BRB No. 01-0775

DONATO CORTEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SWIFTSHIPS, INCORPORATED	)	DATE ISSUED: June 18, 2002
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

George W. Allen, Houston, Texas, for claimant.

William C. Cruse (Blue William L.L.P.), Metaire, Louisiana, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (00-LHC-2965) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a laborer/helper, suffered an injury to his right shoulder when he tripped and fell during the course of his employment on November 20, 1998. Following this work-incident, claimant was diagnosed with a massive rotator cuff tear of the right shoulder, commenced physical therapy, and was restricted to light-duty work picking up paper and small pieces of scrap metal. Claimant continued to complain of pain and last worked for employer on January 10, 1999. On January 21, 1999, claimant underwent various surgical procedures on his right shoulder including

arthoscopy, debridement of a glenoid labral tear, open decompression, subacromial bursectomy, releases and resection of the coracoaacromial ligament, and repair of a massive rotator cuff tear. Thirty-three therapy sessions followed claimant's surgery. Claimant's operating surgeon, Dr. Hoffman, released claimant to light duty involving the use of only one arm, effective February 22, 1999. On December 13, 1999, Dr. Hoffman opined that claimant would reach maximum medical improvement in January 2000, that claimant had a massive rotator cuff tear that could not be completely repaired, and that claimant was restricted from longshore activities with an inability to do repetitive and overhead heavy lifting, climbing, and lifting over 50 pounds from the ground. On May 12, 1999, employer offered claimant a light-duty helper job; claimant declined this offer because of his ongoing pain condition. Thereafter, claimant began working in a yard maintenance position on a limited basis.

In his decision, the administrative law judge initially determined that neither the light-duty position offered to claimant as a helper or the position subsequently described by employer in its tool room established the availability of suitable alternate employment that claimant was capable of performing. Next, the administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and determined that claimant's post-injury yard maintenance work demonstrated a post-injury wage-earning capacity of $162.50 per week. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from January 11, 1998, to May 16, 1999, temporary partial disability compensation from May 17, 1999 to December 31, 1999, and permanent partial disability compensation thereafter.[1]

Employer now appeals, contending that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment and in determining claimant's average weekly wage under Section 10(c) rather than Section 10(b) of the Act. Claimant responds, urging affirmance.

[1]The parties herein stipulated that claimant reached maximum medical improvement on January 1, 2000.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In the instant case, it is uncontroverted that claimant is incapable of resuming his former employment duties with employer. As claimant has returned to work, the issue in this case is whether employer demonstrated the availability of a suitable job which claimant is capable of performing and which pays a higher wage than the job that the administrative law judge used in determining his wage-earning capacity. 33 U.S.C. §908(c)(21), (h). In order to meet this burden by offering claimant a suitable job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).[2]

[2]The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Employer initially avers that the administrative law judge erred by failing to find that the light-duty helper position, which was offered to claimant but refused on May 12, 1999, constituted suitable alternate employment; additionally, employer challenges the administrative law judge's determination that a position later identified as being available in employer's tool room also does not establish the availability of suitable alternate employment. In finding that these two positions were unsuitable for claimant, the administrative law judge implicitly credited claimant's testimony that he continues to suffer from severe post-surgery pain which prevents him from performing the positions identified by employer.[3] Specifically, the administrative law judge initially found that claimant experienced pain post-injury when he performed light-duty work for employer, that claimant informed employer of his ongoing right shoulder discomfort while working, that claimant continues to suffer from severe right shoulder pain, and that claimant's supervisor, in offering claimant a light-duty helper position after his surgery, described that position as constituting the same type of light-duty work that he had previously performed.[4] *See* Decision and Order at 13. Regarding the position identified in employer's tool room, the administrative law judge determined that claimant would not be able to function effectively in this position since claimant cannot speak or read English, employer's tool room supervisor is not fluent in Spanish, and that at best the position described by employer constituted sheltered employment which did not satisfy employer's burden of establishing the availability of suitable alternate employment.[5] *Id.* It is well-established that an administrative law judge is entitled to weigh the evidence and draw his own inferences from it. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge's decision to rely on the testimony of claimant regarding his ongoing complaints of pain and his inability to perform some of the light-duty assignments given to him, and his subsequent determination that the two positions identified by employer are insufficient to establish the availability of suitable alternate employment, are rational and his findings are supported by the record. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that the positions identified by employer do not satisfy employer's burden of

[3]Claimant's complaints of ongoing pain are supported by the testimony of Dr. Hoffman, who stated that claimant's torn rotator cuff could only be partially repaired and that claimant would continue to suffer from arthritis in his right shoulder. *See* CX 5.

[4]Contrary to employer's assertion on appeal, claimant testified that he was unable to perform some of his light-duty, post-injury work assignments, specifically, cleaning and sweeping, due to his pain. *See* Tr. at 60. Claimant's testimony was corroborated by Mr. Salazar, who testified that claimant complained of ongoing right shoulder pain while working during this period of time. *See* Tr. at 114. Moreover, Mr. Salazar testified that when he spoke to claimant about returning to light duty following his surgery, he explained that claimant's post-surgical position would be basically the same job he had performed prior to his surgery. *See* Tr. at 113.

[5]In addressing this position, the administrative law judge specifically declined to rely upon employer's position that the language barrier present in this case could be overcome by the use of some unidentified system of hand signals. *See* Decision and Order at 13; Tr. at 141.

establishing the availability of suitable alternate employment at a higher wage. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer also argues that the administrative law judge erred by determining claimant's pre-injury average weekly wage to be $554.36[6] under Section 10(c) rather than Section 10(b) of the Act, 33 U.S.C. §910(b).[7] Specifically, because claimant was employed by employer for only 14 weeks prior to his injury, employer contends that claimant's pre-injury average weekly wage should be determined under Section 10(b), using as a basis the earnings of three other similarly situated workers.[8] The administrative law judge thoroughly reviewed the earnings and work practices of these workers and found that their earnings could not be used as a comparison because they failed to demonstrate the same work ethic as the claimant, particularly in working overtime during the relevant period.[9] Although employer contends that the overtime hours claimant worked during this period were unusually inflated due to the necessity of meeting a deadline, the record reflects that even during this period of relatively high overtime availability, claimant worked significantly more overtime than the comparison workers; indeed, claimant's overtime hours were more than double the average overtime hours of the three similar employees (19.53 v. 8.14 hours).[10] We hold, therefore,

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[6]In arriving at this figure, the administrative law judge divided claimant's actual wages earned, $7,761, by the 14 weeks he worked prior to his injury. EX 12.

[7]Section 10(b) expressly requires evidence regarding the earnings "of an employee of the same class working in similar employment in the same or a neighboring place." 33 U.S.C. §910(b); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 276, 32 BRBS 91(CRT) (5th Cir. 1998).

[8]Employer offered the wages earned and overtime hours worked by three other workers in the same position as claimant. During the relevant 14 week period:

Worker I	11.6 hours of overtime	Average Weekly Wage: $460.12
Worker II	8.89 hours of overtime	Average Weekly Wage: $426.73
Worker III	3.92 hours of overtime	Average Weekly Wage: $337.00
Claimant	19.53 hours of overtime	Average Weekly Wage: $554.36

EX 16.

[9]In this regard, the administrative law judge relied upon the testimony of Mr. Salazar, who had testified that the three comparable employees relied upon by employer worked fewer hours because they were not as dependable and highly motivated as claimant, who had worked as much overtime as possible. *See* Decision and Order at 7-8.

[10]Contrary to employer's statement on appeal, that the three workers were similarly motivated to work overtime, Brief at 6, Mr. Salazar testified that the three employees identified by employer worked fewer hours as they were less motivated and less dependable than claimant. Tr. at 125-127. Additionally, if employer's contention is accurate, the overtime hours of all four employees would have been inflated, with claimant still working in

that the administrative law judge rationally determined that claimant could not be compared, pursuant to Section 10(b), with workers who lacked his work ethic, and we affirm his decision not to utilize that subsection of the Act in calculating claimant's average weekly wage. As the mathematical calculation of claimant's average

excess of twice the average overtime hours of his co-workers.

weekly wage under Section 10(c) is not challenged on appeal, we affirm the administrative law judge's finding that claimant established an average weekly wage of $554.36.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge