BRB No. 98-1298

KERN A. STEPHENS	)	
	)	
Claimant-Respondent	)	DATE ISSUED: May 26, 1999
	)	
v.	)	
	)	
MCDERMOTT, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

J. Louis Gibbens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-2389) of Administrative Law Judge C. Richard Avery awarding 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, while working as a shipfitter for employer, sustained an injury to his right wrist on August 25, 1996, when he fell from a barge onto the ground below. He was taken to the hospital where x-rays revealed a right distal radius fracture (*i.e.*, a broken wrist). A closed reduction of the fracture was performed by Dr. Stone, and claimant was released from

the hospital on August 26, 1996. A urine sample taken from claimant immediately following the accident tested positive for cocaine use. As a result of the positive drug test employer terminated claimant and refused to pay any compensation for his injury.

Claimant continued to receive treatment until November 27, 1996, when Dr. Stone discharged claimant from his care. At that time, Dr. Stone stated that claimant had not reached maximum medical improvement with regard to his injured right wrist, noting that claimant still needed the supervision of a physical therapist. In a post-trial report dated April 1, 1998, Dr. Stone opined that claimant has a permanent impairment rating of 15 percent for his upper right extremity. Meanwhile, claimant filed a claim seeking compensation and medical benefits under the Act. In addition, he returned to work with another shipyard as a tacker on February 7, 1997.

In his Decision and Order, the administrative law judge determined that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer's evidence of drug use as the cause of claimant's accident is insufficient to rebut the Section 20(c) presumption, 33 U.S.C. §§903(c), 920(c). The administrative law judge therefore concluded that claimant's right wrist injury is work-related, and accordingly, found claimant entitled to temporary total disability benefits from August 25, 1996, until February 7, 1997, and thereafter, a scheduled award for a 15 percent loss of use of the right arm pursuant to Section 8(c)(1), (19) of the Act, 33 U.S.C. §908(c)(1), (19). In addition, the administrative law judge determined that claimant is entitled to medical benefits pursuant to Section 7, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's findings that claimant's claim is not barred by Section 3(c) of the Act, that claimant's average weekly wage is most appropriately calculated under Section 10(b), 33 U.S.C. §910(b), and that the award of temporary total disability extends to February 7, 1997. Claimant responds, urging affirmance of the administrative law judge's decision.

I. *Section 3(c)*

Employer argues that the administrative law judge erred in finding that claimant's claim is not barred by Section 3(c). In this regard, employer contends that the administrative law judge improperly rejected the uncontradicted testimony of Dr. Roniger that claimant's cocaine intoxication contributed to the work-related accident.

Section 3(c) provides that "[n]o compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee . . . " (emphasis added). This provision must be applied in conjunction with Section 20(c), 33 U.S.C. §920(c),

which provides that, in the absence of substantial evidence to the contrary, it shall be presumed that the injury was not occasioned solely by the intoxication of the injured employee. In light of the express statutory requirement that claimant's injury must be "solely" due to intoxication, employer bears a substantial burden of proof. Intoxication will defeat a claim only when all of the evidence and reasonable inferences flowing therefrom allow for no other rational conclusion than that the intoxication was the sole cause of an injury. *See Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986). Where employer proffers substantial rebuttal evidence, the presumption falls from the case. *See Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 173, 13 BRBS 257, 262 (3d Cir. 1981). Section 3(c) applies to bar recovery if the administrative law judge, based on the record as a whole, finds that the intoxication defense is proven. *See Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984).

In the instant case, the administrative law judge determined that employer did not meet its burden of proving that claimant's accident/injury was due solely to his having cocaine in his system. In so finding, the administrative law judge rejected the testimony of Dr. Roniger as he stated only that cocaine could have contributed to the accident, and because he is only a psychiatrist with no expertise in toxicology. As there is no evidence of record that claimant's injury was due solely to cocaine intoxication, employer did not rebut the Section 20(c) presumption.[1] *Birdwell*, 16 BRBS at 321. We therefore affirm the administrative law judge's finding that claimant's claim is not barred by Section 3(c).

II. *Average Weekly Wage*

Employer asserts that the administrative law judge erred in applying Section 10(b) rather than Section 10(c), 33 U.S.C. §910(c), in calculating claimant's average weekly wage, as the facts in the instant case make application of the latter provision

[1]Employer's argument that the administrative law judge erred in crediting the testimony of claimant and a co-worker regarding how the accident occurred misses the mark inasmuch as the parties stipulated that claimant's injury occurred in the course and scope of his employment, and as employer put forth insufficient evidence to rebut the Section 20(c) presumption.

more appropriate. Employer specifically argues that it is unfair to use the earnings of a diligent co-worker to calculate claimant's average weekly wage given claimant's irregular and inconsistent employment record, and the fact that he had worked for employer for only 13 days prior to the injury.

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910. *See* 33 U.S.C. §910(a)-(c). Section 10(a), which is inapplicable here, applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage pursuant to Section 10(b). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

In addressing the issue of average weekly wage, the administrative law judge purported to apply Section 10(b) based on Ken Tishmack's earnings in the 52 weeks immediately preceding the date of claimant's injury, after finding that Mr. Tishmack was a similarly situated employee and that his wage records are a sufficient substitute for what claimant would have earned had he worked the entire year.[2] The administrative law judge relied on employer's records which indicated that Mr. Tishmack earned $22,594.37 during that period, divided by 52 weeks. The

[2]The administrative law judge found that claimant was hired by employer prior to the accident at $7.42 per hour and that there is no evidence that claimant was not a good worker. In addition, the administrative law judge noted that claimant had been working at employer's shipyard for over three months prior to the time of the accident, albeit for another company, until he was hired by employer on August 6, 1996, at an increased hourly wage. The administrative law judge therefore determined that claimant's employment with employer at the time of his injury was regular and continuous. Consequently, as claimant had not worked for employer during substantially the whole year immediately prior to his accident, the administrative law judge sought to apply Section 10(b) of the Act to calculate claimant's average weekly wage.

administrative law judge thus found that claimant had an average weekly wage of $434.51. In so finding, the administrative law judge rejected employer's specific approach for calculating claimant's average weekly wage pursuant to Section 10(c),[3] as it would not enable him to arrive at a sum that reasonably represented claimant's annual earning capacity at the time of his injury.

[3]Employer urged the administrative law judge to consider claimant's earnings from all sources in the 52 weeks prior to the accident to arrive at an average weekly wage.

Initially, we affirm the administrative law judge's finding that Mr. Tishmack is an employee similarly situated to claimant, as the record establishes, and the administrative law judge found that Mr. Tishmack was, at the time of the accident, performing the same job and earning the same hourly wage as claimant. *See* 33 U.S.C. §910(b), (c). Additionally, we affirm the administrative law judge's calculation of claimant's average weekly wage, although we do so under Section 10(c), instead of Section 10(b), as the evidence of record is insufficient to permit a calculation under Section 10(b).[4] Under Section 10(c), the administrative law judge is not required to employ a specific method of calculation and has broad discretion in calculating claimant's average weekly wage based on a variety of factors, including the earnings of co-workers. *See* 33 U.S.C. §910(c); *Gatlin*, 936 F.3d at 819, 25 BRBS at 26 (CRT); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Consequently, the administrative law judge's use of Mr. Tishmack's earnings in the

[4]Section 10(b) requires that the administrative law judge determine claimant's average weekly wage under a specific method of calculation, which is to divide the actual earnings of the appropriate employee for the year preceding the injury by the actual number of days he worked during that period. This average daily rate is then multiplied by 260 for a five-day employee, or by 300 for a six-day employee, and the product is divided by 52. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978); *see also Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 n. 3 (1986). In the instant case, the administrative law judge merely divided Mr. Tishmack's total earnings for the 365 days immediately preceding claimant's accident by 52 weeks. Moreover, there is no evidence of the number of days Mr. Tishmack worked during the aforementioned period of time. Thus, Section 10(b) is inapplicable, and Section 10(c) must be used to calculate claimant's average weekly wage. *See Taylor v. Smith & Kelly Co.,* 14 BRBS 489 (1981).

instant case to calculate claimant's average weekly wage is rational. *Id.* We therefore affirm the administrative law judge's finding that claimant's average weekly wage is $434.51 as it is supported by substantial evidence.

III. *Nature and Extent of Disability*

Employer further contends that if claimant is entitled to temporary total disability benefits, the award should only cover the period between the date of the accident and the date that claimant reached maximum medical improvement, which employer argues is November 27, 1996, the date that Dr. Stone released claimant from his care, rather than, as the administrative law judge found, February 7, 1997. In addition, employer argues that contrary to the administrative law judge's finding, it has established the availability of suitable alternate employment by offering a modified position to claimant within its facility.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to a work-related injury. As in the instant case, once claimant meets his burden, employer must demonstrate the availability of realistic job opportunities within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996). In addition, we note that maximum medical improvement is an indication of permanency and thus goes to the nature of disability, while the availability of suitable alternate employment is an indication of degree and thus goes to the extent of disability.[5] *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444, 30 BRBS 57, 62 (CRT)(5th Cir. 1996); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

In the instant case, the administrative law judge determined that employer failed to meet its burden of establishing the availability of suitable alternate employment. Specifically, the administrative law judge found that employer offered no evidence of light duty work within its facility[6] or as to the availability of suitable alternate employment elsewhere during the six month period between claimant's injury and his return to work with another employer. Consequently, the administrative law judge's finding that claimant is entitled to temporary total disability benefits from the date of injury until February 7, 1997, is affirmed as employer has failed to present any evidence of suitable alternate employment. *Clophus v. Amoco*

[5]Contrary to employer's contention, the date on which Dr. Stone discharged claimant from his care is not, alone, dispositive as to the date on which claimant reaches maximum medical improvement, particularly since in his discharge letter dated November 27, 1996, Dr. Stone explicitly opined that claimant's right wrist had not yet reached maximum medical improvement. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

[6]Employer argues that claimant's testimony conclusively establishes that he was offered light-duty work post-injury within its facility. The administrative law judge however relied on claimant's testimony that there was no light duty work available in the yard, and employer produced no other evidence in support of its position. Moreover, employer does not refute the administrative law judge's finding that claimant's positive drug test precluded him from any further employment with employer, including any light duty jobs.

Production Co., 21 BRBS 261 (1988).

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

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
MALCOLM D. NELSON, Acting
Administrative Appeals Judge