BRB No. 90-0291

JOSE JESUS GARCIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Preston Easley, San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-LHC-0396) of Administrative Law Judge Henry B. Lasky 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).

This case is before the Board for the second time. To reiterate the facts in this case, claimant worked as a welder, prohibited from performing heavy work due to a previous work-related injury, when he reinjured his back on March 18, 1981 while pulling welding cables. He continued working until March 23, 1981, when he again felt discomfort. Diagnosed as having sustained an acute

lumbosacral sprain with pre-existing spondylolisthesis,[1] claimant has not worked since the accident.

In his initial Decision and Order, the administrative law judge concluded that although claimant did not have a psychological disability, he is unable to perform any heavy work due to his physical injury. The administrative law judge then determined that employer met its burden of establishing the availability of suitable alternate employment based on three jobs listed in the classified ads in the *Los Angeles Times*, and other positions identified by employer's vocational expert at L & N Welding, Aco Manufacturing, and Reflector Hardware. The administrative law judge further determined that claimant sustained no loss in his wage-earning capacity, and denied the claim for permanent total disability benefits accordingly. Claimant appealed the administrative law judge's finding that employer established the availability of suitable alternate employment, and employer responded, urging affirmance.

The Board agreed with claimant that the administrative law judge erred in inferring that claimant was capable of performing all heliarc welding jobs from the medical opinions of Drs. Brooks and Booth, and that claimant was capable of performing heliarc or tig welding involving lighter metals based upon a description of a heliarc welding position at Brown Jordan, a lawn furniture manufacturer, which was not available. Accordingly, the Board instructed the administrative law judge that the appropriate standard was to compare the particular requirements of each available job to claimant's physical restrictions, age, education, and work experience in assessing whether it constitutes suitable alternate employment. The Board further concluded that the administrative law judge erred in accepting the classified job listings as evidence of suitable alternate employment and in relying on a position identified at Aco Manufacturing which was unavailable. In addition, the Board vacated the administrative law judge's finding that the L & N Welding and Reflector Hardware positions constituted suitable alternate employment. The Board noted that the record reflected that the L & N Welding position required certification in mig, tig, and stick welding and no lifting over 50 pounds, while claimant testified that he was certified in "arc, pipe, and plate welding." The Board further noted that while the Reflector Hardware position required the ability to read shop drawings, claimant informed employer's vocational consultant that he is unable to read blue prints. In addition, while this job required two years of experience with stainless steel which was described as "relatively light" as well as work with bronze and brass which was described as "heavier," claimant was restricted from heavy work and heavy lifting. Accordingly, the Board vacated both the administrative law judge's suitable alternate employment finding and his determination that claimant sustained no loss in wage-earning capacity, and remanded the case for him to consider whether the specific requirements of the jobs available at L & N Welding and Reflector Hardware were suitable based on claimant's age, education, work experience and physical limitations. *Garcia v. Todd Shipyards Corp.*, BRB No. 84-2404 (July 31, 1989)(unpublished).

In his Decision and Order on Remand, the administrative law judge determined that the jobs at L & N Welding and Reflector Hardware constituted suitable alternate employment. In addition,

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[1]Claimant sustained an earlier injury to his back in a work-related accident on July 12, 1978 for which he was awarded permanent partial disability benefits. At that time, his underlying spondylolisthesis was diagnosed.

he determined that claimant failed to meet his complementary burden of showing due diligence in trying to procure alternate work. Inasmuch as employer's vocational expert indicated that these jobs would have paid between $6.00 and $11.00, with someone with experience likely to get upwards of $9.00, the administrative law judge further determined that claimant was not entitled to compensation because his $360 per week post-injury wage-earning capacity exceeded his $326.55 pre-injury average weekly wage. On appeal, claimant contends that inasmuch as the evidence of record indicates that the jobs at L & N Welding and Reflector Hardware were neither vocationally nor physically suitable for him, the administrative law judge erred on remand in again finding that employer met its burden of establishing suitable alternate employment. Claimant also challenges the administrative law judge's finding that he sustained no loss in his wage-earning capacity. Employer responds, urging affirmance.

Where, as here, it is undisputed that claimant could not perform his usual work, he established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984).

We agree with claimant that the administrative law judge's determination on remand that the jobs available at L & N Welding and Reflector Hardware constituted suitable alternate employment cannot stand. The administrative law judge found the L & N Welding job vocationally suitable for claimant in view of his extensive experience in the welding field, both practical and theoretical, which includes mig as well as tig welding.[2] The administrative law judge also inferred from employer's vocational rehabilitation counselor's report documenting claimant's experience that claimant "knows lots of welding." Emp. Ex. 9. As noted in the Board's prior Decision and Order, however, the job at L & N Welding specifically required *certification* in mig, tig and stick welding. Emp. Ex. 10. Inasmuch as there is no evidence in the record which indicates that claimant has the requisite certification in mig and stick welding necessary to obtain this job, the administrative law judge erred in finding that employer met its burden of establishing that this job was compatible with claimant's education and work experience.[3]

Moreover, although the administrative law judge inferred that claimant was physically capable of performing this job, which required lifting of up to 50 pounds, based upon the fact that

[2]Claimant had three years of welding training, and has approximately ten years of welding experience. Hearing Transcript at 27-30; Emp. Ex. 9.

[3]In a report dated June 24, 1981, employer's vocational rehabilitation counselor noted that claimant informed him that special testing was required for certification in welding specialties. Emp. Ex. 9 at 95.

Drs. Brook and Booth had approved an unavailable position at Brown and Jordan involving welding lighter metals and no lifting over 10 pounds, this inference is irrational given the disparity in the physical requirements of the two positions. In approving the Brown and Jordan job, Dr. Brooks noted the light nature of the work, and both doctors indicated that claimant was precluded from heavy lifting. Accordingly, we reverse the administrative law judge's determination that the job at L & N Welding constituted suitable alternate employment, as employer has failed to establish that claimant has the requisite qualifications to allow him to secure this position. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The administrative law judge similarly erred on remand in finding that the two positions available at Reflector Hardware were compatible with claimant's education and work experience. As was noted by the Board in remanding the case, the Reflector Hardware jobs required the ability to read shop drawings. On remand, the administrative law judge concluded that this would not be a deterrent to claimant's obtaining this position based upon the fact that employer's vocational rehabilitation counselor's report stated that claimant has "studied" drafting. Emp. Ex. 9 at 95. In this same report, however, employer's vocational expert also stated that claimant's drafting skills are limited, that claimant had not been required to read blueprints or diagrams while working for Todd Shipyards, and that he is unable to read blueprints. On these facts, it was irrational for the administrative law judge to conclude that claimant had the requisite skills necessary to perform this job.

Accordingly, we reverse the administrative law judge's determination on remand that employer met its burden of establishing the availability of suitable alternate employment. Employer has failed to establish the existence of any job openings which claimant could realistically fill. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). We need not address claimant's diligence in seeking alternate work, as this burden arises only after employer has demonstrated the existence of suitable available jobs. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). The administrative law judge's Decision and Order On Remand is therefore modified to reflect that claimant is entitled to permanent total disability compensation based upon an average weekly wage of $326.55, commencing on September 24, 1981, the date of maximum medical improvement, consistent with the factual findings made by the administrative law judge in his initial Decision and Order in this case.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment in his Decision and Order on Remand is reversed. This decision is modified to reflect that claimant is entitled to permanent total disability based upon an average weekly wage of $326.55 commencing September 24, 1981.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge