BRB No. 00-1126

JAMES DEBORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Aug. 21, 2001
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Richard E. Weiss (Small, Snell, Weiss & Comfort, P.S.), Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2000-LHC-0096) of Administrative Law Judge Paul A. Mapes 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).

Claimant, a longshoreman, injured his back on March 8, 1996, after slipping

and falling on oil or water while working as a holdman (auto driver). Claimant sought temporary total disability benefits from April 5 to June 4, 1996, temporary partial disability benefits from June 5 to November 30, 1996, temporary total disability benefits from December 1, 1996, to July 11, 1997, and permanent partial disability benefits from July 11, 1997, and continuing. Employer asserted that claimant is not entitled to disability benefits from June 5 to 23, 1996, August 24 to November 30, 1996, April 19 to July 10, 1997, and July 11, 1997, and continuing, but conceded claimant's entitlement to, and voluntarily paid, disability benefits for all other remaining dates. The administrative law judge found that claimant cannot perform post-injury all of the various types of longshoring jobs that he was performing pre-injury and that this resulted in a loss in his post-injury wage-earning capacity as he is unable to work as many hours post-injury as he did pre-injury. Consequently, the administrative law judge ordered employer to pay claimant all benefits sought. The administrative law judge denied summarily employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's admission of certain evidence and his award of disability benefits. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in admitting into evidence certain hearing testimony of claimant and Mr. Schoenfeldt, a union member who dispatches claimant to his jobs in Port Angeles, Washington. Specifically, employer argues that the administrative law judge should not have admitted claimant's hearing testimony that he cannot perform an additional 11 jobs post-injury that he could perform pre-injury since he had previously testified by deposition that there were only two jobs he could not perform post-injury that he could perform pre-injury.[1] Moreover, employer argues that the administrative law judge should not have admitted, over its objection, the testimony of Mr. Schoenfeldt that work is not available to claimant four and one-half days per week because it is hearsay testimony based on what a Portland dispatcher told Mr. Schoenfeldt. Employer additionally argues that the administrative law judge should not have admitted, again over its objection, Mr. Schoenfeldt's testimony regarding the availability of work outside the Port Angeles area because it was surprise testimony not specified in claimant's pre-hearing statement.[2]

[1]Claimant testified by deposition, prior to the hearing in this case, that post-injury he could not perform the jobs of lasher and truckdriver. Emp. Ex. 9 at 75. At the hearing, claimant testified that he could not perform, post-injury, the jobs of utility lift dock driver, gearman, boom and lash, millwright/gear locker, warehouseman, container lasher, bargeman, auto driver, holdman, and gate clerk. Tr. at 62-65.

[2]Claimant's pre-hearing statement indicated that Mr. Schoenfeldt would

testify regarding the availability of work in the Port Angeles area and to all matters in dispute. Cl. Witness List at 2.

The administrative law judge has great discretion concerning the admission of evidence and any decision regarding the admission of evidence is reversible only if it is arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.,* 33 BRBS 19 (1999); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). A party must object timely or move to strike evidence which it asserts should not be admitted by the administrative law judge. 29 C.F.R. §18.103. Moreover, the administrative law judge may rely on hearsay testimony if it is reliable, as he is not bound by formal rules of evidence. 33 U.S.C. §923; *Richardson v. Perales*, 402 U.S. 389 (1971); *Powell v. Nacirema Operating Co.*, 19 BRBS 124 (1986). Additionally, questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

We reject employer's contentions. The administrative law judge did not abuse his discretion in admitting claimant's hearing testimony regarding his inability to perform certain jobs. First, we note that employer did not object or move to strike this testimony at the hearing.[3] 29 C.F.R. §18.103. Moreover, the administrative law judge properly received into evidence relevant and material testimony, 20 C.F.R. §702.338, and the administrative law judge was then entitled to determine the weight to accord claimant's hearing testimony in light of the inconsistencies between it and the deposition testimony. *See Calbeck,* 306 F.2d 693; *Hughes*, 289 F.2d 403.

[3]Although employer did not object or move to strike claimant's testimony at the hearing, employer objected to claimant's hearing testimony in its motion for reconsideration which the administrative law judge denied summarily.

Moreover, the administrative law judge did not abuse his discretion in admitting Mr. Schoenfeldt's testimony that he did not believe that claimant could work four and one-half days per week based on what the Portland dispatcher told him; rather, the administrative law judge admitted it, over employer's timely objection to this testimony as hearsay. The administrative law judge found that Mr. Schoenfeldt is an expert on the job opportunities of the longshoremen based in Port Angeles and recognized that experts, such as Mr. Schoenfeldt, are allowed to testify based on hearsay evidence. *See generally Powell,* 19 BRBS 124*; Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54, 60 (1979); Tr. at 101-103. Lastly, the administrative law judge did not abuse his discretion in admitting Mr.Schoenfeldt's testimony regarding the availability of work outside the Port Angeles area over employer's objection. Claimant's counsel did not obtain the report of employer's vocational expert, Mr. Katzen, concerning the availability of work in the Port Angeles and surrounding areas until after claimant's counsel filed his pre-hearing statement, and Mr. Schoenfeldt did not receive Mr. Katzen's report until one and one-half weeks before the hearing. Tr. at 93-98, 114. Mr. Schoenfeldt testified that there was a lot less work available to claimant than portrayed by Mr. Katzen and disagreed with Mr. Katzen's assertions that claimant could work four and one-half days a week, and that 5.8 jobs per day were available to claimant in three different ports because it did not take into account that a longshore worker can only be in one hiring hall at a time. Tr. at 101, 107-108. In addition, to cure any prejudice in the admission of Mr. Schoenfeldt's testimony, the administrative law judge offered to leave the record open to permit employer to respond to it. Tr. at 98. Employer submitted no evidence post-hearing in response to Mr. Schoenfeldt's testimony.[4] *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). Employer therefore cannot contend it was prejudiced by the admission of this evidence. As the administrative law judge did not abuse his discretion in admitting the hearing testimony of claimant and Mr. Schoenfeldt, we affirm the administrative law judge's admission of this evidence.

Employer also contends that the administrative law judge erred in finding that claimant has a loss in wage-earning capacity. In this regard, employer alleges error in the finding that claimant is unable to perform all of the longshore jobs post-injury which he could perform pre-injury and as a result is unable to work as many hours post-injury as he did pre-injury. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the post-injury wage-earning capacity of a partially disabled claimant shall be his actual post-

[4]Employer renewed its objection to Mr. Schoenfeldt's testimony in its motion for reconsideration but did not submit any responsive evidence to Mr. Schoenfeldt's testimony.

injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. 33 U.S.C. §908(h). In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979).

The administrative law judge's finding that claimant established that he cannot perform post-injury all of the various types of longshore jobs that he was performing at the time of injury is supported by the opinions of Ms. Perry and Ms. Foley and of Drs. Dunn

and Redlin, in addition to claimant's testimony to this effect.[5] Although Dr. McCollum stated that claimant's work injury does not warrant any type of physical restrictions, the administrative law judge rationally concluded that claimant is not exaggerating his symptoms, noting that Dr. McCollum admitted that he did not detect any signs of malingering during claimant's examination. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 8; Emp. Exs. 6, 7 at 14, 19, 22, 24, 32. The administrative law judge also rationally concluded that the videotape showing claimant logging, gardening, stacking firewood, and working at the car wash does not establish that claimant can perform all his pre-injury duties, noting that while the videotape shows claimant engaging in some moderately strenuous activities, Dr. Redlin pointed out that there was no significant activity shown in the videotape that would be inconsistent with his own assessment of claimant's limitations. *See Id.*; Decision and Order at 8; Cl. Ex. 4 at 37A. As the administrative law judge's finding that claimant is unable to perform post-injury all of the jobs he could perform pre-injury is rational and supported by substantial evidence, we affirm it. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); Decision and Order at 8; Cl. Exs. 3-5, 8, 10; Emp. Exs. 2, 3; Tr. at 128-130.

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[5]Ms. Perry performed a physical capacities evaluation of claimant wherein she restricted claimant to light/medium to almost medium level work, and to lifting 45 pounds. Cl. Ex. 8; Emp. Ex. 2. Ms. Foley opined that claimant could work as a crane operator but could not perform many other types of longshore jobs. Cl. Ex. 10; Tr. at 128-130. Dr. Dunn stated that claimant could do the work of a longshoreman with a 25 pound weight lifting limit. Cl. Ex. 5. Dr. Redlin restricted claimant from lifting over 25 pounds and did not think that claimant was ever going to be able to resume his full duties as a longshoreman. Cl. Ex. 4; Emp. Ex. 3. With respect to the jobs claimant stated he was unable to perform post-injury which he could perform pre-injury, *see* n. 1 above.

The administrative law judge's finding that claimant sustained a loss in his post-injury wage-earning capacity because he cannot work as many hours post-injury as he did pre-injury is supported by the testimony of claimant and Mr. Schoenfeldt, and the PMA records submitted by employer. The administrative law judge reasonably relied on claimant's consistent testimony that he could not work post-injury as a lasher, truck driver, and boom man/raftman and on his more recent testimony that he could not work post-injury as a gearman and millwright after finding claimant's testimony credible. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 10, 11; Emp. Ex. 9 at 75; Tr. at 62-65. Although Mr. Schoenfeldt opined that some longshoremen are able to work five or six days a week, the administrative law judge rationally acknowledged, based on Mr. Schoenfeldt's testimony, that this was so because those longshoremen take every job that is available and often obtain jobs in Seattle, where the work exceeds claimant's physical abilities. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 11; Tr. at 119-123. Moreover, the administrative law judge acted within his discretion as the trier of fact in rejecting Mr. Katzen's testimony that many of the jobs claimant performed pre-injury are available to him post-injury when a review of the PMA records reflected that only 41 percent of the pre-injury hours are suitable for claimant post-injury. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 11; Emp. Ex. 5 at 62. Additionally, the administrative law judge acted within his discretion in rejecting Mr. Katzen's opinion that there are at least 5.8 jobs per day in three ports that claimant could obtain post-injury since it failed to reflect the fact that claimant could only seek work in one hiring hall and on occasion might select a hiring hall that has no jobs within his limitations. *See Donovan*, 300 F.2d 741; Decision and Order at 11; Tr. at 107-108. As the administrative law judge's finding that claimant sustained a loss in his post-injury wage-earning capacity because he is unable to work as many hours post-injury as he did pre-injury is rational and supported by substantial evidence, we affirm it. We also affirm the administrative law judge's award of disability benefits as employer does not challenge the administrative law judge's calculation of claimant's loss in his wage-earning capacity.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge