BRB NO. 96-0552

DANIEL D. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v	)	
	)	
SIPCO SERVICES AND MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order[1] (92-LHC-2228) of Administrative Law Judge J. Michael O'Neill 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, a sandsucker, was injured during the course of his employment on May 1, 1990, when he fell approximately seven feet from a beam, injuring his back. Claimant continued to work until May 29, 1990, and remained out of work until June 4, 1990. Because of increasing problems with his back, claimant again ceased work on February 24, 1991; except for a few weeks' employment with a different employer, claimant has not worked since that date.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption which employer failed to rebut. He further found that claimant had reached maximum medical improvement as of December 3, 1992. After concluding that the proper labor market was Duluth, Minnesota, to which claimant had relocated in 1991, the administrative law judge determined that employer failed to establish the availability of suitable alternate employment in either Duluth or Portland, Oregon, the area in which the work accident had taken place. Next, the administrative law judge determined that claimant's average weekly wage for compensation purposes was $425.63. Thus, the administrative law judge awarded claimant temporary partial disability compensation for the period June 10, 1990, to March 1, 1991, temporary total disability compensation from March 1, 1991, to December 1, 1992, and permanent total disability compensation from December 1, 1992, and continuing. *See* 33 U.S.C. §908(a), (b), (e). Finally, the administrative law judge found that there had been no violation of Section 49 of the Act, 33 U.S.C. §948(a).

Employer now appeals, arguing that the administrative law judge erred in finding that claimant had established his *prima facie* case, in calculating claimant's average weekly wage, and in concluding that Duluth, Minnesota, is the relevant job market. Additionally, employer seeks relief under Section 8(f), 33 U.S.C. §908(f), based on claimant's history of back problems. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation

[1]By Order dated February 13, 1997, the Board reinstated this appeal which had been dismissed by Board Order dated December 16, 1996, and remanded to the District Director for reconstruction of the record.

Programs (the Director), has filed a Motion to Strike Employer's Raising of Entitlement to Section 8(f) relief as untimely.

Employer initially challenges the administrative law judge's determination that claimant suffered a fall while working for employer. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, it is uncontested that claimant suffered a "harm," *i.e.*, back pain corroborated by a diagnosis of multi-level degenerative joint disease of the lumbar spine with a history of disc herniation. In his decision, the administrative law judge, after setting forth claimant's testimony regarding both the physical requirements of his job and the occurrence of a work-related incident, credited that testimony in finding that claimant had established the second element of his *prima facie* case. 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 and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). On the basis of the record before us, the administrative law judge's decision to rely upon claimant's testimony is neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's determination that claimant established his *prima facie* case.

Employer further contends that the administrative law judge erred in concluding that claimant is totally disabled. We disagree. 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. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. 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 work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant had established a *prima facie* case of total disability, the administrative law judge first determined that claimant's usual job duties were very strenuous, involving prolonged bending, stooping, stretching and pulling, as well as 10 to 12 hour days. Decision and Order at 32. He then credited the medical opinions of Drs. Person, Freeman and Wallerstein, each of whom commenced treating claimant in 1992, that claimant was restricted from heavy work and could not return to his former occupation,

see EX 59; CXU 2, CXJ 1, over the contrary opinions of Drs. Davis and Himango, which he found unreasoned and unsupported by the majority of x-rays, MRIs, myelogram, and physical therapy evaluations of record, as well as claimant's credible complaints of pain. Decision and Order at 32-34. In arriving at his decision, the administrative law judge is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988). In the instant case, the administrative law judge's finding that claimant is unable to return to his usual job is supported by substantial evidence of record and is hereby affirmed. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Next, employer contends that the administrative law judge erred in concluding that the relevant area in which suitable alternate employment must be established was Duluth, Minnesota, to which claimant relocated in 1991. The administrative law judge thoroughly addressed this argument in his decision after initially finding that claimant had met his burden of proving that he was unable to return to his former job as a sandsucker. Decision and Order at 34. *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 & Const. Co.*, 28 BRBS 290 (1994). In this regard, the administrative law judge noted that the standard for establishing suitable alternate employment specifies that jobs be available in claimant's "local community," and he relied upon the decision of the United States Court of Appeals for the Fourth Circuit in *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994), in determining that Duluth, Minnesota, was the relevant labor market for claimant. In *See*, the court held that where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence, the length of time he has resided in the new community, his ties to the community, the availability of suitable jobs in the new community, and the degree of undue prejudice to employer in proving suitable alternate employment in a new location.

In the instant case, claimant testified that he relocated to the Duluth area in order to find employment; specifically, claimant testified that, because of his employment background working on boats, he was told by a friend that he had a good chance of gaining employment in the Duluth area. The administrative law judge relied upon claimant's testimony in concluding that claimant's move to the Duluth area was economically motivated and that, accordingly, that area was the applicable labor market. On the facts of this case, the administrative law judge's evaluation of the factors and his determination that the relevant job market is Duluth, Minnesota, are rational and supported by substantial evidence. Accordingly, we affirm the administrative law judge's finding that Duluth is the relevant labor market. Consequently, as employer concedes that there is no suitable alternate employment available in the Duluth area, we additionally affirm the administrative law judge's finding that claimant is totally disabled.[2]

[2]Because we affirm the administrative law judge's finding that Duluth, Minnesota, is the relevant job market, we need not address employer's arguments regarding any errors

Employer next challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury. Initially, employer contends that the administrative law judge should have calculated claimant's average weekly wage under Section 10(a) of the Act rather than Section 10(c). 33 U.S.C. §910(a), (c). We disagree. Section 10(a) is to be applied when an 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 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 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), 33 U.S.C. §910(b), can be reasonably and fairly applied.[3] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). 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 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).

In the instant case, the administrative law judge determined that Section 10(a) was inapplicable because not only were claimant's wages in the 52 weeks prior to the injury sporadic, but by their very nature sandsucking positions are inconsistent and temporary. Decision and Order at 41. The administrative law judge thus declined to use Section 10(a) and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). We hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that claimant's average weekly wage should be calculated pursuant to Section 10(c).

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the administrative law judge may have made in determining that employer also failed to establish the availability of suitable alternate employment in the Portland, Oregon, area. We note, however, that employer's vocational consultant conducted his computer market survey of possible positions in the Portland, Oregon, area on November 23-24, 1993, two years after claimant's relocation to Duluth, Minnesota.

[3]In the instant case, no party contends that Section 10(b) is applicable.

Employer additionally challenges the administrative law judge's use of claimant's wages at the time of his injury in determining claimant's average weekly wage. 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 Richardson*, 14 BRBS at 855. It is well-established that the administrative law judge has broad discretion in determining 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). We will 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 Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981). In the instant case, the administrative law judge calculated claimant's average weekly wage by dividing claimant's total earnings from November 1, 1989, to June 10, 1990, by 30. *See* 33 U.S.C. §910(d). We hold that the result reached by the administrative law judge is reasonable and is supported by substantial evidence. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam*, 21 BRBS at 91. We, therefore, affirm the administrative law judge's determination of claimant's average weekly wage.

Finally, employer contends at the end of its brief on appeal that it is entitled to relief under Section 8(f). The record reflects, however, that employer failed to raise this issue below; as the Director argues, that contention must be deemed waived. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge