BRB Nos. 10-0556
and 10-0556A

JESUS D. ALVAREZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL CONTRACTORS, LLC	)	DATE ISSUED: 03/24/2011
	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Aubrey E. Denton (Aubrey E. Denton, Limited), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2009-LHC-622) of Administrative Law Judge Patrick M. Rosenow 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On or about January 15, 2007, claimant commenced employment with employer as a welder/fitter. On February 3, 2007, claimant injured his right shoulder when he fell from a ladder. Claimant sought medical treatment for right shoulder pain and, on May 10, 2007, he underwent an arthroscopic decompression and surgical debridement on that shoulder. Claimant has not returned to gainful employment, and employer voluntarily paid claimant total disability compensation from February 5, 2007 through July 27, 2008, based on an average weekly wage of $595.20.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's medical condition has not yet reached maximum medical improvement. The administrative law judge determined that claimant is incapable of returning to his usual employment duties as a welder, and that employer presented no evidence regarding the availability of suitable alternate employment. Accordingly, after calculating claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge awarded claimant temporary total disability benefits from February 4, 2007, and continuing. 33 U.S.C. §908(b). The administrative law judge also held employer liable for the medical expenses incurred by claimant as a result of his February 3, 2007, work injury. 33 U.S.C. §907(a).

On appeal, claimant challenges the administrative law judge's average weekly wage calculation. In its cross-appeal, employer avers that the administrative law judge erred in determining the extent of claimant's work-related disability, in allowing claimant to have an evaluation and treatment by a shoulder specialist, and in calculating claimant's average weekly wage.

Employer challenges the administrative law judge's award of ongoing total disability compensation. Specifically, employer contends it has presented evidence sufficient to establish that claimant is capable of resuming his usual employment duties as a welder. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must demonstrate that he is unable to return to his usual work. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

In addressing this issue, the administrative law judge initially credited claimant's testimony regarding the physical requirements of the work he performed as a welder/fitter, noting that claimant's description was consistent with the testimony of employer's new area manager. Claimant, who testified through an interpreter at the formal hearing, stated that his employment duties involved heavy work such as moving 30 kilo cables, metal plates and bottles of oxygen. Decision and Order at 10; Tr. at 50 – 52. While employer first classified the physical demands of claimant's employment as a welder/fitter as light, *see* EX 1 at 8 – 9, its new area manager opined that the physical demands of a welder/fitter position exceeded those previously reported by employer.[1] Decision and Order at 13; EX 1 at 1. The administrative law judge also found that the weight of the medical evidence establishes that claimant's present medical condition limits him to light-to-medium duty work. Following a functional capacity evaluation performed in November 2007, claimant was released to return to return to light-to-medium duty work. *See* CX 18. On July 28, 2008, Dr. Cuadra, while finding no objective evidence to explain claimant's complaints of ongoing shoulder pain, specifically deferred to claimant's prior functional capacity evaluation which recommended that claimant return to light-to-medium duty work. *See* EX 4 at 3 - 4. A second functional capacity evaluation, performed on August 11, 2009, also concluded that claimant was capable of light-to-medium employment with restrictions. *See* EX 2. These opinions constitute substantial evidence in support of the administrative law judge's finding that claimant is incapable of returning to his usual heavy-duty employment as a welder/fitter. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *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 claimant established that he is incapable of performing his former employment duties with employer due to his work injury. As employer presented no evidence of the availability of suitable alternate employment, we affirm the award of total disability benefits to claimant. *See, e.g., Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Employer next contends that the administrative law judge erred in holding it liable for an evaluation and treatment by a shoulder specialist. We reject employer's contention and affirm the administrative law judge's finding on this issue as it is rational, supported by substantial evidence, and in accordance with law.

[1]At some point between the April 2007 determination that a welder/fitter position constituted "light" employment and August 22, 2008, employer changed ownership and a new area manager was employed. As employer is a contracting company which provides workers, such as welders, to multiple worksites under various working conditions, employer's present area manager indicated his willingness to inquire as to whether a position could be identified within claimant's physical capabilities. *See* EX 1 at 1. The record is silent on whether he was able to identify any suitable positions.

Section 7(a) of the Act, 33 U.S.C. §907(a), states: "The employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require." In order for a medical expense to be assessed against employer, therefore, the expense must be both reasonable and necessary, and must be related to the work injury. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. In this case, the administrative law judge found that Dr. Lisecki, claimant's treating physician, opined that claimant may benefit from the evaluation and treatment by a shoulder specialist. CXs 26, 27; Decision and Order at 19. Dr. Lisecki's opinion provides substantial evidence to support the administrative law judge's finding that employer is liable for claimant's evaluation and treatment by a shoulder specialist. Decision and Order at 19-20. Consequently, we affirm the administrative law judge's finding. *See generally Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Claimant appeals, and employer cross-appeals, the administrative law judge's calculation of claimant's average weekly wage. Claimant contends that the administrative law judge erred in including in his calculation the wages claimant purportedly earned in the year preceding his work injury. Employer contends that the administrative law judge erred in including all of the amounts employer paid to claimant during claimant's 20 days of employment.

Before the administrative law judge, claimant argued that his average weekly wage should be calculated based solely upon the total amount of the six checks he received from employer during his 20 days of employment, $4,008.75. *See* CX 37. Employer, in response, asserted that the figure in Box 16b of claimant's LS-203 form, Employee's Claim for Compensation, $15,000, offers the best estimate of claimant's earnings in the 52 week period preceding claimant's work injury.[2] *See* CX 42. The administrative law judge initially determined that the record did not contain sufficient evidence that claimant's new employment position would be permanent. Therefore, the administrative law judge declined to calculate claimant's average weekly wage based solely on the wages claimant earned in his three weeks of employment with employer. However, he also found that he should account for claimant's recent increase in earning capacity. Finding that claimant's LS-203 form had been filed on claimant's behalf by his attorney, and that each of the six checks claimant received from employer during his 20 days of employment represented "wages," the administrative law judge prorated claimant's prior 52 weeks of earnings to reflect the 49 weeks prior to his commencement of employment with employer, $14,134.54 ($15,000/52 = $288.46; $288.46 x 49 = $14,134.54), added claimant's employer-paid earnings of $4,008.75 to that amount and,

[2]Box 16b of form LS-203, Employee's Claim for Compensation, is entitled "Total earnings during year immediately before injury." CX 42.

dividing the resulting sum, $18,143.29, by 52, arrived at an average weekly wage of $348.91. Decision and Order at 20 – 21; 33 U.S.C. §910(d)(1).

The object of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of his injury.[3] *See Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The administrative law judge fully addressed the positions of the parties, which they reiterate on appeal, and the limited evidence in the record, Decision and Order at 20-21, and determined that claimant's annual earning capacity was best represented by a combination of the earnings figure on claimant's LS-203 form, and the total monetary amount paid to claimant by employer during his 20 days of employment with employer. The result reached by the administrative law judge constitutes a reasonable estimate of claimant's annual earning capacity based on the limited evidence presented, is supported by substantial evidence, and is in accordance with law. *See generally B&D Contracting v. Pearley*, 549 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008); *Staftex Staffing v. Director*, OWCP, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Hall*, 139 F.3d 1025, 32 BRBS 191(CRT). We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage.

[3]Section 10(c) of the Act states that if neither Section 10(a) nor Section 10(b) applies,

> the claimant's 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.

33 U.S.C. §910(c).

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