the lost wage-earning capacity as a percentage of the claimant's pre-injury average weekly wage, there is a strong implication that he did not fully consider all of the relevant factors, particularly if the percentage is identical to the percentage of physical impairment established by the medical testimony. Bouchard v. General Dynamics Corp., 14 BRBS 839, 841 (1982); Chatterton v. General Dynamics Corp., 12 BRBS 534 (1980).

The **Fifth Circuit** permits an ALJ to **average** the hourly wages of jobs found to be suitable employment for a claimant in order to calculate wage earning capacity. The court reasoned that averaging ensures that the post-injury wage earning capacity reflects each job that is available. See Avondale Industries v. Pulliam, 137 F.3d 326 (**5th Cir.** 1998).

The Board has held that the LHWCA does not contain a provision which entitles an employer to a credit for income a claimant has earned from other employers, Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46(1999), or in the form of back pay, Simmons v. Electric Boat Corp., (BRB No. 00-0393)(Dec. 28, 2000)(Unpublished). In Cooper, the ALJ had found that the claimant was working beyond his physical limitations in order to support his family. Nevertheless, the judge gave employer a credit for income the claimant had earned from other employers. On appeal, the Board held that the LHWCA contains no provision which entitles an employer to a credit for income a claimant has earned from other employers. Such a credit here would contravene Section 8(h), according to the Board.

***[ED. NOTE:** For more on the Credit Doctrine, see Topic 3.4 "Credit For Prior Awards."]*

8.9.2 Factors for Calculation

A comparison of pre- and post-injury wages does not afford the trier-of-fact the necessary information to compute lost earning capacity. Walsh v. Norfolk Dredging Co., 22 BRBS 67, 77-78 (CRT) (**4th Cir.** 1989) (unpublished). The "mere fact that an employee is earning the same or more money following his injury is not determinative of whether he has sustained a loss in wage-earning capacity." Frye v. Potomac Elec. Power Co., 21 BRBS 194, 199 (1988). See Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1551, 24 BRBS 213, 222-23 (CRT) (**9th Cir.** 1991) (higher present wages did not fairly represent wage-earning capacity where claimant had 20-22% disability, reduced hours, and worked at present job in pain because of family obligations); Metropolitan Stevedore Co. v. Rambo, 521 **U.S**. 121 (1997). The ALJ must consider the evidence to determine whether a claimant's post-injury wages fairly and accurately represented his current wage earning capacity. Brown v. National Steel and Shipbuilding Co., 34 BRBS 195 (2001).

For both parts of the wage-earning capacity analysis, the **judge must take a number of factors into consideration**. (See a comprehensive list of factors appearing at the end of this

subsection.) The judge must consider the claimant's physical condition, age, education, industrial history, the number of hours/weeks actually worked per week/year, and availability of employment which he can perform after the injury. Abbott v. Louisiana Ins. Guaranty Ass'n., 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (**5th Cir.**1994); George v. California Stevedore and Ballast Co., BRB No. 92-2235, 4 (Aug 30, 1996) (Unpublished) (calculation of wage-earning capacity must reflect the actual number of weeks worked per year as opposed to the general industry wide average of 52 weeks); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 651 (1979). Other factors to be considered are the beneficence of a sympathetic employer, the claimant's earning power on the open market, whether he must spend more time or use more effort or expertise to achieve pre-injury production, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 153 (1988); Hughes v. Litton Sys., 6 BRBS 301, 304 (1977); Metropolitan Stevedore Co. v. Rambo, 521 **U.S.** 121.

***[ED. NOTE:** For a definition of wages see Topics 2.13, supra, and 10, infra]*

The loss of overtime is a factor in determining the claimant's loss of wage-earning capacity. See Everett v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 316, 320 (1989); Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 112 (1989); Frye v. Potomac Elec. Power Co., 21 BRBS 194, 199 (1988); Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133, 136-37 (1987). The focus here is on the claimant's loss of previously available overtime because of his injury: the claimant must establish that, absent his injury, he would have worked available overtime. Brown, 23 BRBS at 113. See Sears v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 235, 236-37 (1987) (foreman's testimony and employer's overtime records, which showed that little overtime work was available, constituted substantial evidence in support of ALJ's finding that claimant failed to establish availability of post-injury overtime).

Another important factor in determining loss of wage-earning capacity is the continuity and stability of the claimant's post-injury work:

> If the claimant's post-injury work is found to be continuous and stable, the claimant's post-injury earnings are more likely to be found to reasonably and fairly represent his wage-earning capacity than if it is not. ... Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically capable of it, and whether the claimant has the seniority to stay in the job. ... If it is found that the claimant's current employment meets the aforementioned standards, the claimant is not economically disabled even though he may continue to suffer some physical impairment as a result of his injury.

Burkhardt v. Bethlehem Steel Corp., 23 BRBS 273, 276 (1990) (citations omitted). See also Reagan v. Horne Bros., Inc, 24 BRBS 63, 68 (CRT) (**4th Cir.** 1991) (Unpublished.) (no evidence that

claimant suffered or will suffer economic loss because of injury where claimant has been continuously employed for 6 years since returning to work after injury, claimant has received a promotion and raises for excellent work in a job requiring heavy lifting, and claimant is earning higher wages than before injury).

The fact that a claimant's employment is continuous and stable, however, does not establish a conclusive presumption that his actual earnings equal his wage-earning capacity. Penrod Drilling Co. v. Johnson, 905 F.2d 84, 88, 23 BRBS 108, 112 (CRT) (**5th Cir.** 1990) (although claimant engaged in continuous and stable employment, record contained substantial evidence to support ALJ's finding that the employee's post-injury earning capacity as of hearing date exceeded actual wages where expert testified that jobs in employee's field were available at higher salaries). In fact, while a claimant's post injury earnings can exceed his pre-injury wage, he can still have suffered an economic loss on days that he was sent home due to restrictions placed upon him as a result of his injury. Stallings v. Newport News Shipbuilding and Dry Dock Co., 33 BRBS 193(1999)(Limits imposed on claimant as a result of his injuries caused him to miss work opportunities and caused a reduction in his wage earning capacity.). A claimant whose post-injury earnings exceed or are equal to his pre-injury wage has not automatically failed to demonstrate that they suffered a loss of wage earning capacity. Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 39 (1996).

These factors are not exhaustive and the judge need not consider every possible factor nor assign each factor an individual monetary value, as long as his final determination of wage-earning capacity is based on appropriate factors and is reasonable. Devillier, 10 BRBS at 661. See Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26, 31 (1988) (BRB affirmed ALJ's calculation of claimant's loss of wage-earning capacity based on employment as a sheet metal trainee where: (1) claimant requested to be reinstated as sheet metal trainee; (2) claimant only had minor difficulty performing sheet metal work; and (3) physician's report indicated that claimant could perform work).

See also Palmer v. Washington Metro. Area Transit Auth., 20 BRBS 39, 41-42 (1987) (ALJ's finding that claimant's actual earnings represent his wage-earning capacity is supported by substantial evidence where: (1) claimant's current pay as train conductor equals pre-injury wages as bus driver; (2) medical reports state that claimant made good recovery and is physically capable of performing train conductor job; (3) claimant failed to produce evidence that back will deteriorate and passed physical exam for present job; (4) claimant's testimony that back still caused him pain could not be fully credited where claimant had not sought medical help for back for well over two years prior to hearing; (5) claimant's employment as a train operator was not at benevolence of employer--claimant testified that to be accepted for position he needed sufficient seniority and had to pass physical, rehabilitation counselor testified that job was neither favored nor sheltered employment, and assistant superintendent of rail transportation testified that claimant would not have been selected for job if he had sick leave problems and that claimant could not be bumped by senior employee; and (6) evidence did not indicate that claimant would face a higher risk than other train operators of being forced to compete on the open market for a job).

As noted previously, the ALJ need not consider every possible factor nor assign each factor an individual monetary value, as long as his final determination of wage-earning capacity is based on appropriate factors and is reasonable. To recapitulate, **a non-exhaustive list of factors the judge should keep in mind** are:

(1) physical condition;

(2) age;

(3) education;

(4) industrial history;

(5) availability of employment;

(6) beneficence of a sympathetic employer;

(7) claimant's earning power on the open market;

(8) whether claimant must spend more time or use more effort or expertise to achieve pre-injury production;

(9) whether medical and other circumstances indicate a probable future wage loss due to the work-related injury;

(10) loss of overtime (previous available overtime worked by claimant); and

(11) continuity and stability of claimant's post-injury work.

Determining Disability Award for a Second Injury/ Aggregation Displaced in Time

When determining the claimant's disability award for a second injury or aggravation, displaced in time from the first; use either the claimant's actual earnings or current wage-earning capacity to determine the average weekly wage depending on which is the most accurate reflection of his ability to maintain employment. Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419 (**9th Cir.** 1995).

8.9.3 Market Wage v. Actual Wage

The ultimate objective of the "wage-earning capacity formula is 'to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as

injured.'" Randall v. Comfort Control, Inc., 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (**D.C. Cir.** 1984) (quoting 2 Larson, The Law of Workmen's Compensation § 57.21, at 10-101 to 10-102 (1982)). The relevant labor market is the local one, i.e., the place of injury. Lumber Mut. Casualty Ins. Co. v. O'Keeffe (Sinkkila), 217 F.2d 720, 723 (**2d Cir.** 1954). The testimony of a vocational expert, as to what work the claimant can perform with his disability and what wages would be paid for this work, will often be determinative on this issue. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979).

Market wages and actual wages are distinguishable in that actual wages are not always a true measure of one's earning capacity on the open market. Todd Shipyards Corp. v. Allan, 666 F.2d 399, 402, 14 BRBS 427, 430 (**9th Cir.** 1981), cert. denied, 459 **U.S.** 1034 (1982). "The mere fact that post-injury wages are equal to, or in excess of, prior earnings is not determinative of the wage-earning capacity issue." Randall, 725 F.2d at 795, 16 BRBS at 61. For example, a claimant's higher post-injury earnings may be due to the beneficence of a sympathetic employer or sympathetic fellow employees: "[w]ages of this kind are not really earned, 'since his services are not worth as much in the open labor market, but constitute, partly at least, a mere gratuity.'" Devillier, 10 BRBS at 658 (quoting Annot., 149 ALR 413, 439 (1943)). The burden of establishing an alternative reasonable wage-earning capacity lies with the party that contends that the claimant's actual wages are not representative of his wage-earning capacity. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (**9th Cir.** 1990).

There are some situations, however, in which the open market is irrelevant. For instance, post-injury employment may be sufficiently regular and continuous to establish a true earning capacity, without regard to the claimant's earning power on the open market. Edwards v. Director, OWCP, 999 F.2d 1374, 1375 (**9th Cir.** 1993); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 282, 284 (1984), aff'd, 776 F.2d 1225, 18 BRBS 12 (CRT) (**4th Cir.** 1985) (no evidence that employee's job in jeopardy); Drake v. General Dynamics Corp., 11 BRBS 288 (1979); Devillier, 10 BRBS at 658. Contra Penrod Drilling Co. v. Johnson, 905 F.2d 84, 88, 23 BRBS 108, 111-12 (CRT) (**5th Cir.** 1990) (although employment continuous and stable, post-injury earning capacity exceeded actual wages where expert testified that jobs were available at higher salaries). Relevant considerations include the suitability of the employment, whether the employment is within the claimant's physical restrictions, and the claimant's seniority to retain the employment. Burkhardt v. Bethlehem Steel Corp., 23 BRBS 273, 276 (1990); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 694 (1980).

Another situation in which the open market is irrelevant is where the employer provides a non-sheltered position that is within the claimant's physical restrictions. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171, 172 (1986) (although position provided was light-duty, it was not sheltered: claimant capable of performing work, position necessary to employer's operations, several shifts perform same work). See also McCullough v. Marathon Letourneau Co., 22 BRBS 359, 366 (1989) (employer did not need to show claimant's earning capacity in open market where employer

offered claimant position necessary to its operation, within the plant where claimant was injured, which uncontradicted evidence indicated claimant could perform).

8.9.3.1 What constitute "actual wages"?

When calculating the claimant's actual post-injury wages, the **crucial point** is to consider wages **actually received**. See Seidel v. General Dynamics Corp., 22 BRBS 403, 406 (1989). Overtime pay is only included if it was included in the claimant's average weekly wage. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 658 (1979). The focus is on the claimant's loss of previously **available** overtime because of his injury: he must establish that, absent his injury, he would have worked available overtime. Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 113 (1989).

If the receipt of certain money is speculative, then that money should not be included in the claimant's wage-earning capacity. For instance, the loss of a post-injury bonus cannot be considered to reduce a claimant's wage-earning capacity, because whether the claimant would have received that bonus absent his injury is entirely speculative. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). Similarly, the inclusion of anticipated profits in "claimant's wage-earning capacity is erroneous, as claimant's receipt of this money is merely speculative." Seidel, 22 BRBS at 406. Illegally earned income is also not included in a wage-earning capacity determination. Licor v. Washington Metro. Area Transit Auth., 879 F.2d 901, 905, 22 BRBS 90, 95-96 (CRT) (**D.C. Cir.** 1989). Speculative earnings are therefore not included in a determination of wage-earning capacity based on actual wages.

8.9.3.2 Do actual wages accurately reflect wage-earning capacity?

The first inquiry in the wage-earning capacity analysis is: do the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity? Seaco v. Richardson, 136 F.3d 1290 (**11th Cir.** 1998) (container royalty payments and holiday/vacation payments do not represent post-injury wage-earning capacity under Section 8(h)); Randall v. Comfort Control, Inc., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (**D.C. Cir.** 1984); Eagle Marine Services v. Director, OWCP, 115 F.3d 735, 31 BRBS 49 (CRT) (**9th Cir.**1997) (holiday pay earned post-injury due to pre-injury work does not reasonably and fairly represent the claimant's wage-earning capacity); Sproull v. Director, OWCP,25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), aff'g and modifying in part on recon. en banc, 28 BRBS 271 (1994) (Smith and Dolder,JJ., dissenting in part), aff'd in part rev'd in part, 86 F.3d 895, 899 (**9th Cir.** 1996), cert. denied, 520 **U.S.** 1155 (1997); Branch v. Ceres Corp., 29 BRBS 53 (1995), aff'd mem., 96 F.3d 1438 (Table), 30 BRBS 74 (CRT) (**4th Cir.** 1996). The major factors that must be taken into consideration in this analysis have already been discussed: physical condition, age, education, industrial history, etc.

There are a number of relevant sub-issues with regard to the physical condition factor. One such issue is whether the claimant must seek less physically demanding work. Fiamengo v. Metropolitan Stevedore Co., 12 BRBS 546, 548-49 (1980). Another is whether the claimant must

turn down heavy work and requires more time off. Conde v. Interocean Stevedoring, 11 BRBS 850, 857 (1980), overruled in part by Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988). A third issue is whether the claimant loses work for physicians' visits necessitated by the injury. Barnes v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 528, 532 (1978), pet. dismissed mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 590 F.2d 330, 9 BRBS 453 (**4th Cir.** 1978).

A number of sub-issues are also relevant to a consideration of the industrial history factor. For example, the judge may consider whether a co-worker with less seniority was promoted over the claimant's head. Townsend v. Potomac Elec. Power Co., 13 BRBS 127, 132 (1981). Another issue that may be considered is whether the claimant has had difficulty finding work since the injury. Creasy v. J.W. Bateson Co., 14 BRBS 434, 438 (1981).

The judge may also consider the claimant's industrial future, as well as his industrial history. He may consider whether the employee can be retrained, Odom Construction Co. v. United States Department of Labor, 622 F.2d 110, 12 BRBS 396 (**5th Cir.** 1980), aff'g Maze v. Odom Construction Co., 7 BRBS 467 (1978), cert. denied, 450 **U.S.** 966 (1981), or will need retraining for another occupation. Fulks v. Avondale Shipyards, 10 BRBS 340 (1979), aff'd, 637 F.2d 1008, 12 BRBS 975 (**5th Cir.**), cert. denied, 454 **U.S.** 1080 (1981). Also relevant is the employee's motivation. Decosta v. General Dynamics Corp., 13 BRBS 469 (1981); Hollingsworth v. Caruthersville Shipyard, 9 BRBS 775 (1978).

