BRB Nos. 99-0135 and
99-0135A

ROBERT F. COOPER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
OFFSHORE PIPELINES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: April 28, 1999
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Ed W. Barton and John D. McElroy (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Gus David Oppermann (Brown, Sims, Wise & White), Houston, Texas, for employer/carrier.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo,

Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (97-LHC-467) 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 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 worked as an electrician for employer at its facility on an island in the Sabine River. On January 25, 1994, during a restroom break, claimant was seated in a portable toilet when it was accidentally struck by a cherry picker and flipped over. Claimant, who injured his back as a result of being thrown about the interior of the toilet, was treated conservatively with medication and thereafter returned to work. After further complaints of pain, he began to receive injections to his sacroiliac joint region and was eventually diagnosed with sacroiliac joint dysfunction with associated right pyriformis syndrome and sciatic neuritis, and put on light duty restrictions by Dr. Gorin. On March 31, 1995, employer sold its facility on the Sabine River and claimant was laid off. Due to financial considerations, claimant worked for various employers subsequent to his lay-off by employer in jobs that exceeded his physical limitations, even though he continued to experience pain and discomfort in his lower back.

In his Decision and Order, the administrative law judge found that claimant satisfied the situs and status requirements for coverage under the Act. Specifically, the administrative law judge determined that pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981), claimant's injury occurred within the confines of an "adjoining area" under Section 3(a) of the Act, 33 U.S.C. §903(a)(1994). With regard to status, the administrative law judge credited claimant's testimony that he performed welding tasks on barges every other day, in addition to supplying electricity to the barges, and found that as some of claimant's time was devoted to maritime activities,

claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994). Next, the administrative law judge accepted the opinion of Dr. Gorin that claimant reached maximum medical improvement on June 27, 1996. Lastly, the administrative law judge found that claimant established that he should not engage in activities at his previous level of employment, and that claimant has worked at a level beyond his physical limitations since his layoff by employer. Based on the testimony of claimant and Mr. Kramberg, claimant's vocational counselor, the administrative law judge concluded that claimant is capable of light duty work paying minimum wage. Thus, the administrative law judge awarded claimant temporary partial disability compensation from March 31, 1995, through June 27, 1996, 33 U.S.C. §908(e), and permanent partial disability compensation from June 28, 1996, and continuing, 33 U.S.C. §908(c)(21), (h), based on the difference between claimant's average weekly wage of $684.94 and his wage-earning capacity of $170 per week. Lastly, the administrative law judge awarded employer a credit for all income claimant received since March 31, 1995.[1]

[1]On September 22, 1998, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in awarding employer a credit for all income claimant has received since March 31, 1995. Specifically, claimant argues that the administrative law judge's award of a credit to employer is without statutory authorization. Claimant further argues that since the administrative law judge's finding that he has worked beyond his physical restrictions to support his family is tantamount to a finding that claimant's post-injury earnings do not fairly and reasonably represent his wage-earning capacity under Section 8(h) of the Act, 33 U.S.C. §908(h), the administrative law judge's award of a credit is inappropriate. Employer, in its cross-appeal, challenges the administrative law judge's finding that claimant satisfied the situs and status requirements for jurisdiction. In the alternative, employer asserts that the administrative law judge committed reversible error by improperly excluding from the record evidence relevant to the issue of jurisdiction. Employer further challenges the administrative law judge's finding regarding the date that claimant reached maximum medical improvement and the extent of claimant's disability. Claimant responds, urging affirmance of the administrative law judge's findings with regard to jurisdiction, the nature and extent of his disability, and the exclusion of evidence. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response to employer's cross-appeal, urging the Board not to disturb the administrative law judge's findings with respect to jurisdiction. Specifically, the Director asserts that the administrative law judge's findings that claimant satisfied the situs and status requirements for coverage under the Act are in accordance with law.[2] The Board held oral argument in this case in Houston, Texas on February 11, 1999.

Coverage

Inasmuch as the issues regarding coverage are fundamental to the disposition of the instant case, we will address them first. To be covered under the Act, a claimant must satisfy the situs requirement of Section 3(a) and the status

[2]The Director also filed an Emergency Motion to Modify Administrative Law Judge's Order to Render it Enforceable, contending that the administrative law judge's award of a credit in an unspecified amount rendered his September 11, 1998, Decision and Order unenforceable and thus interlocutory. The Director requested that the Board vacate the administrative law judge's award of a credit to employer, modify his Decision and Order to render it enforceable, and remove this case from the current oral argument schedule. In an Order issued on January 4, 1999, the Board denied the Director's motion, inasmuch as the credit issue addressed by the Director in his motion was properly raised and briefed by claimant in his appeal to the Board.

requirement of Section 2(3). Section 3(a) provides that:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Melerine v. Harbor Const. Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Winchester*, 632 F.2d at 504, 12 BRBS at 719. In *Winchester,* the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, adopted a broad view of the situs test, refusing to restrict a covered situs to areas contiguous to water or to limit an area by fence lines or other boundaries. *See also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199 (CRT)(5th Cir. 1998). Thus, the court stated that the perimeter of an "area" is to be defined by function, and that the character of surrounding properties is but one factor to be considered. An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity.[3] *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Using these guidelines, the Fifth Circuit has held that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in the loading process. *See Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

In the instant case, the administrative law judge acknowledged the parties' stipulation that the island on which employer's facility was located was surrounded by navigable waters, and that the site where claimant was injured was four or five blocks from the water's edge. The administrative law judge further found that

[3]"The statute does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity." *Winchester*, 632 F.2d at 515, 12 BRBS at 727.

employer's facility was used for the building and repairing of "jackets" for offshore oil rigs, which were transported to and from the facility by barge, and that the barges themselves required an electrical hookup as well as repair while at employer's facility. Thus, the administrative law judge determined that claimant's injury occurred on an "adjoining area" under Section 3(a) of the Act.

We hold that the administrative law judge's finding that claimant satisfied the situs requirement under Section 3(a) is rational and supported by substantial evidence. An area which is surrounded by water and used for maritime activity clearly meets the Fifth Circuit's test. *See Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729. In concluding that claimant's injury occurred on a covered situs, the administrative law judge clearly considered both the geographic and functional aspects of employer's facility. Addressing first the geographic area, the administrative law judge found, and it is undisputed, that claimant's injury occurred on a facility on an island surrounded by navigable water, with the specific site of injury located four or five blocks from the water's edge of the river. Whether a site is covered under *Winchester* depends on the nature of the overall area rather than the use of a specific spot within a maritime facility.[4] Thus, claimant's injury within a facility surrounded by navigable waters meets the requirements of the Act from a geographic standpoint. *See Univesal Fabricators, Inc. v. Smith,* 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

Moreover, the administrative law judge found that employer's facility served a maritime function, in that the oil rig jackets and platforms were loaded onto and unloaded from barges while at employer's facility, and, significantly, the electrical hookup and the repairs of barges were sometimes performed by employer's employees, including claimant, while at employer's facility. This last fact distinguishes this case from *Melerine*. In that case, the claimant was injured in the

[4]In *Winchester,* the court discussed the court's holdings in *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP v. Jacksonville Shipyards, Inc.,* 433 U.S. 904 (1977), *aff'd on remand,* 575 F.2d 79 (5th Cir. 1978), *reh'g denied,* 580 F.2d 1052 (5th Cir. 1978), which reviewed decisions involving five claimants. One of the employees in that case was injured exiting a bus which had taken him to the yard's office to check out. The *Perdue* court concluded that as there was no evidence that the office was on navigable waters or used for a maritime purpose, this injury was not covered. In *Winchester,* 632 F.2d at 516, 12 BRBS at 728, the court rejected a focus on the precise place of injury in a facility rather than the broader area, overruling *Perdue* to the extent it is inconsistent with this view.

employer's steel mill. In holding that the situs requirement was not met, the Board held that the mill, which had no maritime nexus, was separate and distinct from the facility's waterfront dock, which was used to receive material. *See Melerine*, 26 BRBS at 97; *see also Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998). By contrast, in the instant case, employer's dock is used to load and unload jackets and platforms for fabrication. In fact, much of the fabrication work was performed while the jackets and platforms were still on the barges.[5] *See* Tr. at 81. Moreover, while the barges were at the dock they were supplied with electricity and repairs were performed on them by employer's employees. *See* Tr. at 31-32, 39-40.

[5]Claimant testified that ninety percent of the work he did for employer was performed on the platforms while they were on the barges. Tr. at 81.

We reject employer's assertion that the holding of the United States Court of Appeals for the Fourth Circuit in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT)(4th Cir.), *cert. denied*, 119 S.Ct. 590 (1998), should have been applied to the instant case. Unlike the Fifth Circuit, the Fourth Circuit has strictly construed the situs requirement, holding that in order to constitute a covered situs under the Act, the site must actually adjoin navigable waters, *i.e.,* it must be contiguous to and actually touch the navigable water. *See Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, 116 S.Ct. 2570 (1996). As the instant case arises in the Fifth Circuit, however, *Sidwell* and *Brickhouse* are not controlling, and we must follow *Winchester.*[6] In any event it is undisputed that employer's facility is contiguous with navigable water, and the Fourth Circuit's holdings do not deny coverage where an injury occurs on a maritime facility that is contiguous with navigable water. *See Sidwell,* 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT). Accordingly, since employer's facility was used for the repair and maintenance of vessels, and the facility is on the water, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs under Section 3(a) of the Act. *See, e.g., Universal Fabricators,* 878 F.2d at 843, 22 BRBS at 104 (CRT).

Next, employer challenges the administrative law judge's finding that claimant satisfied the status requirement under the Act. Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker . . . ." 33 U.S.C. §902(3)(1994). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 275-276, 6 BRBS 150, 166 (1977). A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

[6]In *Winchester,* the court stated that although "adjoin" can mean "contiguous," it is also defined as "to be close to," "to be near," and "neighboring." 632 F.2d at 514, 12 BRBS at 727. Thus, the court held that "so long as the site is close to or in the vicinity of navigable waters, or in a neighboring area," an injury can be covered under the Act. *Id.*

Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement for coverage under the Act, the administrative law judge found that claimant's regular employment duties with employer included participating in the maintenance and repair of vessels. Employer asserts that while claimant performed fitting and welding on barges, this work was only done during his first year of employment with employer, and that since that time, claimant performed non-maritime electrical duties. We reject employer's argument. As an electrician, it was part of claimant's regular job duties to supply electricity to barges. Tr. 39-40, 86, 88, 117. Since employer's facility was a non-union shop, claimant was also required to perform welding and repair tasks aboard the barges, and the administrative law judge credited claimant's testimony that he performed these duties every other day up until the date of his injury.[7] *See* Decision and Order at 8; Tr. at 94-95, 123-124, 127-129. Inasmuch as claimant's duties as an electrician involved supplying electricity to barges, and his performance of welding and repair duties while on barges was a regular part of claimant's assigned overall duties, the administrative law judge properly found that claimant spent at least some of his time engaged in clearly maritime employment. *See Caputo*, 432 U.S. at 69, 6 BRBS at 150; *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). Accordingly, we affirm the administrative law judge's finding that claimant satisfied the status requirement under Section 2(3) of the Act.[8]

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[7]Employer's reliance on the holding of the United States Supreme Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), is misplaced. In that case, the Court held that an employee who welded and maintained fixed offshore platforms in state territorial waters was not covered under the Act. In the instant case, however, claimant performed welding and repair duties on board barges, and vessel repair is specifically covered under Section 2(3) of the Act. In addition, as the Director notes, the reasoning of the Fifth Circuit in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (*en banc*), also supports coverage, inasmuch as the court there found a claimant injured on navigable water covered based on his spending some of his time performing work duties aboard a vessel.

[8]One component of employer's argument on appeal is that the Section 20(a), 33 U.S.C. §920(a), presumption does not apply with respect to the issue of coverage under the Act. In his response, the Director disputes this contention. Relying on

Exclusion of Evidence

At the hearing, employer sought to introduce into evidence the deposition transcripts of three of its employees, Messrs. Eddie Evans, John Ford and Frank Gaylor, taken with respect to a separate claim.[9] The administrative law judge excluded these deposition transcripts from the record as claimant's counsel, who had attended the depositions, was unaware that they would be used in claimant's case and thus did not cross-examine the witnesses in furtherance of the instant case. Tr. at 7-10. On appeal, employer contends that the administrative law judge committed reversible error by excluding these exhibits. Specifically, employer asserts that testimony given at the deposition of Mr. Gaylor related to jurisdictional issues with respect to claimant. In response, claimant asserts that employer, at the hearing, failed to carry its burden of establishing that the deposition transcripts were relevant and admissible.

Employer's contentions are without merit. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g. Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In the instant case, the administrative law judge's reasons for excluding from evidence depositions taken in a separate claim are rational. Employer asserts

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Fleischmann v. Director, OWCP, 137 F.3d 131, 32 BRBS 28 (CRT)(2d Cir.), *cert. denied*, 119 S.Ct. 444 (1998), the Director asserts that the Section 20(a) presumption does apply to coverage-determinative facts. *See* Director's Brief at 6-7. Inasmuch as the administrative law judge did not base his coverage findings on the Section 20(a) presumption, and we affirm the administrative law judge's conclusion in this regard, we need not address this issue.

[9]Mr. Gaylor was an employee of employer, OPI International, and Messrs. Evans and Ford were employees of J. Ray McDermott, Inc., which merged with OPI.

that a portion of Mr. Gaylor's deposition testimony related to the issue of coverage in the instant matter, and that claimant's counsel asked questions in this regard. Review of the pages cited, however, Emp. Ex. 5 at 153-161, does not support this contention. Employer has not shown that these depositions are actually relevant, and it has not shown that the administrative law judge erred. In any event, even assuming employer's allegation was correct, claimant's counsel was still unaware that testimony given at a deposition with respect to another claim would be introduced into evidence with regard to the instant claim. Moreover, assuming the testimony of Messrs. Evans, Ford and Gaylor would be relevant to the coverage issues in the instant case, nothing prevented employer from taking their depositions in the instant case or calling them as witnesses at the hearing. Thus, the exclusion from evidence of the Evans, Ford and Gaylor depositions was not arbitrary, capricious or an abuse of discretion.

Nature and Extent of Disability

Employer next contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on June 27, 1996. Specifically, employer argues that since claimant lost minimal time from work subsequent to his work accident on January 25, 1994, the administrative law judge should have credited the medical opinions of Drs. Williams and Ebead that claimant reached maximum medical improvement in February 1994.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In the instant case, Dr. Gorin, who was treating claimant with sacroiliac joint injections in order to relieve his pain, opined that claimant reached maximum medical improvement on June 27, 1996. Cl. Ex. 2 at 18, 55. The administrative law judge credited Dr. Gorin's opinion in this regard, declining to accept February 10, 1994, the date Dr. Ebead returned claimant to work, *see* Emp. Ex. 7 at 6, as the date of maximum medical improvement, since claimant's continued treatment for his lower back pain showed that he had not recovered from his work accident only two

weeks after the accident occurred. As the record contains substantial medical evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on June 27, 1996, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Employer further contends, without any legal citations, that claimant suffered no loss in post-injury wage-earning capacity, as claimant returned to his regular duties in February 1994, and continued his regular employment with employer for over a year. Employer's contention is rejected. Initially, it is noted that at the hearing, claimant sought compensation commencing upon the date of his lay-off, March 31, 1995, *see* Tr. at 18-19, and thus he did not claim benefits for any loss in wage-earning capacity during the period he was employed. In his decision, the administrative law judge found that claimant established a *prima facie* case "that he medically and physically should not engage at his previous level of employment." Decision and Order at 11. Recognizing that claimant has continued to work since March 31, 1995, he found that he did so by using extraordinary effort to continue working at a level beyond his physical and medical limitations. The administrative law judge thus concluded that claimant is entitled to an award of partial disability benefits.

Section 8(c)(21), (e) of the Act, 33 U.S.C. §908(c)(21), (e), provides for award of partial disability benefits based on the difference between the claimant's pre-injury average weekly wage and post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), which provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the instant case, the administrative law judge credited claimant's testimony and the opinion of Dr. Gorin that since March 31, 1995, claimant has worked at jobs requiring medium level physical exertion, and that these jobs are beyond claimant's

physical limitations.[10] The administrative law judge found that claimant "has made extraordinary efforts, including the use of Vicodin, in order to continue working at a level beyond his physical and medical limitations . . ." Decision and Order at 10. Finding that claimant is not capable of his former employment and is capable only of light duty, minimum wage jobs since March 31, 1995, the administrative law judge determined that claimant has had a residual wage-earning capacity of $170 per week since March 31, 1995.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, we hold that the administrative law judge's decision to credit the opinion of Dr. Gorin and the testimony of claimant is rational, and his findings are supported by substantial evidence. *See O'Keeffe,* 380 U.S. at 359. As his findings establish that claimant's work for employer, as well as other employers was not

[10]Dr. Gorin diagnosed claimant as suffering from post-traumatic myofascial pain syndrome and sacroiliac joint dysfunction, associated with right pyriformis syndrome and right sciatic neuritis, which required injection therapy to relieve claimant's pain. Dr. Gorin opined that claimant would be unable to advance beyond the light or light-moderate duty demand of labor, as defined by the Dictionary of Occupational Titles. *See* Cl. Ex. 2 at 11, 53-66. Claimant testified that Dr. Gorin restricted him from performing jobs that involved climbing, pulling, or lifting over 35 pounds, and that the physical requirements of an electrician are greater than these restrictions. Claimant stated that he did not follow Dr. Gorin's recommendations in order to support his family. Tr. at 57-58.

suitable, the administrative law judge properly found that the actual wages paid for this work do not represent his wage-earning capacity. *See* 33 U.S.C. §908(h). Moreover, despite the fact that his findings establish a *prima facie* case of total disability, and employer provided no evidence of other alternate work, the administrative law judge found that claimant established his ability to perform light work paying minimum wage. We therefore affirm the administrative law judge's determination that claimant has a post-injury wage-earning capacity of $170 per week subsequent to March 31, 1995, and his resulting award of temporary and permanent partial disability benefits.

Credit for Income Claimant Earned From Other Employers

In his Decision and Order, the administrative law judge found that claimant had a residual wage-earning capacity subsequent to March 31, 1995, the date of claimant's lay-off by employer, of $170 per week. Thus, the administrative law judge awarded claimant temporary partial disability compensation from March 31, 1995 until June 27, 1996, based on the difference between claimant's average weekly wage of $684.94 and $170, and permanent partial disability compensation commencing June 28, 1996, and continuing, applying the same calculation. The administrative law judge then granted employer two credits; the first, for all compensation previously paid by employer, and the second, for all income claimant earned from other employers since March 31, 1995. *See* Decision and Order at 12.

On appeal, claimant contends that the administrative law judge erred in granting employer a credit for income he earned from other employers. Specifically, claimant argues that this credit award is without statutory authorization. Claimant additionally argues that the administrative law judge's previous finding that claimant was working beyond his physical limitations since March 31, 1995, in order to support his family was tantamount to a finding that claimant's post-injury wages do not fairly and reasonably represent his post-injury wage-earning capacity, and therefore, the award of a credit to employer for income claimant earned since March 31, 1995, violates Section 8(h) of the Act, 33 U.S.C. §908(h). We agree with claimant's contentions and, for the reasons that follow, vacate the administrative law judge's award of credit for income claimant earned from other employers.

The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§903(e), 914(j), 933(f). Section 3(e) provides employer with a credit for payments under other workers' compensation laws or the Jones Act, *see* 33 U.S.C. §903(e),[11] and Section 33(f) provides an offset against amounts due under the Act for any recovery from a third party who is liable in damages for the same disability or death. 33 U.S.C. §933(f). Section 14(j) covers the advance payment of benefits pursuant to the Act. 33 U.S.C. §914(j);[12] *see, e.g., Mason v. Baltimore*

[11]Section 3(e) provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e)(1994).

[12]Section 14(j) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j).

Stevedoring Co., 22 BRBS 413 (1989). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). As claimant contends, the Act contains no provision which entitles an employer to a credit for income a claimant has earned from other employers.

Moreover, an award of a credit to employer for income earned subsequent to March 31, 1995, would contravene Section 8(h) of the Act, and contradict the administrative law judge's determination that claimant has a residual wage-earning capacity of $170 per week. The administrative law judge, in determining that claimant has a post-injury wage-earning capacity of $170 per week since March 31, 1995, found that claimant has worked beyond his physical limitations. Thus, the administrative law judge's findings establish that claimant's earnings subsequent to March 31, 1995, do not fairly and reasonably represent his wage-earning capacity. To grant employer a credit for all income earned subsequent to March 31, 1995, is contravened by this finding and the evidence supporting it. We therefore reverse the administrative law judge's finding that employer is entitled to a credit for income claimant earned from other employers subsequent to March 31, 1995.[13]

[13]Since we vacate the administrative law judge's award of a credit for income claimant earned from other employers, the arguments raised with regard to the administrative law judge's lack of calculations and *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901 (5th Cir. 1998), are moot.

Accordingly, the administrative law judge's award of a credit to employer for income claimant earned from other employers subsequent to March 31, 1995 is reversed. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge