BRB Nos. 08-0397
and 08-0397A

A.S.	)	
	)	
Claimant-Respondent Cross-Respondent	)	
	)	
v.	)	
	)	
HARBOR CONSTRUCTION COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	DATE ISSUED: 02/26/2009
	)	
Employer/Carrier- Petitioner Cross-Respondents	)	
	)	
GLOBAL FABRICATION & WELDING CONTRACTORS, L.L.C.	)	
	)	
and	)	
	)	
LOUISIANA COMMERCE AND TRADE ASSOCIATION	)	
	)	
Employer/Carrier- Respondents Cross-Petitioners	)	DECISION and ORDER

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

Isaac H. Soileau, Jr. (Couture & Soileau LLC), New Orleans, Louisiana, for claimant.

Richard S. Vale and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for Harbor Construction Company, Incorporated and The Gray Insurance Company.

Patrick H. Patrick (Patrick, Miller, & Belleau, LLC), New Orleans, Louisiana, for Global Fabrication & Welding Contractors, LLC, and Louisiana Commerce and Trade Association.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Harbor Construction Company, Incorporated (Harbor) and its carrier, The Gray Insurance Company (Gray), appeal, and Global Fabrication & Welding Contractors, LLC (Global), and its carrier, Louisiana Commerce and Trade Association (LCTA), have filed a protective cross-appeal of, the Decision and Order (2007-LHC-596) 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).

Claimant was hired by Global in August 2002, and sent, on August 9, 2002, to work as a welder for Harbor as part of a ship repair project that was anticipated to last between three to six months. However, on his first day of work, August 9, 2002, claimant sustained a fracture to his right ulna as a result of his having leapt out of the way of a falling diesel fuel tank as it slipped from a fork lift. Dr. Katz subsequently released claimant, based on the condition of his right elbow, to return to modified duty as of September 5, 2002, and to regular work status as of October 22, 2002. Claimant returned to Dr. Katz on January 22, 2003, with complaints of cervical and lumbar pain. Dr. Katz diagnosed a C6-7 disc herniation as indicated by an MRI dated January 8, 2003, and opined that claimant's cervical condition is not related to the work injury. Harbor's Exhibit (HX) 8. As for claimant's lumbar pain, Dr. Katz diagnosed advanced degenerative changes at L4-5 and L5-S1, and opined that this condition pre-dated his August 9, 2002, work injury, and thus, also does not "correlate" with that work-related injury. Dr. Katz recommended conservative treatment for both injuries. At his deposition on December 13, 2007, Dr. Katz opined that claimant was presently unemployable, due primarily to problems relating to claimant's pain medications. EX 24, Dep. at 48.

Meanwhile, Dr. Vogel examined claimant on December 16, 2002, and diagnosed a coronoid fracture of the right elbow, a herniated cervical disc, and herniated lumbar disc, which he stated are causally related to his work accident of August 9, 2002. Dr. Vogel added that claimant was, at that time, disabled from his normal work duties, and he recommended that claimant undertake conservative treatment for his cervical and lumbar conditions. Dr. Corales examined claimant on May 18, 2004, and following an unsuccessful course of conservative treatment, performed a post-anterior discectomy and fusion on claimant at C5-6 and C6-7 on October 6, 2004. In a follow-up report dated January 4, 2005, Dr. Corales stated that claimant, at least insofar as his cervical condition was concerned, could perform light work but that he needs to avoid significant, moderate, or heavy labor. CX 3. Continued neck pain prompted further conservative treatment, and a second cervical surgery was performed by Dr. Kerr on November 8, 2006. Claimant thereafter sought treatment for left shoulder pain with Dr. Atchison who performed arthroscopic surgery on the left shoulder on April 16, 2007.

In his decision, the administrative law judge found that claimant established that the injuries to his right elbow, lower back, neck and shoulders are work-related as they occurred as a result of claimant's August 9, 2002, accident. The administrative law judge next found that claimant cannot return to his former employment, and moreover, that Dr. Katz's testimony that claimant is not employable precludes Harbor from establishing the availability of suitable alternate employment. He thus awarded claimant temporary total disability benefits based on an average weekly wage of $1,344.00, as calculated pursuant to 33 U.S.C. §910(c), as well as medical benefits under 33 U.S.C. §907. In considering the responsible employer issue, the administrative law judge found that Harbor was claimant's borrowing employer at the time of the accident and it was therefore liable for benefits under the Act.

On appeal, Harbor challenges the administrative law judge's findings regarding the extent of claimant's disability and the calculation of claimant's average weekly wage, as well as his finding that it is the responsible employer. Global responds, urging affirmance of the administrative law judge's finding that Harbor is liable for claimant's benefits. Global has also filed a protective cross-appeal, agreeing with Harbor's contention that the administrative law judge erred in calculating claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision.

Harbor contends the administrative law judge erred in finding that claimant established a *prima facie* case of total disability, since the record establishes that claimant was restricted to sedentary work prior to his August 9, 2002, accident and his restrictions remained the same following his initial recovery from that incident. Harbor argues that claimant's August 9, 2002, resulted in nothing more than a temporary aggravation of a

prior back injury sustained in 1998 which left him unable to perform "hard" labor from that time. Harbor further argues that it demonstrated the availability of suitable alternate employment based on the labor market survey conducted by Nancy Favaloro.

We reject Harbor's argument that claimant cannot establish entitlement to total disability benefits because his restrictions, prior to and following the August 9, 2002, work injury, remained the same, *i.e.*, claimant was restricted to sedentary work. To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Claimant's usual employment comprises all of his regular duties at the time he was injured. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 689 (1998); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of the usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In finding that claimant cannot return to his usual employment, and moreover, that claimant is incapable of performing any work following the August 9, 2002, work injury, the administrative law judge initially found that claimant cannot return to his usual work as a pipefitter, Decision and Order at 13, and this finding is supported by substantial evidence.[1] Moreover, regardless of claimant's medical restrictions prior to 2002, the fact remains that he was working as a welder when injured and he can no longer do so. Thus, Harbor's argument that claimant did not establish a *prima facie* case of total disability must be rejected. The finding that claimant established a *prima facie* case of total disability is affirmed.

Although the administrative law judge stated that Harbor introduced surveys listing jobs in the light category which claimant may some day be able to pursue, he credited the opinion of Dr. Katz to find that claimant cannot perform any work and remains temporarily totally disabled. *Id.* Dr. Katz repeatedly stated "no," when he was asked at his November 28, 2007, deposition as to whether claimant was, at that time, employable. HX 24, pp. 27, 47-49; *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). Specifically, Dr. Katz stated, "in my opinion I don't think that anybody

[1] Claimant's testimony that he is not physically able to return to his work as a welder, in conjunction with the opinions of Drs. Nutik, Corales, Vogel, and Katz which limit claimant to, at best, sedentary activity after the August 9, 2002, work injury further support the administrative law judge's finding that claimant is incapable of returning to his usual work.

would hire [claimant] with a condition that he is in with respect to his drug problem right now." HX 24, Dep. at 47-48. Dr. Katz related claimant's drug problem to the numerous medications which he has been taking to combat the pain associated with his August 9, 2002, work injuries. This evidence supports the administrative law judge's conclusion that as a result of the August 9, 2002, work injury, claimant is unable to perform any work at all. We, therefore, affirm the administrative law judge's finding that claimant is incapable of performing any work as it is supported by substantial evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Consequently, the administrative law judge's finding that claimant is entitled to temporary total disability benefits is affirmed.[2] *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT)*; see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Harbor next argues that the record does not support the administrative law judge's finding regarding claimant's average weekly wage. In this regard, Harbor asserts that the administrative law judge erred when he extrapolated claimant's hourly rate over the course of a full year, as the record establishes that claimant's work at Harbor was to last three to six months. The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Under Section 10(c), the administrative law judge has broad discretion and may take into account a claimant's new, higher, wages. *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). Nonetheless, the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity at the time of the injury. *Id.* We agree with Harbor that the case must be remanded for the administrative law judge to reconsider the issue of claimant's average weekly wage.

Pursuant to Section 10(c), the administrative law judge used claimant's hourly rate at the time of injury, $16, times an 84-hour week to conclude that claimant's average weekly wage is $1,344, which he found best represented claimant's earning capacity at the time of injury. Decision and Order at 15. The administrative law judge based this calculation on the testimony of Ms. Herbert, who stated that claimant was to have earned $16 per hour for twelve-hour days, seven days a week, on a job which was to last three to six months. HT at 77-78. While the record contains substantial evidence to support the

[2] The administrative law judge's finding that claimant is incapable of any employment renders employer's evidence, consisting of Ms. Favaloro's labor market surveys, and thus, its specific contentions on appeal regarding the availability of suitable alternate employment, moot. *See generally J.R. v. Bollinger Shipyard, Inc.*, __ BRBS__, BRB No. 08-0508 (Dec. 16, 2008).

administrative law judge's finding that claimant was to be paid $16 per hour, the administrative law judge did not discuss evidence contradicting Ms. Herbert's testimony that claimant could expect to work 84 hours every week.

In presenting his case, claimant submitted his "personnel file" pertaining to his employment with Global and/or Harbor. CX 15. This exhibit includes time sheets for the week spanning August 5-11, 2002, based on the Global/Harbor contract. Included in this are the hours worked that week by seven welders, including claimant, under the terms of the employment contract for the period in question. The records establish that these welders worked an approximate total of 310 hours for that week, that no welder worked in excess of 71 hours that week, and that absent claimant's one day of twelve hours, the remaining six workers averaged 49.67 hours for the week.[3] CX 15. Moreover, substantial evidence does not support the administrative law judge's decision to extend claimant's wages for Harbor over the course of an entire year. It is undisputed that claimant's position for Harbor was to last for no more than six months. HT at 77-78. The administrative law judge's calculation of claimant's average weekly wage, however, assumed that claimant would have worked twelve-hour days, 365 days a year. As the administrative law judge did not fully address the evidence in this case, we vacate his finding that claimant's average weekly wage is $1,344, and remand for further consideration of this issue. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997).

Under Section 10(c), an administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work. On remand, the administrative law judge must make a specific finding regarding the number of hours per week which claimant realistically could have been expected to work at this job, consistent with the evidence of record and multiply this number by his hourly rate. The administrative law judge must also consider the reasonable length of this employment, specifically addressing the evidence that claimant's job would have lasted three to six months, and arrive at a figure which reflects his annual earning capacity. Those total earnings should then be divided by 52 weeks, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), to arrive at a figure which reasonably represents claimant's average weekly wage. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

[3] Specifically, the records indicate that D.J. worked 71 hours, R.R. worked 60 hours, B.A. and L.M each worked 49 hours, M.F. worked 35.5 hours, and that B.M. worked 33.5 hours. CX 15.

Harbor further argues that the administrative law judge erred in finding that he lacked the authority to adjudicate the issue of whether the contract between Global and Harbor contained a "valid and enforceable indemnification agreement" that would serve as a bar to Global's reimbursement claim against Harbor. Harbor maintains that since it has a valid contract in place with Global, it is not required to pay any benefits at all even though it is the borrowing employer.

The administrative law judge found that Harbor, as the responsible employer in this case,[4] is required to pay claimant's compensation and thus, to reimburse Global for any compensation it previously paid as a result of the accident.[5] Additionally, the administrative law judge refused Harbor's request to resolve the question of whether a contract between Global and Harbor contains a "valid and enforceable indemnification agreement," because, in light of the Fifth Circuit's decision in *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), *rev'g Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), that issue is beyond the scope of his jurisdiction in deciding claimant's claim under the Act. Decision and Order at 16.

In *Ricks*, the Fifth Circuit held that an administrative law judge and the Board lack jurisdiction to interpret a contractual indemnity agreement between a borrowing and a lending employer, as such an issue is not "in respect of" a claim pursuant to Section 19(a) of the Act, 33 U.S.C. §919(a). Thus, once the responsible employer/carrier under the Act is identified, any issues regarding contractual indemnification must be resolved in another forum. *Id.*, 261 F.3d at 464-465, 35 BRBS at 98-99(CRT).

The administrative law judge properly applied *Ricks* in this case to conclude that he did not have the authority to determine whether the Global/Harbor contract contained

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[4] In an Order dated September 25, 2007, the administrative law judge found that Harbor is, as a matter of law, the borrowing employer in this case, and furthermore noted, in his subsequent decision, that said finding "was consented to at trial." Decision and Order at 2, *citing* HT at 16-17. The administrative law judge's finding is premised on an earlier decision, in state proceedings involving this case, that Harbor is claimant's borrowing employer. *Sanchez v. Harbor Constr. Co., Inc.*, 968 So.2d 783 (La Ct.App. 2007).

[5] The administrative law judge found that Harbor is responsible for reimbursing Global for $85,190.63 for medical benefits, $67,582.11 in disability benefits, and $8,681.54 for vocational rehabilitation. Decision and Order at 16.

an indemnification agreement between Global and Harbor. *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT); *see also Equitable Equip. Co. v. Director, OWCP* [*Jourdan*], 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999). In addition after the administrative law judge issued his decision in this case, a state court found that the contract between Global and Harbor did not contain a valid indemnification agreement. *Sanchez v. Harbor Constr. Co., Inc.*, 996 So.2d 584 (La.Ct.App. 2008). Moreover, while the state court acknowledged that as part of the contractual arrangement between Harbor and Global, "Global provides the workers' compensation insurance," *id*. at 589, it is undisputed that the insurance policy in the record underwritten by LCTA does not extend to any entity other than Global. *See* Harbor's Brief in Support of its Petition for Review at 24; Global Exhibit 5. Thus, LCTA cannot be the responsible carrier in this case.

We, therefore, reject Harbor's assertion that Global's agreement to insure Harbor for workers' compensation to cover any injuries incurred by workers which Global supplied to Harbor, mandates that Global's carrier, LCTA, is the responsible carrier in this case. Consequently, we affirm the administrative law judge's findings that Harbor is the responsible employer and that its carrier, Gray, is the responsible carrier. We therefore affirm the administrative law judge's conclusion that Harbor is responsible for reimbursing Global for $85,190.63 for medical benefits, $67,582.11 in disability benefits, and $8,681.54 for vocational rehabilitation. Decision and Order at 16; *see generally Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

Accordingly, the administrative law judge's findings that claimant is totally disabled, and that Harbor, as the responsible employer in this case, is required to reimburse Global for compensation it paid claimant, are affirmed.[6] The administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] In view of our affirmance of the administrative law judge's findings that Harbor is the responsible employer and that Gray is the responsible carrier, we need not address the contentions raised by Global in its protective cross-appeal.