The claimant's purported retirement plans may also be considered. Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 187 (1984) (purported retirement plans relevant to claimant's post-injury wage-earning capacity, but not to claimant's average weekly wage at time of injury). These are just some of the factors that may be considered when determining whether actual wages accurately reflect wage-earning capacity.

Actual wages may accurately reflect wage-earning capacity in the case of a self-employed claimant. Although "claimant's ownership of a business does not necessarily indicate an ability to work, income from claimant's services in that business is an indication of true wage-earning capacity." Sledge v. Sealand Terminal, 16 BRBS 178, 181 (1984). See also Mitchell v. Bath Iron Works Corp., 11 BRBS 770, 779 (1980).

8.9.3.3 If actual wages do not accurately reflect wage-earning capacity, what dollar amount fairly and reasonably represents the claimant's wage-earning capacity?

The second inquiry in the wage-earning capacity analysis is: what dollar amount fairly and reasonably represents the claimant's wage-earning capacity? Randall v. Comfort Control, Inc., 725 F.2d 791, 796-97, 16 BRBS 56, 64 (CRT) (**D.C. Cir.** 1984). This inquiry is only made if the administrative law judge determines that the claimant's actual wages are unrepresentative of his wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The same factors that are used to determine whether actual wages accurately reflect wage-earning

capacity are used to determine the claimant's post-injury earning capacity when his actual wages are not an accurate reflection of that capacity.

8.9.4 Beneficent Employer

The beneficence of a sympathetic employer is one of the factors which must be considered with regard to both inquiries of the wage-earning capacity analysis: "[c]onsideration of this variable serves to discount actual earnings back to what the claimant should be earning." Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 658 (1979). "Beneficence" includes arranging job locations to meet the claimant's physical restrictions, hiring an extra person to help him with heavy work, and paying him more than his co-workers. Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983). It also includes creating a position for the claimant which would not necessarily be filled if he left and treating him with "kid gloves." Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38, 42 (1982). Working for a family member may imply beneficence. See Lopes v. Georgia Ave. Tavern, 13 BRBS 1125, 1128 (1981).

Paying an employee full-time wages for part-time work may be sheltered employment and assumes a loss of wage-earning capacity. Shoemaker v. Schiavone & Sons, Inc., 11 BRBS 33, 37 (1979). The transfer of an employee to a lower-paid position at the full pay for a job now ruled out by occupational disease constitutes sheltered employment. Bath Iron Works Corp. v. White, 584 F.2d 569, 575, 8 BRBS 818, 823-24 (**1st Cir.** 1978). Sheltered employment also exists where the claimant is being carried or assisted by his co-workers. Devillier, 10 BRBS at 658; Harris v. Atlantic & Gulf Stevedores, 9 BRBS 7, 11 (1978).

[ED. NOTE: *Lower-paid positions do not necessarily equate with light-duty positions and vice versa. Thus they should be distinguished. See discussion, infra.**]***

A light-duty position or a job in a shop specially tailored for the injured employee is not sheltered employment if the job is necessary. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171, 173 (1986); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224, 226-27 (1986). See also Palmer v. Washington Metro. Area Transit Auth., 20 BRBS 39, 41 (1987) (claimant's employment as a train operator was not at employer's benevolence where he testified that to be accepted for position he needed sufficient seniority and had to pass physical; rehabilitation counselor testified that job was not sheltered or favored; and assistant superintendent of rail transportation testified that claimant would not have been selected if he had sick leave problems and claimant could not be bumped by a more senior employee). If the employer merely provides the necessary comforts so that the claimant suffers no pain while working, the employment is not mere benevolence. Morgan v. Marine Corps Exch., 10 BRBS 442, 447 (1979).

8.9.5 Inflation

The mere fact that the claimant is earning the same amount of money or more post-injury does not meet the employer's burden of proving that he has suffered no lost wage-earning capacity

if the higher wages only represent inflation. Miller v. Central Dispatch, Inc., 16 BRBS 64, 68 (1984). When post-injury wages are used to establish wage-earning capacity, sections 8(c)(21) and 8(h) require that the wages earned in the post-injury job be adjusted to represent the wages which that job paid at the time of the claimant's injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49 (1986); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980)

"A disabled worker's post-injury earnings can only 'fairly and reasonably represent his wage-earning capacity,' § 8(h), if they have been converted to their equivalent at the time of injury." La Faille v. Benefits Review Bd., 884 F.2d 54, 61, 22 BRBS 108, 120 (CRT) (**2d Cir.** 1989). See also White v. Bath Iron Works Corp., 812 F.2d 33, 19 BRBS 70 (CRT) (**1st Cir.** 1987); Sproull v. Stevedoring Serv. of America, 86 F.3d 895, 899 (**9th Cir.** 1996). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. Kleiner v. Todd Shipyards Corp., 16 BRBS 297, 298 (1984). The post-injury wages should be adjusted using the percent change in the National Average Weekly Wage. Quan v. Marine Power & Equipment Company, 30 BRBS 124 (1996).

If there is no evidence of the actual wages paid by the claimant's post-injury employment at the time of his injury, the percentage increase in the yearly national average weekly wage should be applied to adjust the claimant's post-injury wages downward. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). This method is preferable to the application of the Consumer Price Index (CPI) as a means of adjusting post-injury wages to account for inflation, because the yearly national average weekly wage is a more accurate reflection of the increase in wages over time than the CPI. Id.

The **Third Circuit** has held that the proper comparison is of the wage rate in the post-injury job at the time of the hearing with the wages the employee would be earning at the time of the hearing had he continued in his pre-injury employment. McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, 63, 10 BRBS 614, 620 (**3d Cir.** 1979). See also Curtis v. Schlumbeger Offshore Serv., 23 BRBS 63, 70 (1989) (where case arose in **Third Circuit**, ALJ did not err in basing his wage-earning capacity determination upon comparison of wages claimant would have earned but for injury against wages claimant was actually earning in present position). The Board has declined to follow McCabe, holding that the judge may not project the claimant's pre-injury wages into the future, because Section 10 of the LHWCA mandates that average weekly wage be determined from the time of injury. Pumphrey v. E.C. Ernst, 15 BRBS 327, 328-29 (1983); Bethard, 12 BRBS at 695-96 n.2. The Board's approach has been affirmed by the **District of Columbia Circuit**. Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 18 BRBS 100 (CRT) (**D.C. Cir.** 1986), cert. denied, 479 **U.S.** 1094 (1987).

8.9.6 Wage Earning capacity following a relocation

The **First Circuit** recently reviewed the factors to be considered when determining the wage-earning capacity of an employee who had relocated post-injury. Wood v. U.S. Dept. of Labor, 112 F.3d 592, 31 BRBS 43 (CRT) (**1st Cir.** 1997). The court following the lead of the **Fourth Circuit**, announced an **"on the facts" analysis** that focuses on the economic reasons for the relocation. See v. Washington Metropolitan Area Transit Auth., 36 F.3d 375 (**4th Cir.** 1994). The factors to be considered are:

1) the residence of the claimant at the time of filing his claim;

2) his motivation for relocation after the accident;

3) the legitimacy of that motivation to relocate;

4) the availability of suitable employment opportunities in the new locality as opposed to those in his former residence; and

5) the degree of prejudice to the employer in proving suitable alternative employment in the claimant's new community.

Wood, 112 F.3d at 596; See v. Washington Metropolitan Area Transit Auth., 36 F.3d 375 (**4th Cir.** 1994).

The claimant's choice of cities is to be considered presumptively correct and the **burden** of showing that the original move, or the refusal to move back, was unjustified **rests with the employer**. Wood, 112 F.3d 592. The **main thrust of the analysis** should rest on economic considerations behind the move rather than, for example, the decision to care for an aging parent. This does not mean that the analysis should be purely based on wages. The availability of lower wages but greater job security can be a highly appropriate reason for moving. However, even when the economic considerations favor the claimant, the employer may still suffer undue prejudice if there is too great a difference in the wages available in the two areas. Id.

[ED NOTE: For more on this topic, see Topic 8.2.4.3 "Suitable alternate employment: location of jobs."]