BRB No. 97-0381

JOSEPH COLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAKE CHARLES STEVEDORES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Randall E. Hart (Steven Broussard & Association), Lake Charles, Louisiana, for claimant.

Matthew E. Lundy, Samuel B. Gabb, and Thomas P. LeBlanc (Lundy & Davis, L.L.P.), Lake Charles, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-1043) of Administrative Law Judge Lee J. Romero, 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, while loading rice for employer, injured his left arm and neck on May 20, 1993, when he was struck in the back by a shackle that had broken loose from a load of bagged rice. Employer voluntarily paid temporary total disability benefits from May 21, 1993, at the rate of $3.52 per week. After determining that claimant established his *prima facie* case of total disability but that employer did not establish suitable alternate employment, the administrative law judge awarded temporary total disability benefits from May 20, 1993, through March 7, 1994, and permanent total disability benefits from March 8, 1994, and continuing. The administrative law judge held employer liable to claimant for unpaid compensation from May 21, 1993, to present upon concluding that claimant's average weekly wage was $158.37 using Section 10(c) of the Act, 33 U.S.C. §910(c), and also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest.

On appeal, employer challenges the administrative law judge's findings that claimant established his *prima facie* case of total disability and that employer did not establish suitable alternate employment. Employer also challenges the administrative law judge's findings regarding claimant's average weekly wage. Claimant responds in support of the administrative law judge's award of benefits but asserts in his response brief that the administrative law judge erred in calculating his average weekly wage as the administrative law judge did not include claimant's earnings from the entire year prior to injury.

Employer initially contends that the administrative law judge erred in determining that claimant established his *prima facie* case of total disability. Employer asserts that claimant's usual employment was not that of a longshoreman and that Dr. Perry's pre-injury opinion in March 1993 restricting claimant from heavy work precluded claimant from being disabled due to the current injury of May 1993. To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Claimant's usual employment is that which he was performing at the time of injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Despite employer's contention to the contrary, the administrative law judge rationally found that claimant's usual employment was as a longshoreman as it is undisputed that he was working in this capacity at the time of injury.[1] *See Manigault*, 22 BRBS at 332; *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982); Decision and Order at 15; Emp. Ex. 10 at 53-55, 59-62. Moreover, the administrative law judge rationally concluded that claimant cannot return to his usual employment due to his work-related injury in light of both Dr. Perry's post-injury opinion that claimant is not fit to return to his longshore job due to his May 1993 work accident and Mr. Peterson's opinion that claimant is totally and permanently vocationally disabled. *See Hite v. Dresser Guiberson Plumbing*, 22 BRBS 87

[1]Claimant worked as a longshoreman with employer for only two days on May 19, 1993, and May 20, 1993, when he was injured. Claimant was self-employed prior to these two days, engaging in collecting scrap metal, hauling trash, and moving furniture.

(1989); *Williams v. Halter Marine Serv. Inc.*, 19 BRBS 248 (1987); *Blake*, 21 BRBS at 49; Decision and Order at 15-16; Cl. Exs. 7, 8, 10, 11 at 7-10, 16; Tr. at 124. Despite employer's contention that claimant's current injury could not prevent him from returning to longshore work as he was previously restricted from performing longshore work in March 1993, claimant was nevertheless performing the work at the time of the May 1993 work injury. Substantial evidence supports the administrative law judge's finding that claimant is now totally disabled. Consequently, the administrative law judge's conclusion that claimant established his *prima facie* case of total disability is supported by substantial evidence and is affirmed.

Employer next contends that the administrative law judge erred in determining that it did not establish suitable alternate employment. Employer asserts that the uncontradicted evidence of Mr. Quintanilla and Dr. Perry establish that claimant can perform certain light part-time jobs, such as a janitor or delivery driver, identified in the labor market survey. Once claimant has established a *prima facie* case of total disability, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer must establish the general availability of job opportunities within the geographical area in which claimant resides for which claimant can reasonably compete and secure based upon his age, education, work experience, and physical restrictions. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. For the job opportunities to be considered realistic, employer must establish the requirements of the positions so that the administrative law judge can consider their suitability. *See generally Manigault*, 22 BRBS at 332.

In determining that employer did not establish suitable alternate employment, the administrative law judge discussed and weighed the contrary opinions of both Mr. Quintanilla, employer's vocational rehabilitation expert, and Mr. Peterson, claimant's expert in that field, as well as the labor market survey provided by Mr. Quintanilla. Decision and Order at 16-17; Cl. Ex. 10; Emp. Ex. 9; Tr. at 124, 153-179. The administrative law judge acted within his discretion in placing greater weight on Mr. Peterson's testimony that claimant is totally vocationally disabled and that claimant is unable to earn any type of wages, full-time or part-time, due to his physical restrictions, limited education, and age, as it provided a more cogent and precise analysis of claimant's capabilities which rebutted Mr. Quintanilla's opinion that claimant could work part-time as a janitor or delivery driver. *See generally Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *rev'd in part other grounds,* 785 F.2d 329, 18 BRBS 73 (CRT) (1986); Decision and Order at 17. Moreover, the administrative law judge rationally discounted Mr. Quintanilla's labor market survey, in which the positions identified were approved by Dr. Perry, as the administrative law judge found it no more descriptive of the jobs' requirements than a classified ad appearing in a local newspaper.[2] *See Manigault*, 22 BRBS at 332; *Thompson v. Lockheed Shipbuilding &*

[2]The labor market survey identified employer's name, address, phone number, the part-time position available, and the salary. Emp. Ex. 9. Mr. Quintanilla did not testify as to the physical requirements of the jobs in the survey although he testified that these jobs fell into

Construction Co., 21 BRBS 94 (1988); Decision and Order at 17; Emp. Ex. 9. We, therefore, affirm the administrative law judge's finding that employer did not establish suitable alternate employment based on the administrative law judge's weighing of the relevant evidence.

Employer lastly contends that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(c) while conceding that Section 10(c) is the appropriate method for such a determination. Employer asserts that the administrative law judge should not have included claimant's pre-injury earnings from scrap metal collection, hauling trash, and household moving because these earnings are not supported by tax records and that the administrative law judge did not determine whether claimant demonstrated the "ability, willingness, and opportunity" to work as a longshoreman before determining claimant's average weekly wage. In determining average annual earnings under Section 10(c), relevant considerations are (1) the previous earnings of claimant in the job at which he was injured, and (2) the previous earnings of similar employees, or (3) other employment of claimant, including earings in self-employment. 33 U.S.C. §910(c); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). The objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's wage-earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991).

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the "light" category. Tr. at 160-161. The administrative law judge found that the evidence before him did not reveal the physical requirements of the positions identified, and thus he could not determine their suitability for claimant.

The administrative law judge included claimant's actual earnings from July 17, 1992, to May 20, 1993, from collecting scrap metal in the amount of $6,952.46, hauling trash in the amount of $600, and in moving furniture in the amount of $500, as well as the two days claimant worked for employer and earned a total of $183.[3] Decision and Order at 19-20. Contrary to employer's contention, the administrative law judge rationally based his Section 10(c) findings on claimant's actual pre-injury earnings and thus was not required to determine whether claimant had the "ability, willingness and opportunity" to perform longshore work as claimant was not seeking to establish a wage rate based on other than his actual pre-injury earnings. *See Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980)(Board affirmed the administrative law judge's determination of average weekly wage under Section 10(c) based on earnings of temporary bookkeepers who were similarly situated and not those of full-time bookkeepers as claimant could not establish that she had the requisite ability and opportunity to work as a full-time bookkeeper); *Conatser v. Pittsburgh Testing Laboratory,* 9 BRBS 541 (1978)(Board remanded the case to the administrative law judge for a redetermination of average weekly wage based on pre-injury actual earnings as claimant established his unwillingness to work at the higher wage levels used by the administrative law judge). Moreover, the plain language of Section 10(c) provides for the inclusion of earnings in other employment, *see Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990), and the administrative law judge acted within his discretion in including these earnings even though they were not supported by tax records since the administrative law judge found claimant's testimony credible on this issue. 33 U.S.C. §910(c); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); Decision and Order at 19; Cl. Exs. 1, 2, 5; Emp. Exs. 7, 8; Tr. at 34-35, 54-56, 76-77. The administrative law judge's conclusion that claimant's average weekly wage is $158.37 is thus affirmed.

Claimant's counsel has filed a fee petition for work performed before the Board in this case requesting an attorney's fee totaling $2,715 for 27.15 hours of services rendered at the rate of $100 per hour. Employer did not file objections to the fee petition. We award counsel the entire requested fee of $2,715 as it is reasonable in light of claimant's success in defending his award of permanent total disability benefits against employer's appeal. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. Claimant's counsel is awarded a fee of $2,715 for work performed before the Board payable directly to claimant's counsel by employer.

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[3]We need not address claimant's argument that the administrative law judge erred in not including his earnings in these activities for the entire year prior to injury as it is raised in a response brief and not a cross-appeal, and is not in support of the administrative law judge's decision below. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); Cl. Resp. Br. at 17-18.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge