BRB No. 00-0468

ARTHUR WEST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRINITY INDUSTRIES	)	DATE ISSUED: Jan 26, 2001
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DE DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Karla K. Hauser (Tarics & Carrington, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Motion for Reconsideration (99-LHC-0347) of Administrative Law Judge Larry W. Price 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 if they 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 was injured on May 19, 1995, when a boom struck him in the back of his

head causing injuries to his head, shoulders, neck, arms, hands, legs, and back. Without returning to work, claimant retired in 1997 at the age of 62, allegedly due to the effects of his work-related injuries.

In his decision, the administrative law judge found that claimant could not return to his usual employment but that employer had established the availability of suitable alternate employment as of May 8, 1998. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from May 19, 1995, until November 5, 1997, permanent total disability compensation from November 6, 1996, until May 7, 1998, and permanent partial disability compensation thereafter based upon a pre-injury average weekly wage of $479.20 and a residual wage-earning capacity of $114 per week. *See* 33 U.S.C. §908(a), (b), (c)(21). In his Decision on Motion for Reconsideration, the administrative law judge agreed with employer that claimant was entitled to permanent total disability compensation as of November 6, 1997, rather than November 6, 1996, and amended his decision accordingly.

On appeal, claimant argues that the administrative law judge erred in finding that employer had established the availability of suitable alternate employment and in determining that his average weekly wage at the time of his injury was $479.20. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to perform his usual employment duties with employer due to a work-related injury, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the availability of specific jobs within the geographic area in which clamant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See P&M Crane v. Hayes,* 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied* 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

In the instant case, claimant challenges the administrative law judge's decision to rely upon the positions identified by employer's vocational consultant and approved by claimant's long-term treating physician to find that employer established the availability of suitable alternate employment. Claimant contends that neither the physicians of record nor the proposed employers were fully informed of claimant's physical restrictions, especially those relating to his carpal tunnel syndrome, and the administrative law judge thus erred in crediting their opinions. Alternatively, claimant contends that because this case involves dueling experts, *i.e.*, disputing vocational consultants, the opinions of the counselors are in equipoise and therefore employer has failed to carry its burden of proof under the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267,

28 BRBS 43(CRT)(1994).

In determining that employer established the availability of suitable alternate employment, the administrative law judge relied upon the report of Ms. Favaloro, employer's vocational consultant, who identified four positions which were approved by both claimant's treating physician, Dr. Heilman, and an independent medical examiner, Dr. Wilde. Claimant argues that these positions were not suitable based upon his severe carpal tunnel syndrome, a nonwork-related condition. Moreover, claimant argues that the administrative law judge erred in not considering that Ms. Favaloro failed to inform those perspective employers about claimant's alleged symptomology, *i.e.*, his hand and arm symptoms, headaches and dizziness, and neck and low back pain. However, as noted by the administrative law judge, Ms. Favaloro notified possible employers of the parameters of claimant's capacities based upon the results of a functional capacity examination and the medical opinions of record, *see* HT at 41-46; additionally Ms. Favaloro testified that she re-contacted the identified employers after receiving a copy of claimant's medical report concerning his hand usage. *Id.* at 97-100. Next, although claimant's vocational consultant, Mr. Ruppert, opined that the approval of the identified positions by Drs. Heilman and Wilde was made without consideration of claimant's carpal tunnel syndrome, the administrative law judge specifically addressed this contention, finding that both physicians had considered claimant's problem and still approved the proffered positions. *See* Decision and Order at 9. Moreover, although Dr. Wilde opined that any form of employment claimant attempted would probably need to be structured and sheltered and limited to four hours per day, CX 19, he further noted that claimant's carpal tunnel syndrome had greatly improved and that claimant was seeking no further treatment. As Mr. Ruppert conceded, his opinion regarding the degree of claimant's carpel tunnel syndrome was based on his interpretation of a notation by Dr. Melhlhoff, that surgery may be necessary for his carpal tunnel syndrome, and not on that physician's actual description of the condition. Moreover, not only was Dr. Heilman fully aware of the nature and extent of claimant's carpal tunnel syndrome, HT at 87-88, 96, but there is also no medical evidence outlining any work restrictions based on claimant's carpal tunnel syndrome. HT at 82. Thus, contrary to claimant's assertion of error, Drs. Heilman and Wilde both fully understood claimant's medical condition, recognized the restrictions faced by claimant, and thereafter approved the positions proffered by Ms. Favaloro. *See* CXS 21, 22.

Determinations regarding the weight accorded to the evidence of record are the province of the administrative law judge. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In the instant case, the administrative law judge did not find the opinions of the vocational counselors to be in equipoise. Rather, the administrative law judge found that the opinion of claimant's counselor, Mr. Ruppert,

[1]The approved positions involved work as a parking lot cashier, box office cashier, telemarketer, and dispatcher. *See* Emp. Ex 7.

was not more persuasive than that of Ms. Favaloro and Drs. Heilman and Wilde. The administrative law judge thus credited the medical opinions of Drs. Heilman and Wilde, both of whom approved the proposed positions, and found that claimant could perform the positions identified by Ms. Favaloro. Decision and Order at 9-10. Accordingly, as the administrative law judge's decision is supported by substantial evidence, his finding that employer established the availability of suitable alternate employment is affirmed.

Next, claimant argues that the administrative law judge improperly found that his pre-injury average weekly wage was $479.20 per week. Claimant's only contention on appeal is that while the administrative law judge properly included the vacation and sick leave monies that he received while out of work for an unrelated injury in his calculation of his total earnings in the 52 weeks preceding his injury, he should not have included the 184 hours of non-work vacation time in his calculation of the number of hours for which claimant received wages in the year prior to his injury. Thus, claimant alleges that his correct pre-injury average weekly wage is $528.50.

Section 10(a), 33 U.S.C. §910(a), is to be applied when an employee has worked substantially the whole of the year preceding his injury. *See Gilliam v. Addison Crane Co.*,

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[2]In making his determinations, the administrative law judge took claimant's wages for the prior year, $23,613.20, and divided them by the 1,971.2 hours for which claimant received those wages. The resulting sum, $11.98, was then multiplied by 8 hours per day to arrive at a daily wage of $95.84. The administrative law judge then multiplied this figure by 260 days, the result of which is $24,918.40, which he divided by 52 weeks, thereby obtaining an average weekly wage of $479.20. *See* Decision and Order at 11.

[3]Claimant contends the correct calculation is to take his wages for the prior year, $23,613.20, divided by 1,787.2 hours of actual work, which equals $13.21 per hour times 8 hours per day, which equals $105.70 per day, times 260 days, which equals $27,481.79, divided by 52 weeks to obtain an average weekly wage of $528.50.

[4]All parties agree that the administrative law judge properly made his calculations under Section 10(a) of the Act, 33 U.S.C. §910(a), because claimant was employed substantially the entire year prior to his injury. Section 10(a) states:

> If an injured employee shall have worked in the employment in which he was working at the time of injury, whether for the same or another employer, during substantially the whole, if the year immediately preceding his injury, his average annual earnings shall consist of 300 times the average daily wages of salary for a six day worker and 260 times the average daily wage or salary for a five day worker, which he shall have earned in such employment during the day when so employed.

21 BRBS 91 (1988). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the compensation. *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *see Universal Maritime Corp., v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997).

We reject that claimant's assertion that the administrative law judge's inclusion in his Section 10(a) calculation of the number of hours claimant was on vacation and sick leave in the year prior to his work injury violates the Board's holding in *Wooley v. Ingalls Shipbuilding, Inc*., 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12 (CRT)(5th Cir. 2000). In *Wooley*, the Board addressed a situation in which a worker "sold back" his vacation days to his employer, *i.e.*, he did not use the vacation time but received extra money for the unused hours. To have included "sold back" days in the calculation of claimant's average weekly wage would have diluted the worker's earnings by creating additional work days, resulting in claimant's having "worked" more days than a five-day a week worker can work in reality and more than the statutorily mandated numbers of days for a five-day per week worker. *See Wooley*, 33 BRBS at 90. In affirming the Board's decision, the United States Court of Appeals for the Fifth Circuit specifically found it to be "appropriate to charge the ALJ with making factfindings concerning whether a particular instance of vacation compensation counts as a "day worked" or whether it was "sold back" to the employer for additional pay." *Wooley*, 204 F.3d at 618, 34 BRBS at 14 (CRT). In the instant case, however, claimant did not sell back the 184 hours for which he received monies from employer but, rather, claimant was absent from work due to illness and/or vacation during that time.

Pursuant to the court's holding in *Wooley*, we hold that the administrative law judge properly treated the number of hours for which claimant took vacation and sick pay as days worked, as it is uncontested that claimant did not "sell-back" those days to employer. *See Wooley*, 204 F.3d 616, 34 BRBS 12 (CRT). Therefore, inasmuch as the administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence and in accordance with law, it is affirmed.

Accordingly the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

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33 U.S.C. §910(a).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge