BRB No. 99-0405

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| DARYL J. MITCHELL | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| FRANK'S CASING CREW & RENTAL TOOLS, INCORPORATED | ) | DATE ISSUED: |
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| and | ) | |
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| LOUISIANA WORKERS' COMPENSATION CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Lawrence Blake Jones and David C. Whitmore (Scheuermann and Jones), New Orleans, Louisiana, for claimant.

David K. Johnson, Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-584) of Administrative Law Judge Larry W. Price awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

On November 27, 1993, claimant, a certified offshore welder working for employer on an oil rig off the coast of Louisiana, sustained a back injury as a result of tripping over a board on a scaffold and falling on his buttocks. On October 19, 1994,[1] claimant began treatment with Dr. Hubbell, who diagnosed a rupture of the ventral capsule of the sacroiliac joint which resulted in leakage of joint space fluid onto the lumbosacral trunk nervous tissue and S1 nerve root. In light of this diagnosis, Dr. Hubbell recommended, and subsequently on September 17, 1996, implanted in claimant's back, an epidural lumbar plexus catheter which administered a low dose of local anesthetic under continual infusion. Despite physical therapy and trigger point injections, claimant's pain persisted, leading to the implantation of a permanent spinal cord stimulator by Dr. Hubbell on May 30, 1997.

In his opinion dated July 21, 1997, Dr. Hubbell stated that claimant could lift up to 25 pounds on a frequent basis and could work both an eight-hour day and a forty-hour week. Additionally, he opined that claimant was capable of returning to welding with certain additional restrictions, *i.e.*, no bending down at the waist further than 50 percent and no lifting more than 20 pounds unless the weight was kept close to his body.

Meanwhile, claimant returned to work with employer as a dispatcher from April 6, 1994 until July 5, 1994,[2] and attempted to return to work with employer in October 1997, but was told that nothing was available at that time. Claimant was hired as a welder with Marine Industrial Fabricators in October 1997, but quit after three months because the bending and twisting required by that job caused problems with his spinal cord stimulator. He then worked briefly as a vacuum cleaner salesman, until finding welding employment with Simon Manufacturing in February 1998. Employer voluntarily paid periods of temporary total and permanent partial disability plus medical benefits associated with claimant's work-related injury.

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[1]Between the date of the injury and October 19, 1994, claimant was examined by and received ineffective treat from Drs. Smith, Cobb, Hodges, Gidman and Aprill.

[2]Claimant was terminated by employer due to numerous absences throughout the three months that he performed the job.

In his decision, the administrative law judge initially determined that claimant reached maximum medical improvement with regard to his back condition on September 22, 1997. The administrative law judge then found that claimant cannot return to his pre-injury employment, and that employer established the availability of suitable alternate employment from April 6, 1994, until July 5, 1994, but not thereafter. Accordingly, the administrative law judge concluded that claimant is entitled to separate periods of temporary partial, temporary total, permanent partial and permanent total disability benefits,[3] as well as ongoing medical benefits.

On appeal, employer challenges the administrative law judge's award of benefits and calculation of claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance.

Employer initially argues that the administrative law judge's finding that claimant is unable to return to his former employment is not supported by the record. In particular, employer asserts that the record shows that by September 1997, claimant was capable of doing heavy work. Additionally, employer maintains that the administrative law judge's finding that ||since reaching maximum medical improvement, claimant has been able to return to the same type of work he was performing prior to his injury,= Decision and Order at 16, when coupled with the fact that claimant performed the equivalent of his pre-injury work in his post-injury job with Marine Industrial Fabricators, affirmatively establishes that he is capable of performing his regular employment. Additionally, employer argues that contrary to the administrative law judge's finding, it met its burden of establishing the availability of suitable alternate employment by offering claimant the dispatcher's job which he successfully performed.

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). If claimant establishes a *prima facie* case of total

[3]Specifically, the administrative law judge found that claimant is entitled to temporary partial disability benefits from April 7, 1994, to July 5, 1994, temporary total disability benefits from July 5, 1994, until September 22, 1997, permanent total disability benefits from September 22, 1997, until October 27, 1997, and from January 5, 1998, until February 15, 1998, and permanent partial disability benefits from October 28, 1997, until January 4, 1998, and continuing thereafter from February 16, 1998.

disability, the burden shifts to employer to establish the availability of suitable alternate employment which claimant, considering his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An employer's offer of a suitable job within its own facility is sufficient to establish the availability of suitable alternate employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Employer's contentions lack merit. In his decision, the administrative law judge did note that "since reaching maximum medical improvement, claimant has been able to return to the same type of work he was performing prior to his injury." Decision and Order at 16. However, the administrative law judge continued by finding that the evidence establishes that claimant cannot return to his former position with employer, as that position required frequent forward flexing and twisting of the spine as well as overhead work which are precluded by Dr. Hubbell's physical restrictions and/or spinal cord stimulator precautions.[4] Similarly, the record establishes that claimant left his post-injury employment with Marine Industrial Fabricators because the requisite bending and twisting was causing problems with his stimulator, and Dr. Grimes reported that this employment exceeded his physical restrictions. We therefore affirm the administrative law judge's determination that claimant established a *prima facie* case of total disability as it is rational and supported substantial evidence. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

With regard to the dispatcher job claimant performed from April 6, 1994, to July 5, 1994, the administrative law judge, after noting the lack of sufficient evidence of the medical treatment provided by any doctor prior to claimant's examination by Dr. Hubbell on October 19, 1994,[5] concluded that it was not suitable alternate

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[4]Employer maintains that the functional capacity test states that claimant can perform heavy work with certain restrictions related only to twisting and bending which is due to the implantation of the dorsal column stimulator and not from any functional disability related to the work accident. Contrary to employer's contention, the surgical procedure in question was performed in an effort to resolve claimant's persistent back pain which is related, at least in part, to his work injury.

[5]The administrative law judge noted that Dr. Cobb apparently placed claimant on light duty status in April 1994, which resulted in the light duty job with employer,

employment based on claimant's credible testimony that he could not perform the duties required by that job because of pain, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), and Dr. Hubbell's opinion that prior to the implantation of the spinal cord stimulator claimant was not employable. Accordingly, we affirm the administrative law judge's finding that employer did not meet its burden of establishing the availability of suitable alternate employment as it is rational and supported by substantial evidence.

Employer alternatively argues that the administrative law judge erroneously calculated claimant's wage-earning capacity for the periods between April 1994 and October 1997, and then from that point forward. Specifically, employer asserts that claimant's wage-earning capacity from April 6, 1994, until October 1997, should be $300 per week based upon his actual earnings in the dispatcher position and thereafter be $679.36 per week based upon claimant's actual earnings with Marine Industrial Fabricators.

In determining the extent of partial benefits to which claimant is entitled, the administrative law judge relied on claimant's actual earnings for the post-injury periods during which he was employed with employer, Marine Industrial Fabricators, and Simon Manufacturing. First, the administrative law judge rationally determined that for the period between April 7, 1994, through July 5, 1994, when claimant worked the dispatcher job for employer, claimant's residual earning capacity was $94.33 per week, based upon his actual earnings of $1,226.25 over that 13-week period. Second, during his employment with Marine Industrial Fabricators, between

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but found Dr. Hubbell's opinion regarding claimant's ability to work more persuasive. In particular, the administrative law judge found that Dr. Hubbell was able to identify the cause of claimant's pain and that his treatment eventually resulted in claimant's ability to return to heavy work. Moreover, he noted that as late as March 13, 1997, Dr. Hubbell was unsure whether claimant could work an eight-hour day.

October 28, 1997, and January 4, 1998, the administrative law judge similarly calculated claimant's wage-earning capacity at $631.71 per week, by dividing claimant's gross earnings as reflected in seven pay stubs from that employment, $4,421.97, by the corresponding number of weeks. Lastly, the administrative law judge calculated claimant's residual wage-earning capacity in his present employment with Simon Manufacturing, and continuing into the future, at $500 per week, based upon claimant's testimony that he makes $12.50 per hour and works very little overtime. The administrative law judge's calculation of claimant's wage-earning capacity is affirmed as it is rational and supported by substantial evidence. *See generally Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.[6]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Employer's motion to dismiss its petition for review, dated November 29, 1999, due to claimant's settlement of a tort claim is denied, as it is based on evidence not presently in the record before the Board. 20 C.F.R. §802.301(b). Employer may seek to discharge its liability to claimant pursuant to Section 8(i), 33 U.S.C. §908(i), at any time, or it may seek modification pursuant to Section 22, 33 U.S.C. §922, based on a change in a condition or mistake in fact. *See generally Maria v. DelMonte/Southern Stevedore,* 22 BRBS 132 (1989)(*en banc), vacating* 21 BRBS 16 (1988)(McGranery, J., dissenting); *Shoemaker v. Schiavone & Sons, Inc.,* 20 BRBS 214 (1988).