BRB No. 03-0385

LARRY L. JACOBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TARTAN TERMINALS	)	DATE ISSUED: Feb. 18, 2004
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Amended Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Michael W. Prokopik and David J. Schmitz (Franklin & Prokopik, P.C.), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Amended Decision and Order Awarding Benefits (2002-LHC-01581, 01582) of Administrative Law Judge Linda S. Chapman 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 injured the rotator cuff of his right shoulder on October 9, 2000, and the biceps tendon of his right arm on March 2, 2001, during the course of his employment for employer as a mechanic. Claimant underwent surgery for his rotator cuff injury on June 1, 2001. His biceps tendon injury could not be repaired surgically. On January 22, 2002, claimant's treating physician, Dr. Ruland, opined that claimant's shoulder and arm had reached maximum medical improvement, and he restricted claimant from overhead lifting and from lifting over 30 pounds. Claimant, who was born on September 5, 1951, applied for a disability pension from the International Longshoreman's Association and Steamship Trade Association Pension Fund (the Fund), which was granted, and he retired on April 1, 2002. Claimant sought compensation under the Act for permanent total disability. 33 U.S.C. §908(a).

In her decision, the administrative law judge found it undisputed that claimant cannot return to his usual employment as a mechanic. The administrative law judge then addressed employer's evidence of suitable alternate employment. She credited the testimony of claimant and Charles Smolkin, a vocational rehabilitation consultant, and found that employer failed to show that the positions it identified as an automotive service writer were reasonably and realistically available to claimant. The administrative law judge further found that a position with employer as a power combination driver is not reasonably available, and that claimant could not realistically secure and perform the job. The administrative law judge rejected as irrelevant employer's contentions that claimant refused to participate in work hardening, and that he did not diligently attempt to obtain employment because employer did not meet its initial burden of establishing the availability of suitable alternate employment. Accordingly, claimant was awarded compensation for temporary total disability from October 9, 2000, to January 22, 2002, 33 U.S.C. §908(b), and for permanent total disability from January 22, 2002, based on an average weekly wage of $1,862.25. In her supplemental decision, the administrative law judge amended the award to provide that claimant's compensation for temporary total disability commences on April 25, 2001.

On appeal, employer challenges the administrative law judge's finding that the automotive service writer and power combination driver positions do not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Where, as in the instant case, it is undisputed that claimant is incapable of resuming his usual employment duties with employer, he has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In order to meet its burden, employer must establish the availability of realistic 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. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In addressing this issue, the administrative law judge may reject a position which claimant is physically capable of performing, if she finds that the position is not otherwise realistically available to claimant. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

In this case, the administrative law judge addressed the testimony of Mark Dennis, a vocational consultant, that claimant could obtain employment as an automotive service writer given his work experience as a shop mechanic, his education, and his transferable skills. The administrative law judge instead credited claimant's testimony that he had not worked on automobiles for 25 years, Tr. at 79, and the testimony of Mr. Smolkin that the transferability of claimant's skills as an industrial maintenance mechanic to a position as an automotive service writer was limited by claimant's poor math skills, and the lack of a GED diploma, as well as any computer, automotive, and sales skills, Tr. at 265-270. The administrative law judge found that Mr. Dennis did not explain how claimant's work experience as an industrial mechanic provided him with the technical knowledge and supervisory and sales skills necessary for a position as a service writer. Decision and Order at 19. Based on these findings, the administrative law judge concluded that employer failed to show that the position of an automotive service writer is reasonably or realistically available to claimant.

In adjudicating a claim, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw her own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). We hold that the administrative law judge rationally credited claimant=s testimony regarding his limited work experience repairing automobiles and the testimony of Mr. Smolkin that the position of an automotive service write is not suitable for claimant. Moreover, the administrative law judge rationally rejected the testimony of Mr. Dennis because he failed to address claimant's aptitude for the skills required of an automotive service writer. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment though the automotive service writer position.[1] *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT).

[1] We reject employer's contentions that the administrative law judge placed on it an improper burden of ensuring claimant's future success as an automotive service writer, and erred by discounting the evidence of claimant's lack of diligence in seeking alternate employment. The administrative law judge properly concluded that employer did not

Employer next challenges the administrative law judge's finding that a job at its facility as a power combination driver is insufficient to establish the availability of suitable alternate employment. In this regard, Bruce Wrightson,[2] the general manager of employer's stevedoring operations, testified at the October 2002 hearing that employer is precluded from offering specifically to claimant a position as a power combination driver, as any job openings must be posted at claimant's union hiring hall; however, he testified employer had posted 10 such job openings in the last two years that were not filled. Tr. at 241, 253, 257-258.

An employer may establish the availability of suitable alternate employment by providing evidence of other longshore positions that claimant is capable of performing, including suitable positions at its facility. *See generally Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In this case, the administrative law judge found that claimant was not able to perform the driving job because he must demonstrate to the Fund trustees that he is capable of performing all longshore jobs in order to terminate his disability pension and return to longshore employment, and the medical evidence establishes that claimant is not physically capable of performing all the job duties of a longshoreman. The administrative law judge further discussed the conflicting evidence addressing claimant's physical ability to work as a power combination driver, but she did not determine whether the job is within claimant's work restrictions. The administrative law judge next found that, assuming, *arguendo*, that claimant physically could perform the job duties of a power combination driver, and he obtained the necessary driver certification, the job was not reasonably available to claimant.[3] The administrative law judge credited evidence that claimant lost his union seniority as a result of his obtaining a disability pension. Moreover, employer failed to establish that the 10 job openings at its

---

meet its burden of proof to show the availability of suitable alternate employment based on her rational crediting of evidence that the position of an automotive service writer is not reasonably or realistically available to claimant. *See generally Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). Moreover, the administrative law judge properly found that claimant's diligence in seeking alternate employment does not displace employer's initial burden of establishing the availability of suitable alternate employment. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

[2] The record establishes that the court reporter mistakenly referred to Bruce Wrightson as Bruce Rielson. *See* EXs 31, 37.

[3] The Occupational Safety and Health Administration requires that all longshore drivers complete a five-day course, which must be retaken every two to three years. The class is offered weekly for members of Local 333. Tr. at 52, 248; EX 61 at 19-21.

facility were available from International Longshoreman's Association (ILA) Local 333, which represents dockside drivers who unload ships, of which claimant is a member, or ILA Local 1429, which represents drivers whose work is restricted to the inside of a warehouse, of which claimant is not a member.

Employer challenges the administrative law judge's finding that claimant must show he can physically perform all longshore jobs to obtain approval from the Fund trustees to terminate his disability pension and return to longshore employment. In this regard, the administrative law judge credited evidence that claimant must establish he is permanently prevented from performing any further employment in the longshore industry to obtain disability retirement benefits from the Fund. Decision and Order at 19, 19 n.8; *see* EX 41 at 8. While there is evidence that the approval of the Fund trustees is required for claimant to return to longshore employment, EX 60 at 21-24, there is no evidence to support the administrative law judge's finding that claimant must be able to return to *all* longshore positions before approval will be given. The plan description for the Fund states only: "[I]f you recover from your total disability, you may re-enter Covered Employment." EX 41 at 7. At his deposition, Douglas Wagner, Jr., the field representative for the Fund stated that a person wishing to terminate his disability pension and return to work must inform one of the field representatives or the pension manager. EX 60 at 22-24. As there is no evidence supporting the administrative law judge's finding that a worker receiving a disability pension from the Fund must establish that he can perform all longshore jobs before returning to work, we vacate this finding. *See generally Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999).

Employer also challenges the administrative law judge's finding that a position as a power combination driver position is not reasonably available to claimant. Employer argues that claimant's loss of seniority upon returning to work after receiving a disability pension is irrelevant to whether it established suitable alternate employment. We disagree. Claimant's ability to perform the particular physical tasks of a power combination driver is not dispositive of the suitable alternate employment inquiry. Employer also must show that claimant can realistically compete for the alternate position. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting). Accordingly, we hold that the administrative law judge rationally considered claimant's lack of seniority in determining whether a driver position with employer is realistically available to claimant. Claimant's loss of seniority, however, does not dispositively establish that a driver position is unavailable to claimant. Two of employer's drivers, F. Jones and P. Green, are non-union employees, who were able to obtain driver jobs even though they have less port seniority than claimant would have upon his return to work. EXs 39, 57. Moreover, Mr. Wrightson testified that employer had unfilled job postings for drivers at the union hiring hall during the entire period that claimant was off work.

Tr. at 258; *see also* Tr. at 153. Thus, the record contains evidence that claimant's lack of seniority would not necessarily preclude claimant from obtaining employment with employer as power combination driver.

Employer also contends that the administrative law judge erred by finding that employer failed to establish whether the 10 unfilled job openings it had posted at the ILA hiring hall were available for Local 333 members such as claimant, rather than Local 1429 members. We agree, as there is no evidence that there were any job openings with employer available for Local 1429 members. Mr. Wrightson specifically testified at the hearing that Local 1429 warehouse drivers are not employed by employer, but by its parent company, Val Term, and that employer solely hires drivers from Local 333. Tr. at 253; *see also* Tr. at 90. In this regard, Mr. Wrightson testified that employer retains 12 active drivers, and that it employs another two drivers from the union hall when a ship arrives for unloading. Tr. at 242. The power combination drivers are employed in two distinct operations. The drivers either operate yard hustlers and drive cargo from the dock to the warehouse, or they operate forklifts to unload rolls of paper from inside the ship. Tr. at 243-244; *see also* Tr. at 147. These operations are exclusively the domain of Local 333. Tr. at 244, 249-250. On June 18, 2002, and on July 10, 2002, Mr. Wrightson wrote to claimant on company stationary, and not on that of Val Term, and informed claimant that it had scheduled him for paid driver training so that he could obtain the necessary certification to return to work. Tr. at 248; EXs 31, 37. Finally, Mr. Wrightson testified that employer needed more drivers, and that it would re-hire claimant. Tr. at 250-251; *see also* Tr. at 152-154. Based on this uncontradicted testimony, and the absence of any evidence that the driver positions were inside the warehouse of its parent company, Val Term, we hold that the administrative law judge's finding that employer failed to establish that its job openings for combination power drivers were filled by members of Local 333 is not supported by substantial evidence. *See generally Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

In light of these factors, we must remand this case for further consideration. First, the administrative law judge must determine whether claimant is physically capable of working as a power combination driver.[4] *See Hernandez*, 32 BRBS 109. Should the administrative law judge find the job within claimant's restrictions, the administrative law judge must then address employer's evidence that claimant could have obtained a position as a power combination driver during the period after he was able to work. *See*

[4] Employer challenges the administrative law judge's finding that claimant is not physically capable of working as a power combination driver. In her decision, however, the administrative law judge discussed the evidence addressing claimant's ability to perform this job without explicitly or impliedly determining whether the job is within claimant's physical restrictions. Decision and Order at 20.

Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Finally, should the administrative law judge find that employer established the availability of suitable alternate employment, the administrative law judge must then determine claimant's post-injury wage-earning capacity and award permanent partial disability benefits, if appropriate. 33 U.S.C.§908 (c)(21), (h).

Accordingly, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through the position of power combination driver is vacated, and the case is remanded for reconsideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Amended Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge