BRB No. 02-0332

DONALD V. PATTERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OMNIPLEX WORLD SERVICES	)	DATE ISSUED: Jan. 21, 2003
	)	
and	)	
	)	
ACE USA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits, Order Admitting Document Into Evidence and Directing Supplementary Briefing, Order Denying Motion to Reopen Record, and Order dated February 21, 2001 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Lipps (Peterson & Lipps), Algona, Iowa, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order –Awarding Benefits, Order Admitting Document Into Evidence and Directing Supplementary Briefing, Order Denying Motion to Reopen Record, and Order dated February 21, 2001 (1999-LHC-2044) of Administrative Law Judge Thomas F. Phalen, 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.,* as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a security guard at the United States Embassy construction site in Moscow, Russia, in July 1997. Prior to this job, claimant worked overseas as a security guard for MVM Security from about 1990 until 1996. On August 10, 1997, claimant, while in course of his employment for employer in Moscow, sustained an injury to his lower back. Following initial treatment in Moscow, claimant was evacuated to the United States, where he subsequently came under the care of Dr. Fishman, a physiatrist, who recommended that claimant undergo physical therapy. Claimant underwent physical therapy, and Dr. Fishman opined that claimant reached maximum medical improvement for his low back condition as of January 26, 1998, with a five percent permanent partial impairment related to his work-related chronic lumbosacral strain. Dr. Fishman also placed restrictions on claimant's future employment. In September 2000, Dr. Ban diagnosed degenerative disc disease with lumbar radiculopathy, assigned a ten percent permanent partial impairment related to the work injury sustained on August 10, 1997, and opined that claimant has at least light work capacity, as defined by the *Dictionary of Occupational Titles*.

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[1] The record establishes that claimant began his work as a security guard in 1990, and that, while with MVM Security, he held assignments in Mozambique, Nigeria, Russia, South Africa, Chile, Kazakhstan, the Ukraine, and Finland. Claimant also worked briefly as a security guard for a food store in Milan, Missouri while awaiting his placement by MVM Security to a position in Finland.

[2] Dr. Fishman restricted claimant to: no lifting over 70 lbs waist to shoulder, 60 lbs floor to waist, or 50 lbs floor to shoulder other than on an occasional basis; walking limited to six hours total divided into three hour segments with 30 minute rest breaks in between those segments; and no work involving climbing, kneeling or twisting. Claimant's Exhibit 6.

[3] Dr. Ban added, "light work is defined as exerting up to 20 lbs of force occasionally and/or up to 10 lbs of force frequently and/or a negligible amount of force constantly to move objects. Physical demands are in excess of those for sedentary work. Light work usually requires a substantial amount of walking or standing. In addition [claimant] has specific exertional limitations in that he should avoid repetitive climbing, kneeling, stooping, crouching, crawling, bending or twisting," and his "ability to walk and move about is limited to three hours in an eight hour work day. He can stand for three hour workday and sit for four hours in an eight hour workday." Claimant's Exhibit 26.

Employer prepared a labor market survey identifying a number of alternative jobs near claimant's home in the Trenton, Missouri, area. Claimant testified that he applied for many of those positions without any success and due to his back condition, he would not be physically able to perform some of the other jobs listed. Employer also offered claimant two positions on August 17, 1998, one in Fort Wayne, Indiana, and the other in Washington, D.C. Claimant declined these jobs stating that for personal reasons he did not wish to move from his home in Trenton, Missouri. In February 1999, claimant stated that he was, from a financial standpoint, forced to return to work as an overseas security guard, this time in Nigeria for Coastal International Security, Incorporated. While on this job in June 1999, claimant suffered a heart attack prompting his return to the United States, where he sustained a second heart attack in July 1999. As of the date of the hearing on October 11, 2000, claimant had not worked since his return from Nigeria. Employer paid temporary total disability benefits from August 11, 1997, until September 16, 1998. Claimant thereafter sought additional benefits.

In his decision, the administrative law judge determined that claimant sustained a work-related back injury that prevents him from performing his usual employment as a security guard and that employer has not established the availability of suitable alternate employment within the relevant labor market, which he concluded was only the community of Trenton, Missouri. The administrative law judge thus concluded that claimant is entitled to an award of temporary total disability benefits from August 16, 1997, through January 26, 1998, followed by a continuing award of permanent total disability benefits based on an average weekly wage of $582.80, as calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). The administrative law judge also awarded medical benefits and denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that it has not established suitable alternate employment, initially asserting that the administrative law judge erred in excluding evidence that claimant obtained overseas employment following the close of the hearing and in failing to fully consider the ramifications of claimant's post-injury employment on his entitlement to benefits. Employer also challenges the administrative law judge's designation of Trenton, Missouri, as the only relevant labor market, as well as his rejection of its labor market survey and jobs it offered claimant in other U.S. locales. Finally, employer asserts that the administrative law judge erred in calculating claimant's average weekly wage. Clamant responds, urging affirmance.

Admissibility of Evidence

Employer argues that the administrative law judge erred by refusing to receive into the record new and material evidence that, post-hearing, claimant obtained

suitable employment in Tanzania, asserting that this evidence meets all of the requirements for admission of Section 18.54(c) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.54(c). An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Nevertheless, employer's contention that the administrative law judge improperly declined to reopen the record for submission of claimant's post-injury employment has merit.

The hearing in this case was held on October 11, and the record closed on December 11, 2000. On January 5, 2001, employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, employer asserted that in a state court filing dated December 20, 2000, claimant stated that in November he had been offered and had accepted a security guard job in Tanzania. The administrative law judge issued an Order on January 22 admitting employer's filing and directing supplemental briefing and a subsequent Order directing claimant to produce his employment contract and job description for the Tanzania job. In response, claimant's counsel provided the employment contract but not the job description, alleging that claimant's overseas location made communicating with him "complicated." In addition, claimant argued that evidence of this job should not be admitted as it was outside the relevant Trenton, Missouri, labor market. Thereafter, the administrative law judge issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any." Order dated February 9, 2001. The administrative law judge subsequently denied employer's motion for reconsideration.

As employer argues, the evidence regarding claimant's acceptance and performance of the post-hearing security guard job in Tanzania is relevant and material to the case at hand as it goes directly to the disputed issue regarding the extent of claimant's disability. The administrative law judge apparently recognized that the evidence was relevant and material, as he initially admitted it into the record. We note that although claimant argued that the evidence was not relevant in view of the administrative law judge's determination that the labor market was that surrounding claimant's Missouri residence, *see infra*, the administrative law judge did not rely on this reasoning in his Order. Evidence that claimant is actually working at a suitable job should be considered regardless of the labor market defined for

discussing potential job opportunities on the open market. Moreover, the claimant does not dispute employer's assertion that this evidence was not readily available prior to the closing of the record. As the evidence was not available at that time, and as it was submitted prior to the issuance of the administrative law judge's Decision and Order, the evidence was properly admissible under Section 18.54(c) of the general rules of practice for the Office or Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act, 20 C.F.R. §§702.338, 702.339. S*ee generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). Accordingly, as the evidence employer submitted was relevant and material, and as it was obtained after the close of the record and submitted prior to issuance of the administrative law judge's decision, it was admissible under the applicable regulations.

In addition, the administrative law judge's rationale for denying employer's motion to reopen the record is not supportable under the circumstances presented. First, his statement that the record was complete as of the date of the hearing together with the permitted post-hearing submissions ignores Sections 18.54(a) and 702.338 which explicitly permit an administrative law judge to reopen the record, at any time prior to the filing of the compensation order, in order to receive newly discovered relevant and material evidence. *See generally Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992); *Wayland*, 21 BRBS 177. Second, the administrative law judge's statement that "the complexity of the

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[4] Section 18.54(c), in pertinent part, states:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that the new and material evidence has become available which was not readily available prior to the closing of the record.

29 C.F.R. §18.54(c).

[5] Section 702.338 states, in pertinent part:

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the administrative law judge believes that there is relevant and material evidence available, which has not been presented at the hearing, he may . . . at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence.

20 C.F.R. §702.338. Moreover, Section 702.339 provides that the administrative law judge is not bound by technical rules of evidence or procedure, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 20 C.F.R. §702.339. *See* 33 U.S.C. §923.

matters being raised post-hearing," should preclude a reopening of the record, is insufficient given that employer is merely seeking to submit additional evidence on a disputed issue which was already before the administrative law judge for resolution. Third, the fact that claimant's counsel submitted a copy of the employment agreement, which included a job description, in response to employer's motion for reconsideration of the denial of its motion indicates that any delay would be minimal. Lastly, the fact that the award would be subject to modification under Section 22, 33 U.S.C. §922, does not justify a delay in the consideration of employer's evidence. From a procedural standpoint, employer's request to reopen the record was the appropriate action given the issues raised in the case and the nature of the newly discovered evidence. We therefore hold that the administrative law judge abused his discretion in denying employer's motion to reopen the record since the evidence in question is material and relevant and employer's post-hearing submission is in compliance with the applicable regulations. As the administrative law judge's Orders in this regard are neither supported by the facts nor in accordance with the applicable law, they are vacated, and the case is remanded for admission of employer's evidence regarding claimant's post-hearing employment. *See* 20 C.F.R. §§702.338, 702.339; *Ramirez*, 25 BRBS 260; *Wayland*, 21 BRBS 177.

Relevant Labor Market

Employer next argues that the administrative law judge erred by limiting claimant's post-injury labor market to a 50-mile radius from claimant's residence in Trenton, Missouri, in light of the fact that the evidence demonstrates that claimant is, and has been for many years, an employee whose labor market encompasses overseas worksites. The facts in the instant case are most akin to those cases wherein an injured worker relocates subsequent to the date of his work-related

[6] The administrative law judge's subsequent Order rejecting employer's request for reconsideration provides no additional valid reasons for his action. First, the administrative law judge stated that employer has failed to follow the requirements of Section 18.6(a), 29 C.F.R. §18.6(a)(all requests made outside of the hearing shall be made in writing), without any indication as to how employer violated this regulation. Additionally, the administrative law judge stated that "insufficient reasons have been submitted for reconsideration of the prior order," without any discussion of the issues raised by employer.

injury, and the case law developed in those cases provides us with guidance. *See Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). In instances where claimant relocates following an injury, the courts have held that the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in the community as opposed to those in his former residence, and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. In the instant case, the administrative law judge concluded that only Trenton, Missouri, is the relevant labor market since claimant's Moscow employment agreement had been terminated by his inability to perform that work following his injury, and because the record establishes that Trenton is claimant's legitimate residence and therefore his local community. In so finding, the administrative law judge rejected employer's contention that claimant's post-injury job market as a security guard is worldwide.

The administrative law judge's discussion regarding the relevant labor market encompasses a consideration of the relevant factors under *See* and *Wood.* Specifically, the administrative law judge's decision exhibits a consideration of factors such as claimant's residence at the time he filed for benefits, which was Trenton, Missouri, and his motivation for relocating which the administrative law judge deemed was legitimate given the facts that claimant returned to Trenton because his Moscow employment agreement terminated due to his inability to perform the work following his injury. The administrative law judge also considered the duration of his stay in the new community and ties to this community, finding that claimant and his wife spent most of 1996 until April 1997 living in Trenton and that they have a number of family and personal ties to that area. We affirm the administrative law judge's conclusion that Trenton, Missouri, is claimant's permanent residence and thus is his local labor market in this case.

The administrative law judge, however, did not consider the significance of

[7] The primary difference in the instant case is the fact that, as an employee under the Defense Base Act, claimant's regular employment as a security guard at American Embassy sites abroad involved extensive overseas travel with periodic relocations; on these facts, the specific site of injury here, Moscow, Russia, cannot be considered to be the relevant labor market. Employer thus asserts that it is appropriate for it to use a "worldwide" labor market in which to show the availability of suitable alternate employment. Despite the factual differences, the factors applied in relocation cases are pertinent to the determination of the relevant labor market in this case.

claimant's overseas employment in evaluating the relevant labor market, and given claimant's employment history, it cannot be limited solely to the Trenton, Missouri, area. As a Defense Base Act employee, claimant is accustomed to working in locales away from his permanent residence, and excluding evidence of suitable jobs in these locales permits the incongruous result of potentially finding him totally disabled based on a limited local market while he continues to work overseas. In fact, in this case, claimant has continued to perform post-injury security guard work in the worldwide market. As the administrative law judge found, the record establishes that claimant performed the Nigerian security guard job satisfactorily from February 1999, until his heart attack in June 1999. This fact is significant as, when coupled with claimant's extensive history of pre-injury overseas employment, it supports employer's position that claimant's job market includes overseas locations. The fact that claimant has extensive overseas employment, both pre- and post-injury, is clearly germane to the determination of the relevant labor market. Consequently, we hold, based on the unique facts in this case, that the relevant labor market for purposes of establishing the availability of suitable alternate employment includes both the Trenton, Missouri, area as well as overseas locations where jobs similar to those claimant has performed are available which are suitable given claimant's post-injury restrictions.

Suitable Alternate Employment

Employer argues that it established the availability of suitable alternate employment first by means of its labor market survey which identified jobs in the area surrounding Trenton, Missouri, which were within claimant's physical abilities, and then by offering claimant two positions as a security guard. Employer maintains that the administrative law judge's rationale for discrediting the labor market survey, i.e., that it was based on the lesser, discredited restrictions imposed by Dr. Fishman, is improper since a review of the physical limitations of those jobs reveals that they also fall within the more stringent restrictions imposed by Dr. Ban, which the administrative law judge credited. Employer further argues that, at the very least, claimant's successful performance of post-injury employment as a security guard in Nigeria serves as conclusive evidence of suitable alternate employment such that claimant should not be entitled to any total disability benefits after February 17, 1999, the date on which he commenced working in this position.

As it is undisputed that claimant cannot return to his usual work, the burden shifted to employer to establish the availability of suitable alternate employment. See Pietrunti v. Director, OWCP, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000), aff'd, 248 F.2d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to meet this burden, employer must show the availability of actual job opportunities in the relevant community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. Id. In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the position identified by employer. See Pietrunti, 119 F.3d 1035, 31 BRBS 84(CRT); Fox v. West State Inc., 31 BRBS 118 (1997). In order to defeat employer's showing of the availability of suitable alternate employment, claimant must establish that he diligently pursued alternate employment opportunities but was unable to secure a position. Palombo, 937 F.2d 70, 25 BRBS 1(CRT).

In his decision, the administrative law judge rejected employer's labor market survey as evidence of suitable alternate employment because it did not contain sufficient information about each job in connection with the restrictions imposed by Dr. Ban. Specifically, he found that "there is a complete absence of any information about the specific nature of the duties of the job cited by [employer's vocational expert] in relation to Dr. Ban's restrictions." Decision and Order at 27. In his labor market survey, employer's expert, Mr. Combs, stated that he was considering the physical restrictions imposed by Dr. Fishman's report dated January 16, 1998. As the

administrative law judge found, the physical restrictions imposed by Dr. Ban are more stringent than those imposed by Dr. Fishman. See n. 2, 3, supra. Contrary to the administrative law judge's finding, however, several of the jobs listed in the labor market survey provide a sufficient description to enable him to make a comparison between the job requirements and the physical limitations imposed by Dr. Ban. For instance, the labor market survey lists positions as a Customer Service Representative at Westlake Hardware and Mantino Cycle, a Recycling Center Supervisor with Hope Haven Industries, Incorporated, a Night Clerk at Super "8" Motel, a Cashier at Casey's General Store, and as a Telemarketer with Pro-Com, Incorporated, which claimant may be physically capable of performing given Dr. Ban's more stringent restrictions. We thus vacate the administrative law judge's finding that employer's labor market survey is insufficient to meet its burden of showing the availability of suitable alternate employment and remand for reconsideration of this alternate work identified by employer in the Trenton, Missouri, area in light of claimant's restrictions and other relevant factors. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Fox*, 31 BRBS 118; *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). If, on remand, the administrative law judge determines that these positions are suitable, then he must consider claimant's efforts in attempting to secure post-injury employment. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

The administrative law judge rationally rejected the positions employer offered to claimant post-injury in Indiana and Washington, D.C., since they would require the loss of claimant's home and his wife's job, and since they did not include travel and expense money or other benefits offered by employer at the Moscow job. These jobs would require that claimant relocate his permanent residence and thus are not similar to his overseas jobs. With regard to claimant's overseas employment, the administrative law judge determined that while claimant was capable of performing his post-injury security guard work at a satisfactory level until his heart attack, employer produced no evidence "that there was a similar guard position available in the Trenton, Missouri, labor market community that would have accommodated his restrictions, or that these rates established his wage-earning capacity in Trenton, Missouri, for similar positions, if any." Decision and Order at 26. The administrative law judge's analysis of this issue misses the point, initially because it ignores jobs claimant has actually performed post-injury and also as it excludes the overseas market in which claimant was able to successfully compete for jobs pre-injury. If he can do so post-injury, such jobs must be considered. Employer is required to demonstrate

[8]The remaining positions are not suitable to claimant's physical restrictions as they require a considerable amount of "walking and standing" (Security Guard at Dollar General Store, Sales Assistant at Place's Discount Store), stocking shelves (Associate at Wal-Mart), or computer knowledge (Frost Automotive, Wal-Mart).

[9]Claimant testified that he applied for jobs through "Find Work," but was unable to obtain any employment. Claimant's Exhibit 15, Dep. at 130-134. The administrative law judge set out claimant's testimony on this subject but did not make a specific finding regarding claimant's job search.

the availability of jobs that claimant is capable of performing, and in this case claimant's post-injury employment first in Nigeria and then in Tanzania may well fall within this category. On remand, the administrative law judge must therefore also reconsider whether claimant's actual post-injury employment is sufficient to meet employer's burden of showing the availability of suitable alternate employment. If so, then the administrative law judge must determine whether claimant is entitled to an award of partial disability benefits based on the difference between his pre-injury average weekly wage and post-injury wage-earning capacity.

Average Weekly Wage

Employer contends that the administrative law judge erred in utilizing Section 10(a) of the Act to calculate claimant's average weekly wage since claimant worked fewer than four months in the year immediately preceding his injury. Employer maintains that the administrative law judge should have calculated claimant's average weekly wage pursuant to Section 10(c) by dividing his actual earnings from January 1, 1996, through November 17, 1996, by the total number of weeks in this time period, to arrive at a figure of $453.12.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied.

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991);

[10] At the very least, the administrative law judge must, on remand, consider the impact of claimant's post-injury employment in Nigeria, and his earnings in that position as they pertain to employer's burden to establish suitable alternate employment, the calculation of claimant's post-injury wage-earning capacity, and his entitlement to total as opposed to partial disability benefits, particularly since there is no evidence that claimant performed this job only through extraordinary effort or at the beneficence of employer. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Moreover, the Nigeria job may be sufficient to establish claimant's post-injury wage-earning capacity after his heart attack, which may be an intervening cause of any increased disability thereafter.

Richardson v. Safeway Stores, Inc., 14 BRBS 855 (1982). It is well established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co*., 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *Hicks v. Pacific Marine & Supply Co., Ltd*., 14 BRBS 549 (1981).

The administrative law judge determined that claimant's pre-injury work for employer covered 49 weeks, from September 16, 1996, until August 10, 1997, thus satisfying the "substantially the whole of the year" requirement for application of Section 10(a) to calculate claimant's average weekly wage. He then calculated claimant's average weekly wage, purportedly under Section 10(a), by multiplying claimant's hourly rate at the time of his injury by 40 hours to arrive at an average weekly wage of $582.80.

The administrative law judge's professed use of Section 10(a) to calculate claimant's average weekly wage cannot be affirmed. First, in contrast to the administrative law judge's determination, claimant did not work as a security guard "during substantially the whole of the year immediately preceding his injury." The record establishes that claimant worked less than four months during the pertinent one-year time period preceding his injury on August 10, 1997. Additionally, claimant's employment as a security guard was neither regular nor continuous for that period as claimant was unemployed for over eight months in the year preceding his injury. Moreover, Section 10(a) provides a specific formula by which the administrative law judge must calculate claimant's average annual earnings. The administrative law judge herein did not follow this formula. Instead, he multiplied claimant's hourly rate at the time of his injury by his normal workweek of 40 hours to arrive at an average weekly wage of $582.80. *Eckstein v. General Dynamics Corp*., 11 BRBS 781 (1980); *Orkney v. General Dynamics Corp*., 8 BRBS 543 (1978). Although it is not a Section 10(a) calculation, the administrative law judge's conclusion reflects a reasonable method under Section 10(c). Thus, any error by the administrative law judge in citing Section 10(a) is harmless. As the result reached by the administrative law judge is reasonable, is supported by substantial evidence, and is consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury, it is affirmed pursuant to Section 10(c). *See Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Hicks,* 14 BRBS 549.

Accordingly, the administrative law judge's denial of employer's motion to reopen the record for submission of additional evidence is reversed. His finding as to the relevant labor market is modified to include overseas positions, and his determination that employer has not established the availability of suitable alternate employment both in Trenton, Missouri, and overseas is vacated. The administrative law judge's award of total disability benefits is therefore vacated and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge