BRB Nos. 00-0518
and 00-0518A

DANIEL R. JOHNSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
THE HARDAWAY COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Phil Watkins (Phil Watkins, P.C.), Corpus Christi, Texas, for claimant.

John R. Walker (Murphy & Walker, L.L.P.), Houston, Texas, for employer/ carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Awarding Benefits (99-LHC-0067) of Administrative Law Judge Larry W. Price 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 if they 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 form setter, suffered injuries to his lower back while trying to lift an

anchor bolt during the course of his employment on November 29, 1994. Claimant was initially treated by Dr. Ganz, who placed claimant on light duty. On December 9, 1994, Dr. Ganz opined that claimant reached maximum medical improvement, and, on December 12, 1994, claimant returned to full duty with employer and worked for ten days before being fired. Claimant subsequently obtained and left alternate work, and is presently residing in California.

In his decision, the administrative law judge found that claimant reached maximum medical improvement as of December 9, 1994, that employer established the availability of suitable alternate employment, and that the wages claimant earned from March 6, 1995 through May 17, 1995, fairly and reasonably represented his post-injury wage-earning capacity. Accordingly, as claimant's post-injury wages were greater than claimant's average weekly wage at the time of his injury, the administrative law judge awarded claimant only temporary total disability compensation from November 29, 1994 until December 9, 1994, and permanent total disability compensation from December 10, 1994 through March 5, 1995. 33 U.S.C. §908(a), (b). Additionally, the administrative law judge assessed a Section 14(e), 33 U.S.C. §914(e), penalty against employer on all compensation that had not been paid within fourteen days of the date it was due.

Claimant appeals, challenging the administrative law judge's findings regarding the nature and extent of his disability. Employer responds, urging the Board to affirm the administrative law judge's findings on these issues. In a cross-appeal, employer argues that the administrative law judge erred in finding it to be liable for a penalty pursuant to Section 14(e) of the Act.

Claimant initially contends that the administrative law judge erred in determining that his condition became permanent on December 9, 1994. Specifically, claimant contends that the administrative law judge erred in relying upon the opinion of Dr. Ganz in reaching this conclusion. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). The determination of when maximum medical improvement is reached is primarily a question of fact based on the medical evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In addressing this issue, the administrative law judge discussed the relevant medical opinions of Drs. Ganz, McIvor, McKeever, and Masciale regarding claimant's condition, and

determined that claimant reached maximum medical improvement on December 9, 1994, as that is the date Dr. Ganz opined that maximum medical improvement was achieved and he released claimant to return to work. *See* Emp. Ex. 18. In rendering this finding, the administrative law judge acknowledged that Dr. Ganz may have incorrectly diagnosed claimant's injury and prematurely released claimant to full duty. The administrative law judge, however, concluded after reviewing the medical evidence that claimant's condition did not further improve subsequent to December 9, 1994. Claimant, in challenging this conclusion, cites to no evidence supportive of a finding that his condition improved subsequent to December 9, 1994. *See generally SGS Control Serv. v. Director, OWCP,* 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Dr. McIvor stated that claimant had reached maximum medical improvement prior to his examination of claimant on May 27, 1997, Clt. Ex.11, and the fact that Dr. Masciale recommended chiropractic treatment does not indicate that claimant's condition was not permanent. Accordingly, as the administrative law judge's finding that claimant reached maximum medical improvement on December 9, 1994, is rational and supported by substantial evidence, it is affirmed. *See Carlisle v. Bunge Corp.,* 33 BRBS 133 (1999), *aff'd,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Claimant next challenges the administrative law judge's denial of ongoing disability compensation. Specifically, claimant avers that, although he worked post-injury from March 5, 1995 through May 17, 1995 for Staff Pro, and from March 6, 1996 through March 15, 1996 for Ivan Halaj Rentals, he was unable to continue in these positions due to his work-related injury; claimant thus contends that the administrative law judge erred in failing to award ongoing total disability benefits.

Where, as in the instant case, claimant is unable to perform his usual employment duties, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 36(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes,* 930 F. 2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions and could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985). Additionally, employer can satisfy its burden of establishing the availability of suitable alternate employment if claimant successfully performs a job he procured on his own. *See generally Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996)*; Shiver v. United States Marine Corps, Marine Base Exchange,* 23 BRBS 246 (1990); *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986).

In determining whether employer has met its burden of establishing the availability of suitable alternate employment, the administrative law judge must compare the requirements of the jobs identified with claimant's physical restrictions and other vocational factors. *See Hernandez v. National Steel & Shipbuilding Co.,* 32 BRBS 109 (1998); *Bryant v. Carolina Shipping Co.,* 25 BRBS 294 (1992). In the instant case, claimant testified that he was unable to continue working for Staff Pro in 1995 due to the nature of the work offered to him by that employment company. *See* Tr. at 52. In August 1996, Dr. Masciale opined that while he did not recommend that claimant return to heavy type work, claimant could perform lighter activities that do not require repetitive bending, stooping, and lifting or carrying over 40-50 pounds. Clt. Exs.1, 2. In September 1996, Dr. Masciale stated that, due to claimant's diagnosis of chronic right sacroiliac joint strain/sprain, he had no reason to doubt claimant's statements that his back pain in 1995 precluded him from participating in work. Clt. Ex. 2 at 14. Dr. Snook subsequently agreed with the conclusions of Dr. Masciale. Clt. Ex. 9. In June 1997, Dr. McIvor examined claimant, found his back to be quite flexible, and concluded, based upon a lack of positive evidence on physical examination, that he had nothing to suggest from an orthopedic standpoint; Dr. McIvor opined that claimant has the capacity to lift 50 to 60 pounds occasionally during the course of an eight-hour work day. Clt. Ex. 11.

In addressing the extent of claimant's disability, the administrative initially found questionable claimant's testimony regarding his inability to work post-injury, noting that claimant did not file tax returns from 1992 to 1997 although he performed work during this time. *See* Decision and Order at 9; Tr. at 52, 106. Contrary to claimant's contention, the administrative law judge is not required to credit claimant's uncontradicted testimony that he was unable to perform the post-injury jobs. Rather, the administrative law judge is entitled to determine the credibility of a witness's testimony, and the weight to be accorded to such testimony. *See generally* *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Next, after stating that he had reviewed the opinions expressed and job restrictions imposed on claimant by Drs. Masciale, Snook and McIvor, the administrative law judge summarily concluded that claimant was fully capable of performing the duties at Staff Pro, Ivan Halaj Rentals, and as a painter, and thus, that employer established the availability of suitable alternate employment. The administrative law judge further found that claimant's actual post-injury wages with Staff Pro represent claimant's wage-earning capacity. As the administrative law judge, however, did not compare claimant's physical restrictions with the requirements of the post-injury positions performed by claimant, we cannot affirm the administrative law judge's denial of additional disability benefits. *See Hernandez*, 32 BRBS 109; *see also* *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). We, therefore, vacate the administrative law judge's finding that employer established the availability of suitable

alternate employment, and we remand the case to the administrative law judge for reconsideration of the evidence of record regarding this issue.[1] Should the administrative law judge determine on remand that employer met its burden of establishing the availability of suitable alternate employment, he must, pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), fully analyze whether claimant's actual post-injury wages fairly and reasonably represent his post-injury wage-earning capacity. *See generally* *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

In its cross-appeal, employer challenges the administrative law judge's determination that it is liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Specifically, employer contends that, on the facts of this case, it is not liable for a Section 14(e) penalty until it had notice of a claim under the Act, because prior to claimant's filing his claim, employer did not know there was a controversy between the parties.

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[1]Claimant, in January 1997, moved to California. Citing *See v. Washington Metropolitan Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994), wherein the court held that where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence, the length of time he has resided in the new community, his ties to the community, the availability of suitable jobs in the new community, and the degree of undue prejudice to employer in proving suitable alternate employment in a new location, claimant avers that the administrative law judge erred in failing to find that southern California constitutes the relevant labor market for suitable alternate employment purposes. On remand, the administrative law judge must consider claimant's arguments in this regard. *See also Wood v. U.S. Dept of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Section 14(e) provides that employer must either pay compensation within 28 days after such compensation becomes due or, pursuant to Section 14(d), controvert claimant's entitlement to such compensation within 14 days of its knowledge of claimant's injury. *See* 33 U.S.C. §§912(d)(1), 914(b), (d), (e). Contrary to employer's contention, its knowledge of claimant's injury, rather than its knowledge that a claim has been filed under the Act, generally commences the time in which employer must pay or controvert in order to avoid liability for a Section 14(e) penalty. *See Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991). Failure to pay or controvert in a timely manner results in employer's liability for an additional 10 percent of the amount of compensation untimely paid. 33 U.S.C. §914(e).

In the instant case, the parties stipulated that claimant informed employer of his injury on November 29, 1994, and that employer did not file a notice of controversion under the Act until March 19, 1996.[2] Employer, however, contends that it had no reason to believe a controversy existed between the parties despite its knowledge of claimant's injury, as claimant returned to work within several days of his injury, and was subsequently fired for cause. Inasmuch as the administrative law judge summarily found employer liable for a Section 14(e) penalty, and did not make any findings of fact on this issue, we must remand this case for findings as to when a controversy arose between the parties. *See Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978); *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *rev'd on other grounds*, No. 86-1199 (D.C. Cir. Oct. 26, 1987); *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1985); *Paul v. General Dynamics Corp.*, 13 BRBS 1073 (1981); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Accordingly, the administrative law judge's findings that employer established the availability of suitable alternate employment and is liable for a Section 14(e) penalty are vacated, and the case remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]The filing of a notice of controversion terminates an employer's liability for a Section 14(e) penalty. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge