BRB No. 06-0704

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| THOMAS BLACK | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| LOGISTEC OF CONNECTICUT, INCORPORATED | ) | DATE ISSUED: 04/27/2007 |
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| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Decision and Order Denying Employer's Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream and May), Glastonbury, Connecticut, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Denying Employer's Motion for Reconsideration (2005-LHC-1437) of Administrative Law Judge Daniel A. Sarno, 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 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 May 28, 2002, while working in the hold of a vessel unloading bananas, claimant was struck by a forklift. Claimant was transported to the hospital and released the same day. Thereafter, claimant complained of back and right lower extremity pain. On December 10, 2002, claimant underwent arthroscopic surgery on his right knee. Employer voluntarily paid claimant temporary total disability benefits from October 2, 2002, through July 31, 2003. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge concluded that claimant's back condition is related to his May 28, 2002, accident and that claimant sustained a forty percent impairment to his right knee. Next, the administrative law judge acknowledged the parties' stipulation that claimant is unable to return to his usual job as a longshoreman with employer. After taking judicial notice of the driving distances between claimant's home and the five positions identified by employer as establishing the availability of suitable alternate employment, the administrative law judge found that the identified positions were too far away to be considered given claimant's physical restrictions, and that employer had thus failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability compensation from July 31, 2003, and continuing, as well as medical benefits. 33 U.S.C. §§908(a), 907.

Employer filed a motion with the administrative law judge seeking reconsideration of his conclusion that the alternative employment opportunities identified for claimant by employer were too far from claimant's home to be considered reasonable. In support of its motion, employer argued that the administrative law judge violated employer's due process rights by taking judicial notice of the information found on the web-site *Yahoo! Maps*, and the record does not support the inference that claimant is physically unable to drive to the positions identified by employer's vocational expert. In his Decision addressing employer's motion, the administrative law judge discussed his decision with regard to determining the distances between claimant's residence and the employment opportunities identified by employer, as well as his finding regarding the restrictions placed on claimant's ability to drive, and rejected employer's contentions. Alternatively, the administrative law judge concluded that, even if commuting distances were not at issue, employer's evidence was still insufficient to establish the availability of suitable alternate employment that claimant could realistically secure since it did not address whether the opportunities were realistic given claimant's age. Accordingly, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in concluding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Pietrunti*, 119 F.3d 1035, 31 BRBS 89(CRT); *see Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

In challenging the administrative law judge's findings regarding the issue of suitable alternate employment, employer contends that claimant is physically capable of performing the positions identified by employer and that it identified jobs available in the relevant local community. It asserts that the administrative law judge erred in relying on a driving restriction to find that the identified jobs were not suitable for claimant. In support of its position, employer asserts that Dr. Carolan approved the positions identified by employer's vocational expert and that the administrative law judge erred in relying on estimates of commuting time from the web-site *Yahoo! Maps*. We reject these contentions of error and affirm the administrative law judge.

Employer submitted into evidence a labor market survey dated July 31, 2003, which it alleges establishes the availability of suitable alternate employment that claimant could perform. This labor market survey, prepared by employer's vocational rehabilitation expert Elizabeth Sinatro, identified five employment positions which Ms. Sinatro determined were within claimant's physical abilities. *See* Emp. Ex. 5. In his initial decision, the administrative law judge found that the five employment opportunities identified by employer were too far away from claimant's residence to be considered suitable given claimant's driving restriction. In this regard, the administrative law judge found that Dr. Luchini completed a Work Capacity Evaluation form which stated that claimant was limited to one hour of operating a motor vehicle. Emp. Ex. 5; Decision and Order at 13. Additionally, claimant testified that he has difficulty driving a motor vehicle due to the pain that he experiences in his back and right leg, Tr. at 47, and Dr. Carolan acknowledged that claimant has difficulty remaining in one position for any length of time.[1]

[1] Employer points out that the identified jobs were approved by Dr. Carolan, asserting that the jobs were thus within claimant's capabilities. This argument is not relevant to the administrative law judge's finding. The administrative law judge did not find that the jobs' duties were unsuitable for claimant; he found they were outside of his driving restriction. This restrictions must also be met for the jobs to constitute suitable

Clt. Ex. 11 at 27. Based on this evidence, the administrative law judge concluded that claimant's physical restrictions and symptoms limit him to driving no more than one hour at a time. Decision and Order at 13. It is well-established that the administrative law judge is entitled to draw his own inferences from the evidence; moreover, it is within the province of the administrative law judge to assess claimant's credibility regarding his pain and limitations and credit claimant's credible testimony regarding his disability.[2] *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). On this record, the administrative law judge could rationally determine that claimant is restricted in his ability to operate a motor vehicle; accordingly, as it is supported by substantial evidence, the administrative law judge's finding that claimant is presently capable of driving no more than one hour is affirmed.

The administrative law judge next addressed the driving distances between claimant's residence and the employment positions identified by employer's vocational expert. In this regard, the administrative law judge in his decision initially took judicial notice of the driving distances and approximate travel times between the job locations and claimant's residence as determined by the web-site *Yahoo! Maps*. Decision and Order at 12. The administrative law judge concluded that, as each of the identified positions would require a commuting time of one hour or more, those positions were outside of claimant's driving restrictions and it would not be reasonable to require claimant to undertake such a trip given these restrictions. *Id.* at 13. On employer's motion for reconsideration, the administrative law judge discussed at length whether the jobs met claimant's restrictions, given the driving distances between claimant's home and the five alternate employment

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alternate employment. Employer cites a passage from Dr. Carolan's testimony which it characterizes as showing that claimant's counsel was unable to elicit testimony that a job was too far away to be suitable. Its contentions in this regard are misplaced, as it is employer's burden to produce evidence that the jobs are suitable, which includes showing that they are within claimant's driving range. In any event, the administrative law judge quoted and discussed this passage, Decision and Order Denying Reconsideration at 4-5, and rationally found that the doctor's response addressed only claimant's ability to perform the job duties and not his ability to drive to it.

[2] Employer's contention that the administrative law judge erred in considering the restrictions placed on claimant by Dr. Luchini in his OWCP-5 Work Capacity Evaluation form are without merit, as the administrative law judge is entitled to weigh the evidence and draw his own inferences from it. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge rationally concluded that, if Dr. Luchini limited claimant to driving no more than one hour at work, it logically followed that claimant's driving would be similarly limited commuting to and from work. *See* Decision and Order Denying Reconsideration at 6.

positions identified by employer. The administrative law judge noted that employer did not specifically assert that the distances set forth on *Yahoo! Maps* were incorrect, and in fact the information from that source merely verified information listed in employer's brief. The administrative law judge reiterated and further explained his finding that claimant is incapable of driving long distances and, given the absence of conflicting evidence regarding this restriction, the administrative law judge again found that claimant's driving restriction renders him incapable of commuting a distance of 30 miles to and from a job on a daily basis. Decision and Order Denying Reconsideration at 2-6.

We reject employer's assertion that the administrative law judge erred in this determination. As set forth, *supra*, the administrative law judge rationally found that claimant's driving capacity is restricted to one hour based on claimant's testimony, the work capacity evaluation, and the opinion of Dr. Carolan. Employer does not challenge the accuracy of the distances which the administrative law judge found between claimant's home and the identified employment positions or his use of *Yahoo! Maps* to compute those distances, Employer's brief at 20; rather, it challenges only the use of that source to define commuting time. On reconsideration, however, the administrative law judge did not rely on the approximate commuting times, but rationally inferred from the evidence before him that employer had not shown claimant could drive the undisputed distances.[3] Accordingly, as the administrative law judge's finding that each of the employment opportunities identified by employer would require a commute in excess of claimant's driving restriction is rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate employment.[4] *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson*, 30 BRBS 199.

The administrative law judge on reconsideration also found that, even if commuting distances were not an issue, employer nonetheless failed to meet its burden because, while employer's labor market survey addressed the physical aspects of the positions identified as being suitable for claimant, the survey did not address whether claimant could have realistically secured any of the positions given his advanced age. Decision and Order Denying Reconsideration at 6. The administrative law judge stated that employer must show the availability of jobs that claimant can realistically compete for and likely secure, and he had considerable doubt that a 70 year-old man with

[3] Given the administrative law judge's analysis on reconsideration, any error in his use of the commuting times listed on *Yahoo! Maps* without notice to employer is harmless.

[4] Employer's contention that the administrative law judge erred because the jobs are within the relevant local community for establishing suitable alternate employment opportunities for claimant is thus without merit. As the administrative law judge's findings are based on a specific medical restriction, whether the jobs are within the local community is not dispositive.

extensive medical restrictions and no experience in the types of jobs identified could do so. *Id.* Acknowledging that the employers identified in the labor market survey *may* regularly hire employees of claimant's particular age, the administrative law judge nonetheless found that, in light of employer's failure to present some type of evidence regarding this issue,[5] he was not persuaded that such was the case. *Id.* at 7. The administrative law judge therefore concluded that, even if commuting distances were not an issue in the case at bar, employer still did not meet its burden of proof on this issue since its July 31, 2003 labor market survey is insufficient to establish the availability of suitable alternate employment for which claimant could realistically compete. *Id.*

On appeal, employer does not specifically challenge this alternate finding by the administrative law judge. Moreover, contrary to employer's position on appeal, the inquiry concerning suitable alternate employment does not end once employer identifies job positions that it believes claimant is physically capable of performing. Rather, the United States Court of Appeals for the Second Circuit has stated that employer must demonstrate the availability of suitable alternate employment or realistic job opportunities which the claimant is capable of performing and which the claimant "could compete for and realistically and likely secure." *Palombo*, 937 F.2d at 73, 25 BRBS at 6(CRT). *See also Pietrunti*, 119 F.3d 1035, 31 BRBS 89(CRT) (employer must establish the availability of jobs for which the claimant can realistically compete); *Turner*, 661 F.2d at 1043, 14 BRBS at 165 (once employer has identified jobs that claimant is physically capable of performing, the inquiry turns to whether claimant can compete for and realistically and likely secure the positions if he diligently tried, given his age, education, and vocational background). Under this standard, the administrative law judge could rationally conclude that employer's evidence is insufficient to establish the availability of suitable alternate employment. Employer having offered no argument on appeal asserting error in the administrative law judge's alternate finding, it is affirmed. The administrative law judge's award of permanent total disability benefits therefore is affirmed.

[5] The administrative law judge noted that Ms. Sinatro did not testify in this case, and employer in its brief does not cite to any reference in the record to the effect of claimant's age upon his post-injury employment prospects.

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Employer's Motion for Reconsideration are 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