

MICHAEL MELLAND )  
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 Claimant-Petitioner )  
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 v. )  
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 REYNOLDS METALS COMPANY ) DATE ISSUED: 06/25/2010  
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 and )  
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 ACE, USA (CIGNA) )  
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 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order Denying Additional Benefits and the Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Additional Benefits and the Order Denying Motion for Reconsideration (2006-LHC-01539) of Administrative Law Judge Jennifer Gee 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).

Claimant was injured on December 30, 1995, when the bobcat he was operating to unload ore in the hold of a ship ran into a wall. Claimant suffered whiplash and sought treatment a few days following the accident. When conservative treatment was unsuccessful, claimant underwent an anterior cervical discectomy at C6-7 on June 4, 1996. Following the surgery, claimant returned to work on December 2, 1996 with a restriction to light duty. Claimant returned to full-time work on December 30, 1996, and continued working for employer until 2002, when the facility was closed by new owners. Between 2002 and 2004, claimant worked a number of jobs, including maintenance and labor jobs. His last position was as a truck driver for Paramount Supply Company, where his duties included the occasional use of a fork truck, transporting products from place to place, and paperwork. Claimant quit this position on April 12, 2005, and has not worked since that date. He sought permanent partial disability benefits under the Act.

In her decision, the administrative law judge found that claimant filed a timely claim for benefits in May 1996, which remained open and pending. 33 U.S.C. §913. She also found that claimant established that he sustained a work-related injury on December 30, 1995, and that he reached maximum medical improvement on December 29, 1996. As claimant was unable to return to his former duties during his recovery from surgery, the administrative law judge found that claimant is entitled to temporary total disability benefits from June 3, 1996 to December 1, 1996, and she credited employer for benefits previously paid for this period. The administrative law judge found that claimant returned to light-duty work on December 2, 1996, and she awarded claimant temporary partial disability benefits from December 2, 1996 to December 29, 1996. The administrative law judge found that claimant did not demonstrate his inability to return to his usual work as of December 30, 1996. Therefore, the administrative law judge denied further benefits. The administrative law judge denied claimant's motion for reconsideration, finding that although claimant's medical restrictions continued until the end of January 1997, he failed to establish that he had suffered any economic loss due to the restrictions.

On appeal, claimant contends that the administrative law judge erred in denying disability benefits after December 29, 1996. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

Claimant contends that the administrative law judge erred in finding that he could return to his usual work on December 29, 1996, as claimant remained under restrictions until January 27, 1997, and continues to suffer from symptoms that prevent his performing his usual work as a bobcat driver. In order to establish a *prima facie* case of total disability, claimant must show that he cannot return to his usual employment due to his work-related injury. See, e.g., *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Claimant's credible complaints of pain alone may be sufficient to meet his burden.

*Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). If claimant establishes he cannot return to his usual work, employer bears the burden of establishing the availability of suitable alternate employment in order to establish that claimant is not totally disabled. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

In reviewing the evidence, the administrative law judge acknowledged on reconsideration that the restrictions imposed by Dr. Martinson following the surgery in June 1996 continued until the end of January 1997.<sup>1</sup> The administrative law judge found, however, that claimant returned to full-time work at employer's facility on December 29, 1996, a finding that claimant does not contest on appeal. Thus, although claimant could not return to his full pre-injury duties in January 1997, employer established that claimant retained some wage-earning capacity by virtue of his return to work. See *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9<sup>th</sup> Cir. 1975); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5<sup>th</sup> Cir. 2002). There is no evidence in the record regarding claimant's wages during the period from December 30, 1996 to January 27, 1997. Contrary to claimant's contention, once employer establishes suitable alternate employment, as it did here, it is claimant's burden to establish that he has a loss in wage-earning capacity due to his work injury. See generally *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002). As claimant returned to full-time work and did not submit any evidence that he had a loss in wage-earning capacity after December 29, 1996, we affirm the administrative law judge's finding that claimant is not entitled to permanent partial disability benefits from December 29, 1996 to January 27, 1997, notwithstanding the existence of medical restrictions.

The administrative law judge also addressed whether claimant suffers from any residual disability due to his work-related injury. She found that the physicians who examined claimant in 2005 and in 2006 did not impose any work restrictions or recommend that claimant limit his activities. Drs. Henry and Rosenbaum examined claimant in 2005 and found evidence of cervical radiculopathy and that his neck range of motion was "quite painful." However, neither physician imposed restrictions or recommended that claimant limit his physical activity. Emp. Exs. 15-17. Dr. Coletti reported on May 5, 2006 that claimant still has residual radicular symptoms which are consistent with his original injury; he rated claimant with a 15 percent impairment of the

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<sup>1</sup> On December 30, 1996, Dr. Martinson recommended that claimant work eight hours per day of sedentary work for two weeks and continue with physical therapy. Emp. Ex. 12. Dr. Martinson opined that claimant could advance to four hours of "mill work" and four hours of desk work from January 14 until January 27, 1997. Emp. Ex. 12 at 44.

whole person. Dr. Coletti, however, did not impose any restrictions. Cl. Ex. 4; Emp. Ex. 20. Dr. Waller examined claimant in February 2006 and reported that there was no objective worsening of his condition and no objective reason he cannot return to his former work. Emp. Ex. 19. He also reported symptom magnification and facetious weakness. *Id.* Based on the totality of this evidence, the administrative law judge rationally concluded that claimant did not establish he had any medical restrictions due to the work injury after the expiration, at the end of January 1997, of the restrictions imposed by Dr. Martinson. This finding is supported by substantial evidence and is affirmed.

The administrative law judge also rejected claimant's testimony that he is physically unable to perform the duties of his former position with employer or the positions identified by employer's vocational counselor. She found that claimant is not a credible witness as he has performed a number of the duties of his former job since his return to work in 1997, such as the operation of a forklift, at employer's facility and in his subsequent employment. The administrative law judge also noted that claimant testified that he would be unable to perform the duties of the jobs identified by the vocational counselor even though he did not know the details of the jobs' physical requirements. In addition, the administrative law judge found that claimant did not consistently describe his pain to Drs. Waller and Coletti, and that Dr. Waller found symptom magnification. The administrative law judge thoroughly reviewed all of the evidence of record, rejected claimant's complaints of pain, and concluded that any impairment due to the work-related injury on December 30, 1995 had resolved as of January 27, 1997. We affirm this finding as it is rational and supported by substantial evidence. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9<sup>th</sup> Cir. 1990)(table). As any loss in wage-earning capacity thereafter is not due to claimant's work injury, we affirm the denial of additional disability compensation.

Accordingly, the administrative law judge's Decision and Order Denying Additional Benefits and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge