BRB No. 90-771

CLYDE W. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Barbara J. Gardner (Mandell & Wright), Houston, Texas, for claimant.

Michael D. Murphy (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-2847) of Administrative Law Judge Richard D. Mills awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was injured on December 20, 1980 when he was working for employer as a painter. The scaffolding upon which claimant was standing to paint the cargo hold of a ship

collapsed and claimant fell several feet to the steel floor injuring his back and knee. Claimant continued treatment for his injuries through 1987,[1] including four operations. Dr. Murphy, claimant's treating physician, opined that claimant's condition stabilized as of September 1987 and he released claimant for light work. It is undisputed by the parties that claimant cannot return to his former employment as a painter. Claimant sought permanent total disability benefits under the Act.

The administrative law judge found that claimant's condition stabilized, and thus became permanent, as of September 28, 1987, when he was released for light work by Dr. Murphy.[2] The administrative law judge found that suitable alternate employment was not established, and therefore that claimant was entitled to permanent total disability benefits from the date his condition became permanent. The administrative law judge also awarded medical benefits for claimant's psychological condition, and found that claimant and his wife were credible witnesses.

On appeal, employer contends that the administrative law judge erred in finding that claimant was a credible witness and that suitable alternate employment was not established. Claimant responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

Employer specifically contends that the administrative law judge erred in finding that the room service stocker position at the Four Seasons Hotel and the security guard position at the Doubletree Hotel were insufficient to establish the availability of suitable alternate employment. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-165 (5th Cir. 1981). In order to meet this burden, employer must show the availability of general job opportunities in the local community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See P&M Crane Co.*, 930 F.2d at 430, 24 BRBS at 120 (CRT); *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991).

[1] Claimant also developed problems with his left hip and knee, gastrointestinal problems, and psychological problems due to the work-related accident in December 1980.

[2]Employer does not challenge this finding on appeal.

In the present case, the administrative law judge found that all of the positions identified in the December 1988 labor market survey conducted by Ms. Meier, employer's vocational rehabilitation counselor, were in Houston, not in Texas City or Galveston, claimant's place of residence since the date of permanency and the place of injury respectively. The record includes testimony that it is thirty-five to forty miles between Galveston and Houston. Emp. Ex. 26 at 29; Emp. Ex. 27 at 44, 46. Employer must show that suitable alternate employment is available to claimant in the area where he worked at the time of his injury, or if it wishes, in the area where claimant subsequently moves. *Dixon v. John J. McMullen & Assocs., Inc.*, 19 BRBS 243 (1986); *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986). Claimant was injured while working for employer in Galveston. Therefore, we affirm the administrative law judge's finding that, in the present case, the labor market survey conducted in Houston is insufficient to establish the availability of suitable alternate employment in Galveston as it is rational and is supported by substantial evidence. As suitable alternate employment has not been established, we also affirm the administrative law judge's award of permanent total disability benefits.[3] *See Dixon*, 19 BRBS at 247.

[3] The administrative law judge also found that three of the four categories of positions identified in the labor market survey were incompatible with claimant's physical and mental capabilities, including the room service stocker at the Four Seasons Hotel. We affirm the administrative law judge's finding that these positions are insufficient to establish suitable alternate employment as it is supported by substantial evidence. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The administrative law judge also found that claimant probably would be physically and mentally capable of performing the security guard positions identified in the survey, but that Ms. Meier was unable to state the physical requirements and the wages for these positions. Thus, the administrative law judge found that employer failed to establish the precise nature and terms of the positions and that they were therefore insufficient to establish suitable alternate employment. Ms. Meier testified that in her experience, security guard jobs pay between minimum wage and $6.00 per hour, and she testified as to the duties of the job at the Doubletree Hotel. This position may have been sufficient to demonstrate that there were jobs reasonably available within claimant's capabilities and for which he was in a position to compete realistically. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1990). With regard to the other security jobs, the administrative law judge correctly noted that Ms. Meier testified that the physical requirements vary with the job. Thus, the administrative law judge could properly find that these positions were not specific enough to allow a determination as to whether claimant would be capable of performing them. However, we need not address employer's contentions regarding the security guard position at the Doubletree Hotel as the job was not located in the vicinity where claimant was injured or where he resides.

We also reject employer's contention that the administrative law judge erred in finding that claimant was a credible witness. Credibility determinations are within the province of the administrative law judge and are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). The administrative law judge found that employer did not successfully discredit claimant or his wife and that despite some discrepancies in claimant's testimony, he was a credible witness. We have affirmed the administrative law judge's finding that suitable alternate employment is not established by a labor market survey conducted in Houston. This finding is not affected by claimant's testimony, and we therefore hold that the administrative law judge committed no error in crediting claimant's testimony.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge