U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0584
and 17-0584A

DWAYNE D. VICTORIAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED: July 24, 2018
	)	
INTERNATIONAL-MATEX TANK TERMINALS	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Jonathan A. Tweedy, Kelly F. Walsh, and Taylor M. Bologna (Brown Sims), New Orleans, Louisiana, for employer/carrier.

Isidro Mariscal (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher,

Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order Denying Motion for Reconsideration (2015-LHC-01290) 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 injured his neck, left shoulder and arm on June 25, 2014, while moving a 60-foot air hose at work. Tr. at 80-82. Employer paid claimant temporary total disability and medical benefits pursuant to the Louisiana Workers' Compensation Act from July 31, 2014 through October 25, 2016. Decision and Order at 3. Employer disputed coverage under the Longshore Act, whether claimant's left shoulder complaints are related to the work accident, and the nature and extent of claimant's work-related disability.

The administrative law judge found that claimant was a maritime employee who was injured on a covered situs. 33 U.S.C. §§902(3), 903(a). He further found that claimant did not present substantial evidence that his left shoulder labrum tear is related to the work accident and that claimant's work-related neck injury had not reached maximum medical improvement because claimant intends to undergo surgery and claimant is incapable of returning to his former employment. The administrative law judge determined that employer's labor market surveys established the availability of suitable alternate employment, but that claimant diligently, yet unsuccessfully, sought alternate employment. Accordingly, the administrative law judge awarded claimant continuing compensation for temporary total disability, 33 U.S.C. §908(b), from July 30, 2014, and medical benefits for his neck injury. He denied claimant's motion for reconsideration of the finding that his labrum tear is not related to the work accident.

On appeal, employer challenges the administrative law judge's findings of coverage under the Act, that claimant's work injuries have not reached maximum medical improvement, and that claimant diligently sought suitable employment. Claimant and the Director, Office of Workers' Compensation Programs, respond that employer's arguments should be rejected. Employer filed reply briefs. Claimant cross-appeals the administrative

law judge's finding that his left shoulder labrum tear is not related to the work accident and that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

COVERAGE

For a claim to be covered by the Act, a claimant must establish that his injury is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act, and that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a). 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy both the "status" and the "situs" requirements of the Act. *New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc).

SITUS

Employer contends the administrative law judge erred in finding that its Gretna facility is an "adjoining terminal" within the meaning of Section 3(a) because it is a multi-purpose facility used for manufacturing and treatment processes as well as for loading and unloading vessels. Bulk liquid is delivered to the Gretna facility overland or by vessel, where it is pumped through a series of pipes to tanks for storage and/or handling. Thereafter, tank-to-tank transfers occur as needed for the purposes of heating, blending or sparging the liquid product.[1] Thus, because manufacturing processes take place at the Gretna facility, employer argues that it is not a marine terminal because it does not function solely to store liquid bulk product and transfer that product to and from ships.

Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

[1] Sparging utilizes air bubbles to mix two products together to produce a different product. CX 22 at 56.

33 U.S.C. §903(a). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that an enumerated site should be defined not just by its physical appearance, but also by its function and maritime purpose, in order to be covered by the Act. *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004).

Claimant's injury occurred at storage tanks 106 and 107, which are within the fenced-in boundaries of employer's Gretna terminal. Decision and Order at 61-63; *see* Tr. at 64-68; CX 1 at 5. The administrative law judge noted that the Act does not define the term "terminal" in Section 3(a). Moreover, he observed that, while cases have found "terminals" to be covered situses, the term is not defined in those cases.[2] Decision and Order at 56-57. The administrative law judge thus gave weight to the Occupational Safety and Health Administration's definition of a "marine terminal" at 29 C.F.R. §1917.2,[3] and Webster's Dictionary definition of terminal and terminus and found that the Gretna facility is within these definitions.[4] *Id.* at 57-58. The administrative law judge noted that

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[2] In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1139, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), the United States Court of Appeals for the Fourth Circuit stated, "Each of these enumerated 'areas' [in Section 3(a)] is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters."

[3] Section 1917.2 provides in pertinent part:

> *Marine terminal* means wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or adjacent areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas nor does the term include storage facilities directly associated with those production or manufacturing areas.

29 C.F.R. §1917.2.

[4] The administrative law judge quoted from Webster's Dictionary definitions of "terminal" as "of relating to, situated at, or forming an end or boundary," "relating to or occurring at the end of a section or series," and "either end of a transportation line, as a railroad," and "terminus" as "terminal on a transportation line or the town on which it is

employer's website states that it operates 10 "marine terminals," including the Gretna facility, which is a 150-acre site on the west bank of the Mississippi River with deep-water container berths, 60 storage tanks, and the capability of also unloading railcars and trucks. *Id*. at 58; CX 1 at 1, 3. The administrative law judge gave weight to the deposition testimony of Bill Mercier, the Manager of Operations at the Gretna facility, that 94 percent of the bulk liquid product arrives by ship or barge at a dock and that, in the two years prior, 100 percent left by ship or barge. Decision and Order at 58; CX 23 at 52, 71-72; *see also* Tr. at 74. The administrative law judge also relied on the deposition testimony of Kevin Babbs, a shift foreman at the Gretna facility, who testified that the dock receives liquid product from ships 10 to 12 times a year and that barges arrive daily. Decision and Order at 59; CX 22 at 15. The administrative law judge concluded that the Gretna facility is a "marine terminal" because it is "the end of the transportation line" where liquid product is received and shipped by vessels, and where there is "adjacent storage . . . associated with the cargo" that moves between vessel and shore. Decision and Order at 59.

We affirm the administrative law judge's conclusion that employer's Gretna Facility is a maritime situs under Section 3(a). In this case, the definition of "terminal" used by the administrative law judge describes both the physical attributes of the area and the maritime purpose of the docks, pipelines and storage tanks at employer's Gretna facility, which is to move waterborne shipments from vessel to shore and product from shore to vessel. *See Thibodeaux*, 370 F.3d at 488-491, 38 BRBS at 14-15(CRT). Substantial evidence of record supports the finding that the Gretna facility ships and receives the overwhelming majority of its liquid bulk product from vessels at a dock on its property, and has 60 storage tanks for the liquid bulk product that is unloaded directly from ship to tanks and stored there.

Employer's contention that the site is not covered because "manufacturing" also takes place at the facility is misguided.[5] Where a site has functionally and/or geographically distinct loading/unloading and manufacturing areas, the latter are not covered under the Act. *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP* [*Martin*], 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009).[6] However, the Fifth Circuit has stated it is not necessary "that every square inch of an area" be used for a maritime activity. *Coastal Prod. Serv.*,

located," or "a border or boundary." Webster's II New Riverside University Dictionary 1194 (1988).

[5] Employer contends that "blending and sparging" are manufacturing processes.

[6] This case precedent is consistent with the last sentence of 29 C.F.R. §1917.2. *See* n.3, *supra*.

Inc., v. Hudson, 555 F.3d 426, 435, 42 BRBS 68, 73(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Significantly, the administrative law judge found that employer's facility does not contain separate manufacturing facilities. *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).[7] Claimant testified that 70 to 80 percent of the product stored at the terminal does not get blended or sparged in the storage tanks, but is shipped onto vessels from the tanks in the form in which it was received. Tr. at 165. Assuming, arguendo, that blending and sparging at the Gretna facility are manufacturing processes, the administrative law judge found that no specific tanks or area of the Gretna facility is dedicated solely to these processes. *See, e.g.*, *Martin*, 732 F.3d 457, 47 BRBS 39(CRT). The findings that Tank 107, which was being used to sparge at the time of claimant's injury, was regularly used to directly load and unload liquid bulk product onto or from vessels, and that all of the terminal's tanks and pipelines customarily load and unload vessels, are supported by substantial evidence. Decision and Order at 68-69; *see* Tr. at 80-81; CX 29 at 8-19; EX 32 at 33-34, 69-70.

Based on the evidence that employer's entire Gretna facility adjoins navigable waters, that approximately 70 percent of the product is not blended or sparged, and that the lower percentage of product subject to these processes is not conducted at any fixed, dedicated location within the Gretna facility, we affirm the administrative law judge's conclusion that claimant was injured at a "terminal" pursuant to Section 3(a), as the loading and unloading of vessels constitutes a substantial part of the employer's business activity at its Gretna facility.[8] *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT).

STATUS

Employer challenges the administrative law judge's finding that claimant was engaged in maritime employment pursuant to Section 2(3) of the Act because claimant's job duties at the time of his injury were related to sparging. Moreover, employer avers that

[7] "The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot [where the injury occurred] was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding." *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178, 6 BRBS 229, 230(5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *see New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 392, 47 BRBS 5, 10(CRT) (5th Cir. 2013) (en banc).

[8] Accordingly, we need not address the administrative law judge's alternate finding that claimant was injured at an "other adjoining area" under Section 3(a).

claimant's other job duties were too far removed from moving cargo to constitute maritime employment and thus were not integral to the loading and unloading process.

Section 2(3) of the Act provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

33 U.S.C. §902(3). A claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Hudson*, 555 F.3d at 439, 42 BRBS at 76(CRT). In *Hudson*, the Fifth Circuit affirmed a finding of coverage for a claimant who spent 9.7 percent of his work time engaged in maritime activities involving loading oil onto transport barges and servicing equipment necessary to load the oil. *Hudson*, 555 F.3d at 439-440, 42 BRBS at 76-77(CRT).

The administrative law judge listed claimant's job duties as an assistant shift foreman as: checking pipelines and maintaining a working knowledge of all pipelines and pumps; coordinating communication with vessels, the Traffic Department and inspectors/surveyors; investigating mechanical problems; performing the duties of a gauger pumper and dockman; reporting delay in the transfer of product; and assisting the shift foreman. Decision and Order at 73; CX 28. The administrative law judge gave weight to claimant's testimony, which was supported by the deposition testimony of Mr. Mercier and Mr. Babb, that he read tank gauges, opened and adjusted valves to allow product to flow to or from vessels through the pipelines, communicated with the dockmen and, at times, the crew of a vessel, and that he would occasionally go to the docks to "check line-ups or perform an inspection." Decision and Order at 73-74; Tr. at 58-60, 69-70; EXs 31 at 11-13; 32 at 14-20. The administrative law judge also gave weight to Mr. Babbs' deposition testimony that both the dockmen and workers in the tank yard load and unload barges. Decision and Order at 75; EX 31 at 45-46. The administrative law judge found that much of claimant's employment was an integral part of employer's loading and unloading operations because none of the liquid bulk product could be loaded or unloaded onto vessels without claimant's performing his duties in the tank yard. Decision and Order at 75. The administrative law judge concluded that claimant established he was engaged in maritime employment because he performed longshoring operations on a sufficiently regular basis. *Id*.

We affirm the administrative law judge's finding that claimant was engaged in maritime employment pursuant to Section 2(3). The administrative law judge permissibly gave significant weight to evidence that claimant regularly participated in the loading and unloading process by directing and monitoring the flow of liquid bulk product to and from vessels and the tank yard. Thus, claimant's job duties were integral to the loading and unloading process. *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Allen v. Agrifos, LP*, 40 BRBS 78 (2006) (claimant set valves to allow acid to flow from barges to tanks); *Schilhab v. Intercontinental Terminals, Inc.*, 35 BRBS 118 (2001) (claimant attached hoses from railcars necessary to commence transfer of liquid product to vessels). Moreover, contrary to employer's reliance on the fact that claimant's injury occurred during a tank-to-tank sparging transfer, the administrative law judge properly focused on claimant's employment as a whole. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Hudson*, 555 F.3d 426, 439, 42 BRBS 68, 76(CRT). His conclusion that at least some of claimant's regular job duties were integral to the loading and unloading of vessels is amply supported by substantial evidence of record. Accordingly, we affirm the administrative law judge's finding that claimant was engaged in maritime employment under Section 2(3). *Allen*, 40 BRBS 78; *Schilhab*, 35 BRBS 118.

MAXIMUM MEDICAL IMPROVEMENT

Employer appeals the administrative law judge's finding that claimant's neck condition has not reached maximum medical improvement. Employer contends the administrative law judge erred by not accounting for claimant's having declined to undergo recommended neck surgery and that the medical evidence establishes that claimant's neck was at maximum medical improvement on December 15, 2015.

A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition or his condition is of lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). If surgery is anticipated, maximum medical improvement has not been reached. *McCaskie*, 34 BRBS 9; *Kuhn v. Associated Press*, 16 BRBS 46 (1983). If, however, surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie*, 34 BRBS at 13; *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982).

Claimant was first examined by Dr. Miranne on September 8, 2014. On October 8, 2014, claimant reported that his neck condition had improved; therefore, Dr. Miranne referred claimant to Dr. Lundgren for conservative treatment. Decision and Order at 90-91; CX 4 at 1, 10. Dr. Lundgren treated claimant from November 18, 2014 to May 26, 2016. Dr. Ortenberg examined claimant at employer's request on December 15, 2015. He opined that claimant was a good candidate for a cervical fusion; otherwise he was at maximum medical improvement. EX 1 at 6-7. Dr. Lundgren stated at his May 10, 2016 deposition that only an epidural injection or surgery could improve claimant's radiculopathy but that claimant was unwilling to pursue these treatment options. EX 30 at 51-52, 63-64. Subsequently, on May 26, 2016, claimant informed Dr. Lundgren that he wished to discuss surgery with Dr. Miranne and, on August 12, 2016, Dr. Miranne examined claimant and noted his assent to undergo neck surgery. CX 4 at 103, 120. Dr. Miranne opined at his November 14, 2016 deposition that claimant was temporarily disabled due to his neck condition and that it would take a year post-surgery to reach maximum medical improvement. CX 31 at 35-36. The administrative law judge noted there was no evidence that claimant either scheduled or cancelled the proposed surgery. Decision and Order at 92 n.52. Based on the evidence of record, the administrative law judge found that claimant had not reached maximum medical improvement because claimant had expressed a desire for surgical intervention with Dr. Miranne for his neck injury.[9] Decision and Order at 93.

In the absence of any evidence that claimant scheduled or cancelled cervical spine surgery, the administrative law judge permissibly found that claimant's neck condition was not at maximum medical improvement, as claimant will undergo treatment with a view toward improving his condition. The administrative law judge acted within his discretion in relying on Dr. Mirranne's notes that claimant intended to have surgery and Dr. Mirranne's opinion that claimant's neck would be not be at maximum medical improvement until a year after surgery. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *compare McCaskie*, 34 BRBS at 12-13 *with Kuhn*, 16 BRBS at 46. Therefore, we affirm the administrative law judge's finding that claimant's neck condition is not at maximum medical improvement as it accords with law and is supported by substantial evidence of record.

[9] In his decision, the administrative law judge noted that, post-hearing, he conducted a conference call on March 22, 2017, wherein he instructed the parties to ascertain whether claimant intended to proceed with the recommended surgery, but the parties did not thereafter present a joint stipulation to resolve this disputed question of fact. Decision and Order at 92 n.52.

DUE DILIGENCE

Employer challenges the administrative law judge's finding that claimant established due diligence in seeking alternate work based on his testimony and a job application log.

Where, as here, it is uncontested that claimant cannot return to his usual work because of his work injury, and the administrative law judge finds that employer established the availability of suitable alternate employment,[10] claimant is considered totally disabled if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Director, OWCP v. Bethlehem Steel Corp.* [*Dollins*], 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

The administrative law judge noted that many of the jobs identified in employer's three labor market surveys allowed only online applications. He gave weight to claimant's testimony that many of the prospective employers' websites do not provide proof of an online application or allow for printing a completed application. The administrative law judge also credited claimant's testimony that he was not offered a job by any potential employers listed in the labor market surveys. Decision and Order at 99-100; Tr. at 109-110, 156, 160; *see* CX 20. He gave weight to claimant's job application log, emails in the log demonstrating that claimant applied for three positions, and to claimant's testimony that he applied for all of the positions listed in the labor market surveys and in-person for a shuttle bus driver position. Decision and Order at 99-100; Tr. at 109-110; CX 10. He also gave weight to the testimony of claimant's wife that she assisted him with online applications, that the applications could not be printed-out, and that she called employers in the labor market surveys to confirm that a position remained available when it was not listed on the employer's website. Decision and Order at 100; Tr. at 176-177, 181. The administrative law judge further gave weight to her testimony that claimant did not receive any interviews or job offers from the positions identified in the labor market surveys, and that she or their daughter drove claimant to apply for positions at parking companies that required an in-person application. *Id.*; Tr. at 177-179; CX 20 at 43-44, 66-67. Based on this evidence, the administrative law judge concluded that claimant established he exercised "reasonable diligence to secure employment and was unsuccessful." Decision

[10] The administrative law judge found that suitable alternate employment was established by employer's February 2016, March 2016, and August 2016 labor market surveys. Decision and Order at 96-99; EXs 5, 10, 35.

and Order at 100. Thus, the administrative law judge concluded that claimant is totally disabled.

We reject employer's assertion the administrative law judge erred in finding that claimant was diligent in his job search. The Fifth Circuit has held that it is a claimant's burden to establish "reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Turner*, 661 F.2d at 1043, 14 BRBS at 165; *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). Here, the administrative law judge permissibly found that claimant diligently sought suitable work and that he and his wife credibly testified that he applied for all of the positions in employer's labor market surveys, that they were unable to document all of the positions he applied for through an employer's website, and that claimant also applied for positions in-person. Although employer argues that the administrative law judge erred in not requiring claimant to produce additional evidence that he exercised due diligence in seeking suitable work, the administrative law judge, as the fact-finder, is charged with evaluating the sufficiency of a claimant's job search. *See*, *e.g.*, *Wilson*, 40 BRBS 46; *Fortier v. Electric Boat Co.*, 38 BRBS 75 (2004). As the administrative law judge is entitled to determine the credibility of a witness's testimony, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and as the administrative law judge's finding that claimant was diligent in searching for post-injury employment is supported by substantial evidence of record, we affirm. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Consequently, we affirm the administrative law judge's award of continuing temporary total disability benefits from July 30, 2014.[11] *Dollins*, 949 F.2d 185, 25 BRBS 90(CRT).

LEFT SHOULDER INJURY

Claimant challenges the administrative law judge's finding that his left shoulder labrum tear is not related to the June 25, 2014 work accident. Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), and in finding that he did not establish a work-related labrum tear based on the evidence as a whole. We disagree.

The administrative law judge found claimant entitled to the Section 20(a) presumption that his labrum tear is related to the work injury based on claimant's description of immediate pain in his neck and upper extremity and the diagnosis the

[11] Claimant appeals the administrative law judge's finding that employer established the availability of suitable alternate employment. As we affirm the administrative law judge's due diligence finding, claimant is totally disabled. Thus, the suitable alternate employment issue is moot and will not be addressed.

following day by Dr. Guevara that claimant sustained a shoulder strain. Decision and Order at 80; CX 3 at 1. Once claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the work accident and employer can rebut this presumption by producing substantial evidence that the injury is not related to the work accident. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant contends that the administrative law judge erred in crediting the opinion of Dr. Lundgren to find that employer rebutted the Section 20(a) presumption and by ignoring substantial evidence that the labrum tear is related to the work injury. However, employer's burden on rebuttal is one of production, not persuasion. Thus, the Fifth Circuit has held that, in order to rebut the Section 20(a) presumption, employer need only offer substantial evidence that throws factual doubt on claimant's prima facie case. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

The administrative law judge gave weight to Dr. Lundgren's May 10, 2016 deposition testimony that claimant's complaints of shoulder pain and signs of rotator cuff impingement at his last office visit on April 27, 2016, appeared to be a "new issue."[12] Decision and Order at 82; EX 30 at 58-61. The administrative law judge stated that Dr. Lundgren based his opinion on claimant's having not exhibited shoulder pain with limited range of motion and impingement signs until approximately two years after the June 2014 work accident. Decision and Order at 82; *see* CX 4 at 112. Additionally, the administrative law judge gave weight to Dr. Lundgren's note from claimant's initial office visit on November 18, 2014, which stated, "[N]egative impingement signs. Full shoulder range of motion." CX 4 at 19; *see also* EX 30 at 60. The administrative law judge properly found this evidence sufficient to rebut the Section 20(a) presumption. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Accordingly, we reject claimant's contention that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption.

If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d at 229, 46 BRBS 27(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[12] The labrum tear was first diagnosed after an MRI on May 19, 2016. CX 4 at 100-101.

The administrative law judge found, based on the record as a whole, that employer's evidence refutes a causal connection between claimant's left shoulder labrum tear and the work accident. Decision and Order at 86. The administrative law judge gave weight to the June 2014 examination of Dr. Guevara, and the July and August 2014 examinations of Dr. Reiss. Decision and Order at 82-83. They both noted normal left shoulder function. CX 3 at 1, 7-8, 17. The administrative law judge also relied on the lack of left shoulder complaints by claimant to Dr. Ortenberg in December 2015. Decision and Order at 86; EX 1 at 1-2. He credited Dr. Lundgren's reports, which repeatedly stated that claimant had a full range of motion in both shoulders and that no impingement signs were noted until April 22, 2016. Dr. Lundgren opined that it was "not more probable" that claimant's work accident caused the labrum tear. Decision and Order at 87; CX 4 at 112-113; EX 30 at 58-60. The administrative law judge found Dr. Lundgren's opinion most probative as he treated claimant for 18 months from November 2014 to May 2016. Decision and Order at 87. The administrative law judge found Dr. Guevara's June 26, 2014 finding of normal range of motion in the left shoulder supportive of Dr. Lundgren's opinion, and he noted there is no objective medical evidence that claimant had a labrum tear until May 19, 2016. *Id*. Accordingly, the administrative law judge concluded that claimant did not meet his burden of establishing that he sustained a labrum tear as a result of the June 25, 2014 work accident.[13] *Id*.at 86-87.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. *See Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). The administrative law judge rationally gave determinative weight to Dr. Lundgren's opinion. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Moreover, there is no medical opinion of record affirmatively linking claimant's labrum tear to the work accident. Therefore, as it is supported by

[13] Claimant moved for reconsideration of this finding and submitted additional medical articles in support of his motion. In denying claimant's motion, the administrative law judge granted employer's motion to strike the medical articles, because they could have been discovered before the record closed and, assuming, arguendo, that he admitted the articles, he found them unpersuasive because they are general articles from internet sources with "no knowledge of claimant's work accident or specific physical injuries." Order Denying Motion for Reconsideration at 4. The administrative law judge also found "no reason" to change his findings and conclusion in his decision that claimant's labrum tear is not related to the work accident, and he denied claimant's motion for reconsideration. *Id*. at 5.

substantial evidence, we affirm the administrative law judge's conclusion that claimant failed to show by a preponderance of the evidence that his labrum tear is related to the work accident. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Accordingly, the administrative law judge's Decision and Order and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge