BRB No. 92-2170

ROBERT MULGREW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITO CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Cornelius V. Gallagher and Christopher J. Field (Linden & Gallagher), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2509) of Administrative Law Judge Ainsworth H. Brown 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 which 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).

On February 9, 1988, claimant, a deckman, sustained an injury to his back while working for employer. Employer voluntarily paid claimant weekly compensation in the amount of $575.71 for

temporary total disability through March 12, 1990. At that time, employer paid claimant partial disability benefits of $412 per week. In his Decision and Order, the administrative law judge ordered employer to maintain the weekly compensation payments that have been paid since March 13, 1990, for permanent partial disability. The administrative law judge concluded that claimant was not totally disabled, as employer established suitable alternate employment in the form of a single position with Philadelphia Tilco Credit Union as a telephone customer service representative. Employer was awarded relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's award. Employer responds in support of the administrative law judge's award by resubmitting its post-hearing brief before the administrative law judge.

Claimant initially contends that the administrative law judge erred in finding that employer established suitable alternate employment as employer's identification of a single position is insufficient to support such a finding. Claimant asserts that the administrative law judge's reliance on *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), is misplaced and contends that *P & M Crane* is distinguishable from the instant case. In determining that employer established the availability of suitable alternate employment, the administrative law judge concluded based on *P & M Crane* that the single position as a telephone customer service representative constituted suitable alternate employment as claimant had a reasonable likelihood of obtaining it "under appropriate circumstances," because the position offered claimant the benefits of tuition reimbursement and health care coverage. Decision and Order at 5.

In *P & M Crane*, the United States Court of Appeals for the Fifth Circuit held that employer's burden of establishing suitable alternate employment may be met by a single employment opportunity if the employee has a reasonable likelihood of obtaining this single employment opportunity "under appropriate circumstances." *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121 (CRT). The decision provides examples of "appropriate circumstances," including where the employee is highly skilled, the job found by employer is specialized and the number of workers with suitable qualifications in the local community is small. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121-122 (CRT). The court noted that in addition to the single employment opportunity identified by employer in that case, a number of other general employment opportunities were available to claimant in the local community. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 122 (CRT).

Claimant correctly distinguishes *P & M Crane* and asserts that the administrative law judge improperly applied it to this case. While employer's vocational experts in *P & M Crane* were able to locate numerous *types* of employment that the claimant was able to perform in addition to the one specific opportunity, Ms. Rothman conceded that she contacted a minimum of a dozen potential employers who were *unwilling* to consider claimant for employment prior to her locating the telephone customer service representative position. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 122 (CRT); Employer's Exhibit 1 at J. Additionally, the administrative law judge considered the benefits of the telephone customer service position, health care coverage and tuition reimbursement, in

determining whether claimant had a reasonable likelihood of obtaining this employment opportunity "under appropriate circumstances." Although the "appropriate circumstances" given in *P & M Crane* are not confined to the example given in the case, the court did not interpret "appropriate circumstances" to focus on the benefits the position offered the claimant, but rather on whether the position is within claimant's physical and mental capacities and is realistically available to claimant in his local community. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121-122 (CRT). The circumstances indicating a single identified opening is sufficient must demonstrate the realistic availability of employment to claimant. As such factors are absent in the present case, *P & M Crane* is distinguishable. There is no evidence that the customer service representative position is specialized, that claimant is particularly qualified for it based on his skills, or so that the number of workers competing for the job is small. There is also no evidence that similar or other suitable jobs are generally available. We hold that the administrative law judge erred in finding that employer established suitable alternate employment merely by virtue of the identification of the single position in this case. *See also Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Thus, we vacate that finding.

We must, however, remand this case to the administrative law judge for a determination of whether this single position constitutes a job *offer* or *opportunity*. Since Ms. Rothman stated that it was a job offer while claimant stated his belief that it was a job opening, the administrative law judge must resolve this factual issue. Decision and Order at 4; Employer's Exhibit 1 at J; Tr. at 31. The Board has held that a single job *offer* is sufficient to establish suitable alternate employment. *Shiver v. U.S. Marine Corps, Marine Base Exchange*, 23 BRBS 246 (1990). *Cf. Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT)(one job opportunity insufficient); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980)(holding that one opportunity is insufficient to establish suitable alternate employment; however, the single opportunity was not within claimant's physical restrictions). Employer has met its burden in establishing suitable alternate employment if the administrative law judge finds the telephone customer service representative position was actually offered to claimant. *Shiver*, 23 BRBS at 246.

Claimant also contends that the administrative law judge erred in finding that he is medically able to perform full-time employment, as there is no evidence to support this determination. In finding that claimant is medically able to perform full-time employment, the administrative law judge relied on Dr. Lefkoe's report, which limited claimant to intermittent sitting, walking and standing for four hours per day, and stated that claimant could work eight hours a day "when appropriate job is found." Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibit 1 at H. The administrative law judge disagreed with claimant's interpretation that this report is compatible with a 20 but not a 40 hour work week, and explained that it meant that claimant could work an eight hour day "when appropriate job is found" in the context of the restrictions assessed and within claimant's vocational capacity. Decision and Order at 4. The administrative law judge noted that although claimant could not sustain more than four hours of a combination of activities per day, it did not mean that Dr. Lefkoe would limit claimant to certain activities for only four hours per day. Decision and Order at 4. After explaining that a job requiring six hours of standing a day would not be within Dr. Lefkoe's restrictions, the administrative law judge rationally concluded that Dr.

Lefkoe's opinion was more consistent with a 40 hour work week than a 20 hour work week. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibit 1 at H. As Dr. Lefkoe's report is substantial evidence in support of the administrative law judge's finding that claimant is medically able to perform full-time employment, we affirm this finding.[1]

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is vacated, and the case is 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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[1]Dr. Mandel's opinion is also substantial evidence in support of the administrative law judge's finding that claimant is medically able to perform full-time employment. Decision and Order at 3. Dr. Mandel states that claimant is able to perform the duties of a telephone customer service representative, a position which requires 40 hours a week. Employer's Exhibit 1 at J.