BRB Nos. 99-0282
and 99-0282A

JOHN S. BILLIOT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PRIDE OFFSHORE, INCORPORATED	)	DATE ISSUED: Dec. 1, 1999
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Granting in Part and Denying in Part Employer's Motion for Reconsideration, and Order Granting Claimant's Motion for Reconsideration of Order Granting in Part and Denying in Part Employer's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Alan G. Brackett and Gerard J. Dragna (Moouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for claimant.

Jefferson R. Tillery (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits, Order Granting in Part and Denying in Part Employer's Motion for Reconsideration, and Order Granting Claimant's Motion for Reconsideration of Order Granting in Part and Denying in Part Employer's Motion for Reconsideration (97-LHC-2482) of Administrative Law Judge Clement J. Kennington 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 suffered injuries to his neck and shoulder during the course of his employment as a floor hand on an offshore rig on July 14, 1995, but continued to perform his usual work duties until July 18, 1995, when he was assigned to light duty for the remainder of his "hitch" which ended that day.[1] Claimant returned to work as scheduled on July 26, 1995, but performed light duty and continued in this status until August 2, 1995. Claimant thereafter returned to his usual work duties on August 9, 1995, and continued to perform those duties until he was terminated on August 13, 1995. Claimant was rehired to work as a floor hand on September 27, 1995, and continued to perform these duties until November 14, 1995, when he was reassigned to work as a roustabout and had his hourly wage reduced. On December 26, 1995, claimant was terminated for refusing to work offshore. Claimant's termination was rescinded on December 27, 1995, but he was not recalled to work until February 12, 1996, when he was assigned light duty painting chores. Because of increased neck and shoulder pain, claimant left this job on February 15, 1996.

In his decision, the administrative law judge initially found that neither of claimant's terminations on August 13, 1995, or December 26, 1995, constituted a violation of Section 49 of the Act, 33 U.S.C. §948a. Next, the administrative law judge found that claimant's current condition arose out of his work injury and that he is unable to perform his usual job. Although he concluded that employer failed to establish suitable alternate employment within its own facility with either the painting job claimant attempted to perform in February 1996 or other allegedly available light-duty positions, the administrative law judge determined that suitable alternate employment had been demonstrated in the market surveys of August 8, 1996, and August 1, 1997, and that based on the average of the wages paid by the jobs in the

[1]Claimant's usual work schedule required that he work seven consecutive twelve hour days followed by seven days off duty. CX 16.

1996 survey, claimant had a residual wage earning capacity of $188.58. Lastly, the administrative law judge utilized Section 10(b), 33 U.S.C. §910(b), of the Act to determine that claimant's average weekly wage at the time of injury was $575.02. Accordingly, the administrative law judge awarded claimant compensation for a temporary total disability from November 14, 1995 until August 8, 1996, at a weekly rate of $383.35, and temporary partial disability compensation from August 9, 1996, at a rate of $257.63 per week.

In his first Order on reconsideration, the administrative law judge rejected employer's arguments concerning his findings regarding the availability of suitable alternate employment within employer's facility and his calculation of claimant's average weekly wage; however, the administrative law judge agreed with employer that the wages paid by the jobs identified as being suitable in employer's August 1997 labor market survey should be considered when determining claimant's post-injury wage-earning capacity. Accordingly, the administrative law judge amended his decision to reflect that claimant is entitled to temporary partial disability compensation to a lower rate as of August 1, 1997.[2]

[2]In this Order, the administrative law judge awarded a rate of $194.77 per week from August 8, 1996, to July 31, 1997, based on a post-injury wage-earning capacity of $188.58 per week, which he subtracted from claimant's a compensation rate of $383.35, 2/3 of claimant's average weekly wage of $575.02. From August 1, 1997, to the present, the administrative law judge determined that claimant had a post-injury wage-earning capacity of $239.58 per week, thus entitling him to temporary partial disability compensation at a rate of $143.77 per week ($383.25 - 239.58). In a second Order on reconsideration, the administrative law judge corrected these computations, subtracting claimant's wage-earning capacity from his average weekly wage and then awarding 2/3 of the difference; accordingly, the administrative law judge amended his award to reflect a weekly compensation rate of $257.63 from August 8, 1996 to July 31, 1997, and $223.63 from August 1, 1997 to the present.

On appeal, claimant challenges the administrative law judge finding that positions identified in employer's August 1997 market survey established the availability of suitable alternate employment and his subsequent inclusion of the wages paid by those positions in his computation of claimant's post-injury wage-earning capacity. In its cross-appeal, employer argues that the administrative law judge erred in finding that it had not established suitable alternate employment within its own facility, in determining claimant's average weekly wage at the time of injury, and in determining claimant's post-injury wage-earning capacity after August 1, 1997.

Suitable Alternate Employment

Where, as in the instant case, claimant is unable to perform his usual employment duties, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In order to meet its burden by offering claimant a job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Claimant, in his appeal, argues that the administrative law judge erred in determining that the three positions identified in employer's August 1997 market survey established the availability of suitable alternate employment since, he asserts, the three identified positions are beyond his vocational qualifications. We disagree. In the instant case, the administrative law judge relied upon the opinion of employer's vocational consultant, Ms. Bailey, in concluding that employer's August 1997 labor market survey established the availability of suitable alternate employment. In her August 1997 labor market survey, Ms. Bailey considered claimant's background as well as mental and physical capabilities and identified the positions of yard foreman, fleet dispatcher and hospital dispatcher which she opined were suitable for claimant. CX 34. Each of these positions was approved by Dr. Landry, claimant's treating physician. EX 16. Thus, based upon the record before us, the administrative law judge's finding that the three positions identified in employer's August

1997 labor market survey established the availability of suitable alternate employment is supported by substantial evidence and is consistent with law. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding on this issue. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

In its cross-appeal, employer contends that the administrative law judge erred by failing to find that its proffer of a light-duty painting job to claimant constituted suitable alternate employment; alternatively, employer asserts that the availability of light duty jobs in its facility affirmatively established the availability of suitable alternate employment. Although employer may establish the availability of suitable alternate employment within its own facility even if the position is specifically tailored to meet claimant's physical restrictions, *see Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (5th Cir. 1996), claimant must be capable of performing the position offered. *See Darden,* 18 BRBS at 224. In finding that the light-duty painter position offered to claimant was not suitable for him, the administrative law judge stated that he agreed with claimant, who asserted that the job was not suitable and testified that he was forced to leave it after 3½ days due to unbearable pain. Decision and Order at 21. 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 from the evidence. *See John W, McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In this case, the administrative law judge's decision is supported by claimant's testimony regarding his inability to perform the painter position offered by employer; accordingly, we affirm the administrative law judge's determination that this position in employer's facility does not satisfy employer's burden of establishing the availability of suitable alternate employment.

Next, employer contends that the administrative law judge erred in not relying upon the testimony of Mr. Barker and Mr. Jambon that other light duty jobs were available at employer's facility. In addressing these jobs, the administrative law judge concluded that employer had failed to carry its burden because no company official was able to identify any employee performing such a light duty job or to produce any documentation showing the existence of light duty positions during the relevant time period. The record supports the administrative law judge's finding; although the two witnesses relied upon by employer alluded to the general availability of light-duty employment, employer offered no evidence that such employment was actually available or specifying the requirements of such positions. Thus, as the administrative law judge's finding that employer failed to establish suitable alternate employment within its facility is rational and supported by the record, it is affirmed. *See generally O'Keeffe,* 380 U.S. at 359.

Average Weekly Wage

In his decision, the administrative law judge determined claimant's pre-injury average weekly wage pursuant to Section 10(b), 33 U.S.C. §910(b), of the Act. Employer, on appeal, does not challenge the use of this specific subsection of the Act; rather, employer argues that the administrative law judge erred in calculating claimant's pre-injury average weekly wage based on those monies earned by four other floor hands employed by employer rather than the monies earned by other roustabouts employed by employer.

Section 10(b) applies where the employee was not employed for substantially the whole of the year; calculation of average weekly wage under subsection (b) is based on the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In the case at bar, because claimant had been employed by employer for less than twelve months prior to his injury, the administrative law judge determined claimant's average weekly wage pursuant to Section 10(b) by utilizing the wages of four contemporaneous floor hands. The administrative law judge found that while claimant occasionally performed the duties of a roustabout and was in fact performing such work at the time of his initial injury on July 14, 1995, claimant was hired as a floor hand and was receiving the wages of a floor hand at the time of his injury; moreover, when claimant was rehired in September 1996, he was again assigned floor hand duties until his work injury prevented his performing these duties and he was reassigned in November 1996. Decision and Order at 23. Thus, based upon his finding that claimant worked substantial periods of time as a floor hand and continued to earn the hourly rate paid to floor hands at the time of the injury, the administrative law judge concluded that it would be unfair to calculate claimant's pre-injury average weekly wage based upon the lower wage rate paid to roustabouts as to do so would underestimate his pre-injury earning capacity. *Id.* As these findings are supported by the record, rational and in accordance with law, we affirm the administrative law judge's decision to calculate claimant's average weekly wage based upon the wages earned by these co-workers. Accordingly, as the administrative law judge's calculations based on these wages are unchallenged, his average weekly wage determination is affirmed.

Post-Injury Wage-Earning Capacity

Lastly, employer contends that the administrative law judge erred in calculating claimant's wage-earning capacity subsequent to August 1, 1997, the date of its second labor market survey. Pursuant to Section 8(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. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 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. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992);

Penrod Drilling Co. v. Johnson, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director*, OWCP, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). The United States Court of Appeals for the Fifth Circuit has held, in addressing this issue, that an average of the range of salaries identified for suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, the court stated, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam,* 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP,* 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998).

In the instant case, employer asserts that the administrative law judge erred in calculating claimant's post-August 1997 wage-earning capacity by using the wages paid in the identified jobs set forth in both its 1996 and 1997 labor market surveys. Employer, however, cites no evidence that the positions identified in 1996 were no longer available to claimant or representative of the range of jobs. We hold that the administrative law judge's decision to average the wages of the positions identified by employer in 1996 and 1997 is rational and in accordance with law, since the resulting average reflects the range of jobs which employer has identified as establishing the availability of suitable alternate employment. Accordingly, the administrative law judge's calculation of claimant's post-injury wage-earning capacity subsequent to August 1, 1997, is affirmed. *See Pulliam*, 137 F.3d at 326, 32 BRBS at 65 (CRT).

Accordingly, the administrative law judge's Decision and Order and Orders on reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge