

BRB No. 01-0770

JOSEPH T. BROWN)
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Claimant-Respondent)
)
)
v.)
)
RIVER RENTALS STEVEDORING,) DATE ISSUED: June 17, 2002
INCORPORATED)
)
and)
)
LOUISIANA WORKERS')
COMPENSATION CORPORATION)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ted Williams (Johnson, Stiltner & Rathman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-2652) of Administrative Law Judge Lee J. Romero, Jr., 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 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 March 31, 1999, claimant sustained a work-related injury to his lower back when he fell while walking up a gangway. Employer voluntarily paid claimant temporary total disability benefits from March 31, 1999, until July 14, 1999. Claimant returned to work in his usual position, and employer paid him partial disability benefits from July 15, 1999.

Employer terminated claimant's employment on January 10, 2000, for sleeping on the job in violation of company policy. Thereafter, claimant filed a claim for continuing temporary total disability compensation under the Act, as well as for retaliatory discharge.

In his decision, the administrative law judge found that claimant's termination was not in retaliation for his filing a claim under the Act. *See* 33 U.S.C. §948a. The administrative law judge found, however, that claimant is totally disabled after his discharge, as the job claimant held prior thereto was not suitable for him. As employer did not submit into the record any other evidence of suitable alternate employment, the administrative law judge awarded claimant continuing temporary total disability benefits from January 10, 2000.

On appeal, employer contends that the administrative law judge erred in finding that it did not provide claimant with a suitable position at its facility. Claimant has not responded to this appeal.

Employer argues that the administrative law judge erred in awarding claimant continuing temporary total disability benefits. Employer argues that the supervisory position claimant held from July 15, 1999 to January 10, 2000, constituted suitable alternate employment. In this regard, employer relied on having advised claimant that he was not to perform any activity which would hurt his back. Thus, employer argues that any manual labor claimant may have performed outside his restrictions was voluntary; employer notes that the testimony of the two other supervisors demonstrates the degree to which supervisors had control over their own activities. Finally, employer argues that as claimant was able to perform this supervisory position for approximately five months without complaint, the job was suitable.

Once, as here, the administrative law judge finds that claimant is unable to perform his usual work,¹ the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can satisfy this burden by providing claimant with a suitable job at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If claimant successfully performs a suitable alternate position, but is discharged for breaching company rules, employer does not bear a renewed burden of demonstrating suitable alternate employment thereafter. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th

¹Claimant's job, before and after the injury, was as a supervisor. The administrative law judge found that claimant's injury was "disabling" because employer conceded claimant was at least partially disabled. Decision and Order at 18.

Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). That a claimant is discharged due to his own misfeasance, however, does not negate his entitlement to any benefits to which he otherwise would be entitled had the job continued to be available to him. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Walker*, 19 BRBS 171.

In the instant case, the administrative law judge found that the supervisor position was not suitable for claimant, as the weight of the credible evidence established that claimant would be required to exert more than 20 pounds of force in this position; Dr. Nutik released claimant to sedentary/light work with a 20 pound lifting limit. The administrative law judge found that both claimant and his fellow supervisor, Mr. Giangrosso, testified that they assist their deck men in tying down dust tents and chaining and de-chaining dust boxes; they credibly reported that more than half of their tasks involved physical work and some of the tasks involved greater than 20 pounds of exertion, especially when the weather is windy or the dust tents are wet.² Decision and Order at 23.³ In addition to the testimony of claimant and Mr. Giangrosso, the administrative law judge also relied on the testimony of Mr. Jones, a Bunge administrative manager, as well as a directive from Mr. Schibler. *Id.* Mr. Jones stated that claimant should not be in the office and should be assisting his crew in loading the ship, placing dust covers and setting up the chute properly. Tr. at 144. Mr. Schibler, employer's president, sent an all- employee memorandum stating that employer expected all employees to be out on the deck of ships. CX 3. In finding the supervisor position unsuitable for claimant, the administrative law judge also found the testimony of employer's vocational consultant, Mr. Crane, compromised by his admitted omission from his analysis of any tasks related to the dust boxes.⁴ Finally, the administrative law judge credited claimant's consistent complaints of pain which required pain medication, and Dr. Correa's statement that he would not release claimant to full duty.⁵

²Mr. Mason, another supervisor, testified that he does "mostly paperwork," and "very little physical work, if any." *See* Tr. at 170.

³The administrative law judge stated that although claimant inconsistently testified at his deposition and at the hearing regarding laying down wet dust covers, shoveling grain and helping his two deck men after his accident, the tasks clearly exceeded his "light duty" restrictions, and do not provide a basis for concluding that his "modified" supervisory position constituted suitable alternate employment. Decision and Order at 23.

⁴Mr. Crane also acknowledged that tying down dust tents in windy conditions or when they are wet could involve more than 20 pounds of force.

⁵Dr. Correa stated that the muscle relaxant, flexeril, which had been prescribed to claimant for relief of his back pain could have caused claimant to fall asleep at work. *See*

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 inferences and conclusions from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir.1991). Thus, contrary to employer's contention, the administrative law judge was not required to find the supervisor job suitable for claimant because another supervisor, Mr. Mason, testified that he performed very little manual labor. In the instant case, substantial evidence supports the administrative law judge's finding that the job at employer's facility was not suitable for claimant prior to his discharge. Thus, this finding is affirmed. *Id.*

As a result, we reject employer's contention that the administrative law judge erred by awarding claimant continuing total disability benefits after he was discharged. Inasmuch as the administrative law judge rationally found that the job employer provided was not suitable, claimant is entitled total disability benefits irrespective of his discharge, as employer did not establish the availability of any other suitable alternate employment. *See generally Mangaliman*, 30 BRBS at 43; *Walker*, 19 BRBS at 173; *see also Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). Consequently, we affirm the administrative law judge's award of continuing total disability benefits from January 10, 2000, as it is rational, supported by substantial evidence and in accordance with law.

generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge