BRB No. 06-0403

SAILI RYAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: 01/18/2007
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Third Party Administrator-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Attorney Fees and the Order Amending Decision and Order Awarding Benefits Issued November 16, 2005 of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Rafael, California, for claimant.

William N. Brooks II, Long Beach, California, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Attorney Fees and the Order Amending Decision and Order Awarding Benefits Issued November 16, 2005 (2004-LHC-01122, 2004-LHC-02352) of Administrative Law Judge Gerald M. Etchingham 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

Claimant was working at the Café Pearl and Market Street Grill when she was injured on November 3, 1996. She injured her arm, neck and shoulder while lifting a carbon dioxide canister for the soda fountain. Claimant testified that the discomfort in her shoulder, arm, and neck spread to her left leg. She sought medical treatment in February 7, 1997. She was diagnosed with C7 radiculopathy and was released for full duty on March 26, 1997. Claimant was transferred from Café Pearl to Baskin Robbins around April 1998, most likely due to her request for light-duty work. Claimant's duties included bending down into a freezer and scooping ice cream. She claimed that her symptoms worsened while working there. On June 4, 1998, Dr. Clapp, a radiologist, reported that claimant suffers from degenerative disc disease of the cervical spine and a narrowing of the C4-5 disc. Claimant also was seen by Dr. Fong on that day, and he prohibited claimant from scooping ice cream or lifting objects over 25 pounds and limited claimant to only occasional bending, squatting, kneeling, and climbing. Claimant began pain management treatment on September 9, 1998. Claimant did not return to work after July 7, 1998, and was terminated on October 28, 1998, for abandonment of her position. She filed a claim for benefits under the Act on January 19, 1999, alleging a cumulative trauma injury to her low back, hip and arm through her last days of employment.

The administrative law judge found that claimant suffered a work-related injury on November 3, 1996, but that she did not give timely notice of this injury or file a timely claim therefor, and that employer was prejudiced by this failure. However, the administrative law judge found that claimant filed a timely claim for work-related cumulative trauma, and that employer was not prejudiced by claimant's lack of timely notice of this injury. The administrative law judge found that claimant's physical impairment reached maximum medical improvement on October 30, 2000, and that claimant cannot return to work as an ice cream scooper or kitchen worker. The administrative law judge found that employer established the availability of suitable alternate employment as of January 11, 2005, and that claimant did not establish that she diligently sought work. Thus, the administrative law judge found claimant entitled to temporary total disability benefits from July 27, 1998 to October 30, 2000, and permanent total disability benefits from October 31, 2000 to January 10, 2005. The administrative law judge found that claimant's residual post-injury wage-earning capacity is $8.14 per hour, or $162.80 per week, and he awarded permanent partial disability benefits from January 11, 2005, and continuing.

On employer's motion for reconsideration, the administrative law judge found that employer did not establish that a light-duty position was available at its facility, as no specific job was identified or offered to claimant. Moreover, while conceding there is no

evidence that claimant is limited to part-time work, the administrative law judge found that claimant worked only part-time prior to the injury and he thus calculated her loss in wage-earning capacity based on available part-time work. The administrative law judge found that as claimant worked 27 hours per week prior to her injury, her loss in wage-earning capacity should be calculated based on the wages for the positions identified multiplied by a 27-hour week (or $219.78).

On appeal, employer contends that the administrative law judge erred in finding that it did not establish the availability of light-duty work at its facility beginning in 1998. In addition, employer contends that the administrative law judge erred in finding the evidence insufficient to establish the availability of suitable alternate employment when claimant reached maximum medical improvement in October 2000, asserting that one of the jobs the administrative law judge found suitable was identified as available at that time. Lastly, employer contends that the administrative law judge erred in determining claimant's residual wage-earning capacity based on a 27-hour week. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer first contends that claimant was offered a light-duty position at its facility which she was capable of performing given her compensable injuries. Thus, employer contends that the administrative law judge erred in finding that it did not establish suitable alternate employment at its facility. A claimant establishes her *prima facie* case of total disability if she is unable to perform her usual employment duties due to a work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Where, as in the instant case, it is uncontested that claimant is unable to perform her usual duties, the burden shifts to employer to establish the availability of suitable alternate employment, which it may do by providing claimant with a suitable light-duty job at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The administrative law judge's role as fact-finder requires that he review the requirements of any positions identified as alternate work and determine whether claimant can perform the position given her physical restrictions, age, education, and work experience. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *see generally Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). In the present case, the administrative law judge found that employer did not offer any evidence as to any specific jobs allegedly available to claimant. Employer's representative, Ms. Manz, was not able to testify as to specific jobs that were considered suitable for claimant, but stated generally that the jobs probably were available in security or administration. Tr. at 83, 104-105. Employer did not present any evidence as to the physical requirements of these jobs. Therefore, as there is insufficient evidence from which the administrative law judge could ascertain the suitability of any positions at employer's facility, we affirm the administrative law judge's finding that employer did

not establish the availability of suitable alternate employment in its facility as it is rational and supported by substantial evidence. *See Stratton*, 35 BRBS at 6; *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

We also affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment prior to the date of the labor market survey, January 11, 2005. One of the employers listed in this labor market survey, Regis Inventory, indicated that a position as an inventory taker was available in October 2000 when claimant's condition reached maximum medical improvement. Although there were 24 openings with this one employer in 2005, the administrative law judge found that there is no indication of how many positions actually were available in 2000. The administrative law judge rejected employer's contention that one position establishes the availability of suitable alternate employment as of October 2000, finding that there are no special circumstances that would suggest claimant could have obtained a single available job. This finding is rational, supported by substantial evidence, and in accordance with law. *See Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 431, 24 BRBS 116, 121(CRT) (5th Cir. 1991) (an employer can establish suitable alternate employment with only one job opportunity, and the general availability of other suitable positions, where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances"); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988) (employer must present evidence that a range of jobs exists).

Lastly, employer contends that the administrative law judge erred in calculating claimant's residual wage-earning capacity based on a 27-hour work week. Employer contends there is no evidence that claimant is medically unable to work a 40-hour week. The administrative law judge found that while there is no credible evidence that claimant is medically restricted from working a full-time job, claimant's average weekly wage was based on her wages as a 27-hour per week worker. Thus, he concluded that it would be unfair to claimant to calculate her retained earning capacity based on full-time work when her actual work in the year prior to the injury involved only part-time work.[1]

Where, as here, the claimant has no actual post-injury earnings, Section 8(h) of the Act requires the administrative law judge:

> in the interest of justice, [to] fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of

[1] Consequently, the administrative law judge selected as suitable alternate employment only the jobs that were part-time and did not discuss the suitability of the full-time jobs identified by employer.

> 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). The objective of the inquiry concerning claimant's post-injury wage-earning capacity is to determine the wages the claimant could earn on the open market under normal employment conditions to the claimant as injured. *Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153(CRT) (9th Cir. 1985). The administrative law judge is afforded considerable discretion in setting a claimant's wage-earning capacity based on relevant factors. *See generally Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). In *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979), the Board exhaustively discussed the variables relevant to a determination of an injured claimant's wage-earning capacity. One such statutory factor is the claimant's "usual employment," and the Board noted that while this factor obviously concerns the effect of claimant's medical impairment on her ability to work in her usual job, the statute also encompasses consideration of the duties and wages of the usual work. *Id.* at 655-656 n.8. The Board also discussed an injury's effect on hours worked, noting that a worker who is working full-time when he is injured is entitled to compensation if he can only work part-time after the injury. The Board further stated that, "By the same token, we have noted that a claimant who is able to earn wages after injury comparable to pre-injury earnings only by expending more time and effort should be compensated." *Id.* at 658. The Board cited *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411 (9th Cir. 1971), in which the Ninth Circuit affirmed a finding that higher post-injury earnings do not preclude a finding of a loss in wage-earning capacity when the reason for claimant's higher post-injury wages was his working an extra shift. Similarly, the Board noted that overtime should not be included in assessing post-injury earning capacity if it has not been included in average weekly wage. *Devillier*, 10 BRBS at 658.

In the present case, in fixing a reasonable earning capacity, the administrative law judge gave "due regard" to claimant's usual work. Claimant's "usual employment" was a part-time position, and thus, wages for a 40-hour week were not included in the determination of claimant's average weekly wage. The administrative law judge therefore rationally determined that computing claimant's post-injury wage-earning capacity based on a 40-hour week increases claimant's earning capacity only by requiring her to expend more effort and to work additional hours. The administrative law judge addressed relevant factors, and he arrived at a reasonable wage-earning capacity within the statutory framework. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the determination of claimant's wage-earning capacity should be based on a 27-hour week. *See generally Sproull v.*

Director, OWCP, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

Accordingly, the Decision and Order Awarding Benefits and Attorney Fees and the Order Amending Decision and Order Awarding Benefits Issued November 16, 2005 of the administrative law judge are 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