BRB No. 99-1057

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| JONATHAN TATE<br><br>Claimant<br><br>v. | ) | |
| WALASHEK INDUSTRIAL AND MARINE<br><br>and<br><br>THE SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED<br><br>Employer/Carrier-Respondents<br><br>and<br><br>CONTINENTAL INSURANCE COMPANY<br><br>Carrier-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 7/11/2000<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer and Signal Mutual Indemnity Association, Limited.

David A. Hamby, Jr., and Jene W. Owens, Jr. (Brooks & Hamby, P.C.),

Mobile, Alabama, for employer and Continental Insurance Company.

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

PER CURIAM:

Employer and Continental Insurance Company (CNA) appeal the Decision and Order on Remand (95-LHC-2835, 96-LHC-460) of Administrative Law Judge Richard K. Malamphy 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). This is the second time this case is before the Board.

Claimant, while working as a boilermaker mechanic for employer, injured his back and neck in 1992, at which time CNA was the insurance carrier on the risk. Claimant did not return to work until May 2, 1995, at which time Signal Mutual Indemnity Association, Limited (Signal) was on the risk. On that date, claimant attempted to return to work as a light-duty boilermaker mechanic for employer. Upon his return to work, claimant experienced pain and physical problems which resulted in his request for further medical treatment and a reduction in his work day from eight to six hours. After working two hours on May 11, 1995, claimant suffered intense pain after moving some doors. Claimant thereafter attempted to return to work on May 15, 1995, as his treating physician released him with the same physical restrictions in existence prior to May 11, 1995; however, employer refused to allow claimant to work due to the risk he presented. Claimant subsequently obtained employment as a restaurant cook.

In his first decision, the administrative law judge, having determined that claimant suffered a work-related aggravation of his pre-existing back and shoulder condition on May 11, 1995, found, *inter alia*, that Signal was the responsible carrier and ordered it to pay claimant temporary total disability benefits from May 12 through May 15, 1995, permanent total disability benefits from May 16 through June 16, 1995, permanent partial disability benefits from June 17, 1995 through June 18, 1997, based on his residual wage earning capacity of $6 per hour as a cook, temporary total disability benefits from January 19 through January 24, 1997, while claimant underwent and recovered from surgery, and permanent partial disability benefits from January 25, 1997, and continuing based on claimant's residual wage earning capacity of $7 per hour. *See* Decision and Order at 14-15, 21-23. Signal appealed this decision to the Board.

On appeal, the Board held that the administrative law judge's analysis was incomplete

because he failed to ascertain whether claimant's 1992 injury, his 1995 injury or both injuries caused claimant's disability; thus, the Board determined that the case must be remanded for further findings. In this regard, after discussing the law regarding aggravation and natural progression as it affects determining the responsible carrier, *see Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), the Board stated that resolution of this issue turned on the cause of claimant's disability. The case was remanded for the administrative law judge to determine if the work to which claimant returned in May 1995 constituted alternate employment which was both suitable and of sufficient duration to establish a post-injury wage-earning capacity. If this employment was not suitable, then claimant was totally disabled as of the date of the May 11, 1995, incident notwithstanding his attempt to return to work, and CNA would be the party liable for the entire amount of permanent disability benefits due claimant as that incident did not increase claimant's disability. Conversely, if the position in employer's facility constituted suitable alternate employment, Signal would be the party responsible for any totally disabling exacerbation sustained by claimant on May 11, 1995, and for any increase in claimant's partial disability resulting from this injury based on claimant's residual wage-earning capacity at the time of the second injury.[1] *See Tate v. Walashek Industrial & Marine*, BRB No. 98-0238 (Oct. 27, 1998)(unpublished).

On remand, the administrative law judge determined that the position to which claimant returned on May 2, 1995, did not constitute suitable alternate employment and, therefore, claimant remained totally disabled from the 1992 work-related accident despite his attempted return to work. Thus, concluding the events in 1995 resulted from the natural progression of claimant's work injury, the administrative law judge found that CNA was the carrier responsible for the payment of benefits due claimant under the Act. The administrative law judge then determined that claimant's benefits were to be based on claimant's 1992 average weekly wage.

On appeal, CNA asserts that the administrative law judge erred in finding it to be the

[1]The Board further found that the administrative law judge's initial award based on claimant's average weekly wage in 1992 was inconsistent with the imposition of liability against Signal based on well-established law that where an aggravation occurs, average weekly wage is determined as of the date of the aggravation. The case was remanded for resolution of this issue consistent with the responsible carrier.

carrier responsible for the payment of claimant's benefits; specifically, CNA challenges the administrative law judge's findings that claimant's May 1995 position as a boilermaker mechanic within its facility did not constitute suitable alternate employment and that claimant's May 11, 1995, work-incident did not result in a new injury. Signal responds, urging affirmance of the administrative law judge's decision in its entirety.

CNA contends that the administrative law judge erred in finding that the job claimant attempted from May 2 to May 11 was not suitable, asserting that as the light-duty position as a boilermaker mechanic in employer's facility was necessary, it was within claimant's physical restrictions, and it could be performed by claimant without extraordinary effort, that position establishes that claimant had a wage-earning capacity and thus, the initial injury is not the cause of claimant's ongoing permanent disability. A light-duty job in employer's facility can establish suitable alternate employment, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996), and a job tailored to claimant's specific restrictions may suffice to establish an earning capacity so long as the work is necessary and beneficial to employer. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if he cannot do the work or which is unnecessary and is created merely to place claimant on the payroll; such employment is insufficient to constitute suitable alternate employment, and claimant is entitled to benefits under the Act for total disability while working in a post-injury job under this circumstance. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). In ascertaining the suitability of a job in employer's facility, the administrative law judge must consider whether the requirements of the position are within claimant's physical capabilities, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), or whether claimant worked only through extraordinary effort and despite excruciating pain. *See Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978).

In the instant case, the administrative law judge's implicit determination that claimant's work in the position of a modified boilermaker mechanic for employer in May 1995 was beyond his physical restrictions, and that employer therefore failed to establish suitable alternate employment, is rational and supported by substantial evidence. Regarding his employment from May 2 though May 11, 1995, claimant testified that he was required to walk approximately one mile from his car to his work station at employer's vessel and that by the time he reached the ship's boiler room he was almost exhausted. *See* Tr. at 51-52, 115. On his first two days of employment, *i.e.,* May 2 and 3, 1995, claimant testified that he performed essentially menial jobs consisting of survey, inspection, and report work. *Id.* at 135-136. The following two days, however, claimant was assigned work in a confined area

repacking seals in a boiler. *Id.* at 52-53, 136. As a result of this work in a confined space, claimant experienced muscle spasms and numbness in his legs and back, *id.* at 53-54; due to his work-related exhaustion, claimant testified that he subsequently began to have problems driving home and sleeping. As his physical symptoms increased, claimant on May 8, 1995, requested and was prescribed additional muscle relaxers by his treating physician; also on this day, claimant sought and received employer's permission to reduce his workday to six hours, citing his need to slow down a little bit. *Id.* at 53, 138. Claimant described his symptoms at this time as consisting of uncomfortable pain resulting from a weakness and numbness in his legs, stiffness in his neck, and some soreness in both shoulders. *Id.* at 148. Claimant testified that on May 11, 1995, he was unable to secure the assistance of fellow employees that he felt was required in order the move doors that were laying about his work area floor; subsequently, after obtaining help from another boilermaker, claimant stated that he developed increased pain after they moved a large door into an upright position. *Id.* at 53-56. After setting forth this testimony, the administrative law judge concluded that the boilermaker mechanic position did not constitute suitable alternate employment as claimant was required to perform work beyond his physical restrictions and the position resulted in his having to request a reduction in the number of hours worked per day after four days of employment. *See* Decision and Order on Remand at 9.

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 his own conclusions and inferences from the evidence. *See Wheeler v. Interocean Stevedoring,* 21 BRBS 33 (1988). In the instant case, we hold that the administrative law judge's decision to rely upon claimant's extensive uncontroverted testimony is rational, and his finding that claimant's position in May 1995 as a boilermaker mechanic was beyond claimant's capabilities is supported by substantial evidence. *Mijangos,* 948 F.2d at 941, 25 BRBS at 78 (CRT). Accordingly, we affirm his conclusion that this job was not suitable alternate employment for claimant and that claimant remained totally disabled as a result of his initial injury. Given this finding, as well as the fact that claimant's restrictions remained the same on May 15 as prior to his attempt to work, the administrative law judge properly found that the events in 1995 were the result of the natural progression of the initial injury. His finding that CNA is thus liable for claimant's temporary total and permanent partial disability compensation is also affirmed.[2]

[2]Contrary to CNA's assertion on appeal, the fact that claimant's boilermaker mechanic position may have been necessary, and that claimant may have been able to perform the position's duties without extraordinary effort, is not dispositive of the issue. Rather, the administrative law judge properly considered whether the requirements of the position presented to claimant were within claimant's physical capabilities, taking into account claimant's uncontroverted testimony that he experienced pain and physical discomfort

immediately upon his employment in May 1995, that he was assigned duties in confined spaces which affected his physical condition, and that within four days he was required to seek additional prescription medication and request that his work day be reduced to six hours.

Lastly, we note that it is uncontroverted that when claimant attempted to return to this position on May 15, 1995, with the same restrictions that were in effect on May 2, 1995, employer would not re-employ him because of the possibility of re-injury. *See* Tr. at 60.

Accordingly, the administrative law judge's decision on remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge