BRB Nos. 07-0503
and 07-0503A

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| W. M. | ) | |
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| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 12/13/2007 |
| FRED WAHL MARINE CONSTRUCTION | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | |
| Cross-Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky MacColl Olsen, P.C.), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (2005-LHC-01178) of Administrative Law Judge William Dorsey 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 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 injured his back on May 15, 2001, during the course of his employment for employer. Claimant underwent surgery on his lower back on July 11, 2002.

Claimant's treating physician, Dr. Bert, released him to light to light-moderate duty on January 27, 2003. Claimant has not returned to work.

In his Decision and Order, the administrative law judge addressed the nine positions identified in employer's December 10, 2004, labor market survey. The administrative law judge found that eight of the jobs are not suitable for claimant given his physical limitations due to the work injury, but that claimant is capable of working at a Dairy Queen as a server/food preparer. The administrative law judge found that employer did not establish suitable alternate employment as it did not demonstrate the existence of a range of jobs claimant could perform in and around Reedsport, where claimant resides. The administrative law judge also found that claimant did not diligently seek suitable work based on his having applied for only one job, his lack of cooperation with vocational rehabilitation, and his not taking any steps to have his driving privileges reinstated, which would allow claimant to seek work outside of Reedsport. Nonetheless, the administrative law judge concluded that claimant is totally disabled as the single job identified at Dairy Queen is not legally sufficient to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from May 16, 2001, to January 26, 2003, and for permanent total disability from January 27, 2003.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment and that claimant's lack of diligence does not preclude an award for total disability. BRB No. 07-0503. Claimant responds, urging affirmance. Claimant cross-appeals the administrative law judge's finding that the Dairy Queen job as a server/food preparer is suitable for and available to him. BRB No. 07-0503A. Employer responds, urging affirmance.

We first address claimant's contention that the administrative law judge erred in finding that the Dairy Queen job is suitable for and available to claimant. Once, as here, the claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to establish the availability of specific jobs claimant can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). 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., Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Bumble Bee*

*Seafoods*, 629 F.2d 1327, 12 BRBS 660. In his decision, the administrative law judge addressed each of the positions identified in employer's labor market survey. The administrative law judge accurately stated the primary physical requirements of the Dairy Queen job are standing and walking. Decision and Order at 10; EX 69 at 254. Employees may sit during slow periods, and while working at the drive-through counter. In finding this position suitable, the administrative law judge relied on Dr. Bert's approval of the position and his deposition testimony that claimant could stand and walk up to six hours of an eight-hour work day. CX 59 at 163-165; EXs 56, 57. The administrative law judge found that Dennis Funk and Scott Stipe, vocational consultants for employer and claimant respectively, agreed that fast food workers are on their feet most of the day; however, the administrative law judge found there is no indication that the Dairy Queen position would require claimant to move at a fast pace. Moreover, the workers rotate through the positions, including the seated position at the drive-through window. May 4, 2006, Tr. at 80; CX 57 at 147-148. Therefore, the administrative law judge found the job is within claimant's physical limitations, and that it is suitable given his technical and verbal skills. *See* EX 59. The administrative law judge found this is an entry-level position, that no prior food service experience is necessary, and that claimant developed customer service skills while in charge of his father's well drilling business. May 4, 2006, Tr. at 42. Finally, the administrative law judge found that the position at Dairy Queen is reasonably available on the basis that the particular Dairy Queen identified in the survey has six full-time and twelve part-time positions, and that it hired someone within two months of Mr. Funk's completing the survey. Decision and Order at 11; EX 69 at 254. As the evidence cited by the administrative law judge constitutes substantial evidence supporting his finding that the Dairy Queen job is suitable for and available to claimant, we reject claimant's contention of error. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

We next address employer's appeal of the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Employer first contends that its identification of a specific available job at Dairy Queen, as well as evidence of the general availability of similar jobs within a reasonable commuting distance, is sufficient to satisfy its burden of establishing the availability of suitable alternate employment. In this respect, employer argues that the relevant community should not be limited to Reedsport where claimant resides, but should encompass an area within 25 miles of Reedsport inasmuch as claimant made no effort to have his driving privileges reinstated after he was medically cleared to work.[1] Employer relies on the

[1] In his decision, the administrative law judge addressed the report of Mark McGowan, a vocational rehabilitation counselor, that claimant lost his driving privileges because he failed to pay speeding and overload tickets totaling $1,688.22 that he had received while working as a truck driver prior to his obtaining a job with employer. Decision and Order at 5-6; CX 51 at 104, 116. The administrative law judge also noted

testimony of Mr. Funk that claimant's job market with a driver's license would include Coos Bay and Florence, which would quadruple the number of available job opportunities. May 4, 2006, Tr. at 52; *see also* EX 60 at 198-208.

Employer does not challenge the administrative law judge's factual determinations regarding claimant's inability to physically perform of eight of the nine positions identified in its labor market survey. Employer instead challenges the administrative law judge's legal conclusion that the position he found suitable at Dairy Queen is insufficient to establish that claimant is not totally disabled since similar jobs were reasonably available but for claimant's self-limiting to Reedsport the relevant community for establishing suitable alternate employment as a result of his not making any effort to have his driving privileges reinstated.

We reject employer's contention that the relevant geographic community should be extended beyond Reedsport. Claimant did not have a valid driver's license at the time he suffered his work injury, due to his failure to pay fines. Employer therefore had to establish the availability of suitable alternate work, taking into account this pre-existing limitation. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997); *see also Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). In this regard, we reject employer's reliance on *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). In *Livingston*, the Board held that the administrative law judge properly found suitable three jobs requiring a driver's license notwithstanding that the claimant did not have a license at the time the jobs were initially available inasmuch as claimant's inability to drive arose after the work injury and his driving privileges were reinstated within a reasonable period after the jobs were identified, which rendered the positions both suitable and available. *Livingston*, 32 BRBS at 125. In this case, the administrative law judge found that claimant's driving privileges were suspended prior to the work injury and he has not had his license reinstated. *See* November 29, 2005, Tr. at 76. Thus, the Board's decision in *Livingston* does not require a finding that suitable alternate employment is established in this case. The administrative law judge also rationally found that it was unreasonable, on the facts of this case, to expect that claimant could carpool to work outside of Reedsport or that claimant's wife could drive him to work in other locales.[2] *See generally See v. Washington Metropolitan Area Transit*

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claimant's testimony that he is physically able to drive about 25 miles, which, the administrative law judge found, would give claimant access to employment opportunities in the larger towns of Coos Bay and Florence. Decision and Order at 6; November 29, 2005, Tr. at 72.

[2] The administrative law judge found that claimant's ability to carpool is speculative, given the high turnover of personnel at Affiliated Computer Systems in Coos Bay, a call center where employer attempted to establish suitable alternate employment. EX 74. The administrative law judge also found that it was "unrealistically expensive" to

*Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Therefore, as there is no evidence from which the administrative law judge could find that jobs outside of Reedsport were available to claimant due to his pre-existing transportation limitations, we reject employer's reliance on general jobs availability in Coos Bay and Florence. *See Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT); *Fox*, 31 BRBS 118.

Moreover, there is no evidence that the general jobs outside of Reedsport are suitable for claimant. The administrative law judge found that the Dairy Queen position is within the restriction that claimant stand and walk for no more that six hours of an eight-hour day because he would be allowed to sit while working at the drive-through window as well as during his breaks. Decision and Order at 10-11; EX at 69 at 254. However, the administrative law judge rationally rejected five similar specific jobs identified by employer because they were not suitable given this restriction. Specifically, the administrative law judge found unsuitable fast-food worker positions at McDonald's and King Neptune Drive-In, restaurant server positions at Leona's and Organ Grinder's Pizza, and a server/food preparation position at Bedrock Pizza/Chowder House. Based on this record, employer's evidence that the labor market within 25 miles of Reedsport contains numerous jobs that claimant could perform is legally insufficient to establish that suitable jobs exist. There is no evidence that these jobs account for claimant's restrictions, as does the specific position at Dairy Queen, and therefore employer's evidence of general job availability outside of Reedsport does not establish the availability of multiple positions that are physically suitable for claimant. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *see generally P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). Therefore, as there are no "special circumstances" that would permit the administrative law judge to find that claimant likely could obtain the single job opening at Dairy Queen, *see Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998), we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment as it is rational, supported by substantial evidence and in accordance with law. *See generally DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

Employer next argues that claimant's lack of diligence in seeking work in this case should preclude his receiving benefits for total disability. Specifically, the administrative law judge found that claimant failed to diligently seek employment as he has applied for only one job, he took no steps to have his driving privileges reinstated so that he could seek work outside of Reedsport, and claimant otherwise demonstrated a passive attitude towards vocational rehabilitation. Decision and Order at 17. It is well established,

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expect claimant's wife to drive 100 miles a day, given the low wages claimant could be expected to earn. Decision and Order at 14 n.14.

however, that claimant's duty to show reasonable diligence in attempting to secure suitable work does not displace employer's initial burden of establishing 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 Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Therefore, as we have affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, the administrative law judge properly concluded that, regardless of claimant's lack of diligence, claimant is entitled to benefits for total disability. Decision and Order at 17. We therefore affirm the award of total disability benefits. *Holland*, 32 BRBS 179.

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