BRB No. 01-0228

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| FREDERICK WELLS | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: Nov. 2, 2001 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Chandra L. Wilson (Rutter, Walsh, Mills, & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-0450) of Administrative Law Judge Daniel A. Sarno, 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 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).

Claimant, a shipfitter, suffered an acute lumbar strain while climbing a ladder during

the course of his employment on December 2, 1998, but immediately returned to work. Claimant continued to perform work as a shipfitter, but was assigned light duty jobs within the restrictions thereafter assigned to him by Dr. Ross, which included limiting his lifting to 20 pounds or less, prohibited non-vertical ladders and crawling, and limited bending, twisting, and stooping. *See* CX j. Claimant went out on strike from April to August 1999; subsequent to his return to work, claimant was laid off on September 9, 1999, for reasons unrelated to his injury. Claimant thereafter worked as a shipfitter for three other employers.[1] He thereafter sought temporary total disability compensation for those periods of time during which he was unemployed following his layoff.[2]

In his decision, the administrative law judge found that claimant failed to establish that his work restrictions at the time of his return to work in August 1999 rendered him incapable of performing his usual employment duties as a shipfitter at that time. Accordingly, the administrative law judge denied the claim for temporary total disability compensation.

On appeal, claimant argues that the administrative law judge erred in denying his claim for temporary total disability compensation. Employer responds, urging affirmance.

It is claimant's burden to establish the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20

[1]The record reflects that following his layoff September 9, 1999, claimant was employed as a shipfitter with Tecnico from November 21, 1999, to January 28, 2000, with Tradesman International from February 15, 2000, to March 17, 2000, and from May 31, 2000, to the present with Norfolk Naval Shipyard. Claimant does not argue that he was terminated from either Tecnico or Tradesman International for reasons related to his work injury.

[2]Claimant specifically sought temporary total disability benefits from September 9 to November 20, 1999, from January 29 to February 14, 2000, and from April 18 to May 30, 2000.

(1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to perform the duties of his prior employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In the instant case, the administrative law judge determined that despite the physical restrictions placed upon claimant, claimant was able to perform his usual job duties upon his return to work following the strike in August 1999 and at the time he was laid off by employer on September 9, 1999.

The record reflects that upon his return to work immediately following his December 2, 1998, work accident claimant was under work restrictions that limited his lifting to 20 pounds or less, prohibited non-vertical ladders and crawling, and allowed only limited bending, twisting, and stooping. *See* CX j. On January 19, 1999, claimant's restrictions were modified to permit lifting of up to 30 pounds. *See* CX 1b. When claimant returned to work in August 1999 following the strike, his January 1999 restrictions had expired; Dr. Ross, his treating physician, then assigned new restrictions that allowed unlimited climbing of stairs and ladders, frequent crawling, kneeling, squatting, bending and twisting up to five hours per day, and lifting of 50 pounds or less for 100 feet. *See* EX 1a. Employer, however, was not made aware of these reduced restrictions.

It is undisputed that claimant was able to work as a shipfitter, albeit on light duty assignments, with employer immediately following his injury. Employer contends, and the administrative law judge found, that the usual job duties of a shipfitter were within the restrictions imposed on claimant by his treating physician at the time of his return to work following the strike in August 1999. Claimant argues that the administrative law judge erred in his determination of his job duties, both as outlined by employer and as actually performed in the workplace.

In reaching his decision, the administrative law judge relied upon the testimony of Mr. Alston, claimant's supervisor, who testified as to the usual job duties of a shipfitter and stressed that help is available for lifting heavy objects; thus, Mr. Alston opined that claimant's present physical restrictions would not prevent him from performing the regular duties of a shipfitter. *See* HT at 76-82, 85-97. Specifically, Mr. Alston testified that shipfitters were not required to lift excessive amounts of weight, *i.e.*, in excess of 40 pounds, by themselves and that if assistance was not available the job would not get done until it was. *Id.* at 92. In addition, although claimant continued to perform light duty work assignments following his return to work after the strike, Mr. Alston's testimony indicates that this was the result of employer's not being made aware of the fact that claimant's work restrictions had been changed by Dr. Ross. *Id.* at 81. Once he had the opportunity to review claimant's August 1999 restrictions, Mr. Alston was of the opinion that claimant have performed the usual employment duties of a shipfitter. *Id.* at 81-85. In this regard, claimant conceded at the formal hearing that there were options regularly available to assist employees in the performance of their usual employment duties as shipfitters. *See* HT at 51-55. Moreover, the administrative law judge noted that claimant had applied for, obtained, and performed three subsequent, unmodified, shipfitter positions following his layoff from

employer. Decision and Order at 6. Accordingly, the administrative law judge determined that even with his post-injury physical restrictions, claimant could have performed his normal job duties as a shipfitter in August 1999 without any modifications or accommodations being made to that position by employer.

Claimant argues that the administrative law judge's decision is based on erroneous assumptions about the workplace, and that in reality, shipfitters do not avail themselves of "help" or assistance on the job, even if proffered. In support of his argument, claimant presented the description of a shipfitter position provided by the United States Department of Labor, U.S. DEPT. OF LABOR, Employment and Training Administration, in the Dictionary of Occupational Titles, Volume II, Fourth Edition, Revised 1991, at 852 (1997). It is claimant's contention that this description demonstrates that claimant's job is outside of his restrictions. While claimant alleges that the administrative law judge erred in relying on a hypothetical idealization of his job duties, claimant fails to establish which of the listed duties are outside of his limitations. Moreover, claimant's treating physician, Dr. Ross, who was aware of claimant's job, opined that claimant could return to his work duties without restrictions on July 7, 1999. *See* CX 7j. Thereafter, Dr. Ross returned claimant to work on August 25, 1999, with the proviso that claimant can do all activities frequently, but none constantly. *See* CX 7i.

It is well-established that an administrative law judge is entitled to weigh the evidence and draw his own conclusions and inferences and conclusions from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Anderson*, 22 BRBS at 22. In the instant case, the administrative law judge rationally found, based upon the testimony of claimant regarding the assistance that was available to all employees for lifting heavy objects and the testimony of Mr. Alston regarding the normal duties of a shipfitter, that post-strike claimant was capable of performing the regular duties of a shipfitter. As the administrative law judge's credibility determinations are rational and within his authority as factfinder, we affirm the administrative law judge's determination that claimant has failed to meet his burden of proving that he was incapable of performing his former occupational duties as a shipfitter upon his return to work in August 1999, and his consequent denial of claimant's request for temporary total disability compensation. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331 , 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979); *Donovan*, 300

F.2d 741.[3]

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Claimant's reliance upon the United States Court of Appeals for the Fourth Circuit's decision in *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), is misplaced. In *Hord*, the court addressed employer's obligation to establish suitable alternate employment where the parties had agreed that claimant had established his *prima facie* case of total disability because he was unable to perform his pre-injury employment duties due to the effects of his injury. In the case at bar, employer maintained, and the administrative law judge agreed, that claimant never established his *prima facie* case of total disability following his return to work in August 1999.