BRB No. 03-0350

JOHN ARMSTRONG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE/ HAM MARINE, INCORPORATED	)	DATE ISSUED: Jan. 12, 2004
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

D. Mitchell McCranie (Denham, Backstrom & Associates, Ltd.), Ocean Springs, Mississippi, for claimant.

Michael J. McElhaney, Jr., and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-2687) of Administrative Law Judge Lee J. Romero, Jr., 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 commenced employment with employer as an electrician on February 7, 2000.[1] On February 28, 2000, claimant injured his back when he fell backward after stepping an a pipe flange. Following surgery to remove a herniated disc from his back, claimant returned to work for employer in a light-duty capacity in July 2000. Claimant continued to work for employer until he was discharged in September 2000. Employer voluntarily paid claimant medical benefits and temporary total disability compensation from March 10, 2000, through July 9, 2000. 33 U.S.C. §§907, 908(b).

In his Decision and Order, the administrative law judge determined that claimant was incapable of resuming his usual employment duties with employer, that claimant's condition reached maximum medical improvement as of January 10, 2001, that employer established the availability of suitable alternate employment as of February 6, 2001, and that the average of the wages in the positions identified as being suitable for claimant established claimant's post-injury wage-earning capacity. Next, pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge found claimant's average weekly wage at the time of his injury to be $379.70. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the periods of March 10, 2000 to July 9, 2000, and September 5, 2000 to January 9, 2001, permanent total disability compensation from January 10, 2001 to February 5, 2001, and permanent partial disability compensation from February 6

, 2001 and continuing. 33 U.S.C. §908(a), (b), (c)(21).

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage as well as the administrative law judge's award of disability benefits. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury, contending that the administrative law judge should have calculated claimant's average weekly wage under Section 10(b) of the Act rather than Section 10(c) of the Act. 33 U.S.C. §910(b), (c). We disagree. Section 10(b) of the Act applies where the employee was not employed for substantially the whole of the year; the calculation of claimant's average weekly wage under subsection (b) is based on the wages of an employee of the same class as claimant who worked substantially the whole year in similar employment in the same or a neighboring place. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). Section 10(c) of the Act is a catch-all provision to be used in instances when neither Section 10(a), 33 U.S.C. §910(a), nor Section 10(b) can be

[1] Claimant previously worked for employer from October 1998 to June 1999. He thereafter worked for various employers prior to his return to employer in February 2000.

reasonably and fairly applied.[2] *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

In the instant case, the administrative law judge found that Section 10(b) was inapplicable since the record does not contain the wage information of a similar employee, which is necessary to perform a Section 10(b) calculation. Our review of the record reveals that neither party submitted into evidence documentation regarding the wages of other similarly situated electricians. This failure is fatal to claimant's contention of error since Section 10(b) expressly requires evidence of the earnings "of an employee of the same class working in similar employment in the same or a neighboring place."[3] *See* 33 U.S.C. §910(b); *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT). Without this evidence, the administrative law judge cannot apply Section 10(b) to calculate claimant's average weekly wage. As Section 10(b) could not be applied, the administrative law judge properly determined claimant's average weekly wage pursuant to Section 10(c). Accordingly, as the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) is unchallenged, it is affirmed.[4]

Lastly, claimant contends that he is entitled to temporary disability benefits for various periods: temporary total disability compensation from September 5, 2000, through March 1, 2001, when he commenced employment at Cut Rate Liquor Store; temporary partial disability compensation from March 2, 2001 through December 14, 2001 based upon the wages that he earned while employed by Cut Rate; temporary total disability compensation from December 15, 2001 through February 5, 2002; temporary partial disability compensation from February 6, 2002, and continuing based upon the wages which he is presently earning while employed as a leasing agent with Friede Goldman.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd*

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[2] In the instant case, no party contends that Section 10(a), 33 U.S.C. §910(a), is applicable.

[3] Claimant's argument that his actual hourly rate of $14.75 multiplied by 40 hours should be utilized under Section 10(b) is thus without merit as it is contrary to the plain language of the subsection.

[4] Utilizing Section 10(c), the administrative law judge found that claimant's employment records indicate that he earned a total of $19,744.44, working for multiple employers, in the 52 weeks prior to the occurrence of his work-related injury. The administrative law judge divided this sum by 52 to determine that claimant's average weekly wage at the time of his injury was $379.70. The result obtained by the administrative law judge is reasonable, is supported by substantial evidence, and reflects claimant's annual earning capacity at the time of his injury.

Shipyards Corp., 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Where, as here, claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he were diligent. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986). In the instant case, the administrative law judge determined that employer established the availability of suitable alternate employment as of February 6, 2001, and that as claimant reached maximum medical improvement on January 10, 2001, claimant was accordingly entitled to temporary total disability compensation from September 5, 2000 through January 9, 2001, at which time benefits were to be paid to claimant for a permanent disability. As claimant does not challenge the administrative law judge's findings regarding the nature and extent of his disability, they are affirmed. Accordingly, claimant's disability became permanent in nature on January 10, 2001, and the extent of his disability became partial, rather than total, as of February 6, 2001.

An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act provides that claimant's 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 calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *See Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In his decision, the administrative law judge took into consideration claimant's age, education, industrial history and the availability of employment in concluding that claimant's post-injury wage earning capacity amounts to the average of the hourly wages of the jobs shown by employer to be available to claimant, rather than the wages actually earned by claimant post-injury.[5] *See* Decision and Order at 31-32. On appeal, claimant has neither demonstrated a legal error by reference to relevant caselaw nor has he identified any factual error in the administrative law judge's consideration of the issue of claimant's post-

[5] In this regard, the administrative law judge determined that employer had identified six specific employment positions which were suitable and available to claimant. *See* Decision and Order at 27-34.

injury wage-earning capacity. As the administrative law judge properly considered the factors necessary in addressing this issue, we affirm his conclusion that claimant retains a greater post-injury wage-earning capacity than that reflected in his actual post-injury employment, and the administrative law judge's subsequent calculation of claimant's post-injury wage-earning capacity based upon an average of the salaries paid by the positions identified as constituting suitable alternate employment. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge