BRB No. 98-325

TROY W. BALL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
TRINITY MARINE	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation Benefits, Order Denying Claimant's Motion for Reconsideration, and Order of Dismissal of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Ed W. Barton (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Collins C. Rossi (Bernard, Cassisa, Elliott & Davis), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits, Order Denying Claimant's Motion for Reconsideration (96-LHC-359), and Order of Dismissal (96-LHC-360 and 96-LHC-361) of Administrative Law Judge Richard D. Mills rendered on claims 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 shipfitter, injured his left shoulder on January 22, 1993, after a board fell off a scaffold and hit him in the left upper arm. Claimant suffered subsequent injuries to his left foot on July 13, 1993, and to his back on June 16, 1994. Claimant had left shoulder surgery on November 17, 1993, and returned to light duty work with employer from April 4, 1994, to June 16, 1994. The shipyard closed down in late 1994. Employer voluntarily paid claimant temporary total disability benefits for the left shoulder injury from November 17, 1993, to April 5, 1994, temporary partial disability benefits from October 10, 1994, to September 29, 1995, and benefits for a 12 percent permanent partial disability to the left arm. Employer also voluntarily paid claimant temporary total disability benefits from June 17, 1994, to July 13, 1995, for his back injury sustained on June 16, 1994. Claimant sought additional disability benefits.

The administrative law judge denied claimant's claim after finding that claimant's post-injury light duty work with employer was suitable alternate employment in which claimant suffered no loss in wage-earning capacity. The administrative law judge also denied claimant's claim for benefits after the closing of the shipyard in late 1994, stating that employer is not a long-term guarantor of employment. The administrative law judge awarded claimant medical benefits, except for Dr. Teuscher's medical bill of $783.75 as it had been written off by the physician. The administrative law judge dismissed claimant's claims for his left foot and back injuries in a separate order based on claimant's motion made at the hearing. The administrative law judge denied both of claimant's motions for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of benefits for his left shoulder claim and the dismissal of his claims for his left foot and back injuries. Employer responds in support of the administrative law judge's denial of benefits for claimant's left shoulder claim and dismissal of claims for claimant's left foot and back injuries.

We first address claimant's challenge to the administrative law judge's denial of benefits for his left shoulder claim. Claimant contends that the administrative law judge erred in finding that he suffered no loss in his post-injury wage-earning capacity in his post-injury light duty job with employer. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his

post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). If they do not, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, and industrial history, as well as the availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier*, 10 BRBS at 660. The party seeking to prove that claimant's actual post-injury earnings do not fairly and reasonably represent his post-injury wage-earning capacity bears the burden of proof. *See, e.g.*, *Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT).

The administrative law judge rationally found that claimant suffered no loss in his post-injury wage-earning capacity in the light duty job at employer's facility, as claimant's pay records indicated that claimant's work hours varied greatly and his typical work hours pre-injury were extremely similar to his post-injury work hours; thus, the administrative law judge found that post-injury claimant was earning the same pay for the same hours.[1] *See Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); Decision and Order Denying Compensation Benefits at 8; Order Denying Claimant's Motion for Reconsideration at 3; Cl. Ex. 14. Thus, we affirm the administrative law judge's finding that claimant's post-injury light duty job with employer was suitable alternate employment in which claimant suffered no loss in his post-injury wage-earning capacity.

We agree, however, with claimant's contention that the administrative law judge erred by stating that the closure of employer's shipyard is of no consequence to claimant's entitlement to benefits. Once, as here, claimant establishes that he is unable to perform his usual work, 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

[1]Claimant's pay records indicate that claimant averaged 37 hours per week in the 42 weeks pre-injury and 35 hours per week in the 42 weeks post-injury prior to his shoulder surgery. On light duty to which claimant returned after his shoulder surgery, claimant averaged approximately 35 hours. Cl. Ex. 14.

physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). Where claimant is laid off from a post-injury light duty job within employer's control that constituted suitable alternate employment, for reasons unrelated to any actions on his part, and demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In *Mendez*, employer withdrew the opportunity for claimant to do light duty work in its facility by laying off claimant with the result that suitable alternate employment in employer's facility was no longer available. The Board affirmed the administrative law judge's finding that Mendez was totally disabled since the claimant's light duty job with employer was no longer available and as employer did not establish the availability of other suitable alternate employment. *Mendez,* 21 BRBS at 25. There was no evidence of improper motivation on behalf of employer in laying off Mendez. Thus, in concluding that employer was not required to re-establish suitable alternate employment after its shipyard closed down in this case, the administrative law judge erroneously found that the holding in *Mendez* requires an improper motivation on behalf of employer as the reason why claimant was no longer working in his post-injury light duty job with employer. Order Denying Claimant's Motion for Reconsideration at 3. The administrative law judge also reasoned that employer is not a long-term guarantor of employment and that an employee who has regular and continuous[2] post-injury employment must take chances on unemployment like anyone else, relying in part on the Board's decision in *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). Order Denying Claimant's Motion for Reconsideration at 2-3. We note, however, that the Board's decision in *Edwards* was subsequently reversed by the United States Court of Appeals for the Ninth Circuit in *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994), and that case involved alternate employment on the open market.[3] When, as here, claimant is

[2]We note, however, that claimant only worked two months before his back injury and was on disability for his back injury when the shipyard closed down.

[3]In *Edwards*, the United States Court of Appeals for the Ninth Circuit held that claimant's 11 week job as a mechanical inspector for another employer from which he was laid off because of a reduction in force did not satisfy employer's burden of

unable to return to his usual work, and employer withdraws light duty employment at its facility for reasons unrelated to any misconduct on claimant's part, the burden to establish suitable alternate employment remains with employer if it seeks to avoid liability for total disability benefits. *Mendez,* 21 BRBS at 25; *cf. Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP,* 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993)(employer is not liable for any loss in wage-earning capacity caused by claimant's losing, due to his misconduct, a suitable post-injury job at employer's facility). Consequently, the case is remanded to the administrative law judge to determine whether employer established suitable alternate employment after its shipyard closed down. In this regard, the administrative law judge should discuss and weigh the vocational rehabilitation reports of Messrs. Quintanilla and Stanfill. Emp. Ex. 15. If the administrative law judge finds suitable alternate employment established, he then must determine whether claimant diligently tried but was unable to secure employment and determine claimant's post-injury wage-earning capacity.

Claimant also contends that the administrative law judge erred in holding that employer is not liable for Dr. Teuscher's medical bill in the amount of $783.75. Employer is liable to claimant for all medical expenses due to a work-related injury paid by claimant and to the medical provider for bills not paid by claimant. *See Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993); *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997)(decision on reconsideration *en banc*); *Nooner v. National Steel & Shipbuilding Co.*, 19 BRBS 43 (1986). Contrary to claimant's contention, the administrative law judge properly held that employer is not liable for Dr. Teuscher's medical bill on the facts of this case as the physician had written it off and was not seeking payment for it from claimant or employer. *See Plappert*, 31 BRBS at 109; *Nooner*, 19 BRBS at 43; *see also U.S. v. Bender Welding & Machine Co.*, 558 F.2d 761, 764 (5th Cir. 1977)(employer is not liable for medical services which are free); Decision and Order Denying Compensation Benefits at 9; Order Denying Claimant's Motion for Reconsideration at 3; Cl. Ex. 5 at 53; Emp. Ex. 24 at 53. If the physician had sought payment for this bill, employer would have been liable for it. 33 U.S.C. §907(d). Consequently, we affirm the administrative law judge's finding on this matter.

We next address claimant's challenge to the administrative law judge's

---

establishing the availability of suitable alternate employment. *Edwards*, 999 F.2d at 1375, 27 BRBS at 83 (CRT). The court, deferring to the Director's interpretation, reasoned that employer failed to carry its burden of establishing suitable alternate employment because the short-lived employment at the other employer was not "realistically and regularly available" to Edwards on the open market. *Id.*

dismissal of claimant's left foot and back claims. At the hearing in the instant case, claimant's counsel stated that claimant was not going to pursue these claims because his left shoulder injury primarily restricted his earnings. Tr. at 4-5. Claimant's counsel also indicated that he just "kind of abandoned" these claims. Tr. at 6. Subsequently, claimant's counsel made an oral motion to withdraw these claims which the administrative law judge granted as it was unopposed, *id*., and he summarily dismissed these two claims in his Order of Dismissal. On reconsideration, the administrative law judge concluded that it was within his discretion to dismiss these two claims as claimant abandoned them and orally made it clear to the court that he was abandoning them and was not seeking adjudication, relying on the holding in *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989), that 29 C.F.R. §§18.39(b) and 18.29(a) provide authority for an administrative law judge, in the exercise of his sound discretion, to dismiss a claim where it has been abandoned. Order Denying Claimant's Motion for Reconsideration at 2.

If a claimant expresses a desire not to pursue a claim after the case has been transferred for a formal hearing, the administrative law judge should treat the motion as a request for withdrawal rather than simply dismissing the claim. *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978). The Board has held that administrative law judges have the authority to consider motions for withdrawal, provided they adhere to the requirements in the regulations. *Id.; Stevens v. Matson Terminals, Inc.*, BRBS , BRB No. 97-1581 (Aug. 12, 1998); 20 C.F.R. §702.225.

We agree with claimant that the administrative law judge erred in dismissing the claims because his desire, through counsel, not to pursue these two claims after the case has been transferred for a formal hearing should be treated as a motion to withdraw, which must be in writing, and requires the administrative law judge to determine whether it is for a proper purpose and in claimant's best interest. 20 C.F.R. §702.225(a);[4] *see Stevens,* slip. op. at 3; *Graham*, 9 BRBS at 155; *Lundy v.*

[4]Section 702.225(a) states:

> (a) *Before adjudication of claim*. A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: *Provided*, That:
>
> > (1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;
> >
> > (2) The claimant is alive at the time his request for

Atlantic Marine, Inc., 9 BRBS 391 (1978); *but see Ridley v. Surface Technologies Corp.*, BRBS , No. 97-1362 (June 10, 1998)(case remanded to the administrative law judge to determine whether claimant in fact was requesting a withdrawal by not wanting to pursue his claim). Moreover, the administrative law judge erroneously relied on *Taylor*, 22 BRBS at 408, as that case involved a failure to prosecute in that the claimant failed to appear at the hearing. Furthermore, the regulations at 29 C.F.R. §§18.39(b) and 18.29(a) do not apply in the instant case as the specific longshore regulation governing withdrawals, namely, 20 C.F.R. §702.225, applies. *See Bogdis v. Marine Terminals Corp.*, 23 BRBS 136, 139 (1989); 29 C.F.R. §18.1. We, therefore, vacate the administrative law judge's dismissal of these two claims and remand this case to the administrative law judge to consider claimant's motion to withdraw in light of the regulatory criteria. 20 C.F.R. §702.225.

---

withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.225(a).

Accordingly, the administrative law judge's denial of benefits on claimant's shoulder claim after June 16, 1994, is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's denial of claimant's left shoulder claim is affirmed, including the administrative law judge's holding that employer is not liable for Dr. Teuscher's bill in the amount of $783.75. We also vacate the administrative law judge's dismissal of claimant's left foot and back claims and remand this case to the administrative law judge for consideration consistent with 20 C.F.R. §702.225.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge