BRB No. 98-688

LAUES J. GIRARD	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
FERRIS A-1 GLASS SHOP, INCORPORATED	)	
	)	
	)	
and	)	
	)	
VALLEY FORGE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

R. Scott Ramsey, Jr., Morgan City, Louisiana, for claimant.

Thomas J. Smith and Benjamin R. Eustice (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-00359) of Administrative Law Judge Robert D. Kaplan 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).[1] We must affirm the findings of fact and

[1]We hereby sever employer's appeals of the fee awards of the administrative law judge, BRB No. 98-688S, and the district director, BRB No. 98-688Q, from employer's appeal of the administrative law judge's award of benefits. 20 C.F.R.

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 glass helper, injured his right wrist and back on January 16, 1995, at work after he fell off a ladder on a barge. Employer voluntarily paid claimant temporary total disability benefits from January 17, 1995, through August 1995. After finding that claimant established his *prima facie* case of total disability, the administrative law judge found that employer did not establish the availability of suitable alternate employment, and that claimant therefore is totally disabled. The administrative law judge calculated claimant's average weekly wage as $234 based on claimant's weekly earnings with employer. Consequently, the administrative law judge awarded claimant temporary total disability benefits from January 17, 1995, and continuing.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds in support of the administrative law judge's award.

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§802.104(b). The briefing schedule is not yet complete in employer's appeals of the fee awards, and we have concluded that our disposition of the merits should not be delayed. A decision on the fee awards will issue once briefing is complete.

Employer initially contends that the administrative law judge erred in finding that claimant established his *prima facie* case of total disability. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge rationally concluded that claimant is unable to return to his usual work after finding that claimant's former job requirements exceeded medium work and as Dr. Fitter, claimant's treating physician, released claimant to only light work and as Dr. Rhymes limited claimant to sedentary work.[2] *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); Decision and Order at 5; Cl. Exs. B, G at 36. The administrative law judge also rationally found that claimant's post-injury videotaped activities, which the administrative law judge found inconclusive as to the extent of claimant's impairment, did not establish that claimant can return to his usual work as these activities were not as strenuous as his usual work.[3] Decision and Order at 6; Emp. Exs. 17, 18. Lastly, the administrative law judge acted within his discretion in crediting claimant's hearing testimony that he cannot perform his usual work over an audiotape wherein he stated he could perform his usual work. Claimant stated he agreed to say whatever the insurance investigators wanted him to say, *i.e.,* that he was able to return to his usual work, after they showed him a post-injury videotape depicting him hammering and threatened to prosecute him for insurance fraud. *See*

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[2]The administrative law judge found that claimant's former job requirements included climbing ladders while carrying window glass, as well as raising his hands over his head in order to install the glass on the ships. Decision and Order at 5; *see* Tr. at 31-35.

[3]The administrative law judge's finding that claimant's activities as a fireman do not establish that he is able to return to his usual work is supported by substantial evidence as Mr. Perry, the fire chief, testified that claimant is not permitted to do anything but drive the fire truck and monitor the pump. Decision and Order at 6; Tr. at 181; *see also* Tr. at 58-59.

Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 6-7; Emp. Exs. 15, 22; Tr. at 93-105. As the administrative law judge's finding that claimant is unable to return to his usual work is rational and supported by substantial evidence, we affirm it. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Employer next contends that the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment. Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining that employer did not establish suitable alternate employment, the administrative law judge discussed the jobs that employer's vocational expert, Ms. Reese, identified. Decision and Order at 8-10; Emp. Ex. 12; Tr. at 207-256. With regard to the yard hand position, the administrative law judge rationally found that this job did not constitute suitable alternate employment as it was not approved by Dr. Fitter. Decision and Order at 9; Emp. Ex. 16. Although Dr. Fitter approved of the meat wrapper and delivery driver jobs, the administrative law judge rationally found that these jobs do not constitute suitable alternate employment because they exceeded claimant's physical capabilities by requiring lifting up to 50 pounds when Dr. Fitter had not released claimant to lift 50 pounds. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); Decision and Order at 9; Tr. at 237-241. Moreover, the administrative law judge rationally found that the vacuum cleaner salesman job and the remaining two waiter jobs do not constitute suitable alternate employment because no information was provided as to how many hours of work they involved or the earnings to be expected. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); Decision and Order at 9-10; Emp. Ex. 12; Tr. at 223-224. Consequently, we affirm the administrative law judge's finding that employer did not establish suitable alternate employment and his award of total disability benefits.[4]

Lastly, employer challenges the administrative law judge's finding that

[4]We need not address the administrative law judge's finding that claimant did not establish diligence in pursuing alternate employment in light of our affirmance of the administrative law judge's finding that employer did not establish suitable alternate employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Decision and Order at 10 n. 6; Emp. Br. at 23-24.

claimant's average weekly wage is $234 and asserts that the administrative law judge should have found that claimant's average weekly wage was $211.45. Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, Section 10(b) is applied. Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

Citing to Section 10(a), the administrative law judge determined that claimant's average weekly wage was $234 based on the fact that in claimant's three months of employment with employer he worked 39 hours a week earning $6 an hour. Decision and Order at 11; Tr. at 139, 140, 148. The administrative law judge did not consider claimant's earnings from his former employment as a patio installer as he rationally found that it was not comparable to the job he was performing at the time of the injury. *See generally Le v. Sioux City & New Orleans Terminal Corp.,* 18 BRBS 175 (1986); Tr. at 23-24, 31-35. Although the administrative law judge cited to Section 10(a), he actually applied Section 10(c), which is appropriate here as there is insufficient evidence to make a determination of average daily wage under either Section 10(a) or (b).[5] *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); Emp. Ex. 13. Under Section 10(c), the administrative law judge is not required to employ a specific method of calculation and has broad discretion in calculating claimant's average weekly wage based on a variety of

[5]Section 10(a) and (b) requires that the administrative law judge determine claimant's average weekly wage under a specific method of calculation, which is to divide the actual earnings of the appropriate employee for the year preceding the injury by the actual number of days he actually worked during that period. This actual daily rate is then multiplied by 260 for a five-day employee, and the product is divided by 52. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978); *see also Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 n. 3 (1986). As there is no evidence of the number of days claimant worked in the year preceding the injury, Section 10(a) is inapplicable, and Section 10(c) must be used to calculate claimant's average weekly wage. *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).

factors, and thus was not required to accept employer's calculation of an average weekly wage of $211.45 based on all of claimant's earnings in the year preceding the injury. *See generally Hall v. Consolidated Employment Systems, Inc.,* 139 F.3d 1025, 32 BRBS 91 (CRT)(5th Cir. 1998). Moreover, the administrative law judge's use of claimant's wage rate times the number of hours he worked each week is a proper method of computing average weekly wage. *See generally Eckstein v. General Dynamics Corp.,* 11 BRBS 781 (1980). Consequently, we affirm the administrative law judge's finding that claimant's average weekly wage is $234 as it is rational and supported by substantial evidence.[6]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Moreover, the administrative law judge noted that his finding entitles claimant to the minimum applicable compensation rate, and that even if claimant's average weekly wage is less than $234, claimant would still be entitled only to the minimum compensation rate. Decision and Order at 10.