BRB No. 91-0988

ERNEST E. EUBANK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of James J. Butler, Administrative Law Judge, United States Department of Labor.

Richard L. Newman (Jewel & Leary), Oakland, California, for claimant.

Phil N. Walker (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (90-LHC-0763) of Administrative Law Judge James J. Butler 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, a marine machinist, sustained an injury to both of his knees on March 27, 1987, while chiseling nuts and bolts from a manifold. Subsequent to that time, claimant has undergone significant medical treatment and surgery; claimant has not returned to work since the date of his injury. In his decision, the administrative law judge found that claimant was permanently and totally disabled since employer failed to establish the availability of suitable alternate employment, claimant's compensation rate was $256 per week, and that, as employer failed to file a timely petition for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), the absolute bar mandated by the statute must be invoked. *See* 33 U.S.C. §908(f)(3); 20 C.F.R. §702.321(b).

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment, in determining claimant's pre-injury average weekly wage, and in finding it barred from Section 8(f) relief pursuant to Section 8(f)(3). Claimant responds, agreeing with employer that the administrative law judge's computation of his pre-injury average weekly wage is mathematically incorrect, but urging affirmance of all other aspects of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response brief, addressing the issue of employer's entitlement to relief under Section 8(f) and urging affirmance of the administrative law judge's finding that such relief is barred under Section 8(f)(3).

I. Suitable Alternate Employment

Where, as in the instant case, claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographical area where the employee resides, which he is capable of performing, considering his age, education, work experience and physical restrictions and which he could secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994).

In the instant case, employer contends that the administrative law judge erred in rejecting the testimony of Ms. Wilson, its vocational counselor, which, employer avers, is sufficient to establish the availability of suitable alternate employment which claimant is capable of performing. In his

decision, the administrative law judge relied upon the opinion of Mr. Linder, a rehabilitation counselor, who opined that claimant had "no residual wage earning capacity," Tr. at 41, rather than that of Ms. Wilson, in concluding that claimant remained permanently totally disabled. In rendering this credibility determination, the administrative law judge stated that Mr. Linder's conclusions were consistent with the medical testimony of Dr. Schulze, claimant's treating physician, who opined that claimant's pain and poor ability to walk rendered him incapable of performing any type of work, and Dr. Mandell, an agreed medical examiner, who documented a continuing disintegration of claimant's physical condition. *See* Tr. at 25; EX-13.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, we affirm the administrative law judge's decision to credit the testimony of Mr. Linder, as supported by the medical opinions of Drs. Schulze and Mandell, as that determination is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as we affirm the administrative law judge's finding that claimant cannot perform any employment, it follows that employer has not established the availability of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, we affirm the administrative law judge's conclusion that claimant is permanently totally disabled.

II. Average Weekly Wage

Employer next contends that the administrative law judge erred in calculating claimant's average weekly wage for compensation purposes. Specifically, employer argues that the administrative law judge's calculation is mathematically incorrect, that the administrative law judge erroneously assumed that full-time employment was available to claimant pre-injury, and that the administrative law judge's calculation under Section 10(c) of the Act resulted in a figure identical to that previously rejected by the administrative law judge.

Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's average annual wage where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to subsection (c) if neither subsection (a) nor (b) can be reasonably and fairly applied. *See* 33 U.S.C. §910(a), (b), (c). The object of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earnings at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290

(1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

In the instant case, the administrative law judge initially concluded that claimant's average weekly wage must be calculated pursuant to Section 10(c), 33 U.S.C. §910(c), finding Section 10(a) and (b) inapplicable since claimant did not work in the employment in which he was working at the time of his injury during substantially the whole of the year immediately preceding his injury. Thereafter, the administrative law judge multiplied claimant's hourly rate of $12 by 40 hours per week to produce an average weekly wage of $480.[1]

We agree with employer that the administrative law judge's calculation of claimant's average weekly wage is inconsistent with his finding that claimant was not employed full-time in the year preceding his injury. Moreover, the administrative law judge's calculation pursuant to Section 10(c) results in a figure identical to that previously rejected by the administrative law judge when he discussed, and rejected, use of Section 10(b) in the instant case, *i.e.*, an average weekly wage of $480. Accordingly, as the administrative law judge's average weekly wage determination under Section 10(c) is inconsistent with his prior determination and does not appear to reasonably represent claimant's earning capacity at the time of his injury given claimant's limited employment with employer, we vacate the administrative law judge's determination of claimant's average weekly wage, and we remand the case for the administrative law judge to recalculate claimant's average weekly wage pursuant to Section 10(c) of the Act. *See generally Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

III. Section 8(f)

Lastly, employer contends that the administrative law judge erred in applying the Section 8(f)(3) absolute bar to its request for Section 8(f) relief, based upon employer's failure to submit a timely and fully documented application to the district director in accordance with Section 702.321 of the regulations, 20 C.F.R. §702.321. Specifically, employer asserts that the administrative law judge erred in summarily denying its request for Section 8(f) relief without addressing its contention that its failure to timely file a fully documented application was occasioned by both the Department of Labor's failure to respond to its subpoena for documents and claimant's failure to sign a medical release for his medical history. The Director responds, arguing, *inter alia*, that once employer missed the deadline for filing a fully documented application set by the district director,[2] employer failed to timely file its application and was barred from Section 8(f) relief.[3]

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[1]We note that the administrative law judge's calculation of claimant's compensation rate is mathematically incorrect. Using the administrative law judge's method would result in a weekly compensation rate of $320 (*i.e.*, $12 per hour x 40 hours per week = $480 per week x 66 2/3 per cent = $320), but the administrative law judge ordered benefits at a rate of $256 per week.

[2]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

[3]The Director asserts: (1) that there is no evidence that a valid subpoena was ever issued as the

Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3) (1988), provides that a request for Section 8(f) relief which is filed after September 28, 1984, such as the one in the instant case, must be presented to the district director prior to consideration of the claim by the district director and that failure to do so will bar the payment of benefits by the Special Fund unless employer could not have reasonably anticipated that Special Fund liability would be at issue. The regulations implementing this provision provide that employer must request Section 8(f) relief and file a fully documented application in support of its request.

Section 702.321(b) of the regulations provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is an issue in dispute. 20 C.F.R. §702.321(b)(1). Section 702.321(b)(2) states that the district director may, at the request of the employer and for good cause, grant an extension of the date for submission of the fully documented application. 20 C.F.R. §702.321(b)(2). While Section 702.321(b)(3) states that an application need not be filed where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of the claim's referral to the Office of Administrative Law Judges, it provides that in all other cases failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund; such a failure may be excused where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order. 20 C.F.R. §702.321(b)(3); *see Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).

In the instant case, employer requested Section 8(f) relief during an informal conference before the district director in July 1989; employer was subsequently given until September 15, 1989, to submit its application in support of that request. On September 14, 1989, employer sought an extension of time in which to file its application; the district director granted this request and set November 15, 1989, as the date by which employer was to file its application. Subsequently, on November 28, 1989, the claims examiner wrote to the parties stating that as they had been unable to settle the case, the claim would be referred for a hearing. EX-14. On December 26, 1989, employer wrote to the district director detailing its efforts to obtain the medical evidence needed to support its request for Section 8(f) relief, objecting to the referral of the case to the Office of Administrative Law Judges, and requesting another extension of time in which to file its supporting application for Special Fund relief. EX-16. On January 3, 1990, the district director denied employer's request for an extension; the case was referred to the Office of Administrative Law Judges that same day. DX-2. Employer asserts that it subsequently obtained the needed medical documentation in March 1990,

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district director never signed the subpoena and there is no service sheet which establishes that anyone in the district director's office was ever served, Ex. 18 at 21; (2) that the prior injuries upon which employer hoped to establish entitlement all occurred at employer's facility and therefore the information was already available to employer; and (3) that employer's argument that permanency was not at issue until claimant reached maximum medical improvement on February 16, 1990, is without merit as employer itself requested Section 8(f) relief at the informal conference held on July 19, 1989.

and that it filed a fully documented application with the administrative law judge the following month.

We agree with employer that the administrative law judge erred in summarily stating, without addressing employer's specific arguments that the evidence needed to document its request was inaccessible, that he found no excuse for employer's failure to file a timely and fully documented application for Section 8(f) relief. In this case, employer timely raised Section 8(f) at the informal conference, but it did not comply with the November 15, 1989, deadline set by the district director for filing its fully documented application. Employer did seek another extension of time to file its application on December 26, approximately one month after the deadline expired, and the district director summarily denied its request. The regulations authorize the district director to grant extensions of time for filing an application; the factors to be considered in granting such an extension include, but are not limited to, whether compensation is being paid, the hardship of delaying referral, the complexity of the issues and availability of medical and other evidence to employer, the length of time employer should have been aware permanency was at issue and the reasons listed in support of the request. *See* 20 C.F.R. §702.321(b)(2). Moreover, the failure to file a timely application may be excused where the employer could not have reasonably anticipated the liability of the Special Fund. *See* 20 C.F.R. §702.321(b)(3). Issues involving Section 8(f)(3) are subject to *de novo* review by an administrative law judge, *see Tennant*, 26 BRBS at 103, and the administrative law judge has the discretion to examine the facts and excuse the late filing. Employer's contentions as to the unavailability of evidence supportive of its application for Section 8(f) relief, and the Director's response thereto, must be addressed in order to determine whether employer's failure to file its application with the district director may be excused. As the administrative law judge made no findings on employer's assertion that the evidence needed to support its application for Section 8(f) relief was inaccessible, we vacate his invocation of the absolute bar contained in Section 8(f)(3) of the Act. The case is remanded for the administrative law judge to address the parties' arguments regarding employer's alleged inability to obtain the necessary evidence.

Accordingly, the administrative law judge's findings on average weekly wage and the denial of Section 8(f) relief are vacated and the case is remanded to the administrative law judge for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge