

WILFORD NAILER )  
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 Claimant-Respondent )  
 )  
 v. )  
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 NEW ORLEANS STEVEDORING ) DATE ISSUED: June 20, 2001  
 COMPANY )  
 )  
 and )  
 )  
 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION, LIMITED )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, United States Department of Labor.

William S. Vincent, Jr. and William J. Delsa (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-LHC-2213) of Administrative Law Judge Clement J. Kennington awarding benefits 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).

Claimant, a hold man, sustained a work-place injury on June 22, 1997, while handing

material to another employee on a ladder, who was to use the material to hook a container onto the bottom of the ship. While claimant began to retrieve a hook, a jack began rolling, which pushed a pallet onto claimant's groin, and claimant fell back onto the jack. Claimant sustained back and testicular injuries in this accident. Employer voluntarily paid claimant temporary total disability benefits from June 25, 1997 to June 22, 1998, and permanent partial disability benefits from June 23, 1998 to March 23, 2000. In his Decision and Order, the administrative law judge found that claimant established his *prima facie* case of total disability, and that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant ongoing total disability benefits from June 22, 1997.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

In order to establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment due to his work-related injury. *See, e.g., Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5<sup>th</sup> Cir. 2000). Once, as in the instant case, claimant establishes his *prima facie* case, the burden shifts to employer to establish the existence of realistic job opportunities that are suitable for claimant, considering his age, education, vocational history and physical capabilities, and for which he could realistically compete if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981). The administrative law judge found that the jobs identified as suitable for claimant by employer's vocational consultant, Nancy Favaloro, were not in fact suitable given claimant's significant cognitive limitations and the physical restrictions placed by claimant's treating physician, Dr. Billings. The administrative law judge also found that claimant's vocational consultant, Ed Ryan, stated only one job was potentially suitable for claimant, without consideration of claimant's significant pain. The administrative law judge then found claimant's continuing complaints of pain to be credible and supported by diagnostic studies, and he therefore concluded that claimant cannot perform the jobs identified.

Employer contends the administrative law judge's rejection of the jobs identified by Ms. Favaloro is not supported by substantial evidence, in that Dr. Billings approved five of the jobs. Thus, employer contends the administrative law judge erred in stating the jobs are not within the restrictions placed by Dr. Billings. Employer also contends the administrative law judge erred in stating that Ms. Favaloro did not take into account claimant's cognitive limitations, and in crediting claimant's subjective complaints of pain.

We affirm the administrative law judge's award of total disability benefits. The administrative law judge's finding, that Ms. Favaloro did not take into account Dr. Billings's

restrictions and claimant's cognitive impairments, is questionable in light of Ms. Favaloro's hearing and deposition testimony, and Dr. Billings's approval of some of the identified jobs.<sup>1</sup>

Nonetheless, the administrative law judge found that claimant's vocational consultant stated that only one of the jobs identified, that of parking lot cashier, was potentially suitable for claimant,<sup>2</sup> and substantial evidence supports the administrative law judge's finding that none of the jobs is suitable for claimant given his significant pain.

In this regard, the administrative law judge found that Dr. Billings stated the jobs he approved are not medically contraindicated, *if* claimant's symptoms are under reasonable control. EX 18 at 24. Dr. Billings stated, however, that claimant's pain has stayed constant at a fairly high level, *id.* at 36, and that medication has not provided much relief, *id.* at 28-29. Mr. Ryan stated that claimant probably cannot hold a job if claimant indeed has the pain he has related. CX 7 at 68. Claimant testified that he is in severe pain, *see, e.g.* Tr. at

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<sup>1</sup>Claimant is illiterate and aptitude test results place him in the mildly mentally retarded classification. CX 5 at 1-3. Ms. Favaloro was aware of these factors when she identified potential employment for claimant. *See* Tr. at 68; EX 13. Based on claimant's vocational history, however, she stated that claimant has the ability to learn new job tasks. *See* EX 13 at 11. This statement does not indicate that she ignored claimant's limited cognitive abilities. In identifying claimant's restrictions, Dr. Billings checked a box stating that claimant could work an eight-hour day, within the restrictions indicated. Dr. Billings approved several of the jobs identified by Ms. Favaloro as being within the restrictions. EX 13.

<sup>2</sup>Mr. Ryan stated he contacted the potential employers identified by employer, and that claimant was not a viable candidate for any job but that of cashier given his physical restrictions and cognitive limitations. CX 7.

27, 30, and he takes several pain medications each day. Dr. Billings stated that claimant's persistent pain is consistent with nerve root irritation, and that diagnostic tests showed evidence of arthritic changes, primarily at L4-5. EX 18 at 12-16. Dr. Billings explained that the small joints of the back are similar to other joints, such as the knee, and that standing, sitting, walking, and merely remaining upright can cause inflammation and pain, despite medication. *Id.* at 29-30.

“A claimant's credible testimony may constitute substantial evidence justifying an award of compensation.” *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5<sup>th</sup> Cir. 1980). The administrative law judge is entitled to determine the weight to be given a witness's testimony, and credibility determinations are to be affirmed unless they are “inherently incredible or patently unreasonable.” *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Employer has not established that the administrative law judge's crediting of claimant's testimony concerning his pain, as supported by Dr. Billings's opinion, constitutes an abuse of the administrative law judge's discretion. In *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991), the United States Court of Appeals for the Fifth Circuit was presented with a case very similar to the case at bar. There was evidence, as here, that the claimant was capable of performing the alternate employment identified. There also was evidence, as here, that the claimant was in constant pain. The court concluded that the “facts in this case could support a finding in favor of either party. The choice between reasonable inferences is left to the ALJ and may not be disturbed if it is supported by the evidence.” *Mijangos*, 948 F.2d at 945, 25 BRBS at 81(CRT). Inasmuch as the administrative law judge's decision herein is rational, supported by substantial evidence, and in accordance with law, we affirm the finding that employer did not establish the availability of suitable alternate employment, and the consequent award of total disability benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge