

BRB No. 97-1513

WILLIAM HOLLAND)
)
 Claimant-Petitioner) DATE ISSUED:
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 v.)
)
 HOLT CARGO SYSTEMS,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freeman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Benjamin Rose (Clayton H. Thomas & Associates), Philadelphia, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2113) of Administrative Law Judge Robert D. Kaplan 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a checker, was injured during the course of his employment on June 4, 1990, when he tripped and fell, striking his right knee on steel pipes; claimant has not returned to work since that time. Employer voluntarily paid claimant temporary total disability compensation from the date of injury, June 4, 1990, until December 23, 1994, and permanent partial disability under the schedule, Section 8(c)(2), 33 U.S.C. §908(c)(2), for a

25 percent permanent loss of the use of his right leg. Claimant thereafter sought permanent total disability compensation as well as a penalty under Section 14(e), 33 U.S.C. §914(e), of the Act.

In his decision, the administrative law judge found, *inter alia*, that employer timely filed a notice of controversion pursuant to Section 14(d) of the Act, 33 U.S.C. §914(d), and that, while claimant is unable to perform his usual job, employer established the availability of suitable alternate employment as of December 1994; accordingly, he found claimant to be entitled to permanent partial disability compensation under the schedule commencing December 23, 1994. Finally, as the administrative law judge determined that employer had paid claimant compensation in excess of the amount to which claimant is entitled, he found that there had not been a successful prosecution of the claim and denied attorney fees.

Claimant now appeals, contending that the administrative law judge erred in denying him total disability compensation from December 23, 1994, and continuing. Additionally, claimant asserts that employer failed to timely file its notice of controversion. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment as of December 23, 1994. Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

In support of its contention that the extent of claimant's disability is partial rather than total, employer identified six specific jobs available as of December 23, 1994, all of which were approved by Dr. Guttman, an orthopedic surgeon who examined claimant.¹ EX H. The administrative law judge found five of these positions unsuitable for claimant because their requirements exceeded either claimant's physical restrictions or his educational background. The administrative law judge found the single remaining position, specifically that of parking lot cashier at Square Industries, to be suitable and available for claimant. EX

¹The jobs identified were: collection trainee, unarmed security guard, gas station cashier, telemarketer, parking attendant, and parking lot cashier. EXS H, K.

H. Claimant, on appeal, does not assert that this position is not suitable given his restrictions, but asserts, relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), that this one position is insufficient to meet employer's burden. Employer, in response, urges the Board to apply the holding of the United States Court of Appeals for the Fifth Circuit in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied.*, 935 F.2d 1293 (5th Cir. 1991), to the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Employer asserts that, pursuant to *P & M Crane*, a single employment opportunity may meet its burden of establishing the availability of suitable alternate employment. Thus, this case involves the question of whether one employment opportunity, standing alone, may satisfy employer's burden of establishing the availability of suitable alternate employment within the jurisdiction of the United States Court of Appeals for the Third Circuit, which has not yet issued a ruling on this issue.

After a thorough review of the record and the case law relied upon by the parties, we conclude that under either of the standards espoused by the parties, the administrative law judge erred in finding that the single position identified in the instant case is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. Thus, for the reasons set forth below, we reverse the administrative law judge's finding on this issue.

Claimant, in support of his assertions of error, urges the Board to apply the holding of the Fourth Circuit in *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT), to the facts contained herein. In *Lentz*, the circuit court stated that, once the burden shifted to employer to demonstrate the availability of suitable alternate employment, employer must present evidence that a range of jobs exists which are reasonably available and which the disabled employee is realistically able to secure and perform. Thereafter, the court stated that:

[t]he identification of a single job opening, as in this case, simply does not meet this standard. A single job opening cannot reasonably or realistically satisfy an employer's burden of "demonstrat[ing] the type of jobs that the claimant can perform, that those types of jobs are available in the relevant community, and that there is a reasonable likelihood that the claimant would be hired if he diligently sought the job." (cite omitted). If a vocational expert is able to identify and locate only one employment position, it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job.

852 F.2d at 131, 21 BRBS at 112-113 (CRT)(emphasis in original). Thus, as the identification of a single job opening does not satisfy employer's burden of establishing the availability of suitable alternate employment, employer here has not met its burden under

Fourth Circuit precedent.

Employer, however, argues that the Board may affirm the administrative law judge's finding of suitable alternate employment since, it asserts, that finding is in compliance with the Fifth Circuit's decision in *P & M Crane*. The United States Courts of Appeals for the Fifth Circuit has stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity, and the general availability of other suitable positions, where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." See *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121 (CRT). According to the court, such circumstances would exist, for example, where the employee is highly skilled, the job relied upon by employer is specialized and the number of workers with suitable qualifications is small. In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19, 1994) (5th Cir. 1994)(unpublished),² the Fifth Circuit discussed its holding in *P & M Crane*, stating that *P & M Crane* establishes that more must be shown than the mere existence of a single job the claimant can perform; specifically, the court stated that in a case where one specific job has been identified and no general employment opportunities that were suitable alternatives for the claimant had been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified. Since employer had not done so in that case, the court reversed the Board's decision finding a single opening sufficient under *P & M Crane*. See also *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

²The rules of the Fifth Circuit state that unpublished opinions issued prior to January 1, 1996, are precedent. U.S. Ct. of App. 5th Circuit Rule 47.5.3.

In the instant case, employer's rehabilitation consultant identified six positions which were deemed to be suitable for claimant. The administrative law judge found five of these positions to be either physically or vocationally unsuitable. Only the position of parking lot cashier was found to be suitable, available, and within claimant's restrictions.³ The record reflects that this position, *i.e.*, parking lot cashier, is an entry-level job which does not require either a high school diploma or specialized skills.⁴ As it is uncontroverted that employer did not proffer any evidence of the general availability of jobs which claimant could perform, the case before us consists of the rare situation in which only one specific job is offered as suitable alternate employment. Moreover, employer has presented no evidence that there was a "reasonable likelihood" under the circumstances of this case that claimant could obtain the single identified position as is required by *P & M Crane*. As employer thus identified only one employment opportunity found suitable for claimant and proffered neither evidence of the general availability of jobs which claimant could perform nor evidence of a significant likelihood of claimant's obtaining the specific position identified, employer has failed to meet its burden of establishing the availability of suitable alternate employment under the standard set forth by the Fifth Circuit.

Accordingly, based upon the facts in this case, employer has failed to meet the standards elucidated by either the Fourth or Fifth Circuit Court of Appeals. We therefore reverse the administrative law judge's finding that employer established the availability of suitable alternate employment and his consequent award to claimant of permanent partial disability compensation. As employer has not met its burden of establishing the availability of suitable alternate employment, the administrative law judge's decision is modified to reflect claimant's entitlement to ongoing payments of permanent total disability compensation.⁵

Next, claimant contends that the administrative law judge erred in finding that the notice employer filed on February 15, 1996, constituted a timely notice of controversion

³The administrative law judge's findings regarding the five rejected positions have not been appealed by employer.

⁴In this regard, the administrative law judge noted that claimant's vocational consultant, Mr. Mohn, testified that although the parking lot cashier was the only one of the proffered jobs which claimant could possibly secure, there were only a few such jobs in the area. CX G at 13-14, 16-17; Decision at 11.

⁵Claimant's assertion that employer was required to inform him of the availability of suitable alternate employment so that he could diligently pursue such work is moot. See *Palombo v. Director, OWCP*, 932 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

pursuant to Section 14(d) of the Act, 33 U.S.C. §914(d). Specifically, claimant contends that employer's notice of controversion should have been filed on or about December 23, 1994, at which time employer alleges claimant reached maximum medical improvement and it established the availability of suitable alternate employment. Claimant asserts that employer's failure to file such a notice in 1994 "effectively precluded the claimant from attempting to exercise due diligence concerning locating suitable alternative employment available in December of 1994." Brief at 17. Claimant's contentions are without merit.

Section 14(d) provides that if employer controverts the claim, rather than commencing the payment of compensation under Section 14(b), then a notice of controversion must be filed on or before the fourteenth day after employer has knowledge of the injury. Section 14(d) requires that specific information be provided in the notice of controversion.⁶ Although Section 14(d) refers to a "form prescribed by the Secretary" the Board has held that the title of the document is not determinative of whether it constitutes a notice of controversion. See *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1985). Thus, the Board has held that a document which contains the information required by Section 14(d) may be the equivalent of a notice of controversion. In *White*, the Board held that a notice of suspension of compensation benefits filed with the district director within 14 days of the cessation of voluntary payments which provides the information required by Section 14(d) is the functional equivalent of a notice of controversion for purposes of avoiding a Section 14(e), 33 U.S.C. §914(e), penalty. *Id.*; see also *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

In the instant case, claimant does not contend that the notice given by employer did not contain the required information but asserts only that it should have been filed at the same time employer alleges it established the availability of suitable alternate employment. We disagree. Employer in this case commenced payments following claimant's injury and paid benefits from June 5, 1990 to May 13, 1996. Employer first notified claimant that it controverted his entitlement to ongoing compensation on February 15, 1996, filing notice alleging that claimant was capable of employment based on jobs identified and approved as of December 23, 1994, and that claimant was being paid compensation for a 25 percent impairment of the right lower extremity from December 23, 1994, to May 13, 1996. Thereafter, on June 3, 1996, employer filed a Notice of Final Payment/Suspension of Compensation Payments (LS-207). EX D. As employer thus timely controverted the claim by providing notice of the cessation of benefits, we affirm the administrative law judge's

⁶The notice must state that the right to benefits is controverted, the name of the employer, the date of the alleged injury, and the grounds for the controversion. See 33 U.S.C. §914(d).

finding that employer filed a timely notice of controversion in the case at bar. *See White*, 17 BRBS at 75.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is reversed, and the decision modified to reflect claimant's entitlement to continuing permanent total disability compensation. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge