BRB Nos. 06-0433
and 06-0433A

EDUARDO GONZALEZ	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
RENDA MARINE, INCORPORATED	)	DATE ISSUED: 02/12/2007
	)	
and	)	
	)	
TEXAS MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Order on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur (Law Offices of Harry C. Arthur), Houston, Texas, for claimant.

Peter Thompson (Thompson & Reilly, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order on Motion for Reconsideration (2004-LHC-2355) of Administrative Law Judge Patrick M. Rosenow 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 worked as a welder's helper for employer on a dredge located in the Port of Houston Harbor. He alleges that he sustained an elbow injury in a work accident on June 8, 2001. Claimant testified that he stopped working on June 18, 2001, because employer advised him that he needed a return-to-work note from a physician, but employer's clinic refused to see him without an authorization letter from employer. In February 2003, claimant returned to work with a non-maritime employer as a painter. Claimant sought temporary total disability benefits under the Act from June 18, 2001 until February 2003, and medical benefits, including surgery for his elbow condition, cubital tunnel syndrome, also known as ulnar nerve entrapment.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and that employer presented sufficient evidence to establish rebuttal thereof. The administrative law judge found, on the record as a whole, that "it is more likely than not" that claimant suffers from cubital tunnel syndrome as a consequence of the work injury on June 8, 2001. The administrative law judge found that claimant's medical treatment, excluding that provided by a chiropractor, has been reasonable and necessary and that employer is liable for the proposed surgery. The administrative law judge also found that employer had necessary and meaningful light-duty work available at its facility at all times since June 18, 2001. But, the administrative law judge credited Dr. Crawford's opinion restricting claimant from any work between June 26, 2001, and February 21, 2002, and therefore found that employer could not establish the availability of suitable alternate employment until February 21, 2002, at a pay rate equal to claimant's pre-injury average weekly wage. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 26, 2001 through February 21, 2002, and medical benefits.

Claimant filed a motion for reconsideration. He argued that the administrative law judge erred in finding that employer established suitable alternate employment, because there was no evidence in the record to support a finding that light-duty work was available with employer on February 21, 2002, or that employer communicated an offer of employment to claimant on or about February 21, 2002. Claimant also argued that the administrative law judge erred in failing to find that he suffered a post-injury loss of wage-earning capacity. The administrative law judge denied claimant's contentions of error in this regard.

On appeal, employer contends that the administrative law judge erred in finding that claimant's left elbow condition is work-related. Claimant responds, urging rejection

of employer's contention. In his cross-appeal, claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment at its facility, with no resulting loss in wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's findings.

Employer contends that the administrative law judge erred in finding that claimant's cubital tunnel syndrome is causally related to his June 8, 2001, work accident. Employer argues that the administrative law judge erred in not crediting the testimony of its expert, Dr. Hildreth, who possesses superior credentials and has published peer-reviewed articles. Employer avers that the opinion of claimant's expert, Dr. Sanders, is not scientifically based and therefore is inadmissible pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Once, as here, claimant invokes and employer rebuts the Section 20(a) presumption, it no longer controls and the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). In this case, the administrative law judge merely stated that the weight of the evidence as a whole establishes that it is more likely than not that claimant sustained a work-related injury. Decision and Order at 56. We cannot affirm this conclusion as, despite his thorough recitation of the evidence, the administrative law judge did not state the evidence on which he relied in making this finding. Decision and Order at 56; *see Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). Therefore, we must vacate the finding that claimant's elbow condition is work-related and remand the case for the administrative law judge to weigh the conflicting evidence and to identify the evidence upon which he relies as the cause of claimant's condition is a material issue of fact. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

We reject, however, employer's contention that the administrative law judge is required to give greater weight to the opinion of its expert, Dr. Hildreth, than to that of Dr. Sanders. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 23(CRT) (5th Cir. 1994). As employer states, Dr. Hildreth, a specialist in upper-extremity orthopedic injuries, testified with reasonable medical certainty that claimant could not have suffered an injury to his ulnar nerve as a result of the 2001 incident because claimant's description of that work accident did not fit any of the possible traumatic causes documented by reliable medical evidence. EX 12 at 4. In contrast, Dr. Sanders opined that claimant's elbow injury was caused by the work incident, notwithstanding his inability to identify any published peer-reviewed articles supporting his position. Decision and Order at 36. In this regard, we reject employer's contention that Dr. Sanders's opinion is inadmissible under *Daubert.* The Ninth Circuit's statement in

Bayliss v. Barnhart, 427 F.3d 1211, 1218 n.4 (9th Cir. 2005) applies with equal force to this longshore case:

> It is clear that the *Daubert* decision rests on an interpretation of Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 589-92, 113 S.Ct. 2786. The requirements established in Federal Rule of Evidence 702, *Daubert,* and *Kumho [Tire Co. v. Carmichael,* 526 U.S. 137 (1999) extending application of *Daubert* rule beyond scientific testimony to all expert testimony] do not govern the admissibility of evidence before the ALJ in the administrative proceeding in this Social Security case.

The standards governing the admissibility of evidence in administrative hearings are less stringent than those that govern under the Federal Rules of Evidence. *See generally Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1984), *aff'd mem.*, 764 F.2d 926 (D.C. Cir. 1985)(table). Section 23(a) of the Act specifically provides that the administrative law judge is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure," 33 U.S.C. §923(a); *see also* 20 C.F.R. §§702.338,702.339; 29 C.F.R. §§18.401, 18.402. Because Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence, he is not bound to apply the decision in *Daubert* restricting the admission of evidence to that which is scientifically based. *See Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *see also Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993) (table). Employer's argument goes to the weight to be accorded to the medical reports rather than to the admissibility of Dr. Sanders's report. On remand, therefore, the administrative law judge is free to determine the weight to be accorded to the medical evidence on the causation issue, so long as he provides a rational basis for his finding.[1] *See generally Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

In his appeal, claimant contends that the administrative law judge erred in finding suitable alternate employment established at employer's facility. Claimant contends that employer did not establish the availability of a job within his part-time work restriction. Alternatively, claimant contends the administrative law judge erred in finding that he does not have a loss in wage-earning capacity.

[1] On remand, employer may raise its contention that Dr. Hildreth's opinion about the cause of claimant's condition was unwavering.

Where, as in the instant case, claimant is unable to perform his usual employment duties, the burden shifts 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 which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An employer's offer of a suitable job within its own facility is sufficient to establish suitable alternate employment; the employer need not also show that the claimant can earn wages in the open market. *Darby v. Ingalls Shipbuilding, Inc.*, 99 BRBS F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996). Dr. Crawford released claimant to perform light-duty work on February 21, 2002. CX 16 at 31. Dr. Crawford limited claimant to working 4 hours per day and from lifting more than 20 pounds. He stated the restrictions were expected to last until March 21, 2002. *Id.* However, in April 2002, Dr. Crawford recommended surgery, as claimant's symptoms remained. CX 6 at 3.

We reject claimant's contention that the administrative law judge erred in finding that employer established the availability of employment at its facility. The administrative law judge rationally credited the testimony of Mr. Rodriguez, claimant's former supervisor, that claimant could have come back to work for employer on light duty once he had a medical release. Decision and Order at 59; Order on Motion for Reconsideration at 3-4; Tr. at 196-197, 207-208, 211-215. It was within the administrative law judge's discretion to find that a light-duty position would have been available on February 21, 2002, because Mr. Rodriguez testified that such work was available "indefinitely."[2] *Id.* The administrative law judge also noted the testimony of Mr. Rodriguez that employer always has at least two people working in this position, and that it is a "never-ending job." *Id.* In addition, the administrative law judge rationally found that the work duties described by Mr. Rodriguez are essential to the operation of the dredge and its welding operation. Tr. at 212-214; Decision and Order at 59. Moreover, we reject claimant's contention that employer's failure to communicate to claimant the availability of a job at its facility is fatal to its showing of alternate employment. The administrative law judge rationally found that claimant effectively

[2] In his Order denying reconsideration, the administrative law judge rejected claimant's contention that suitable alternate employment was not established because employer was no longer in business. The administrative law judge found no evidence to support this assertion. Claimant may seek modification pursuant to Section 22, 33 U.S.C. §922, if he wishes to pursue this contention. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

abandoned his employment by failing to communicate with employer or to return to his place of employment. *Cf. Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*) (employer must actually offer jobs which are within its control to claimant in order to meet its burden). Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer established that alternate employment was available to claimant as of February 21, 2002. *See generally Beulah v. Avis Rent-A-Car*, 19 BRBS 131 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

Nonetheless, remand is required for the administrative law judge to determine whether the job was suitable for claimant given that on February 21, 2002, Dr. Crawford released claimant to work for only four hours per day with lifting restrictions, and that, in April 2002, the doctor recommended surgery. *See generally Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *see also Stratton*, 35 BRBS 1. Moreover, if claimant was able to work only four hours per day, the administrative law judge erred in not addressing whether claimant had a loss in wage-earning capacity which would entitle him to temporary partial disability compensation.[3] 33 U.S.C. §908(e), (h). The fact that claimant's pay rate would have been the same as his pre-injury rate does not establish the absence of a loss of wage-earning capacity where claimant is unable to work a full-time schedule. Consequently, we vacate the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant has no loss of wage-earning capacity as of February 21, 2002. We remand this case to the administrative law judge for further findings on these issues.[4]

Accordingly, we vacate the administrative law judge's finding that claimant's cubital tunnel syndrome is casually related to his June 8, 2001, work accident, as well as the award of medical benefits, and we remand the case for the administrative law judge to

[3] The administrative law judge found that claimant's condition had not reached maximum medical improvement, and this finding is unchallenged on appeal. Decision and Order at 57.

[4] If, on remand, the administrative law judge finds that the job at employer's facility was not suitable for claimant, then claimant is entitled to total disability benefits until he obtained work on his own in February 2003, as employer did not offer any other evidence of suitable alternate employment. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). Under such circumstances, the administrative law judge should determine claimant's post-injury wage earning capacity with reference to claimant's actual earnings and the factors set out in Section 8(h) of the Act, 33 U.S.C. §908(h). *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

weigh the relevant evidence concerning the cause of claimant's elbow condition. We vacate the administrative law judge's findings that employer established suitable alternate employment as of February 21, 2002, and that claimant has no loss of wage-earning capacity as of that date, and we remand the case for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is 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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REGINA C. McGRANERY
Administrative Appeals Judge