BRB No. 92-0744

NGHIA HUU THAI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SWIFTSHIPS, INCORPORATED	)	DATE ISSUED
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Collins C. Rossi (Bailey, Rossi & Kincaid), Metairie, Louisiana, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (90-LHC-2079) of Administrative Law Judge Quentin P. McColgin 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 April 15, 1981, when he slipped while lifting an 85 pound piece of wood and hit his back on a piece of steel. After undergoing a lengthy period of treatment with medication and physical therapy, claimant underwent surgery on November 30, 1983. On June 1, 1986, claimant was given an impairment rating of 35 percent and was

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

advised that he could return to work with restrictions; claimant, however, did not return to work. On September 30, 1988, claimant's treating physician opined that claimant's condition had deteriorated

and increased claimant's work restrictions. Claimant has not worked since the date of his injury.

In his Decision and Order, the administrative law judge, after acknowledging an alleged May 1983 agreement between the parties in which compensation was to be paid to claimant at a rate of $212.92 per week, determined that claimant had a pre-injury average weekly wage of $343.60. The administrative law judge then determined that although claimant could not return to his usual employment, employer established the availability of suitable alternate employment for the period June 3, 1985, to September 30, 1988, at which time additional work restrictions were placed on claimant by his physician. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from April 15, 1981 through June 3, 1985, and from September 30, 1988, and continuing. 33 U.S.C. §908(b). From June 4, 1985 through September 29, 1988, claimant was awarded compensation for a permanent partial disability based on a residual wage earning capacity of $134.00 per week. 33 U.S.C. §908(c)(21), (h).

On appeal, employer contends that the administrative law judge erred in addressing the issue of claimant's average weekly wage; in the alternative, employer challenges the administrative law judge's calculation of claimant's average weekly wage. Additionally, employer alleges that the administrative law judge erred in determining that it failed to establish the availability of suitable alternate employment subsequent to May 23, 1991. Claimant has not filed a response.

Employer first contends that the parties stipulated to claimant's pre-injury average weekly wage and, therefore, the administrative law judge erred in addressing this issue. We disagree. In concluding that the issue of claimant's average weekly wage was before him, the administrative law judge found that even if such an agreement between the parties existed, it was invalidated by Section 15(b), 33 U.S.C. §915(b), of the Act.[1] Further, the administrative law judge concluded that only those agreements approved by the district director pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i) (1988), are excepted from the provisions of Section 15(b).

[1]Section 15(b) provides

> [n]o agreement by an employee to waive his right to compensation under the Act shall be valid.

33 U.S.C. §915(b).

Initially, we note that employer has submitted no documentation in support of its contention that either a stipulation or an agreement had been reached by the parties regarding this issue. The only mention of the average weekly wage issue in the record is a letter, dated June 1, 1983, from carrier's attorney to claimant's attorney indicating that his client agrees to the "settlement proposal" of May 4, 1983, in which claimant would receive a weekly compensation rate of $212.92 in exchange for reinstatement of medical treatment. EX 23. The May 4, 1983, "proposal" is a letter which states only that claimant is desirous of having his medical treatment reinstated as well as a possible settlement. EX 21. Thus, as there is no indication that a complete settlement application was ever submitted for approval, *see* 33 U.S.C. §908(i)(1988); 20 C.F.R. §§702.242, 702.243; *see also McPheherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992), the parties' correspondence will not bar the administrative law judge's consideration of this issue. Similarly, we reject employer's assertion that claimant's average weekly wage had been stipulated to by the parties, since that contention is unsupported by the record. Specifically, average weekly wage is not listed in the stipulations, employer's pre-hearing statement, LS-18, dated February 19, 1991, lists average weekly wage as an issue to be resolved at the formal hearing, and claimant's average weekly wage was set forth as an unresolved issue at the hearing. *See* transcript at 5-6. Thus, as no formal stipulation of claimant's average weekly wage was presented to the administrative law judge, and employer was aware that that issue was before the administrative law judge, we hold that the administrative law judge committed no error in addressing the issue of claimant's pre-injury average weekly wage.

Employer alternatively challenges the administrative law judge's average weekly wage calculation pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this claim arises, has stated that the prime objective of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury; in order to meet this objective, the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity. *See Empire United Stevedores & Signal Administration, Inc. v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). Thus, the Board will affirm an administrative law judge's determination of a claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of injury. *See Hicks v. Pacific Maritime Supply Co., Ltd.*, 14 BRBS 549 (1981).

In the instant case, the administrative law judge, utilizing claimant's social security records from January 1 to April 15, 1981, found that claimant had an average daily wage of $68.72 (*i.e.*, claimant's earnings for that period, $5,154.32, divided by 75 days). The administrative law judge then multiplied that amount by 260 days to determine that claimant had an average yearly wage of $17,867.20, which, after application of Section 10(d), 33 U.S.C. §910(d), yields an average weekly wage of $343.60.[2] Employer asserts that this computation is contrary to Section 10(c), since it employs computations provided for in Section 10(a), 33 U.S.C. §910(a), and that the administrative

[2]Section 10(d)(1) of the Act states that the average weekly wages of an employee shall be one fifty-second part of his average annual earnings. *See* 33 U.S.C. §910(d)(1).

law judge erred in failing to consider claimant's earnings for the years 1978 through 1991.[3] We disagree. The administrative law judge's calculation is the same as if he divided actual earnings by actual weeks worked to achieve a measure of actual weekly earnings and then extrapolated this figure over the entire year by multiplying it by 52 to achieve an annual earning capacity under Section 10(c), which would then be subject to the 52-week divisor of Section 10(d). Furthermore, the United States Court of Appeals for the Fifth Circuit has stated that calculations under Section 10(c) are not limited to the 52 weeks immediately preceding a claimant's injury. *See Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT). In the instant case, the result reached by the administrative law judge is consistent with the goal of seeking a reasonable approximation of claimant's annual earning capacity. Accordingly, the administrative law judge's finding that claimant's average weekly wage is $343.60 is affirmed. *See generally Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988).

Lastly, employer contends that the administrative law judge erred in failing to find that it had established the availability of suitable alternate employment subsequent to May 23, 1991. Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied* 935 F.2d 1293 (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Employer contends that the administrative law judge erred in failing to credit the May 23, 1991, labor market survey prepared by American Rehabilitation Consultant Services, Inc., which identified five alternate employment positions for claimant: parking attendant, cashier, attendant for a gameroom and video arcade, press utility worker for a newspaper and beader for a jewelry designer. In concluding that employer's survey failed to establish the availability of suitable alternate employment, the administrative law judge specifically noted that that report failed to describe the jobs set forth as suitable for claimant; rather, the report listed only the position name along with the hourly rate of pay associated with the position. *See* EX 31. Additionally, while the survey stated that claimant's physical restrictions were taken into consideration, the administrative

[3]We note that employer itself seems uncertain as to what claimant's average weekly wage should be. Initially, employer states that claimant's average weekly wage is 150 percent of the agreed to compensation rate; thus, claimant's average weekly wage is $319.38 because it is 150 percent of $212.92. Brief at 7. Subsequently, employer argues that the correct method is to add claimant's wage from this employer from 1978 through 1981, a total of $48.341.34, and then divide by the number of weeks worked, *i.e.*, 171, for an average weekly wage of $282.70. Brief at 8. Then, employer argues that the average weekly wage sought is properly $312.38. Brief at 9. In documents developed prior to the hearing, employer lists claimant's average weekly wage as $475.70, EX 1, $346.00, EX 2, and $319.30, EXS 6-10.

law judge found that claimant's restricted motion of the vertebral axis and sitting only in appropriate chairs were not considered. That report explicitly states:

> [a]s per the information provided by Dr. Kinnet, physical demands did not exceed twenty-five (25) to thirty (30) pounds of repetitive lifting and allowed opportunities to alternate sitting, standing and walking. Additionally, physical demands of these jobs did not require repetitive stooping, squatting or bending.

EX 31. As the administrative law judge, as factfinder, is entitled to evaluate the evidence of record, it was within his authority to determine that employer's survey failed to consider the totality of claimant's restrictions; thus, the administrative law judge rationally discredited employer's vocational report because of the report's inaccurate assessment of claimant's capabilities.[4] *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Additionally, given the absence of the jobs' descriptions in the report, the administrative law judge was unable to independently determine if claimant is physically capable of performing the jobs. *See generally P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 122 (CRT); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). We, therefore, affirm the administrative law judge's finding that employer's May 23, 1991 labor market survey is insufficient to establish the availability of suitable alternate employment and his consequent finding that employer has failed to establish the availability of suitable alternate employment subsequent to September 30, 1988. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

[4]Employer asserts that the report did consider all of Dr. Kinnet's restrictions, relying on a statement in the report that the functional limitations described by Dr. Kinnet in an April 1991 deposition were considered. We reject this argument in view of the explicit description of the restrictions quoted above.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge