BRB No. 02-0158

DAVID A. DOYLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROWAN COMPANIES, INCORPORATED	)	DATE ISSUED: Nov. 6, 2002
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Employer/Carrier=s Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Scott E. Raynes and Stephen L. Roberts (Fulbright & Jaworski L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Employer/Carrier=s Motion for Reconsideration (2000-LHC-2878) 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).

On December 28, 1999, claimant experienced neck and back pain when, while working for employer as a yardman, he lifted a railroad tie. That same day, claimant was treated at a local hospital where he was given pain medication, muscle relaxers, and was released for light-duty work. Thereafter, claimant, who worked a fourteen days on, fourteen days off schedule for employer, continued to complain of pain while performing light-duty work assignments for employer. Subsequently, on January 20, 2000, claimant was sent home by employer. On January 26, 2000, an MRI was performed on claimant=s back and revealed a bulging disc at C5-6, focal herniation at C6-7, and early changes of discogenic disease. In addition to being evaluated by a number of physicians, claimant was admitted to an emergency room on February 24, 2000, complaining of shoulder and neck pain; claimant was treated with injections of Demoral and Phenergan, given a prescription for Vicodin, and released. Employer voluntarily paid claimant compensation under the Act from January 21, 2000, through March 16, 2000, at which time claimant was terminated by employer. Claimant, who subsequently sought temporary total and temporary partial disability benefits for various periods of time under the Act, commenced non-longshore employment on July 25, 2000.

In his Decision and Order, the administrative law judge evaluated the medical and lay evidence of record and concluded that claimant has been temporarily disabled from the date of his work-related injury. The administrative law judge determined that claimant had not reached maximum medical improvement, and that although employer presented no evidence of suitable alternate employment, the record indicates that claimant worked for employer and others post-injury. Accordingly, after calculating claimant=s average weekly wage and post-injury wage-earning capacity, the administrative law judge awarded claimant temporary total disability compensation for the periods from January 21, 2000, through July 24, 2000, and from December 3, 2000, through January 3, 2001, temporary partial disability compensation for the periods from July 25, 2000, through December 3, 2000, and from January 4, 2001, and continuing, as well as medical benefits and interest. Employer thereafter moved for reconsideration, requesting that the administrative law judge reconsider his findings regarding the nature and extent of claimant=s disability, as well as his calculation of claimant=s average weekly wage and post-injury wage-earning capacity. The administrative law judge considered each of employer=s arguments in his Order on reconsideration, but denied the relief requested by employer.

On appeal, employer challenges the administrative law judge=s credibility determinations and his consequent finding that claimant is entitled to various periods of temporary total and temporary partial disability benefits. Employer additionally avers that the administrative law judge erred in his calculations of claimant=s average weekly wage and post-injury wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge=s decision in its entirety.

Prima Facie Case of Total Disability

Employer initially contends that the administrative law judge erred in determining that claimant is incapable of performing his usual employment duties with employer. Specifically, employer asserts that the administrative law judge erred in failing to credit the opinion of Dr. Esses over the testimony of Dr. Wilson and claimant. 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 disability. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual employment. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988); *Roger=s Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 (1988).

Employer=s arguments on appeal challenge the administrative law judge=s decision to credit the testimony of claimant and the medical opinions of Drs. Wilson and Haig. Dr. Wilson, who examined claimant on two occasions, opined that claimant sustained a cervical strain while lifting a railroad tie, and that this incident resulted in either a small herniation or some combination of herniation and inflamation in claimant=s cervical spine. *See* CX 2 at 80-81. Pursuant to his clinical findings, claimant=s complaints, and the January 26, 2000, MRI which revealed a bulging disc at C5-6, small focal herniations at C6-7 and L5-S1, and discogenic disease at L5-S1, Dr. Wilson diagnosed claimant with a C6 radiculopathy, or nerve root irritation, and opined that, in light of claimant=s restrictions, he was restricted to light duty work. *See* CX 2. Dr. Wilson deemed videotape film of claimant washing a truck and lying on his back to be irrelevant to his diagnosis, since in his opinion such tapes cannot document the pain or lack thereof experienced by claimant while performing the shown activities. Dr. Haig, who examined claimant on May 30, 2000, reviewed claimant=s January 26, 2000, MRI and concluded that it revealed a bulging disc at C6-7, of a moderate degree, that was pressing on claimant=s spinal canal, and a bulging disc at L5-S1 without herniation. *See* CX 4. Noting that claimant has had serious symptoms, Dr. Haig opined that claimant was not a surgical candidate; rather, Dr. Haig stated that epidural nerve blocks would help claimant and that claimant deserves a trial of closely supervised physical therapy. *Id.* Claimant testified that he continues to experience neck and back pain. *See* Tr. at 67-70, 101. Dr. Esses, upon whom employer relies, examined claimant on four occasions and interpreted claimant=s January 26, 2000, MRI as revealing disc bulges at L5-S1 and C5-6 with no evidence of nerve root or spinal cord compression. On January 27,

2000, Dr. Esses diagnosed lumbar and cervical sprains, or muscle spasms, rather than cervical radiculopathy, as the cause of claimant=s complaints of pain, opined that these would improve over time, and released claimant to return to work at his discretion. *See* EX 15 at 18-20, 26, 32, 50-51. Dr. Esses last examined claimant on February 21, 2000. Thereafter, Dr. Esses viewed the videotape procured by employer and concluded that claimant=s conditions had resolved on or about February 25, 2000, and that claimant was capable of returning to his duties as a yardman with employer without restrictions at that time. *See* EX 15 at 30-33, 53.

In challenging the administrative law judge=s decision, employer initially avers that the administrative law judge erred in determining that claimant was a credible witness. In support of this position, employer states that claimant was untruthful on a post-injury employment application regarding his prior injuries, that claimant was untruthful at the formal hearing until confronted with this subsequent employment application, and that claimant was dishonest when describing the examination performed by Dr. Esses. In his Decision and Order, the administrative law judge specifically considered the issue of claimant=s credibility. In addressing this issue, the administrative law judge, citing to *Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995)(wherein the Board held that the administrative law judge acted within his discretion in accepting claimant=s explanation for withholding information from subsequent employers about his work-injury), initially found that claimant credibly and adequately explained his reasons for misrepresenting his prior physical condition on a post-injury employment application. Additionally, the administrative law judge found that while Dr. Esses performed a physical examination of claimant, that examination may not have included testing as thorough as that performed by other physicians who examined claimant; thus, the administrative law judge concluded that claimant=s testimony regarding Dr. Esses=s examination was credible and that any inconsistencies had been adequately explained. Inasmuch as the administrative law judge considered employer=s arguments regarding the veracity of claimant=s testimony, and adequately explained his decision to credit that testimony, we hold that the administrative law judge acted within his discretion in accepting claimant=s explanation for his actions. As his credibility determination is neither inherently incredible or patently unreasonable, the administrative law judge=s finding that claimant is a credible witness is affirmed. *Cordero v. Triple a Machine*

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[1]Claimant testified that applying for other post-injury jobs with applications which included an accurate history of his work-injury had not resulted in his being called for an interview. *See* Tr. at 75-76.

[2]Claimant and his wife testified that Dr. Esses=s examination of claimant was limited in nature, while Dr. Esses testified that he performed a full examination on claimant. *Compare* Tr. at 48-49, 147-148, *with* Emp. Ex. 15.

Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We next reject employer=s contention that the administrative law judge erred in failing to credit and rely upon the opinion of Dr. Esses. Contrary to the position advocated by employer on appeal, an administrative law judge is not required to find determinative the opinion of a medical expert simply because that expert is more highly trained. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). Rather, an administrative law judge is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Anderson*, 22 BRBS 20. Furthermore, the administrative law judge may rely upon claimant=s credible subjective complaints to find that claimant has established an inability to perform his usual work activities with employer. *See Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Eller & Co. v. Golden,* 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In the instant case, contrary to employer=s allegation of error, the administrative law judge rationally found that Dr. Wilson based his diagnosis of C6 radiculopathy on claimant=s subjective complaints, his clinical examination of claimant, and the January 26, 2000, MRI which all of the physicians of record agreed revealed a herniation at the C6 level, and determined that claimant was capable of only light-duty employment. As this opinion provides substantial evidence to support the administrative law judge=s determination that claimant is incapable of resuming his usual employment duties as a yardman with employer, *see Mijangos,* 948 F.2d 941, 25 BRBS 78(CRT), we affirm the administrative law judge=s finding on this issue. *See Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989); *Anderson,* 22 BRBS 20; *Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).

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[3]Any error committed by the administrative law judge in declining to credit Dr. Esses=s testimony based upon that physician=s reliance on employer=s videotape of claimant performing certain outdoor activities is, moreover, harmless. The administrative law judge specifically found Dr. Wilson=s testimony regarding the inability of a videotape to gauge claimant=s pain to be persuasive. Additionally, the administrative law judge found that claimant had received narcotic injections at an emergency room on the day before the videotape was taken, that claimant testified that he felt temporarily better following this treatment, and that the videotape in question did not reveal activities that were inconsistent with claimant=s complaints of pain and symptomatology. *See* Decision and Order at 24. Lastly, while Dr. Esses had previously released claimant to return to work at his discretion and with the caveat that claimant would determine his own restrictions, *see* EX 10 at 19; EX 15 at 51, the administrative law judge ultimately found claimant=s testimony to be credible.

Average Weekly Wage

Employer next challenges the administrative law judge=s calculation of claimant=s average weekly wage at the time of his injury. Specifically, while acknowledging that the administrative law judge properly utilized Section 10(c) of the Act, 33 U.S.C. '910(c), to calculate claimant=s average weekly wage at the time of his injury, employer contends that the administrative law judge erred in using only the wages claimant earned while working for employer rather than a combination of claimant=s seventeen weeks of earnings and the earnings of two similarly situated employees. We disagree.

In the instant case, the administrative law judge initially found that both parties agreed that Section 10(c) should be utilized to determine claimant=s average weekly wage. *See* Decision and Order at 28. Next, the administrative law judge divided the total amount of wages which claimant received during the period he worked for employer pre-injury, from August 31, 1999 to December 28, 1999, $11,833.10, by the seventeen weeks represented by that period of time, in arriving at an average weekly wage for compensation purposes of $696.06. *Id.* at 30.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant=s annual earning capacity at the time of his injury. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *SGS Control Serv. v. Director,* OWCP, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996); *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991)*; Richardson v. Safeway Stores, Inc.,* 14 BRBS 855 (1982). It is well-established that the administrative law judge has broad discretion in determining a claimant=s annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh=g*, 237 F.3d 409, 35 BRBS 26(CRT)(5th Cir. 2000). Accordingly, the Board will therefore affirm an administrative law judge=s determination of 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 the injury. *See Fox v. West State Inc.,* 31 BRBS 118 (1997). In the instant case, the administrative law judge calculated claimant=s average weekly wage by dividing claimant=s total earnings from August 31, 1999 through December 28, 1999, by 17, the number of weeks he worked during that period. We hold that the result reached by the administrative law

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[4]In this regard, employer urges the Board to adopt a formula whereby claimant=s seventeen weeks of earnings would be combined with the earnings received by two other employees for 75 and 84 weeks of employment respectively; this sum would then be divided by 176.

judge is reasonable, is supported by substantial evidence, and best reflects claimant=s earning capacity with employer at the time of his injury. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). We, therefore, affirm the administrative law judge=s determination of claimant=s average weekly wage.

Post-Injury Wage Earning Capacity

Lastly, employer challenges the administrative law judge=s calculation of claimant=s post-injury wage-earning capacity while working for Shamrock Equipment Rental Co. from January 4, 2001, and continuing; specifically, employer avers that the administrative law judge erred in failing to consider claimant=s testimony regarding the number of overtime hours that he works for his new post-injury employer. An award for temporary partial disability is based upon the difference between claimant=s pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. '908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.,* 25 BRBS 340 (1988). Section 8(h) of the Act, 33 U.S.C. '908(h), provides that claimant=s wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT)(5th Cir. 1992). The objective of the inquiry concerning claimant=s wage-earning capacity is to determine the post-injury wages to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP,* 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *see also Abbott v. Louisiana Ins. Guaranty Ass=n*, 27 BRBS 192 (1993), *aff=d,* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The party contending that the employee=s actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In the instant case, claimant commenced employment with Shamrock Equipment Rental Company on January 4, 2001. Claimant testified that he is on call 24 hours a day, that he earns $7.00 per hour and time-and-a-half for overtime, and

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[5]As the extent of claimant=s disability was an issue in dispute before the administrative law judge, and employer thereafter sought reconsideration of the administrative law judge=s finding on that issue, we reject claimant=s assertion that employer is raising this issue for the first time on appeal.

[6]Initially, claimant worked post-injury for Gulf South Systems/Oil and Tools, Inc., until December 2, 2000. Employer does not challenge the administrative law judge=s determination that claimant earned $386.93 per week during this period of time; accordingly, that finding is affirmed.

that he works approximately 65 to 75 hours per week. *See* Tr. at 97-98. In his decision, the administrative law judge in a footnote summarily determined claimant=s post-injury wage-earning capacity with Shamrock Equipment by multiplying $7.00 per hour by 40. *See* Decision and Order at 27, fn. 7. Thereafter, the administrative law judge denied employer=s motion for reconsideration, concluding that he had correctly calculated claimant=s residual wage-earning capacity. *See* Order Denying Motion for Reconsideration at 4. As the administrative law judge did not consider claimant=s testimony regarding the amount of overtime that he customarily works for Shamrock Equipment, and consequently his actual post-injury wages paid by that employer, he did not render a finding as to whether claimant=s post-injury earnings reasonably represent his wage-earning capacity. Accordingly, we vacate the administrative law judge=s calculation of claimant=s post-injury wage-earning capacity subsequent to January 4, 2001, and we remand the case for the administrative law judge to consider all of the relevant evidence of record pursuant to Sections 8(e) and (h) of the Act.

Accordingly, the administrative law judge=s award of temporary partial disability compensation subsequent to January 4, 2001, is vacated, and the case is remanded for reconsideration of claimant=s wage-earning capacity consistent with this opinion. In all other respects, the administrative law judge=s Decision and Order and Order Denying Employer/Carrier=s Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge