BRB No. 02-0153

VERNON J. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE	)	DATE ISSUED: Oct. 24, 2002
	)	
and	)	
	)	
AIGCS	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Louis Fondren (Fondren and Fondren), Pascagoula, Mississippi, for claimant.

Michael J. McElhaney, Jr. (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2000-LHC-913) of Administrative Law Judge Richard D. Mills 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).[1] We must affirm the findings of fact and

[1]We note that claimant, on August 12, 2002, filed an appeal of the administrative law judge=s Supplemental Decision and Order Denying Attorney Fees, and filed his Petition for Review and brief at this time. The Board acknowledged this appeal on September 5, 2002, BRB No. 02-0153S, and consolidated it with claimant=s appeal on the merits. We hereby sever these

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 worked as a first class electrician for Atlantic Marine/Alabama Shipyard from the fall of 1996 through April 1998. On or about May 1, 1998, claimant commenced employment with employer in that same capacity. On May 7, 1998, claimant experienced discomfort in his shoulder and neck while in the course of his employment. Claimant declined medical treatment from employer=s medical staff, however that night claimant was taken to the hospital whereupon he was diagnosed as having sustained a neck strain with radiculopathy. Claimant subsequently underwent a cervical fusion at C5-6 on May 19, 1998. On July 27, 1998, Dr. Middleton, the neurologist who performed the surgical procedure on claimant=s neck, released claimant to return to work. Employer voluntarily paid claimant disability compensation from May 8, 1998 to July 30, 1998. Claimant ultimately did not return to work for employer but, rather, commenced employment on November 7, 1998, with Facileness Medical Care as a technician.

At the formal hearing, the administrative law judge denied claimant=s request to submit the medical reports of Dr. Hamilton into the record, finding that claimant failed to comply with the time limitations set forth in the judge=s pre-hearing order. Thereafter, in his Decision and Order, the administrative law judge initially determined that employer did not establish rebuttal of the invoked Section 20(a), 33 U.S.C. '920(a), presumption linking claimant=s neck condition to his employment with employer. Next, the administrative law judge found that claimant reached maximum medical improvement as of July 27, 1998, and that as of that date claimant was capable of resuming his usual employment duties. Lastly, the administrative law judge calculated claimant=s average weekly wage, finding that Section 10(a), 33 U.S.C. '910(a), provides the best method for determining that wage since claimant worked as an electrician during the full year preceding his work-

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appeals. 20 C.F.R. '802.104(b). On October 16, 2002, employer filed a motion for an extension of time in which to file its response brief. Employer=s motion is denied. Employer may file its response brief within 10 days of receipt of this decision. When the case is fully briefed, the Board will issue a decision on claimant=s appeal of the administrative law judge=s Supplemental Decision and Order.

related injury; thereafter, pursuant to Section 10(a), the administrative law judge determined that claimant=s average weekly wage at the time of his injury was $543.40. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from May 7, 1998, until July 27, 1998, based upon an average weekly wage of $543.40.

On appeal, claimant asserts that the administrative law judge erred in failing to admit Dr. Hamilton=s reports into evidence. Additionally, claimant challenges the administrative law judge=s denial of his request for continuing disability benefits, as well as the administrative law judge=s calculation of his pre-injury average weekly wage. Employer responds, urging affirmance of the administrative law judge=s decision in its entirety.

