BRB No. 97-0324

RICHARD C. CABELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter and Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order awarding benefits (95-LHC-1949) of Administrative Law Judge Fletcher E. Campbell, 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).

Claimant worked for employer as a rigger. On June 8, 1987, he suffered a work-related injury to his back, resulting ultimately in persistent lower back pain that at times radiates down his left leg. Employer voluntarily paid temporary total and partial disability benefits for various periods between August 19, 1987 and April 2, 1995, and then temporary partial disability benefits from April 3, 1995 and continuing. *See* EX-1. The parties stipulated, *inter alia*, that claimant's average weekly wage at the time of his injury was $458.82, and employer conceded that claimant's injury precluded him from returning to his former position with employer. *See* Decision and Order at 2-3, 15. They also stipulated

that claimant was convicted in 1978 on a misdemeanor charge of disorderly conduct. *Id.* at 3, 18 n. 2.

After a formal hearing on this claim, the administrative law judge determined that employer established the availability of suitable alternate employment by demonstrating a number of specific jobs within claimant's work restrictions. He awarded claimant permanent partial disability benefits, finding a post-injury wage-earning capacity of $113 per week. Decision and Order at 15-16. In rendering these findings, the administrative law judge rejected claimant's assertions that performance of these jobs would be difficult because he was taking medication for pain and that employer failed to discharge its burden of proving that claimant was not totally disabled because its evidence of suitable alternate employment did not take into account the effects of claimant's conviction in 1978. Decision and Order at 16-17.

Claimant appeals, asserting that the administrative law judge erred in finding that employer demonstrated the availability of suitable alternate employment and in setting the amount of claimant's post-injury wage-earning capacity. Employer responds, urging affirmance. Upon consideration of the Decision and Order of the administrative law judge, the arguments raised on appeal and the administrative record as a whole, we conclude that the administrative law judge's award of permanent partial disability benefits is supported by substantial evidence based on the record as a whole and that it accords with applicable law, and we therefore affirm the Decision and Order in all respects.

Claimant's challenge to the administrative law judge's finding that employer established the availability of suitable alternate employment lacks merit.[1] Claimant contests the sufficiency of employer's rebuttal evidence on the issue of nature and extent of disability "as the [prospective] employers contacted were not notified of Mr. Cabell's criminal record," which claimant asserts is "an integral factor which would certainly preclude him from many positions." Cl. Br. at 11.

[1]Employer conceded that claimant is unable to return to his previous position. *See* Decision and Order at 15. Accordingly, the burden shifts to employer to prove that the claimant is only partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *See Lentz v. Cottman Co.*, 852 F.2d 129, 131, 21 BRBS 109, 112 (CRT)(4th Cir. 1988*); Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 542, 21 BRBS 10, 13 (CRT)(4th Cir. 1988).

While an employment possibility which is precluded because of a disabled employee's prior criminal record does not constitute suitable alternate employment, *see Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196, 21 BRBS 122, 123-24 (CRT)(9th Cir. 1988); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367, 370 (1990), we reject the argument that claimant's prior record precludes the jobs identified here. The administrative law judge found more than 17 positions, only some of which involved work as a security guard, suitably rejecting the argument that claimant's criminal conviction precluded his obtaining any of the jobs. The relevant provision of the Virginia Code dictates that

> [n]o person with a criminal record of a misdemeanor involving moral turpitude or any felony shall be employed as an unarmed security officer, except that, upon written request, the Director of the Department of Criminal Justice Services may waive the prohibition.

Va. Code Ann. §9-183.3E (1997). There is no allegation that claimant's disorderly conduct conviction, which resulted in a $25 fine, constitutes a felony. Thus, it appears that this conviction would preclude work as a security guard if a conviction for disorderly conduct would be for a "misdemeanor involving moral turpitude." We conclude that the administrative law judge correctly determined that disorderly conduct is not a "misdemeanor involving moral turpitude" under Virginia law.[2] The Virginia Supreme Court has stated that

> a crime which involves moral turpitude is "an act of baseness, vileness, or

[2]Even if claimant's conviction was for a crime involving moral turpitude, a major concern voiced by the court of appeals in *Hairston* over the permanent or conclusive disqualifying effect of certain convictions would not be at issue here, because, unlike the violation at issue in *Hairston*, any prohibition that would preclude employment with a security service could be waived by the Director of the Virginia Department of Criminal Justice Services. *See* Va. Code Ann. §9-183.3E (1997); *compare Hairston*, 849 F.2d at 1196, 21 BRBS at 124 (CRT)(employee could do nothing to overcome disqualifying effect of record). In addition, there is no evidence that a criminal record would preclude employment as a telemarketer, fast-food worker or the other non-security jobs listed by the administrative law judge.

> depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

Parr v. Commonwealth, 198 Va. 721, 724, 96 S.E.2d 160, 163 (1957), *citing* 58 C.J.S. at 1201. The Court has ruled that neither assault and battery nor drunkenness and illegal possession of liquor are crimes involving moral turpitude. *See Pike v. Eubank*, 197 Va. 692, 90 S.E.2d 821 (1956); *Burford v. Commonwealth*, 179 Va. 752, 20 S.E.2d 509 (1942); *see generally Chrisman v. Commonwealth*, 3 Va.App. 89, 93-97, 348 S.E.2d 399, 401-03 (1986). Contrary to claimant's argument, the administrative law judge rationally determined that claimant's conviction on the charge of disorderly conduct should have no legal effect on the availability of the positions found by the vocational experts in this case.[3] Because this is claimant's sole challenge on appeal to the sufficiency of employer's evidence of suitable alternate employment, we affirm the administrative law judge's finding that employer met its burden of establishing that claimant was not permanently and totally disabled by identifying suitable alternate employment.[4]

Claimant next contends that his post-injury wage-earning capacity should reflect only his actual earnings as a tax preparer with the Jackson Hewitt tax service, for whom he worked a total of 64 hours from January to April 17, 1995, *see* CX-3, and avers that the administrative law judge erred in calculating his post-injury wage-earning capacity by employing the average wages of the positions that were identified in employer's labor market survey. According to claimant, the amount of $18.78 constitutes his weekly post-injury wage-earning capacity, giving a wage loss of $440.07 and a resulting compensation rate of $293.38, which, according to claimant, amounts to "a mere adjustment" to the wage-earning capacity of $237.21 found by the administrative law judge. Cl. Br. at 9.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h), 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. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). The objective of the

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[3]The administrative law judge credited Mr. Edward's testimony that, given the age of claimant's conviction, it would not affect claimant's employment opportunities in any event. *See* Tr. at 125.

[4]Claimant does not contest on appeal the administrative law judge's rejection of his argument below that he is limited in working because of his medication for pain. Nor does claimant question the finding that he is able to work 20 to 25 hours per week. Finally, the administrative law judge's finding that claimant failed to exercise due diligence in seeking employment is likewise not an issue in this case. *See generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 717 (4th Cir. 1993).

inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage claimant can earn under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42 (1996).

Claimant was not employed at the time of the hearing,[5] and the administrative law judge stated he could not determine which of the identified jobs was more suitable for claimant. As a result, the administrative law judge averaged the hourly wages paid at the positions which were identified by employer as suitable alternate employment, including the position at Jackson Hewlitt, and took into account that claimant is only able to work 25 hours per week. *See* EX-4; *Mangaliman*, 30 BRBS at 43 (administrative law judge did not err in considering earning capabilities on open market). Determinations of wage-earning capacity under Section 8(h) are based on relevant factors, such as claimant's physical condition, age, education, work experience, claimant's earning power on the open market and any other reasonable variable that would form a rational basis for the decision. *See id.*; *see also Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Claimant has failed to demonstrate why the actual wages he earned in a position he held at Jackson Hewitt for 64 hours would fairly and reasonably represent his wage-earning capacity in his injured condition, *see Long*, 767 F.2d at 1582, 17 BRBS at 153 (CRT), while the wages paid for jobs the administrative law judge found were suitable and available would not provide a realistic assessment of his wage-earning capacity. We reject his contention that the administrative law judge erred in averaging the wages paid in all the positions identified as suitable alternate employment. *See generally Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). Thus, we affirm the administrative law judge's determination of claimant's post-injury wage-earning capacity.

Accordingly, the Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

[5]Claimant was employed for slightly over one year with a courier service after his injury. *See* Tr. at 22-24, 33-34. After a lengthy interval, claimant's next worked with the Jackson Hewitt tax service. *See* CX-3; Tr. at 25.