BRB No. 90-377

WILLIAM W. MOORHOUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEALAND SERVICES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED:
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

William J. Moorhouse, Puyallup, Washington, pro se.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals the Decision and Order (87-LHC-652, 89-LHC-2375) of Administrative Law Judge Robert J. Brissenden denying benefits 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, who began working for employer as a loader-checker in approximately May 1980, injured his lower back on October 9, 1984, and again on November 5, 1985. Employer voluntarily paid claimant temporary total disability benefits for the following periods: October 10, 1984; November 1, 1984 through December 9, 1984; and November 6, 1985 through June 17, 1986. Claimant has not returned to work with employer since the second injury, although he has since been employed intermittently as a driver for a car rental agency. He filed this claim under the Act, seeking permanent partial disability benefits during the period from December 9, 1984 through November 5, 1985, and permanent total disability benefits as of June 18, 1986, the date employer terminated its voluntary payments of temporary total disability benefits, and continuing.

In his Decision and Order, the administrative law judge found that claimant was able to perform his usual work following the first injury based on Dr. Burns' opinion, notwithstanding claimant's hearing testimony to the contrary. The administrative law judge therefore denied the benefits sought for the period from December 9, 1984 to November 5, 1985. In addition, the administrative law judge found that claimant was unable to return to his usual work due to his work-related back condition following the second injury, and that he reached maximum medical improvement on February 28, 1986. The administrative law judge then found that employer established the availability of suitable alternate employment as of the date of maximum medical improvement, relying on the vocational reports and hearing testimony of Carolyn Prosser, employer's vocational rehabilitation counselor. Next, the administrative law judge applied Section 10(c), 33 U.S.C. §910(c), in determining claimant's average weekly wage based on evidence of record that claimant's employment with employer was intermittent. The administrative law judge, using claimant's actual wages, found that claimant would have earned $7,994.77 had he worked the 52 weeks preceding his November 5, 1985 injury, amounting to an average weekly wage of $153.75. The administrative law judge concluded that because the average weekly wage in 1985 of the suitable alternate jobs was greater than claimant's average weekly wage, claimant suffered no loss of wage-earning capacity. The administrative law judge therefore denied benefits.

As claimant appeals the administrative law judge's Decision and Order without the assistance of counsel, the Board will review the administrative law judge's decision under its statutory standard of review. O'Keeffe, supra. Employer has not responded to this appeal.

We affirm the administrative law judge's finding that claimant is not entitled to compensation between December 9, 1984 and November 5, 1985. It is within the administrative law judge's discretion to discredit claimant's complaints of pain during this period, and his determination that claimant could return to his usual work is supported by substantial evidence in the record. See Goldsmith v. Director, OWCP, 838 F.2d 1079, 21 BRBS 27 (CRT) (9th Cir. 1988). The administrative law judge credited the opinion of Dr. Burns, an orthopedic surgeon who examined claimant in October and November 1984 and released him to return to full duty, without restrictions, on December 10, 1984. Emp. Ex. 5; Dep. of Dr. Burns at 13, 31.

We further affirm the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment after the November 5, 1985 injury as of February 28, 1986, the date Dr. Wiese opined claimant reached maximum medical improvement. See Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). See also Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), appeal pending, No. 91-70648 (9th Cir. Oct. 24, 1991). The

administrative law judge credited the testimony and labor market reports of Carolyn Prosser. Ms. Prosser testified that she determined claimant's employment aptitude and identified alternate job opportunities by reviewing a physical capacities evaluation completed by Dr. Wiese in September 1987, which indicated claimant could lift and carry up to 24 pounds on occasion and could sit, stand, and walk two to three hours per day, and comparing these restrictions to the alternate jobs listed in her labor market survey. Tr. at 104; Emp. Ex. 12.[1] The administrative law judge found that 10 of these jobs, as an electronics assembler and light delivery worker, were suitable for claimant. Decision and Order at 25. In addition, the administrative law judge found that Ms. Prosser contacted actual potential employers in 1987 and 1989, and she testified at the hearing that similar jobs were available for claimant in February 1986. Tr. at 101-104, 119. Moreover, Ms. Prosser's labor market survey specifically states that the identified employers actually hired for these jobs between June and October 1986. Emp. Ex. 12. We hold that this evidence constitutes substantial evidence in support of the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment as of the date claimant reached maximum medical improvement. See Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), cert. denied, 111 S.Ct. 798 (1991); see also Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1992).

We also affirm the administrative law judge's average weekly wage finding pursuant to Section 10(c). The primary purpose of Section 10(c) is to reach a fair and reasonable approximation of claimant's earning capacity at the time of injury when neither Section 10(a) nor Section 10(b) can fairly and reasonably be applied. See, e.g., Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). In the instant case, the administrative law judge properly applied Section 10(c) because claimant's employment during this period was intermittent and irregular. Id.; Gilliam v. Addison Crane Co., 21 BRBS 91 (1987). As the administrative law judge stated, both employer's records and the testimony of employer's claims supervisor, Thomas Jackson, reflect that for most of the year prior to his second injury, claimant was a "casual" worker, i.e., someone who was not a permanent employee, but who had his name placed at the bottom of a seniority list and was called for work as it became available. Tr. at 79-80. Claimant conceded that he had not been working on a

[1] When informed that Dr. Wiese had also completed a Department of Labor work restriction form indicating claimant could only lift 10-20 pounds, see Cl. Ex. B5, Ms. Prosser stated that this did not alter her opinion as to the suitability of the listed jobs because these were light jobs which involved little or no lifting. Tr. at 110-112.

continuous basis prior to his second injury. Dep. at 29. Based on this evidence, therefore, we affirm the administrative law judge's application of Section 10(c) in determining claimant's average weekly wage.

Using Section 10(c), the administrative law judge calculated claimant's average weekly wage by taking claimant's actual earnings between January 1, 1985 and November 5, 1985, $5,704.36, and combining them with the amount claimant would have earned had he worked in the 9 weeks between November 5, 1984 and December 31, 1984, $2,290.41.[2] Emp. Ex. 3; Cl. Ex. B16. The administrative law judge divided this sum, $7,994.77, by 52 to arrive at an average weekly wage of $153.75. See 33 U.S.C. §910(d). We hold that the result reached by the administrative law judge is rational and supported by substantial evidence, and we therefore affirm the administrative law judge's determination of claimant's average weekly wage under Section 10(c). See generally Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182 (1984).

Lastly, the administrative law judge found that claimant suffered no loss of wage-earning capacity due to his work injury, as he found that the average weekly wage paid at the time of injury in the jobs identified as suitable alternate employment was more than claimant's average weekly wage of $153.75. We affirm this conclusion as it is in accordance with law and supported by the evidence of record. See Emp. Ex. 12; see generally Cook v. Seattle Stevedore Co., 21 BRBS 4, 7 (1988).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[2] In arriving at this figure, the administrative law judge first calculated claimant's average weekly wage at the time of his injury in October 1984. He determined that claimant's average weekly wage was $254.49, based on the sum of claimant's actual wages in the years 1983 and 1984 divided by the 95 and three-seventh weeks that claimant worked in this period.

REGINA C. McGRANERY
Administrative Appeals Judge