Exclusion of Evidence

Claimant initially contends that the administrative law judge erred in refusing to admit certain medical evidence into the record, specifically the medical reports of Dr. Hamilton regarding claimant=s physical condition just prior to the hearing. At the formal hearing, the administrative law judge rejected these reports as untimely, since they had not been served by claimant upon employer within the 20-day period provided in the administrative law judge=s pre-trial order for the exchange of exhibits from experts. Section 702.338, 20 C.F.R. '702.338, of the Act=s implementing regulations provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. Section 702.339, 20 C.F.R. '702.339, of the regulations provides that administrative law judges are not bound by common law or statutory rules of evidence. In this regard, the Board has held that an administrative law judge may, within his discretion, exclude even relevant and material testimony for failure to comply with the terms of a pre-hearing order. *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986)(the Board affirmed an administrative law judge=s decision to exclude the testimony of employer=s sole witness where employer=s counsel misplaced the administrative law judge=s pre-hearing order); *see also Picinich v. Seattle Stevedore Co.,* 19 BRBS 63 (1986)(the Board affirmed an administrative law judge=s decision to admit employer=s evidence into the record despite its non-compliance with a pre-hearing order since the order in question stated that such evidence may result in exclusion and the administrative law judge=s decision was not arbitrary, capricious or an abuse of discretion). Accordingly, because the admission or exclusion of evidence is discretionary, the Board may overturn such determinations only if they are arbitrary, capricious, or an abuse of discretion. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988).

In the instant case, the administrative law judge rationally excluded the exhibits sought to be admitted by claimant on the basis that they were not submitted within the time limits required by his pre-hearing order. Specifically, the administrative law judge=s October 17, 2000, pre-hearing order unequivocally set the date of the formal hearing for February 7, 2001, and informed the parties that a report from an expert must be exchanged not less than 20 days prior to trial. The administrative law judge thereafter found, and both of the parties agree, that claimant did not comply with this time limit for the exchange of expert evidence between claimant and employer, as claimant first provided employer with a report from Dr. Hamilton on January 25, 2001.[2] As claimant has not established that the administrative law judge=s decision to exclude Dr. Hamilton=s reports is arbitrary, capricious, or an abuse of discretion, it is affirmed.[3] *See Williams v. Marine*

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[2]1Dr. Hamilton=s reports reflect that he saw claimant on October 31, 2000, and in December 2000. Claimant asserted that Dr. Hamilton did not provide a document stating claimant=s restrictions until January 23, 2001. In excluding claimant=s evidence from Dr. Hamilton, the administrative law judge reasoned that the case was continued twice at claimant=s request, that claimant had seen two other doctors of his choice previously and that claimant had seen Dr. Hamilton on several occasions dating back to October, which should have permitted the timely submission of this evidence. Thus, he sustained employer=s objection to admission of the reports of Dr. Hamilton as violating the pre-hearing order.

[3]2The fact that the administrative law judge ultimately left the record open for the taking of depositions regarding the issue of claimant=s average weekly wage does not compel a different result, as the administrative law judge rationally limited

Terminals Corp., 14 BRBS 728 (1981); *see also Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.,* 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing).

Extent of Disability

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this additional discovery to that issue alone.

Claimant next challenges the administrative law judge=s denial of his claim for continuing permanent partial disability benefits. Claimant, however, has failed to demonstrate error in the administrative law judge=s determination that claimant sustained no residual disability subsequent to July 27, 1998, as a result of his work-related neck injury. 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 injury.[4] *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). In the instant case, the administrative law judge credited and relied upon the opinion of Dr. Middleton, the neurologist who performed claimant=s cervical fusion, in concluding that claimant sustained no ongoing residual disability as a result of his neck injury as of July 27, 1998. Dr. Middleton opined that, as of July 27, 1998, claimant had reached maximum medical improvement and that he had placed no restrictions on claimant that would prohibit claimant=s return to work at that time. *See* Emp. Ex. 17. Thus, as the administrative law judge=s decision to rely upon the medical of opinion of Dr. Middleton is rational and within his authority as a factfinder, and as this credited opinion constitutes substantial evidence to support the administrative law judge=s ultimate finding, we affirm the administrative law judge=s determination that claimant sustained no impairment subsequent to July 27, 1998.[5] *See generally Cordero v.*

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[4]3Contrary to the implied contention contained in claimant=s brief, the issue of whether suitable alternate employment has been established by employer need not be addressed until claimant establishes an inability to return to his usual employment duties due to a work-related injury. *See Roger=s Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

[5]4Claimant on appeal summarily avers that he continuously, but without success, sought reemployment with employer. In his decision, the administrative law judge specifically found that there is no independent evidence to support the conclusion that claimant could not return to his previous employment duties with employer. *See* Decision and Order at 8. Our review of the record reveals an unsigned and undated memorandum from employer stating that claimant wanted to return to work, *see* Emp. Ex. 6 at 3, telephone records indicating that claimant called a Pascagoula, Mississippi, telephone number repeatedly prior to July 27, 1998, *see* Cl. Ex. 12, and claimant=s hearing testimony that he spoke with employer sometime in July 1998. *See* Tr. at 89-91. As the record is thus devoid of evidence that claimant sought and was denied reemployment with employer subsequent to his release to return to work by Dr. Middleton on July 27, 1998, we affirm the findings in this regard.

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

Average Weekly Wage

Lastly, claimant contends that the administrative law judge erred in utilizing Section 10(a), rather than Section 10(c), of the Act to calculate claimant=s average weekly wage at the time of his injury. Specifically, claimant avers that his commencement of employment with employer on May 1, 1998, would have resulted in his working substantial overtime; thus, claimant asserts this transfer to a higher paying job is the equivalent of receiving a salary increase shortly before his work-related injury.

Section 10(a) of the Act is to be applied in calculating a claimant=s average weekly wage when the employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. '910(a); *see Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or by 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. '910(d), in order to yield claimant=s statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. '910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b) of the Act, 33 U.S.C. '910(b), can be reasonably and fairly applied.[6] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is the arrive at a sum which reasonably represents the claimant=s annual earning capacity at the time of his injury; thus, under Section 10(c), the administrative law judge is required to make a fair and accurate assessment of the amount that the claimant would have the potential and opportunity of earning absent the injury. *See Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In the instant case, the administrative law judge found that claimant worked as an electrician from 1997 through the date of his injury. Therefore, the administrative law judge calculated claimant=s average weekly wage pursuant to Section 10(a). In rendering his calculation, however, the administrative law judge declined to include claimant=s potential overtime with employer, finding that such overtime was not

[6]5Claimant does not argue that Section 10(b) is applicable in the case at bar.

assured. No party challenges the administrative law judge=s determination that claimant worked during the 52 weeks preceding his injury; accordingly, the administrative law judge=s use of Section 10(a) is rational based upon the facts of this case. Moreover, our review of the record reveals that Mr. Hyland, employer=s electrical superintendent at the time that claimant was hired, testified that while overtime was worked by employer=s employees, such work above 40 hours per week was not guaranteed and that in fact overtime had been suspended for one to two months in both 1998 and 1999. *See* Emp. Ex. 24 at 8-14. Similarly, Mr. Pipkins, claimant=s co-worker, testified that although he worked overtime for employer, such time was not guaranteed and at times the number of hours scheduled were reduced. *See* Emp. Ex. 23. Substantial evidence therefore supports the administrative law judge=s finding that overtime with employer was not assured; we thus hold that the administrative law judge rationally determined that claimant=s average weekly wage should be calculated pursuant to Section 10(a). Accordingly, as the administrative law judge=s calculation of claimant=s average weekly wage utilizing Section 10(a) is unchallenged, it is affirmed.[7]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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[7]6We note that claimant, in his reply brief, asserts without citation to the record that Athe testimony of the employers [sic] witnesses, under cross examination, pointed out that the Claimant=s job was that of a six (6) day a week worker.@ *See* Clt=s reply brief at 2. In their respective depositions, however, employer=s witnesses did not discuss claimant=s employment schedule in the year preceding his transfer to employer=s facility. *See* Emp. Exs. 23, 24. Claimant=s implicit challenge to the administrative law judge=s average weekly wage calculation is therefore without merit.

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge