BRB No. 07-0120

H.C. Claimant-Respondent v. BOH BROTHERS CONSTRUCTION COMPANY and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Petitioners	)	DATE ISSUED: 07/24/2007 DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

Richard S. Vale, Christopher K. LeMieux, Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-01210) 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 findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, while working for employer as a welding foreman on December 17, 2002, experienced pain in his lower back, arm and shoulders when he slipped and fell. Claimant subsequently experienced neck pain and, on July 23, 2003, he underwent an anterior cervical discectomy and fusion at the C5-6 and C6-7 levels. Claimant returned to restricted duty with employer from August 24, 2004, through January 20, 2005, but discontinued this employment due to his ongoing symptoms of pain and the recommendation of his treating physician. Employer voluntarily paid claimant temporary total disability compensation from February 28, 2003, through August 23, 2003, and January 21, 2005, through the date of the formal hearing. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that claimant's condition reached maximum medical improvement on November 25, 2003. Next, the administrative law judge determined that claimant was incapable of returning to his usual employment duties with employer and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from February 28, 2003, through November 24, 2003, and permanent total disability benefits from November 25, 2003, through August 23, 2004, and from January 21, 2005, and continuing. 33 U.S.C. §908(a), (b). The administrative law judge also found employer liable for the medical expenses incurred by claimant as a result of his December 17, 2002, work injury, and an assessment pursuant to Section 14(e) on any benefits owed to claimant prior to January 3, 2004, the date on which employer filed its notice of controversion. 33 U.S.C. §§907, 914(e).

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment and that it is liable for a Section 14(e) assessment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

It is well established that where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424,

24 BRBS 116(CRT) (5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156.

In determining claimant's physical restrictions in this case, the administrative law judge relied upon the functional capacity evaluation performed on May 13, 2004, and the subsequent opinion of Dr. Bratton. The functional capacity evaluation restricted, *inter alia*, claimant's lifting and carrying activities, while Dr. Bratton stated that claimant's cervical fusion required that he avoid repetitive movement of his neck and head, that is, looking up and down.[1] EXs 3 at 8-9; 7. Pursuant to these restrictions, the administrative law judge initially found that the labor market survey completed by Mr. Stewart did not establish the availability of suitable alternate employment since that report did not contain a description of the nature and terms of the positions contained in the report. Decision and Order at 29-30; CX 7. Next, the administrative law judge addressed at length the eight specific employment opportunities identified by Ms. Favaloro in her March 27, 2006, vocational rehabilitation report. *See* EX 5. Specifically, the administrative law judge found that the positions of outside cashier, component assembler, lab technician, manager trainee, and communications officer were unsuitable for claimant since each of these positions required repetitive head movements, an activity which is beyond claimant's physical capacity. The administrative law judge found that the positions of sales associate, product specialist, and service advisor did not establish the availability of suitable alternate employment since the record contained insufficient information regarding the specific physical demands of these positions. Decision and Order at 29-35.

In challenging the administrative law judge's determination that it did not establish the availability of suitable alternate employment, employer contends that the administrative law judge erred in determining that five of the identified positions required repetitive head movements; rather, employer avers that the positions in question require at most, periodic looking down. Employer's Br. at 17. Additionally, employer contends that the administrative law judge erred in requiring it to establish the nature and terms, or a quantitative measure of activity, of the positions identified as being suitable for claimant. We reject employer's contentions. The administrative law judge, as the trier-of-fact, is entitled to weigh the evidence and to draw his own inferences from it. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In this case, the administrative law judge's finding that five of the positions identified by employer violated Dr. Bratton's restrictions

[1] Dr. Bratton testified that claimant could occasionally look down, and that the question of claimant's tolerance for such activity would depend upon the repetition or duration of these movements. EX 3 at 8-9. Dr. Bratton further stated that driving was a stress factor to claimant's neck. *See* EX 3 at 15-16.

on claimant's head and neck movements is rational, as Dr. Bratton stated that claimant is to avoid repetitive movements of his head and neck and, after discussing the duties of the five positions in question, the administrative law judge rationally concluded that repetitive head movements were required in these specific positions.[2] The finding that these jobs were not suitable for claimant is therefore affirmed.

Employer contends that the administrative law judge erred in rejecting the remaining jobs on the basis that it did not establish the nature and terms of the positions, arguing that under *Turner*, 661 F.2d 1031, 14 BRBS 156(CRT), and *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT), it need not establish the precise nature and terms of specific jobs but need only show the general availability of jobs in the local market. We reject the contention that the administrative law judge's decision does not comply with *Turner* and *P & M Crane.* While employer correctly contends that it need not establish a specific job for claimant in order to show the availability of suitable alternate employment,[3] the issue here is not whether the positions it identified were sufficient to

[2] In this regard, employer acknowledges that Dr. Bratton prohibited claimant from engaging in "repetitive" head movements. Employer's Br. at 19.

[3] Contrary to employer's contention, however, neither general job availability nor a single job alone will necessarily meet employer's burden. Pursuant to *Turner,* the issue is whether employer presents evidence of jobs which claimant is physically capable of performing and which are realistically available to him. *See* n. 4, *infra.* In *P & M Crane,* employer presented evidence of one specific job opportunity and the general availability of other suitable positions. The court stated that a single position may suffice where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121(CRT). According to the court, such circumstances may exist where the employee is highly skilled, the job relied upon by employer is specialized, and the number of workers with suitable qualifications is small. *Id. Compare Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422, 29 BRBS 125(CRT) (5th Cir. Sept. 19, 1994)(in an unpublished opinion, which is precedent pursuant to Fifth Circuit Local Rule 47.5.3, the court reversed the Board's decision finding suitable alternate employment based on a single job opening, holding that *P & M Crane* establishes that more must be shown than the mere existence of a single job that the claimant can perform and that where one specific job has been identified and no general employment opportunities suitable for claimant have been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified). In *P & M Crane* the court remanded the case for findings as to whether its proposed specific and general jobs were within claimant's physical and mental capacities and were realistically available to claimant.

show job availability in the local labor market, but whether employer established that the jobs it relies upon were suitable for claimant given his medical restrictions. Under *P & M Crane* and *Turner*, employer must show that the claimant is capable of performing the identified jobs given his physical restrictions and other relevant factors.[4] *See also Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). Without sufficient information regarding the duties of a potential job or its required activity level, the administrative law judge is unable to determine whether identified jobs were suitable given a claimant's physical restrictions. In this case, as we have discussed, claimant's physical capabilities include limits on lifting, carrying, and repetitive movement of his head and neck. As the fact-finder, the administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine the suitability for claimant. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998). In this case, the administrative law judge rationally found that the lack of specific information regarding the physical duties required of the remaining positions identified by employer made it impossible for him to determine whether in fact those positions were suitable for claimant in light of claimant's physical restrictions. Thus, as the administrative law judge's findings are rational, supported by substantial evidence, and are in accordance with law, we affirm the administrative law judge's determination that

[4] In *Turner*, the court stated that the suitable alternate employment inquiry turns on two questions:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

Turner, 661 F.2d 1042-1043, 14 BRBS at 165 (footnote omitted). The issue in the present case concerns the first question rather than the second.

the positions identified by employer are insufficient to establish the availability of suitable alternate employment.[5]

Employer next contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment on the difference between the amount of benefits due claimant and the amount of benefits voluntarily paid to claimant between February 28, 2003, and January 3, 2004, the date on which employer filed its notice of controversion. Specifically, employer contends that it voluntarily commenced payment of compensation benefits to claimant once claimant stopped working, and that its subsequent filing of a notice of controversion eliminated its liability for such an assessment. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily with 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to section 14(d), 33 U.S.C. §914(d). Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury. Under Section 14(d), the notice of controversion must be filed with 14 days of employer's knowledge of the injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

On the undisputed facts of this case, we affirm the administrative law judge's determination that employer is liable for a ten percent assessment on all compensation due and unpaid from February 28, 2003, until January 3, 2004, the date on which employer filed its notice of controversion. Although employer was voluntarily paying compensation, claimant filed a claim on May 5, 2003, asserting that he was entitled to weekly compensation benefits at a higher rate than that being paid by employer. CX 6 at 2. As of this date, a dispute existed between the parties as to the amount of compensation due claimant. Once this dispute existed, employer had 28 days to pay all of the additional benefits sought by claimant or 14 days to file a notice of controversion with the district director in order to avoid incurring liability under Section 14(e). *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Employer does not aver on appeal that it paid the higher weekly compensation rate sought by

[5] As claimant's duty to diligently seek employment does not arise until employer successfully establishes the availability of suitable alternate employment, *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); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991), we need not address employer's contention that claimant did not seek employment post-injury.

claimant, or that it timely filed a notice of controversion. Thus, because employer did not pay the additional compensation demanded when it became due and did not timely controvert the claim, the administrative law judge's finding that employer is liable for an assessment on the additional compensation eventually found due from February 28, 2003, until employer filed its notice of controversion is affirmed.[6]

Accordingly, the administrative law judge's Decision and Order 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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BETTY JEAN HALL
Administrative Appeals Judge

[6] We decline claimant's counsel's summary request for an attorney's fee, payable by employer, for services rendered in defending against employer's appeal. Counsel may seek an attorney's fee by submitting to the Board an appropriate fee request which is in compliance with the Board's regulations. *See* 20 C.F.R. §802.203.