BRB No. 96-852

GERALD W. ELLISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARD	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Mary Nelson Morgan (Cole, Stone & Stoudemire, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-1953) of Administrative Law Judge Frederick D. Neusner 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 30, 1986, claimant suffered injuries to his back when he fell on loose sandblasting sand strewn on the floor. He reached maximum medical improvement, after medical care that included a number of surgeries on his back. He returned to work, but never resumed his usual job as a crane operator. Although claimant has received periods of temporary total, temporary partial, and permanent partial disability compensation since the

injury, the parties disagree as to the amount of the further compensation benefits to which he is entitled, if any.

In his Decision and Order, the administrative law judge found that although the work assigned to claimant after his return to work was necessary to the operation of the shipyard, employer has not proven that claimant can perform the tasks assigned him. The administrative law judge concluded that claimant's light duty work was sheltered employment which therefore does not constitute suitable alternate employment, and thus he awarded claimant permanent total disability compensation. In addition, administrative law judge rejected employer's contention that Section 10(c) of the Act, 33 U.S.C. §910(c), should be used to calculate claimant's average weekly wage, and found that claimant's average weekly wage should be determined pursuant to Section 10(a), 33 U.S.C. §910(a).

On appeal, employer contends that the administrative law judge erred in finding that claimant is permanently totally disabled and that the employment offered by employer is sheltered and thus not evidence of suitable alternate employment. In addition, employer contends that the administrative law judge erred in calculating claimant's average weekly wage pursuant to Section 10(a), rather than Section 10(c). Claimant responds, urging affirmance of the administrative law judge's decision.

As it is undisputed that claimant cannot return to his usual employment due to his work-related injury, the burden shifted to employer to establish the existence of 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. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An employer can meet its burden of establishing suitable alternate employment by providing light duty work to claimant within its own facility which is necessary to its enterprise. *Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment is that for which the employee is paid even if he cannot do the work or which is unnecessary. *See Argonaut Ins. Co. v. Patterson,* 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *see also CNA Ins. Co. V. Legrow,* 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991).

In the present case, the administrative law judge found that employer offered evidence of positions claimant has held since his injury and five sedentary positions it proposes claimant can do. Claimant testified that he was not able to perform the duties in the electrical department repairing extension cords, stringer lights, etc, and that he has been able to increase his post-injury hours to somewhere between 30 and 40 a week because he can come and go as he pleases, and lie down when the pain becomes too severe. Tr. at 99, 106-107.

The administrative law judge credited claimant's complaints of pain and found that he would have had to endure severe pain to work at any of the jobs he has held since returning to work or was offered. Decision and Order at 13. The administrative law judge also found that claimant's pain was such that he could not be relied upon to be present at work, to stay at work if he came, or to be able to perform the specified duties if he was there. Decision and Order at 12.

The United States Court of Appeals for the Fifth Circuit reviewed a similar case in which the medical evidence indicated that claimant could return to sedentary work but the administrative law judge credited claimant's complaints of pain to find that he was unable to perform the work assigned by employer. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). In that case, the administrative law judge awarded claimant permanent total disability benefits. The court held that the administrative law judge's credibility determination that claimant's pain would not allow him to perform the positions offered by employer must be affirmed as it was rational and supported by substantial evidence. *Id.*, 948 F.2d at 945, 25 BRBS at 81 (CRT).

The administrative law judge in the instant case reviewed the physical requirements of the five positions identified by employer as available for claimant, as well as the positions claimant has attempted since his injury. He also credited claimant's testimony that he was unable to perform the tasks assigned to him in the tool keeper position and was only able to maintain his current position because he was allowed to rest when needed. Although claimant's treating physicians released him for sedentary work, the administrative law judge in the instant case credited claimant's complaints of pain and concluded that the sedentary jobs offered by employer demanded a level of exertion that exceeded claimant's physical capacity. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981). The choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it supported by the evidence. *See Mijangos*, 948 F.2d at 945, 25 BRBS at 81 (CRT). As employer has raised no reversible error on appeal, we affirm the administrative law judge's finding that claimant was only employed at the beneficence of employer, and that as suitable alternate employment had not been established, claimant is entitled to permanent total disability benefits. *Legrow*, 935 F.2d at 437, 24 BRBS at 209 (CRT).

Employer also contends that the administrative law judge erred in applying Section 10(a) of the Act to determine claimant's pre-injury average weekly wage. Section 10(a) provides that where a claimant worked at his pre-injury job "during substantially the whole of the year immediately preceding his injury," the determination of average weekly wage should presuppose that he could have actually earned wages during all 260 days of that year. 33 U.S.C. §910(a); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). The administrative law judge in the instant case found that claimant worked in 45 of the preceding 52 weeks which is substantially the whole of the year, and rejected employer's contention that claimant's

average weekly wage calculated pursuant to Section 10(a) did not fairly represent claimant's earning capacity at the time of injury. Therefore, the administrative law judge applied Section 10(a) in determining claimant's average weekly wage.

The evidence supports the administrative law judge's finding that claimant worked in 45 of the 52 weeks preceding the injury. However, the administrative law judge did not address the evidence indicating that claimant only worked five or more days in 25 of the 52 weeks preceding his injury.[1] Section 10(a) aims at a theoretical approximation of what a claimant working five or six days a week during the work year could have been expected to earn during the period in question. *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). In this case, however, claimant did not work a full week for most of the year; thus, calculations under Section 10(a) yield average annual earnings of $23,205, while claimant's actual earnings were $18,829.70.[2] Application of Section 10(a) thus yields a 27 percent higher average weekly wage than claimant's actual earnings. Consequently, we hold that the application of Section 10(a) in this case does not result in a fair and reasonable approximation of claimant's annual wage-earning capacity, as it distorts the projection of his annual earnings beyond the amount which he could actually have earned at his job had he not been injured. *See Duncanson-Harrelson Co. v. Director,* OWCP, 686 F.2d 1336 (9th Cir. 1982); *Gilliam,* 21 BRBS at 93; *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (1985). Therefore, we vacate the administrative law judge's determination of claimant's average weekly wage under Section 10(a) and remand the case to the administrative law judge to compute claimant's average weekly wage pursuant to Section 10(c). 33 U.S.C. §§910(c), 910(d).

[1]The administrative law judge found that it was undisputed that claimant had worked 211 of the 356 days preceding the injury. Decision and Order at 16.

[2]Pursuant to Section 10(a), claimant's actual earnings, $18,829.70, are divided by the number of days he worked in the preceding year, 211, to determine his average daily wage, $89.25. 33 U.S.C. §910(a). The average daily wage is multiplied by 260, based on a five-day work week, which yields an average annual earnings of $23,205. 33 U.S.C. §910(a). When divided by 52 weeks, the annual earning yields an average weekly wage of $446.25. 33 U.S.C. §910(d).

Accordingly, the administrative law judge's decision finding claimant permanently totally disabled is affirmed. However, the administrative law judge's determination of claimant's average weekly wage pursuant to Section 10(a) is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge