

BRB No. 05-0542

RAUL REYNA )  
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 Claimant-Petitioner )  
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 v. )  
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 UNIVERSAL MARITIME SERVICE ) DATE ISSUED: 03/23/2006  
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 and )  
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 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION )  
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 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Sidney Ravkind (The Ravkind Firm), Montgomery, Texas, for claimant.

Jennifer O’Sullivan (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-1151) 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.* (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 injured in the late night or early morning of May 20 or May 21, 2002. At the time of injury, claimant was working as a truck driver. He testified that his

truck was lifted by a crane and dropped onto the dock, causing him to sustain injuries to his neck, lower back, and leg. Claimant began treatment with Dr. Sardinias, who operated on his right knee, and subsequently released claimant for work on October 27, 2003. Claimant attempted to return to work on November 16 and November 19, 2003, but testified that he had to leave due to pain. Claimant began working at his former position as a truck driver on April 2, 2004, with no reduction in wages. Claimant sought benefits under the Act.

The administrative law judge found that claimant's right knee, neck and back injuries are causally related to the May 2002 work injury. In addition, the administrative law judge found that claimant suffered a 10 percent impairment of his right leg, and thus is entitled to permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). The administrative law judge also found that Dr. Sardinias released claimant on October 27, 2003, to full-duty work with no restrictions. Thus, the administrative law judge found that claimant established his entitlement to total disability benefits from May 20, 2002 to October 26, 2003. However, the administrative law judge found that claimant did not establish that he could not return to his usual work after October 27, 2003, and that claimant is not entitled to disability benefits after that date. Moreover, the administrative law judge found that claimant returned to work on April 2, 2004, with no loss in wage-earning capacity, and therefore is not entitled to continuing disability benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he was not disabled from October 27, 2003, to April 1, 2004, as he contends that he was not able to return to his usual work duties during that period. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. See *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to determine whether claimant has met his burden, the administrative law judge must compare the employee's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In the present case, the administrative law judge found "that the credible evidence of record does not support a finding that claimant was unable to perform his former job or was disabled from doing so." Decision and Order at 31. The administrative law judge recognized that claimant continued to seek medical treatment throughout the relevant period, but based his finding that claimant was not disabled on the fact that from October

2003 to April 2004 Dr. Sardinias did not change his October 2003 recommendation that claimant could return to full-duty work.<sup>1</sup>

As the administrative law judge correctly stated, claimant's credible complaints of pain alone may be enough to meet the employee's burden. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). However, the administrative law judge did not address the evidence that claimant attempted to return to work on November 16 and November 19, 2003, but testified that he had to stop due to pain.<sup>2</sup> H. Tr. at 53-54. Dr. Sardinias subsequently testified that while it was "medically safe" for claimant to return to work in October 2003, claimant's condition could have become symptomatic with work. He opined that is in fact what occurred when claimant attempted to work in November 2003. Emp. Ex. 34 at 57. Moreover, Dr. Sardinias opined in a report dated January 16, 2004, that claimant's herniated disc may have interfered with his ability to earn pre-injury wages, Cl. Ex. 13, and the vocational counselor, Ms. Rampant, reported that she met with Dr. Sardinias in February 2004 and he told her that claimant could not return to his former employment at that time. Cl. Ex. 9. Ms. Rampant's report appears to corroborate the later testimony of Dr. Sardinias, but was not addressed by the administrative law judge in his evaluation of the evidence. Consequently, as there is probative evidence of record which was not addressed by the administrative law judge in his decision, we vacate the administrative law judge's finding that claimant did not establish his inability to return to his usual work during the period from October 27, 2003 and April 1, 2004, and we remand the case for further findings. *See generally H.B. Zachry Co. v. Quoinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5<sup>th</sup> Cir. 2000); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

Accordingly, the administrative law judge's Decision and Order denying benefits for the period from October 27, 2003, to April 1, 2004, is vacated, and the case is

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<sup>1</sup> Dr. Sardinias examined claimant on October 7, 2003, and filled out a Work Restriction Evaluation which reported that claimant could return to work on October 27, 2003, with no restrictions and that he could work an eight-hour day. Emp. Ex. 13. Although Dr. Sardinias treated claimant for tenderness in his lower back in November 2003, December 2003, January 2004 and February 2004, he never reported that claimant was unable to perform his work duties. Cl. Ex. 13. In January and February 2004, Dr. Sardinias signed a Texas Workers' Compensation Work Status Report stating that claimant was able to return to work without restrictions on October 27, 2003. Emp. Exs. 15, 16.

<sup>2</sup> Claimant testified that he had to stop working after two hours on November 16, and that he could not return to work after November 19 due to pain. H. Tr. at 53-54.

remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge