

DENNIS JOHNSON)
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 Claimant-Respondent)
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 v.)
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 SSA MARINE TERMINALS, LLC) DATE ISSUED: 07/26/2012
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 and)
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 HOMEPORT INSURANCE COMPANY)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Patrick B. Streb (Weltin Streb & Weltin, LLP), Oakland, California, for claimant.

Judith A. Leichtnam (Bruyneel & Leichtnam, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Compensation Benefits (2010-LHC-01200) of Administrative Law Judge Richard M. Clark 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a steady clerk, suffered an injury to his lower back on November 12, 2007, when he was hit from behind by a top-pick while sitting in his work truck. Tr. at 60-61. Dr. Blackwell, claimant's treating physician, kept claimant off work between November 13 and December 13, 2007, and prescribed narcotic pain medication (Norco). CX 16 at 91, 98. Due to claimant's continued pain, Dr. Blackwell postponed claimant's return to work date. Dr. Jones performed surgery on claimant's back on January 13 and January 15, 2009.¹ Dr. Blackwell released claimant to work without restriction on August 28, 2009, but again removed him from work on October 16, 2009, due to claimant's complaints of excruciating pain. CX 16 at 37-38. Employer's records show that claimant was off work from November 13, 2007, until August 30, 2009, when he returned to work. CX 13 at 36-38. Claimant's last day of work with employer was October 13, 2009, and he has not worked anywhere since that day.

Claimant filed a claim under the Act seeking compensation and medical benefits related to the November 12, 2007, work injury to his back. Claimant sought temporary total disability benefits from November 13, 2007 to August 27, 2009, and from October 14, 2009 to August 21, 2010, and ongoing permanent total disability benefits from August 22, 2010. Employer contended that claimant was entitled to temporary total disability benefits from November 13, 2007 until August 27, 2009, and from October 14, 2009 until August 2, 2010, the date Dr. von Rogov opined claimant could return to work and on which employer alleges suitable alternate employment was available on the waterfront, or, in the alternative, until October 8, 2010, the date employer alleges it established suitable alternate employment off the waterfront with its labor market survey. The administrative law judge found that claimant's work restrictions prevent him from returning to his regular job, his condition reached maximum medical improvement on August 4, 2010, and employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from November 13, 2007 until August 29, 2009, and from October 14, 2009 until August 4, 2010, and permanent total disability benefits from August 4, 2010, and continuing. On appeal, employer challenges the administrative law judge's maximum medical improvement and suitable alternate employment findings. Claimant responds, urging affirmance.

Employer contends the record does not support the administrative law judge's finding that claimant reached maximum medical improvement on August 4, 2010. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). A claimant's condition may be

¹Dr. Jones performed an anterior L5-S1 discectomy and fusion followed by a posterior L5-S1 pedicle screw and rod fixation. CX 17.

considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In this case, the administrative law judge considered the opinions of Drs. von Rogov, Blackwell, and Jones as to the permanency of claimant's condition. On August 2, 2010, Dr. von Rogov opined that claimant had not yet reached maximum medical improvement but would likely reach maximum medical improvement in January 2011.² EX 19 at 69. On August 21, 2010, Dr. Blackwell opined that claimant's condition reached maximum medical improvement. CX 16 at 185. On October 1, 2010, Dr. Jones opined that claimant's condition had not yet reached permanency, explaining that claimant might need future surgery. EX 47 at 449, 456. Based on the reports of Drs. Blackwell and von Rogov, the administrative law judge found that the parties agreed claimant reached maximum medical improvement as of August 4, 2010. Further finding that Dr. Blackwell, as claimant's treating physician, "knows his condition best," and that Dr. Jones premised his maximum medical improvement opinion on claimant's having future surgery, the necessity of which was uncertain, the administrative law judge found that "[c]laimant's maximum medical improvement date is August 4, 2010." Decision and Order at 16.

Initially, we note the administrative law judge rationally found Dr. Jones's opinion does not preclude a finding of permanency because claimant's need for future surgery was uncertain. See *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). However, we agree with employer that the record does not support the administrative law judge's finding as to the date of maximum medical improvement. Contrary to the administrative law judge's finding, the opinions of Drs. Von Rogov and Blackwell are not in agreement as to the date claimant reached maximum medical improvement. Moreover, neither physician's report supports a finding that claimant's condition reached permanency on August 4, 2010.³ CX 16 at 185; EX 19 at 69. As it is

²Dr. von Rogov examined claimant on behalf of employer/carrier on July 19, 2010. EX 19 at 60.

³Although Dr. Blackwell indicated in his August 21, 2010, report that claimant's condition was permanent and stationary, he made no reference to any earlier date and the report does not specify the date of examination. Further, the record indicates that, prior to August 21, 2010, the last time Dr. Blackwell noted claimant's progress was on July 13, 2010. CX 16 at 175, 183.

unclear how the administrative law judge arrived at August 4, 2010, as the date claimant's condition reached maximum medical improvement, we vacate his finding and remand the case for further consideration. See *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

Employer also contends the administrative law judge erred in finding that it did not establish suitable alternate employment on or off the waterfront and that claimant therefore is totally disabled. Once, as here, a claimant has shown that his work-related injury prevents him from performing his usual work, the burden shifts to the employer to establish the availability of realistic job opportunities within the geographic area where the employee resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. See *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); see also *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The employer must point to actual jobs that the claimant can perform. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); see *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. In addressing the availability of suitable alternate employment, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. See, e.g., *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Employer offered the testimony of Mr. Brakefield and Mr. Hazlak in support of its position that suitable alternate work as a "transtainer clerk"⁴ and "computer kitchen clerk"⁵ was available to claimant on the waterfront. Mr. Hazlak testified that there are

⁴ Transtainer clerks are responsible for checking the license plate numbers of outside truckers to verify they are there to pick up a container. The transtainer clerk verifies the yard location of the container, and reports the location to a transtainer operator via radio. In verifying that a container is where the computer reports it to be, the transtainer clerk must physically walk into the stacks of containers to let the transtainer operator know which container it is and where it is in the stack. Tr. at 97-100; CX 23 at 24-25.

⁵ Kitchen clerks are supervisor/receiver clerks who verify and document container cargo from an office cubicle. They interact with arriving truckers through a microphone/headset and use a monitor to receive visual confirmation of incoming containers on trucks and to obtain relevant information regarding the cargo, such as container numbers, chassis numbers, tractor weight, and the driver's license numbers. CX 23 at 12-14.

many clerk jobs available on any given day that routinely go to members of Local 10, a union whose members have access to clerk positions only after they have been passed over by claimant's union, Local 34. Tr. at 176-179. Mr. Brakefield testified that transtainer clerks lift no more than 20 pounds and do not have to stand or sit for more than 30 minutes at a time, and that kitchen clerks can stand and sit at will as their computers and work stations are adjustable. Tr. at 102, 104-05, 110. Employer also offered an October 8, 2010, labor market survey, conducted by Ms. Winkler, as evidence of suitable alternate employment off the waterfront. The survey identified ten positions within 50 miles of claimant's Vallejo residence.⁶ ALJX 9.

Based on the opinions of Drs. Blackwell, von Rogov, and Jones, the administrative law judge found that: claimant is restricted to sitting or standing no more than 30 minutes at a time, with the ability to sit or stand at will; he should not engage in simultaneous bending, lifting and twisting; he should avoid leaning; he should not push weight greater than 150 pounds or pull greater than 110 pounds; he should not lift or carry greater than 15 pounds, occasionally up to 20 pounds; and he should not climb or squat. Because claimant was taking Norco, he should avoid being around heavy machinery. Decision and Order at 9; Tr. at 125, 143-148; CX 16 at 186; CX 17 at 267. The administrative law judge found both the transtainer clerk and kitchen clerk positions unsuitable "given [c]laimant's work restrictions, including his continued use of Norco, which significantly impairs his ability to work on the waterfront." Decision and Order at 17. Specifically, the administrative law judge found the transtainer clerk position was not semi-sedentary as described by Dr. Blackwell and it would not allow claimant to sit and stand at will because it required claimant to be out of his truck frequently to search for containers. Further, the administrative law judge found that, although the hearing testimony showed that kitchen clerks' workstations can be adjusted, "there was no credible evidence or testimony that they could be adjusted in a manner conducive to maintaining an effective and efficient work place while meeting claimant's job restrictions." *Id.* As Mr. Fung, chief dispatcher for Local 34, testified that there were no "ergonomic work stations" on the waterfront, the administrative law judge found that the "kitchen" could not accommodate claimant's work restrictions easily enough to suit its fast-paced environment; "the impact on claimant and the disruption to the work routine would be too great." Decision and Order at 12, 17. Thus, the administrative law judge determined that the transtainer clerk and kitchen clerk positions are not suitable alternate employment.

⁶ Ms. Winkler identified two security supervisor positions, three customer service positions, three elderly companion caregiver positions, one healthcare security dispatcher, and one dispatcher position. ALJX 9.

The administrative law judge additionally rejected the jobs on the open market, stating that the labor market survey was “flawed” because Ms. Winkler did not determine whether the physical requirements of the positions fit within claimant’s restrictions, it was unclear what Ms. Winkler understood claimant’s work restrictions to be, and some of the positions required claimant to pass a drug test even though claimant was taking narcotic pain medication. Decision and Order at 10. Because “there was no evidence that the work places would hire someone with [c]laimant’s restrictions, including the taking of a narcotic pain medication,” and there was “little evidence” regarding how claimant’s condition might be affected by work, or how his condition might affect the workplace, the administrative law judge found that the labor market survey did not establish suitable and specific employment that meets claimant’s work restrictions. *Id.* at 16.

Employer challenges these findings, asserting that they are not supported by substantial evidence of record and that the administrative law judge failed to adequately explain his conclusions. With respect to the transtainer clerk position, although Mr. Brakefield testified that transtainer clerks do not have to sit or stand for periods longer than 30 minutes, he also stated that, due to the constant flow of trucks, transtainer clerks consistently need to get in and out of their vehicles to check containers and have been instructed to spend no more than five minutes searching for a container before returning to their truck. Tr. at 101-02. As this testimony supports the administrative law judge’s finding that a transtainer clerk position would not allow claimant to sit and stand at will as required by his restrictions, we affirm the administrative law judge’s finding that the position is not suitable. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

With respect to the kitchen clerk position, however, it is unclear on what basis the administrative law judge determined that the work stations are “not easily manipulated” and that claimant’s restrictions could not be accommodated without disrupting the work routine. None of the experts testified to such. Mr. Brakefield, who spends all day in the “kitchen,” and Mr. Hazlak testified that kitchen clerks can alter their workstations “to fit their needs,” they can adjust them repeatedly throughout the day, and there, in fact, are “people who freely adjust their station all day long.”⁷ Tr. at 104-05, 175, 186-87. The administrative law judge declined to credit this testimony given the “fast-pace environment” and Mr. Fung’s testimony as to the absence of ergonomic work stations. Although the administrative law judge has great discretion in determining which

⁷Mr. Brakefield testified that he has adjusted work stations in the kitchen by adjusting monitor height, keyboard height, and moving the chairs out of the way if the clerk wants to stand. Tr. at 107. Mr. Hazlak testified that stands are available at every waterfront location to raise computer monitors. *Id.* at 186-87.

witnesses' testimony to credit, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.), *cert. denied*, 440 U.S. 911 (1970), it is unclear on what basis the administrative law judge found the pace of the "kitchen" to be "fast," or how Mr. Fung's testimony establishes that the accommodations Mr. Brakefield and Mr. Hazlak testified to do not satisfy claimant's work restrictions and are too time-consuming and disruptive to employ.⁸ Further, although Mr. Brakefield and Mr. Fung testified that employees are not supposed to be under the influence or any outside substance that inhibits their ability to perform their jobs, the administrative law judge did not explain what about claimant's taking narcotic medication impairs his ability to work as a kitchen clerk. Indeed, Dr. Blackwell, whom the administrative law judge found knows claimant's condition best, testified that claimant's use of Norco does not prevent him from working at a computer workstation, and the only work restrictions associated with claimant's Norco use were that he not be in a situation where an impaired reaction time causes safety concerns; claimant should not operate heavy equipment or operate vehicles routinely. EX 48 at 507; Tr. at 126, 155. Moreover, to the extent the administrative law judge found the position unsuitable based on claimant's testimony that Norco slows him down and makes him dizzy and drowsy, the administrative law judge erred in failing to explain why he found claimant's testimony credible and how these side effects translate into physical restrictions that prevent claimant from working as a kitchen clerk.⁹ Based on the foregoing, we vacate the administrative law judge's finding that the kitchen clerk position

⁸We agree with employer that it is not employer's burden to produce "credible evidence or testimony" that claimant's restrictions can be accommodated "in a manner conducive to maintaining an effective and efficient work place." Decision and Order at 17. As the record contains no evidence suggesting any disruption caused by adjusting a kitchen clerk's workstation affects claimant's employability, any such effect is best assessed when claimant engages in a diligent job search from among the jobs employer successfully identifies as suitable, as well as other jobs. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997).

⁹As employer states, claimant did not report any side effects to his physicians. Mr. Fung testified that a kitchen clerk's narcotic use potentially affects safety where an inattentive clerk misses an overweight or hazardous material label on a cargo container because that container could be stored in a part of the yard where such containers are not supposed to be stored. CX 23 at 10-11. However, the administrative law judge did not find that claimant's use of Norco renders him incapable of the level of attention required of a kitchen clerk.

is unsuitable and remand the case for further consideration of the suitability of this position.¹⁰ See, e.g., *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990) (holding that an administrative law judge must discuss relevant evidence and explain findings).

We additionally agree with employer that the administrative law judge erred in his consideration of the labor market survey. Although Ms. Winkler did not state what she understood claimant's work restrictions to be, she specified job duties for each position and physical requirements for some. The administrative law judge, as factfinder, was obligated to compare the duties of these positions with claimant's restrictions to determine whether employer established the jobs are suitable. See, e.g., *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). Further, to the extent the administrative law judge found the labor market survey cannot establish the availability of suitable alternate employment because it did not inquire into the willingness of the employers to hire someone taking narcotic pain medication, this finding is not in accordance with law, as a vocational counselor is not required to contact prospective employers to inquire whether claimant's use of legal prescription medications would preclude his ability to pass drug testing and thus, disqualify him from otherwise suitable employment. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Similarly, the administrative law judge's findings that the labor market survey cannot establish the availability of suitable alternate employment because it did not address how claimant's condition might "affect" the workplace is not in accordance with law. *Id.*

Moreover, on the facts of this case, we cannot affirm the administrative law judge's inference that it is employer's burden to establish that claimant will have to pass any pre-employment drug test. Some of the jobs listed in employer's labor market survey require drug tests, and claimant, in his post-hearing brief, suggested that his lawful use of a prescribed medication will cause him to fail the drug test required by those positions and prevent his employment. However, there is no suggestion, other than claimant's argument in his post-hearing brief, that employers are testing prospective, disabled employees for legal, prescription drugs. See generally 29 C.F.R. §§1630.11, 1630.13, 1630-14, 1630.16 (describing prohibited and permitted pre-employment medical tests

¹⁰In this respect, we further note that the administrative law judge may not rely on the testimony of Mr. Marzano. Employer correctly states that his testimony was excluded from the record by the administrative law judge who presided at the hearing. Tr. at 9-10, 163. We therefore agree with employer that administrative law judge should not have considered Mr. Marzano's testimony.

when the Americans With Disabilities Act applies).¹¹ There is no evidence that claimant has taken a drug test in the past and has failed it due to legally prescribed drugs and been denied employment as a result.

In this case, claimant has physical restrictions resulting from his work injury as well as restrictions on his employability in positions where his medication could present safety issues. Under these circumstances, in assessing whether employer has established suitable alternate employment, the effects of claimant's medications on his employability are best limited to the physical restrictions resulting from his use of the medication.¹² Consequently, we vacate the administrative law judge's finding that the labor market survey does not establish suitable alternate employment,¹³ and we remand the case for the administrative law judge to reconsider whether employer established suitable alternate employment both on and off the waterfront.

On remand, the administrative law judge must compare the duties of the kitchen clerk position and labor market survey positions with claimant's restrictions to determine whether they constitute suitable alternate employment. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge must address the probative value of claimant's testimony that Norco causes him side effects,¹⁴ and if credible, whether the side effects result in additional physical restrictions. The administrative law judge must explain the basis for his credibility determinations and his findings of fact.

Should the administrative law judge find that employer established the availability of suitable alternate employment, claimant can rebut employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he

¹¹Many disabled employees take narcotic and other prescription medication for their conditions.

¹²Conversely, the effects of claimant's medications on his obtaining otherwise suitable alternate employment are best assessed when claimant engages in a diligent job search from among the jobs employer successfully identifies as suitable. *See generally Fox*, 31 BRBS 118.

¹³We deny employer's request to reassign this case to a different administrative law judge on remand. *See generally Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

¹⁴Employer, in its brief, cites evidence that it alleges undermines claimant's credibility as a whole. Er. Br. at 16-18. Employer can present its argument to the administrative law judge on remand.

diligently pursued alternate employment opportunities but was unable to secure a position. *See Edwards*, 999 F.2d at 1376 n. 2, 27 BRBS at 84 n. 2(CRT). It is at this point in the extent of disability query that the issue of drug testing becomes relevant. If claimant is denied employment due to his taking prescribed medications or because he otherwise was not hired, then he may retain entitlement to total disability benefits. *Berezin*, 34 BRBS 163; *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998); *see generally Fox*, 31 BRBS 118.

Accordingly, the administrative law findings regarding the date claimant's condition reached maximum medical improvement and that employer did not establish suitable alternate employment are vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Compensation Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge