

DAVID W. COOPER)
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 Claimant-Respondent)
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 v.)
)
 ORANGE SHIPBUILDING COMPANY,) DATE ISSUED: 12/14/2006
 INCORPORATED)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

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

Quentin D. Price (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Patrick E. O’Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-01133) 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’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his lower back on October 21, 2002, during the course of his employment for employer as a fitter. In January 2003, claimant returned to light-duty work in employer's tool room. He was laid off due to a reduction in force on July 29, 2003. Claimant was last examined on July 15, 2003, by Dr. Lo. He noted that claimant was very symptomatic with focal and palpable muscle spasms. Dr. Lo prescribed Botox injections, which employer refused to authorize. On or about September 3, 2003, Dr. Anabtawi, who last examined claimant on June 9, 2003, opined that claimant could return to work without restrictions. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from November 8, 2002, to January 5, 2003, from June 2 to June 29, 2003, and from August 7 to September 2, 2003. Claimant sought continuing compensation under the Act for temporary total disability at a higher average weekly wage than voluntarily paid by employer, and ongoing treatment by Dr. Lo, to include Botox injections.

In his decision, the administrative law judge found that claimant is entitled to compensation for temporary total disability from the date he was laid off by employer on July 29, 2003, inasmuch as claimant is unable to return to his usual work as a fitter. The administrative law judge rejected employer's evidence of suitable alternate employment as there is no indication that the jobs identified by employer are within claimant's work restriction that he sit, stand, and walk for no more than three hours of an eight-hour work day. The administrative law judge found that, pursuant to Section 10(a), 33 U.S.C. §910(a), claimant's average weekly wage is \$566.70. Finally, the administrative law judge found that claimant is entitled to Botox injections per the recommendation of Dr. Lo, and to reimbursement for medical treatment claimant obtained for low back pain on October 31, 2002, at the emergency room of Memorial Hermann Baptist Hospital.

On appeal, employer contends that the administrative law judge erred in finding it had to establish suitable alternate employment after claimant was terminated from his light-duty job due to economic reasons. Employer also argues that the administrative law judge erred by rejecting its evidence of suitable alternate employment, by finding claimant entitled to Botox injections, and by ordering it to reimburse claimant for emergency room treatment. Claimant responds, urging affirmance of the administrative law judge's decision.

The administrative law judge found that claimant is unable to return to his usual employment duties, and thus the burden shifted to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). A job in the employer's facility

within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If employer establishes suitable alternate employment in this manner, as employer did in this case, employer bears a renewed burden of establishing suitable alternate employment when claimant is laid off from the job at employer's facility for economic reasons, in order to defeat claimant's entitlement to total disability benefits. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Employer contends that it provided claimant with a suitable light-duty job at its facility, and that claimant was laid off for economic reasons, rather than due to his inability to perform the job or to malfeasance.¹ Thus, employer contends it did not have a further duty to establish suitable alternate employment. In *Hord*, the United States Court of Appeals for the Fourth Circuit addressed the issue of employer's liability for total disability compensation after employer laid off an injured worker from a suitable post-injury position. The court concluded that, since employer made the suitable job unavailable, it bore a renewed burden of demonstrating the availability of other suitable alternate employment. *Id.* Similarly, in *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), the Board held that where an employer provided claimant with a job in its facility but then laid claimant off for economic reasons, that job did not meet its burden of establishing suitable alternate employment during the layoff period. Once employer withdrew the opportunity for such work, suitable alternate employment in employer's facility was no longer available. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994)(court held that short-lived employment did not establish that suitable alternate employment was realistically and regularly available on the open market). *Hord* is consistent with the Fifth Circuit's decision in *Turner*, in that *Turner* places on employer the burden of establishing "reasonably available" jobs that are suitable for the claimant. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. A short-lived job that is withdrawn by employer due to no fault of claimant is not a "reasonably available" job.

Thus, we reject employer's contention that the administrative law judge erred in requiring employer to establish suitable alternate employment once claimant was terminated for economic reasons from his light-duty job. While employer is not required to act as an employment agency for claimant, disability under the Act is an economic as well as a medical concept, and thus cannot be measured by claimant's physical condition

¹ It is well established that where claimant loses a suitable job in employer's facility due to his own misconduct, employer need not establish the availability of other suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

alone. *Turner*, 661 F.2d at 1042-43, 14 BRBS at 160; *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). As the administrative law judge rationally found, employer must establish the availability of jobs claimant can perform given his physical restrictions and other relevant factors, including economic factors. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). Therefore, we affirm the administrative law judge's finding that the position at employer's facility is insufficient to establish that alternate employment was available to claimant after the date of his layoff.² *Hord*, 193 F.3d 794, 33 BRBS 170(CRT).

Employer next argues the administrative law judge erred by finding that it did not establish the availability of suitable alternate employment. Specifically, employer contends that the administrative law judge erred by rejecting the hearing testimony of its vocational consultant, Carla Seyler, regarding the suitability of jobs for claimant as a security guard with various employers and as a sales associate at Home Depot. A vocational consultant's testimony may be discredited if the consultant fails to take into consideration all relevant restrictions found by the administrative law judge. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1992). In this regard, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden of proof. *See Ledet*, 163 F.2d 901, 32 BRBS 212(CRT);

² We reject employer's contention that this analysis violates the Equal Protection Clause of the Fifth Amendment of the United States Constitution by holding employers to different standards depending on whether suitable alternate employment is shown on the open market or via a job at employer's facility. Where suitable alternate employment is shown via a job at employer's facility, it need not demonstrate job availability on the open market. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Employer's withdrawal of a suitable job at its facility results in its needing to meet the open market standard. In order to show suitable employment on the open market, employer must demonstrate that jobs are realistically available. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Thus, the standards are not dissimilar. In addition, there is a rational basis for holding the employer to the standard required by *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), when it provides a suitable job at its facility in that an employer who rehires its disabled employee has direct control over his fate and could have an economic incentive to hire claimant for a short time and then discharge him from a light-duty job in order to avoid greater liability under the Act.

Hernandez v. National Steel & Shipbuilding Co., 32 BRBS 109 (1998). The administrative law judge rejected the security guard and sales associate positions identified by Ms. Seyler because he found that employer did not establish that these jobs are within claimant's restrictions enumerated in the January 14, 2003, functional capacity evaluation (FCE), which requires that claimant limit sitting, standing and walking to three hours each during an eight-hour work day. *See* CX 4 at 29.

Employer argues that the administrative law judge erred by crediting the FCE because it was conducted only two months after claimant's October 2002 work injury. Employer contends that, thereafter, claimant attended some 25 physical therapy sessions and a work hardening program, and that the positions are within Dr. Lo's July 2003 30-pound lifting restriction. Employer also contends it was irrational for the administrative law judge to credit this FCE but to discredit the September 2003 opinion of Dr. Anabtawi and the November 2003 opinion of Dr. Lo that claimant could return to work without restrictions.

The administrative law judge rationally rejected the opinion of Dr. Anabtawi, who last examined claimant on June 9, 2003, because there is no objective evidence that claimant is capable of lifting 100 pounds. Decision and Order at 20; *see* Tr. at 23. The administrative law judge also rejected Dr. Lo's November 2003 opinion inasmuch as, at his last examination of claimant on July 15, 2003, he had noted continued low back pain and muscle spasm, recommended Botox injections, and continued claimant on a 30-pound lifting restriction. *See* CX 4 at 67-69. The administrative law judge found that Dr. Lo had based his November 2003 work release solely on Dr. Anabtawi's discredited assessment, and that he, in fact, did not know whether claimant's condition had improved since July 2003. Decision and Order at 21-22; *see* CX 3 at 31-32, 40-41. Dr. Lo's July 15, 2003, report noted that claimant is at light-duty status with a 30-pound lifting restriction. The administrative law judge found that claimant's 30-pound lifting restriction, as well as his restrictions on sitting, standing and walking, date from the January 14, 2003, FCE, and that these are the only valid restrictions of record. *See* CX 4 at 28-30. With regard to the vocational evidence, the administrative law judge found that Ms. Seyler testified that claimant had no medical restrictions and had been released for full-duty work by Drs. Anabtawi and Lo. Tr. at 97. The administrative law judge also found that Ms. Seyler did not describe the walking, sitting, and standing requirements of the jobs. The administrative law judge therefore concluded that employer did not establish the suitability of the security guard and sales associate positions identified by Ms. Seyler.³ The administrative law judge's crediting of the restrictions contained in the

³ Given this result, we need not address claimant's contention raised in his response brief that the administrative law judge erred by allowing Ms. Seyler to testify despite employer's noncompliance with claimant's discovery request.

January 2003 FCE is rational. *See Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). Therefore, the finding that employer did not establish the suitability of the identified jobs is supported by substantial evidence. *See Carlisle*, 33 BRBS 133; *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Accordingly, we affirm the award of compensation for temporary total disability from September 3, 2003.

Employer next challenges the administrative law judge's finding that claimant is entitled to Botox injections per the recommendation of Dr. Lo, and his ordering employer to pay for claimant's treatment on October 31, 2002, at the emergency room of Memorial Hermann Baptist Hospital. Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In order for medical care to be compensable, it must be appropriate for the injury, *see* 20 C.F.R. §702.402, and the administrative law judge has the authority to determine the reasonableness and necessity of medical treatment. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). The administrative law judge found that claimant is entitled to Botox injections consistent with the opinion of Dr. Lo. At his last examination of claimant on July 15, 2003, Dr. Lo prescribed Botox injections to relieve the muscle spasms in claimant's back. CX 4 at 68. In his report and deposition testimony, Dr. Lo explained that Botox injections were indicated because epidural injections had not worked to relieve claimant's muscle spasm, and the muscle relaxers he had prescribed were not significantly helping. CXs 3 at 24, 32-33; 4 at 67-68. Claimant testified that he experiences significant back pain, and the administrative law judge found claimant's testimony credible. Decision and Order at 16; Tr. at 42-43; *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Regarding the emergency room treatment on October 31, 2002, the administrative law judge found claimant's testimony credible that he required treatment for low back pain during a weekend 10 days after the work injury. Tr. at 43.

Substantial evidence supports the administrative law judge's finding that Botox injections are reasonable and necessary to treat claimant's back condition and that claimant reasonably sought emergency room treatment on October 31, 2002, for his work-related back pain. Therefore, the administrative law judge's findings that employer is liable for Botox treatment and for the treatment provided by at Memorial Hermann

Baptist Hospital are affirmed.⁴ 33 U.S.C. §907; *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Monta*, 39 BRBS 104; *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ We decline to address employer's contention that claimant did not timely provide it with a report of the treatment by Memorial Hermann Baptist Hospital, as that contention is raised for the first time on appeal. *See generally Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).