BRB No. 01-0229

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| KENNETH J. GUITHUES | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| TIDEWATER EQUIPMENT COMPANY | ) | DATE ISSUED: 10/29/01 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Henry P. Bouffard and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2161) of Fletcher E. Campbell, 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 sustained a work-related injury to his back and left shoulder on June 25, 1993, while attempting to lift a heavy jack with another employee. Employer voluntarily paid claimant total disability benefits until March 21, 1999, when claimant's treating physician, Dr. Kirven, based on his viewing of a surveillance videotape, opined that claimant could return to his pre-injury employment as a pipefitter. Claimant sought continuing permanent total disability benefits. The administrative law judge credited Dr. Kirven's 1999 opinion that claimant could perform his usual employment, and he therefore denied claimant disability benefits. On appeal, claimant challenges

the administrative law judge's denial of benefits. Employer responds, urging affirmance.

We first address claimant's contention that the administrative law judge erred in admitting the surveillance videotape into evidence. The administrative law judge stated he had concerns about the admissibility of the tape because there was no foundational testimony offered by the videographer. Decision and Order at 2 n.3. The administrative law judge nonetheless admitted it because Dr. Kirven, who viewed the tape, described it in his deposition with sufficient detail to satisfy the administrative law judge that employer offered into evidence the tape viewed by Dr. Kirven and that claimant was indeed the subject of the surveillance. *Id.* On appeal, claimant contends that the tape should not have been admitted into evidence, as employer offered it, and its other evidence, into the record only three weeks before the administrative law judge issued his decision, and as claimant did not have the opportunity to challenge the validity of the tape or to explain its contents.[1]

The administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious or an abuse of discretion. *See, e.g., McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also* *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).. The administrative law judge is not bound by formal rules of evidence. 33 U.S.C. §923; *Powell v. Nacirema Operating Co.*, 19 BRBS 124 (1986). Claimant's challenge to the administrative law judge's admission of the videotape is without merit. First, claimant did not object to the tape's admission when it was offered by employer, even though claimant was advised that it was among employer's exhibits. *See* Decision and Order at 2; 29 C.F.R. §18.103(a)(1). Thus, claimant waived his right to object on appeal to the tape's admission. *See* *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Moreover, the administrative law judge rationally allowed for the tape to be admitted without a foundation by the videographer because Dr. Kirven's testimony made it clear that the tape he viewed was the tape introduced by employer, and that claimant is the subject of that tape. *See* Decision and Order at 2, n. 3; EX 5. Finally, the record indicates that claimant questioned Dr. Kirven at two depositions, on May 14, 1999, and June 1, 1999, with respect to his opinion after the doctor viewed the videotape to which claimant now objects. EX 4. Claimant, nonetheless, agreed to the cancellation of the oral hearing and to a decision on the record, knowing of the existence of the tape, and that Dr. Kirven's opinion had changed based on his viewing of the tape. Thus, as claimant failed to object to the tape's admission below, and has failed to establish that the administrative law judge abused his discretion in admitting the tape, we affirm the administrative law judge's admission of the

[1]The parties agreed to have the administrative law judge issue a decision without an oral hearing, based on the documentary evidence of record.

videotape into evidence.

We next address claimant's contention that the administrative law judge erred in relying on Dr. Kirven's 1999 opinion to find that claimant can return to his usual work. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment due to his work-related injury. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

We affirm the administrative law judge's finding that claimant is capable of performing his usual work as, after reviewing the medical evidence in its totality, he rationally credited the opinion of Dr. Kirven that claimant could perform his usual employment as a pipefitter. In crediting Dr. Kirven's opinion, the administrative law judge reasoned that the doctor had been claimant's treating physician since approximately September 1996 and has performed at least one operation on claimant, providing Dr. Kirven with an excellent opportunity to observe claimant and know him well.[2] Additionally, the administrative law judge found that Dr. Kirven's unbiased opinion was based on the videotape of claimant's activities, claimant's job description, the doctor's personal knowledge of similar jobs, and claimant's functional capacities evaluation (FCE).[3] *See* EX 4. Moreover, the administrative law judge rationally concluded after viewing the videotape that such evidence could cause an orthopedic physician to modify his prior opinion that claimant was disabled from manual labor, and thus Dr. Kirven's prior opinions regarding claimant's disability do not detract from his later opinion that claimant can return to work as a

[2]Claimant had a spinal fusion in 1994 with insertion of pedicel screw instrumentation. Dr. Kirven removed the hardware in 1996 to alleviate claimant's complaints of pain.

[3] Dr. Kirven stated that he does not believe that claimant gave his full effort in the FCE, and that claimant has exhibited symptom magnification. EX 4 at 5 (dep. of June 1, 1999).

pipefitter.[4]

Contrary to claimant's contention, the administrative law judge discussed all the relevant evidence of record. The administrative law judge noted that Dr. Kirven's opinion that claimant could return to his usual employment has not been specifically contradicted. He emphasized that Dr. Morales, when given the opportunity to disagree with Dr. Kirven, did not do so. CX 17. In this regard, the administrative law judge additionally noted that while Dr. Skidmore referenced claimant's chronic back pain and stated that he is not able to do heavy labor, he opined that claimant had no neurological deficit that would support a finding of disability. CX 19. The administrative law judge also stated that Dr. Skidmore made no comment with respect to the elements of claimant's previous job, and there is no evidence that Dr. Skidmore viewed the surveillance tape of claimant as did Dr. Kirven. In acknowledging that Dr. Skidmore referred to claimant's FCE, which at one point indicated total disability, the administrative law judge pointed out that there also is no evidence that Dr. Skidmore was aware of Dr. Kirven's opinion that claimant had not expended maximum effort in the FCE.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to determine the weight to be accorded the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir .1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge acted within his discretion in crediting the later opinion of Dr. Kirven that claimant is capable of performing his usual work, we affirm the administrative law judge's denial of permanent total disability benefits as it is supported by substantial evidence. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

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

SO ORDERED.

BETTY JEAN HALL, Chief

[4] Dr. Kirven's lifting restriction of 75 pounds is not inconsistent with claimant's performing his regular employment, as a pipefitter need not lift more than 40 pounds. *See* exhibit to Dep. of June 1, 1999.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge