BRB No. 07-0615

J.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/29/2008
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-LDA-0119) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After retiring from full-time employment as a truck driver in January 1999, and sporadically undertaking a variety of part-time or independent trucking jobs thereafter, claimant, who had just turned 64, went to Iraq to work as a truck driver for employer in September 2003. He was injured in a work-related accident in January 2004.[1] After recuperating, he returned to his job in Iraq in August 2004. Emp. Ex. 10. On December 2, 2004, claimant was chaining tanks to his truck when he fell off the bed of the truck, landing on his right shoulder, side, hip and head. He completed his shift but within a few hours his hand and arm became numb. Tr. at 16-18. Claimant was sent to Kuwait and then to the United States after medication prescribed by a paramedic in Iraq did not help. Dr. Ledbetter, an orthopedic surgeon, diagnosed radiculitis, numbness, and carpal tunnel syndrome with cervical radiculopathy. He recommended physical therapy and traction, but not surgery. Cl. Ex. 1. Dr. Ledbetter stated that claimant's condition reached maximum medical improvement as of July 25, 2005, and he assessed claimant with a six percent impairment of the whole body. *Id.* Claimant filed a claim for compensation for his orthopedic injuries in November 2005. Cl. Ex. 2.

The administrative law judge found that claimant cannot return to his work in Iraq or to truck-driving work. Decision and Order at 15. The administrative law judge also found that employer identified ten jobs as evidence of suitable alternate employment and that Dr. Blankenship, employer's expert, opined that claimant should be capable of performing light-duty work.[2] Decision and Order at 16-17. The administrative law judge rejected claimant's assertion that he could not physically perform the duties of the identified jobs; however, he found that employer failed to establish the availability of suitable alternate employment because the jobs identified were located too far from claimant's residence and it would not be economically sound for him to commute that distance. Decision and Order at 17. The administrative law judge thus found that claimant is totally disabled. With regard to claimant's average weekly wage, the administrative law judge applied Section 10(c), 33 U.S.C. §910(c), rejected employer's assertion that he should "blend" claimant's contract rate with his previous stateside employment wages to arrive at an average weekly wage, and found that claimant's average weekly wage is $1,797.39. Decision and Order at 19-20. Employer appeals the administrative law judge's calculation of claimant's average weekly wage and his finding that claimant is totally disabled. Claimant responds urging affirmance of his award of benefits.

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[1]Claimant's eye was injured when a brick was thrown through the windshield of his truck. *[J.C.] v. Service Employers Int'l*, 40 BRBS 1 (ALJ) (2006).

[2]Claimant saw Dr. Blankenship once in July 2006 at employer's request. He diagnosed a contusion of the right hip and shoulder and a possible cervical spine strain with upper extremity radiculopathy. Emp. Ex. 3.

Employer first argues that the administrative law judge erred in determining claimant's average weekly wage. Claimant submitted an average weekly wage calculation based on two pay periods of work in Iraq from the fall of 2004, and the administrative law judge adopted that calculation. Decision and Order at 20. Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury.[3] *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). Thus, an administrative law judge may consider only those wages earned following a promotion or increase in wages. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). In this case, the administrative law judge found that claimant's earnings from his work in Iraq were representative of his earning potential at the time of his work injury. This finding is supported by substantial evidence. Emp. Exs. 7-9. Therefore, contrary to employer's contention, the administrative law judge did not err in using only claimant's wages from the job in Iraq and excluding earnings from his prior stateside employment. We affirm the administrative law judge's rational finding that claimant's compensation is to be based on an average weekly wage of $1,797.39. *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949); *Proffitt*, 40 BRBS 41; *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986).

Employer also argues that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Employer identified ten potential entry-level jobs for claimant, all located in Conway, Arkansas, with wages ranging from $5.15 to $8.50 per hour. Emp. Exs. 5-6. Claimant lives in Clinton, Arkansas, which is approximately 39 miles from Conway. The vocational counselor testified that she was unable to find jobs in Clinton, as it is primarily a residential community. Emp. Ex. 18 at 31-32. Claimant testified that it would cost approximately $100 in gasoline each week to commute to Conway and that even a $10-per-hour job would not be worthwhile. Tr. at 27-28, 35; *see* Decision and Order at 5-10. Although the

[3]It is undisputed that neither Section 10(a) nor 10(b), 33 U.S.C. §910(a), (b), applies to this case, as claimant did not work substantially the whole of the year prior to his injury, and the record contains no evidence of wages of similarly-situated employees. Therefore, Section 10(c) properly applies, and it states: "average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee."

administrative law judge found that the identified jobs are within claimant's physical restrictions, he concluded that employer failed to show the availability of jobs within the geographic area where claimant resides. Examining the commuting distance of 39 miles each way from claimant's home and the associated costs, the administrative law judge found the wages paid at the identified jobs made the commuting distance economically unfeasible. Decision and Order at 17. Employer contends that such economic concerns are an improper reason for rejecting otherwise suitable employment. We reject employer's contention.

In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, as here, the burden shifts to the employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether work is realistically available to and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The proper community or geographic area in which an employer must identify suitable jobs is based on the facts of each case. *See Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978). Typically, the relevant community is where the claimant resides or where he resided at the time of his injury. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The cases addressing the relevant community when a claimant has relocated following his injury demonstrate that economic feasibility is a relevant consideration for determining whether alternate employment is suitable and available. For example, in *Wood*, 112 F.3d 592, 31 BRBS 43(CRT), after the claimant was injured and later laid off from Bath Iron Works (BIW), he moved to a small town in New York to be near his extended family and found a job in that area. BIW offered to rehire the claimant five years after his injury, but he refused citing a recall one year earlier which proved to be temporary. The administrative law judge terminated the claimant's permanent partial disability benefits because he found that the claimant's refusal to return to BIW was due

to personal and family reasons. The court vacated the decision and remanded the case for the administrative law judge to consider whether the claimant was justified economically in refusing to relocate for a potentially temporary job while giving up the possibility of promotion in his current steady job. *Wood*, 112 F.3d 592, 31 BRBS 43(CRT).

It is appropriate for an administrative law judge to use a similar analysis in determining the reach of the local community in assessing realistic job opportunities. In the present case, the administrative law judge rationally considered the commuting distance and associated costs in addressing whether jobs were available in claimant's local community. He reasonably found that, although claimant is physically capable of performing the identified jobs, the commuting distance is such that the jobs are not realistically available. Accordingly, on these facts, we affirm the administrative law judge's conclusion that employer failed to establish suitable alternate employment which was realistically available to claimant in the geographic area where he resides. *See Wood*, 112 F.3d 592, 31 BRBS 43(CRT); *See*, 36 F.3d 375, 28 BRBS 96(CRT) (because disability is an economic concept under the Act, eligibility for benefits must reflect a concern for the "economic consequences" of the injury); *see also* 33 U.S.C. §908(h) (determination of wage-earning capacity may include "any other factors or circumstances . . . which may affect [a claimant's] capacity to earn wages in his disabled condition").

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge