BRB No. 99-1006

JOSEPH AMBROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Michael C. Eisenstein, Baltimore, Maryland, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-LHC-2143) of Administrative Law Judge John C. Holmes 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).

This case is before the Board for the second time. To briefly recapitulate, claimant was injured on April 4, 1996, when several stadium boards, weighing 75 to 80 pounds each, fell and struck claimant in the area of his head, neck, and right shoulder. On April 5, 1996, claimant reported to the Eastern Industrial Medical Center for a medical examination by Dr. Dollette, who diagnosed a contusion and sprain of the right neck and shoulder and released

claimant for sedentary work. Later that afternoon, claimant was examined by Dr. Bailey, to whom he was referred by his attorney. On April 12, 1996, claimant was seen by Dr. Friedler, an orthopedist who had treated him twenty years earlier, and claimant continued treatment with Dr. Friedler. John Hafler, supervisor of employer's dispensary at the time of the injury, testified that he advised claimant of sedentary work available at the shipyard and offered to send a cab to bring claimant to the dispensary for that purpose. Claimant did not report for the sedentary duty and employer discharged him on May 22, 1996, pursuant to the union-management contract, for failure to accept restricted duty. Claimant sought permanent total disability benefits under the Act.

Administrative Law Judge Vivian Schreter-Murray found that claimant chose Dr. Bailey as his physician, and that his change to Dr. Friedler was not authorized by employer. Moreover, the administrative law judge found that the multiple MRI's ordered and the surgery performed on claimant's shoulder by Dr. Friedler were not reasonable or necessary. In addition, the administrative law judge found that claimant's right knee complaints are not related to the work injury. Thus, the administrative law judge concluded that employer is not liable for the consultation and treatment by Dr. Friedler.

The administrative law judge also found inexcusable claimant's refusal to be examined by employer's physicians on April 10, 1996, and continuing until May 1, 1996. Lastly, the administrative law judge found that claimant was released for sedentary work of the type provided by employer immediately following the accident, for which claimant would receive full pay, and that all of claimant's soft tissue injuries had completely resolved prior to October 1996. Therefore, the administrative law judge denied compensation benefits under the Act.

Claimant appealed the denial of benefits, asserting that the administrative law judge erred in denying him total disability benefits. Specifically, claimant contended that the administrative law judge erred in finding that he could return to his former employment and in finding that he knew of the restricted duty program.[1] The Board held that, while claimant knew of employer's restricted duty position at least by April 5, 1996, the administrative law judge's finding that this position established the availability of suitable alternate employment until claimant was discharged by employer on May 22, 1996, must be vacated. On remand, the administrative law judge was instructed to address the medical evidence that claimant is capable of performing only sedentary or light-duty work, and to compare this evidence to the

[1] Claimant additionally contended that the administrative law judge erred in denying him reimbursement for past and future medical treatment with Dr. Friedler, and in finding that his knee condition is not causally related to the work injury. The Board rejected these contentions.

physical requirements of the restricted duty employment that employer offered to claimant. *See Ambrose v. Bethlehem Steel Corp.*, BRB No. 98-0469 (Nov. 27, 1998)(unpublished).

On remand, the case was reassigned to Administrative Law Judge John C. Holmes. In his Decision and Order on Remand, the administrative law judge denied claimant's motion for a new hearing. He next interpreted the Board's remand instructions as requiring him to determine whether claimant is entitled to benefits for temporary total disability, 33 U.S.C. §908(b), from May 1 to October 30, 1996.[2] He found that claimant could perform the light-duty work employer offered based on the evidence of record. He noted the testimony of Mr. Hafler and Mr. Wilson, employer's workers' compensation supervisor, as to the job's sedentary work requirements, and the medical evidence that claimant could perform light-duty work from May 1 until October 30, 1996, when Dr. Apostolo opined that claimant could work without restrictions.

On appeal, claimant alleges error in the Board's holding that claimant was informed by Mr. Hafler by April 5, 1996, that he should report for restricted duty. Moreover, as Mr. Wilson's testimony in this regard conflicts with claimant's testimony that employer never offered such employment, claimant contends the administrative law judge erred by denying his motion for a new hearing to assess witness credibility. Claimant also challenges the administrative law judge's finding that employer's offer of a restricted duty position established the availability of suitable alternate employment. Employer responds, urging affirmance.

[2]In its Decision and Order, the Board noted that claimant would not be entitled to benefits from April 10 to 30, 1996, based on Judge Schreter-Murray's finding that claimant unreasonably refused to be examined by employer's physicians during this period. 33 U.S.C. §907(d)(4); *Ambrose*, slip op. at 5 n.3.

Initially, we reject claimant's challenge to the Board's holding in its initial Decision and Order that Mr. Hafler informed claimant by April 5, 1996, that he should report for restricted duty at employer's dispensary. In its Decision and Order, the Board rejected claimant's contention that Judge Schreter-Murray erred in finding that claimant knew of employer's job offer by April 5, 1996. *See Ambrose*, slip op. at 5 n.2. Judge Schreter-Murray credited both Mr. Hafler's testimony that he offered claimant light-duty work in the dispensary, Tr. at 82-83, and the records of Dr. Friedler, reflecting his knowledge of a proposed return to work on April 8, 1996. The Board thus affirmed Judge Schreter-Murray's finding as rational and supported by substantial evidence. As the Board's holding on this issue is the law of the case, the Board will not address it in this appeal. *See Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999). Moreover, we hold that claimant has failed to show any prejudice from Judge Holmes's denial of his motion for a new hearing, as the administrative law judge was not instructed, nor required, to reassess on remand the credibility of claimant and Mr. Wilson in this regard.[3] *See Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981).

We next address claimant's contention that the administrative law judge erred in finding that employer established the availability of suitable alternate employment from May 1 to October 30, 1996. Specifically, claimant asserts that only a labor market survey may be utilized to establish the availability of suitable alternate employment. Claimant also contends that the administrative law judge, on remand, failed to adhere to the Board's directive that he assess the physical requirements of the restricted duty position at employer's dispensary.

Where, as here, it was uncontested that at least for a period of time, claimant was incapable of returning to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). In the present case, the administrative law judge on remand denied compensation based on his finding that employer established suitable alternate employment from May 1 to October 30, 1996, at full pay, by providing light-duty work at its shipyard. As it is well-established that employer can meet its burden of establishing suitable alternate employment by offering claimant a suitable light-duty job in its facility, we reject claimant's contention that the administrative law judge was required to base his finding that employer established the availability of suitable alternate employment on a labor market survey. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Fleetwood v. Newport News Shipbuilding &*

[3]Contrary to claimant's contention, in the first paragraph of his decision on remand, Judge Holmes explicitly denied claimant's motion for a new hearing

Dry Dock Co., 776 F.2d 1225, 18 BRBS 12(CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984).

Furthermore, we reject claimant's contention that the administrative law judge failed on remand to follow the Board's instruction to discuss the physical requirements of employer's light-duty position. The administrative law judge specifically noted Mr. Hafler's testimony that the job was a "sit-down" job, which required light filing, Tr. at 81, 112-114, and Mr. Wilson's testimony that the job was completely sedentary and there was a bed available, if needed, *id*. at 115-117 . Finally, as the administrative law judge's finding that claimant was restricted to sedentary or light-duty work is supported by substantial evidence, *see* EXS 6, 8, 14; CX 10 at 35-37, and as he rationally found that employer's restricted duty position was within these restrictions, we affirm the administrative law judge's conclusion that employer's April 5, 1996, job offer established the availability of suitable alternate employment. *Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge