

BRB Nos. 96-1565
and 96-1565A

GLENVILLE PETRIE)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
BROWARD MARINE, INCORPORATED)	DATE ISSUED: _____
)	
and)	
)	
RISCORP)	
)	
Employer/Carrier- Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION, PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits of John C. Holmes,
Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein, Miami, Florida, for claimant.

Warren K. Sponsler (Rissman, Weisburg, Barrett, Hurt, Donahue & McClain,
P.A.), Tampa, Florida, for employer/carrier.

Before: SMITH, BROWN and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Granting Benefits (95-LHC-1027) of Administrative Law Judge John C. Holmes 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 the 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 March 4, 1992, claimant sustained injury to his throat when he was exposed to gaseous fumes while working for employer as a welder; as a result, he now suffers from chronic laryngitis. Claimant was treated by Dr. Callari and Dr. Koris, who performed a microlaryngoscopy on April 17, 1992. After attempting unsuccessfully to return to work, claimant opened his own car repair business. Claimant sought compensation under the Act, alleging that he sustained a loss in his wage-earning capacity.

In his Decision and Order, the administrative law judge found that prior to the date of maximum medical improvement, claimant was not able to return to his usual work, reasoning that claimant had attempted to do so unsuccessfully and relying on the January 1993 opinion of Dr. Callari that he should "avoid smoke inhalation." The administrative law judge further determined that while employer had not initiated a search to find alternative employment prior to claimant's reaching maximum medical improvement, claimant was not totally disabled during this period because he worked in his own business, and the net profits¹ of claimant's auto repair business, as reflected in his Wage and Tax Forms for 1993 and 1994, reasonably represented his post-injury wage-earning capacity prior to February 22, 1994. Accordingly, he awarded claimant temporary partial disability compensation from the date of his injury until February 22, 1994, when Dr. Koris found that maximum medical improvement had been achieved. Crediting the opinion of Dr. Koris that claimant was able to return to his usual employment after he reached maximum medical improvement, the administrative law judge, however, denied claimant permanent disability compensation.

Claimant appeals the denial of permanent partial disability compensation, maintaining it is inconsistent with the administrative law judge's award of temporary partial disability compensation. Claimant also contends that the administrative law judge erred in

¹Although the administrative law judge states in his Decision and Order at 3, that he considers the actual profits claimant paid to himself as a worker in his company representative of claimant's post-injury wage-earning capacity, in his Decision and Order at 4-5, he actually utilizes the net profits from claimant's business.

rejecting certain business expenses he claimed on his tax returns in calculating the net profits from his business in determining his post-injury wage-earning capacity for the award of temporary partial disability. Employer responds, urging that the administrative law judge's denial of permanent partial disability compensation be affirmed. Employer also cross-appeals the award of temporary partial disability compensation, arguing that because it established the availability of suitable alternative employment, consistent with Dr. Callari's restrictions and paying comparable wages to those claimant earned as a welder, claimant sustained no loss in his wage-earning capacity but rather chose to limit his earning potential by starting his own business. Employer alternatively asserts that in determining claimant's post-injury wage-earning capacity, the administrative law judge failed to consider several factors, including claimant's testimony that he paid himself a salary of as much as \$300 per week and claimant's failure to document employee wages and numerous other deductions such as depreciation, which are available to new companies to lower net profits for tax purposes. Claimant replies that the administrative law judge's award of temporary partial disability was proper because employer made no showing that claimant was capable of performing suitable alternative employment at comparable wages at any time prior to his reaching maximum medical improvement and there is no support in the record for employer's assertion that he voluntarily limited his income. Employer also replies, reiterating the arguments it made previously.

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 and Construction 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. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1991). Employer can meet this burden is by showing that claimant actually performed a suitable job after his work-related injury. See *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

Initially, we affirm the administrative law judge's determination that claimant is entitled to temporarily partial disability compensation. It is undisputed that claimant was unable to perform his usual work prior to reaching maximum medical improvement. Employer argues that claimant sustained no loss in his wage-earning capacity during this period because employer's vocational expert, Ms. Mendoza, considered claimant's 1993 work restrictions in conducting her 1995 vocational survey which identified suitable job opportunities paying the same wages claimant earned pre-injury. Inasmuch, however, as Ms. Mendoza conducted her labor market survey in June 1995 and did not testify that the jobs she identified were available at any earlier time, the administrative law judge properly determined that her testimony was insufficient to establish the availability of suitable alternate employment during the period of temporary disability. See *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

However, the administrative law judge erred in calculating claimant's post-injury wage-earning capacity for the period of temporary disability. Although both parties raise various points regarding the administrative law judge's calculation of the profits from claimant's business, we need not address these specific arguments because they are premised on the erroneous assumption that the net profits from claimant's business are a proper basis for determining claimant's post-injury wage-earning capacity. Wage-earning capacity under the Act, however, refers to an injured employee's ability to command regular income as a result of his personal labor. See 33 U.S.C. §902(13)(1988); 1C A. Larson, *The Law of Workmen's Compensation*, §57.51 at 10-164.64 (1987). Inasmuch as income earned from a business owned by the employee, even though he contributes some work to it, should not be used to reduce disability compensation, the administrative law judge in the present case erred in utilizing the net profits from claimant's business to determine his post-injury wage-earning capacity. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989). Instead, claimant's wage-earning capacity must be based on the wages which claimant received as a result of his personal labor in his auto repair business. *Id.* We therefore vacate the finding regarding claimant's post-injury wage-earning capacity during the period of temporary disability. On remand, the administrative law judge should determine what portion, if any, of claimant's income in his business represents salary and should use that figure, adjusted for inflation, as claimant's post-injury wage-earning capacity for purposes of calculating the award of temporary partial disability compensation.

Turning to claimant's appeal of the administrative law judge's denial of permanent partial disability compensation, we reject his assertion that this conclusion is inconsistent with his award of temporary partial disability compensation. The administrative law judge relied upon Dr. Callari's opinion and claimant's unsuccessful attempt to return to work for employer in concluding that he could not return to his usual work as a welder prior to reaching maximum medical improvement. For the period after claimant reached maximum medical improvement, however, the administrative law judge chose to credit the December 21, 1995, opinion of Dr. Koris that claimant was able to return to his usual welding duties. Such credibility determinations are solely within the purview of the administrative law judge, who may accept or reject all or any part of any testimony as he sees fit. See, e.g., *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Although claimant maintains that the administrative law judge should have disregarded this opinion because it was not shown that Dr. Koris was familiar with claimant's duties as a welder, the administrative law judge considered and rationally rejected this argument.² The December 21, 1995, opinion of Dr. Koris provides substantial evidence to support the administrative law judge's finding that claimant was capable of performing his usual work after his condition reached permanency. Inasmuch as claimant has failed to establish any reversible error made by

²Dr. Koris stated in this note that he provided medical treatment to claimant for work place exposure in 1992. Based on this treatment, the administrative law judge rationally inferred that Dr. Koris was sufficiently familiar with the requirements of claimant's work to render a probative opinion regarding his ability to perform his usual welding duties.

the administrative law judge in evaluating the conflicting medical evidence and making credibility determinations, his denial of permanent disability compensation is affirmed.³

Accordingly, the case is remanded for reconsideration of the extent of claimant's temporary partial disability. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

³Because we affirm the administrative law judge's determination that claimant failed to establish a *prima facie* case for the period of permanent disability, we need not address claimant's arguments regarding the calculation of his loss in wage-earning capacity.