BRB No. 10-0228

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| MATTHEW G. ELLIS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED | ) | DATE ISSUED: 08/26/2010 |
| | ) | |
| and | ) | |
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| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order and Order Granting in Part and Denying in Part Motion for Clarification/Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Frank J. Sioli (Brown Sims, P.C.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Granting in Part and Denying in Part Motion for Clarification/Reconsideration (2008-LDA-400) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33

U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired by employer to work in Iraq as a heavy equipment operator in 2006. On April 26, 2006, claimant lost his balance and twisted/hyper-stretched his left shoulder and back while attempting to get down from a piece of heavy equipment. He received medical attention within minutes of the injury but has not returned to work for employer since then. Tr. at 43-47. Employer voluntarily paid temporary total disability benefits from April 30, 2006, through April 27, 2008. Employer also paid medical benefits. Claimant secured alternate work in June 2008 but was laid off in January 2009. Thereafter, he secured another job where he was working as of the date of the hearing on May 7, 2009. Both post-injury jobs paid $12 per hour and both, according to claimant, were lighter duty than his regular job with employer.

The parties stipulated that claimant's back condition reached maximum medical improvement on October 1, 2007, but there was a dispute as to the status of his left shoulder condition and the level of work to which he can return. Claimant also sought additional medical treatment for his left shoulder and back, as employer had since disapproved all treatment based on the report of its expert. The administrative law judge credited claimant's treating physician, Dr. Vaughn, and found that claimant's shoulder condition has not reached maximum medical improvement and he has not been released to return to any work as a result of his shoulder condition. As Dr. Vaughn recommended surgery, and as the back and shoulder conditions are work-related, the administrative law judge awarded reasonable and necessary medical benefits. 33 U.S.C. §907(a). Further, as claimant secured alternate work, and the administrative law judge credited claimant's testimony regarding such work, he awarded claimant temporary partial disability benefits based on claimant's post-injury wage-earning capacity of $480 per week. 33 U.S.C. §908(e), (h); Decision and Order at 13-17. Thereafter, employer filed a motion for clarification/reconsideration, arguing that the administrative law judge should have drawn an adverse inference against claimant due to his failure to fully disclose information about his current job. Employer sought a finding, based on the adverse inference, that claimant was physically capable of performing his usual work. The administrative law judge denied the motion, stating that claimant had provided sufficient information about his job in his testimony such that the testimony supported the award of temporary partial disability benefits. Order at 2.

Employer appeals the award of benefits, contending the administrative law judge failed to draw an adverse inference against claimant. Employer specifically argues the administrative law judge should have found, based on an adverse inference, that claimant is not disabled at all, due to his failure to identify his current employer, as this prevented employer from deposing his supervisors about his work duties. Accordingly, employer

asserts that the award of temporary partial disability benefits should be reversed. Claimant responds, urging affirmance.

Claimant testified that he found post-injury work beginning in January 2009 with a company in Northern Virginia. He testified that he makes $12 per hour and works approximately 45 hours per week. He stated that his sole duty is to secure loads with nylon ratchet straps, that he uses only his right arm to do so, that he works with a partner, that each job takes approximately five minutes and he typically has approximately seven jobs per day, and that he spends most of his day waiting for the loads to be ready to be secured. Tr. at 26-28, 72-74. Claimant also stated that he found this position on the internet, he has top secret clearance, he does not drive heavy machinery or lift anything over eight pounds, and he cannot reveal the name of his company or his supervisors. Tr. at 28, 30, 75-76.[1] Claimant submitted a highly redacted earnings statement which confirmed that he was working as of the pay week ending April 19, 2009, earning $12 per hour. Cl. Ex. 19.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

In this case, the administrative law judge credited claimant's treating physician, Dr. Vaughn, who stated that claimant's left shoulder condition has not reached maximum medical improvement and that surgery is recommended, and who, therefore, has not released claimant to return to any work. Decision and Order at 13-14; Emp. Ex. 16. Because claimant has not been released to return to any work, evidence of suitable alternate employment arguably is premature. *Hoodye v. Empire/United Stevedores*, 23

[1]Claimant testified that he had to report to his supervisor after his deposition and his hearing testimony. He also stated that, if he were to divulge the information, he could lose his security clearance or go to prison. Even after he stops working for this employer, he must remain silent. Tr. at 28-29.

BRBS 341 (1990). However, as claimant has returned to alternate employment, stating that he is able to perform his current job because it is much lighter work than what he was doing for employer, the administrative law judge rationally found that the availability of suitable alternate employment is established and that claimant has a loss in wage-earning capacity based on this job. Therefore, there is substantial evidence of record supporting the administrative law judge's finding that claimant is temporarily partially disabled. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009).

Employer contends its inability to depose claimant's current supervisors prejudices it, as it is unable to assess the true nature of claimant's current employment. Because Dr. Suh, claimant's treating physician for his back, stated that claimant can return to his usual work insofar as his back is concerned, and Dr. Deriso, employer's expert orthopedic surgeon, stated that neither surgery nor further treatment is warranted for either work-related condition and that there is no reason for claimant not to return to work, employer argues that it is not rational to take claimant's word, alone, with regard to his work duties/capacity. Cl. Ex. 17; Emp. Ex. 27. Rather, employer asserts claimant has made it impossible for either it or the administrative law judge to verify his testimony, so an adverse inference should be drawn against claimant such that the administrative law judge should find he is not disabled at all.

An administrative law judge may draw an adverse inference against a party, concluding that where the party does not submit evidence within his control, that evidence is unfavorable to him. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516 (6th Cir. 2008); *Singh v. Gonzales*, 491 F.3d 1019 (9th Cir. 2007); *Int'l Union (UAW) v. Nat'l Labor Relations Board*, 459 F.2d 1329 (D.C. Cir. 1972); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). The decision of whether to draw an inference and what type of inference to draw is within the administrative law judge's discretion. *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *see BNSF Ry. Co. v. Brotherhood of Maintenance*, 550 F.3d 418, 424 (5th Cir. 2008).

The administrative law judge credited the opinion of Dr. Vaughn, claimant's treating physician, that claimant needs further treatment on his shoulder and should not return to work. Decision and Order at 13-14. With regard to claimant's current employer, the administrative law judge credited claimant's testimony that he is capable of performing the lighter work and found: "Although claimant has since found employment with an undisclosed employer, his earning capacity has been diminished by his work-related injury." Decision and Order at 15. As claimant's hourly rate of $12 is higher

than that paid by any of the jobs identified by employer's vocational rehabilitation expert but is lower than claimant's earnings with employer, the administrative law judge found that claimant "remains entitled to temporary partial compensation benefits. . . ." *Id.* In denying employer's motion for clarification/reconsideration, the administrative law judge specifically declined to draw an adverse inference resulting in a finding that claimant is not physically disabled because he credited claimant's testimony regarding his work status, hourly wage, and work activities.

We reject employer's contention of error, as the administrative law judge's award of temporary partial disability and medical benefits is supported by substantial evidence. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *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). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge rationally relied on the opinion of claimant's treating physician to find that claimant's shoulder condition had not reached maximum medical improvement, as it needed further treatment, and that he should not return to work. Further, the administrative law judge rationally credited claimant's description of his current work as light-duty, and the Board cannot disturb a reasonable credibility determination. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Indeed, employer provided no evidence to demonstrate claimant's lack of credibility in any other regard. Based on claimant's credible testimony and his paystub, substantial evidence supports the administrative law judge's finding that claimant has returned to work at lower pay and lighter duty than his usual job.[2] *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In addition, application of an adverse inference is discretionary, *Hansen*, 8 BRBS at 841, and employer has not shown an abuse of discretion here. Thus, we affirm the administrative law judge's award of medical and disability benefits.

[2]The administrative law judge's award results in lower liability for employer than if the administrative law judge had credited employer's suitable alternate employment evidence.

Accordingly, the administrative law judge's Decision and Order and Order Granting in Part and Denying in Part Motion for Clarification/Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge