

BRB No. 02-0169

THURMAN JOHNSON)
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 Claimant-Petitioner)
)
 v.)
)
 STEVEDORING SERVICES OF) DATE ISSUED: November 15, 2002
 AMERICA)
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 and)
)
 HOMEPORT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Andrew J. Hanley (Crossley McIntosh Prior & Collier), Wilmington, North Carolina, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (2001-LHC-0641) of Administrative Law Judge David W. Di Nardi 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).

Claimant injured his back at work on March 29, 1999, as he was unloading a container as part of his duties as a hauler driver. The parties stipulated that employer voluntarily paid claimant temporary total disability benefits from March 30 through May 31, 1999. The administrative law judge found that claimant could return to his usual work on June 1, 1999, and thus denied additional compensation. Alternatively, the administrative law judge found that employer established the availability of suitable alternate employment through the jobs identified by employer's vocational expert, Nancy Favaloro.

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits, contending that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability after June 1, 1999, and in alternatively finding that employer established the availability of suitable alternate employment. Claimant also contends that the administrative law judge erred in not determining whether he sustained a loss in his post-injury wage-earning capacity. Employer responds in support of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in finding that he could return to his usual work on June 1, 1999. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. See *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). In making this determination, the administrative law judge must compare claimant's medical restrictions to the specific physical requirements of his usual employment. See *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT)(4th Cir. 2001); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Claimant's regular duties at the time that he was injured are his usual employment. See *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982).

In the instant case, the administrative law judge did not specifically determine the physical requirements of claimant's usual work and compare them to any medical restrictions claimant may have as a result of his injury. Rather, the administrative law judge found that claimant could return to his usual work on June 1, 1999, based on the opinions of Drs. Sutton and Moore, as well as the surveillance videotape. On the videotape, claimant is shown unloading boxes, weight unknown, from a U Haul truck at a hotel, on August 6, 1999. Emp. Ex. 44. The administrative law judge rationally inferred from this tape that claimant's lifting ability was greater than claimant stated. See *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir.

¹Dr. Moore viewed the videotape, but stated he could not see the contents of the boxes, and therefore could not judge the weight claimant was lifting. EX 20.

1962). Moreover, Dr. Sutton=s opinion supports the administrative law judge=s finding that claimant could return to his usual work. *Gacki*, 33 BRBS 127. Nonetheless, we must remand the case as the opinion of Dr. Moore does not unequivocally establish that, as of June 1, 1999, claimant could return to his usual work. Moreover, the administrative law judge did not discuss the opinion of Dr. Johnson.

On remand, the administrative law judge must determine the duties of claimant=s usual work and then compare them to the medical restrictions, if any, imposed on claimant. See *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Curit*, 22 BRBS 100. On June 24, 1999, Dr. Moore stated claimant could return to work with restrictions against climbing and lifting more than 15 pounds. Emp. Exs. 11 at 7-8, 12, 36 at 19. He stated claimant could drive a forklift, truck, or other vehicle. *Id.* Dr. Moore also imposed these same restrictions on July 22, September 10, and October 29, 1999. Emp. Exs. 11 at 5-6; 14, 20. Dr. Moore increased claimant=s lifting ability to 40 pounds on February 1, 2000, Emp. Exs. 11 at 3, 30, but decreased it to 20 pounds on March 28, 2000. Emp. Exs. 11 at 1, 32. On April 10, 2000, Dr. Moore opined that claimant has no permanent impairment as a result of the work injury. Emp. Ex. 33. Although Dr. Moore eventually returned claimant to work without restrictions, he did not do so on June 1, 1999. Thus, as the administrative law judge did not compare the restrictions placed by Dr. Moore with the requirements of claimant=s usual work, we cannot affirm his reliance on Dr. Moore=s opinion to terminate benefits as of June 1, 1999. See *Curit*, 22 BRBS 100. In addition, the administrative law judge did not weigh the opinion of Dr. Johnson, who opined on April 20, 2001, that claimant is permanently restricted from climbing and lifting more than 20 pounds due to the work injury, and from operating heavy machinery because

²On May 14, 1999, Dr. Sutton stated that claimant Ahopefully@ could return to work without restrictions on June 1, 1999. Emp. Ex. 6 at 4. He filled out a return to work slip on May 19, 1999, stating that claimant could return to work on June 1, 1999, with no restrictions. Emp. Ex. 7. On June 17, 1999, Dr. Sutton acknowledged claimant=s belief that he was unable to work, but stated that claimant Awould probably be able to go back to his previous level of activity and work in [sic] demands based on his injury. I think three months [sic] recovery is enough from a resolution standpoint.@ Emp. Ex. 6 at 3. Dr. Sutton saw claimant again in January 2000, and again returned claimant to full time work without restrictions.

³Representatives of the employers at the Wilmington port stated they would not be able to employ anyone who could not lift, climb, or operate forklifts, trucks, or hustlers. Cl. Ex. 13. Mr. Hines, the union=s business agent, testified that claimant=s usual work requires lifting of more than 20 pounds and climbing. Tr. at 61, 70-71. The job description of tractor trailer driver for container operations, which may be a part of claimant=s usual work, requires occasional climbing. Cl. Ex. 17.

of the problem with his legs. See *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring); Cl. Ex. 16 at 12-13, 15. Therefore, we vacate the administrative law judge's finding that claimant did not establish his inability to return to his usual work, and we remand the case for further findings after a consideration and weighing of all relevant evidence.

Claimant also contends that the administrative law judge erred in alternatively finding that employer established the availability of suitable alternate employment. Once a claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). The date suitable alternate employment is established marks the end of claimant's entitlement to total disability benefits. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2^d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

In this case, the administrative law judge found that employer established the availability of suitable alternate employment based on the labor market survey performed by Ms. Favaloro. See Decision and Order - Awarding Benefits at 27-28, 43-49. In her April 3, 2001, survey, Ms. Favaloro identified five specific jobs as suitable for claimant: production worker, packager, toe sewer, quality inspector, and dispatcher. Emp. Ex. 45 at 2-3. The jobs were all light duty jobs which do not require climbing or lifting more than 20 pounds, and which paid between \$5.15 to \$7 per hour. *Id.* The administrative law judge's finding that these jobs are suitable for claimant is rational and supported by substantial evidence. Thus, we affirm the administrative law judge's alternative finding that employer established the availability of suitable alternate employment. See *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); Decision and Order - Awarding Benefits at 43, 47, 48; Emp. Exs. 25, 45. On remand, if necessary, the administrative law judge should determine the date on which employer established the availability of suitable alternate employment, see *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Rinaldi*, 25 BRBS 128, and if claimant established that despite a diligent job search, he was unable to obtain suitable alternate employment. See *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); see also *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Livingston v. Jacksonville Shipyards*, 32 BRBS 123 (1998); Decision and Order - Awarding Benefits at 49; Tr. at 85.

⁴⁴The administrative law judge stated, "Thus, as the Employer has shown the availability of suitable alternate employment within Claimant's residual work capacity, the burden now is on Claimant to show that he is ready, willing and able to return to work, just like any other unemployed worker." (Citation omitted). Decision and Order - Awarding Benefits at 49.

Claimant lastly contends that the administrative law judge erred in not determining whether he sustained a loss in his post-injury wage-earning capacity. An award for partial disability benefits in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. '908(c)(21), (h). Where employer establishes the availability of suitable alternate employment, as here, the wages which the alternate jobs would have paid at the time of the injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss in wage-earning capacity. See *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT)(5th Cir. 1998); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT)(D.C. Cir. 1990); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). If the wages the alternate jobs paid at the time of injury are unknown, the administrative law judge must determine claimant's loss in wage-earning capacity by applying the increase in the national average weekly wage downward to account for inflationary effects. See *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Richardson*, 23 BRBS 327. In this case, the administrative law judge did not award partial disability benefits and thus was not required to determine whether claimant sustained a loss in his post-injury wage-earning capacity. However, in light of the Board's vacating of the administrative law judge's finding that claimant could return to his usual work on June 1, 1999, the administrative law judge on remand must determine claimant's post-injury wage-earning capacity, and any loss thereof, if the administrative law judge finds that claimant established his *prima facie* case and did not establish diligence in pursuing alternate employment.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated with respect to the administrative law judge's finding that claimant could return to his usual work on June 1, 1999, and the consequent denial of additional disability benefits. The case is remanded for further consideration of that issue, and if necessary, the unresolved issues concerning suitable alternate employment and claimant's post-injury wage-earning capacity. In all other respects, we affirm the administrative law judge's decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge