BRB No. 01-0183

ROCCO MISSUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL	)	DATE ISSUED: Sept. 25, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order of Denial of Motion for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order of Denial of Motion for Reconsideration (99-LHC-0742) of Administrative Law Judge of Ralph A. Romano 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 slipped and fell on April 23, 1998, during the course of his employment as a TIR man. Claimant reported injuries to his head, neck, back, right shoulder and right knee. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from April 24 to June 7, 1998. Claimant unsuccessfully attempted to return to work as a maintenance man on July 7, 1998. At the formal hearing on February 8, 2000, claimant sought continuing compensation for temporary total disability from June 8, 1998.

In his decision, the administrative law judge determined that claimant's usual employment was equally apportioned between working as a TIR man and a maintenance man. The administrative law judge found that claimant established he could not return to his usual employment as a maintenance man. The administrative law judge credited employer's offer of continuing employment as a TIR man, an offer which was extended at the formal hearing by Mr. Bolcar, employer's Safety Director, to find that employer established the availability of suitable alternate employment. The administrative law judge thus concluded that claimant is entitled to compensation for temporary total disability from April 23, 1998, to the date of the hearing on February 8, 2000. In his Order denying claimant's motion for reconsideration, the administrative law judge found that claimant did not carry his burden of establishing a loss of wage-earning capacity arising from employer's showing of suitable alternate employment as a TIR man. The administrative law judge refused to reopen the record for claimant to submit evidence of a wage loss.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment and the administrative law judge's denial of claimant's motion for reconsideration. Employer responds, urging affirmance.[1]

[1]Employer's cross-appeal, BRB No. 01-0183A, was dismissed at its request by Order dated May 29, 2001.

Claimant initially contends that the administrative law judge's finding that employer's job offer of a position as a TIR man established the availability of suitable alternate employment is not supported by substantial evidence. Specifically, claimant contends that the job duties of a TIR man are not within the work restrictions placed by claimant's treating physician, Dr. Krishna, and the administrative law judge failed to address Dr. Krishna's testimony that claimant is totally disabled. 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 physical restrictions, is capable of performing.[2] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). 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); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the position identified by employer. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In the instant case, the administrative law judge found that the specific restrictions of Dr. Krishna are consistent with Mr. Bolcar's description of the job duties of a TIR man. Moreover, the administrative law judge credited the opinions of Drs. Nehmer, Marton and Head, and the observation of Drs. Nehmer and Head that claimant exaggerated his symptoms, in concluding that claimant is physically able to work as a TIR man. Mr. Bolcar testified that a TIR man inspects containers and chassis for damage as they enter and exit employer's facility and that it is the lightest duty available. Tr. at 88-89, 94. Mr. Bolcar described the job duties of a TIR man as walking around the chassis/container, conducting a visual inspection, and completing a form. Tr. at 92. Mr. Bolcar stated that claimant is not required to bend and he regularly may sit on a stool inside a booth. Tr. at 90-92, 94. Dr. Krishna opined that claimant is restricted from strenuous activity. CX 8 at ex. 2. Specifically, Dr. Krishna stated that claimant should not bend, lift, kneel, or crawl, and that claimant's job duties should not require use of his dominant right hand and arm, and standing all day. CX 8 at 24-25. Drs. Head and Nehmer stated that their examinations revealed objective findings of

[2]In its response brief, employer contends that claimant failed to establish that he is unable to return to his usual employment because the administrative law judge found that claimant could return to work as a TIR man. We reject employer's contention. In view of the administrative law judge's unchallenged finding that claimant worked half the time as a maintenance man and half the time as a TIR man, the administrative law judge properly determined that claimant's inability to work as a maintenance man renders claimant unable to return to his usual employment. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

symptom magnification and they opined that claimant is capable of working as a TIR man. EX 16 at 24-25; EX 17 at 16-19. Dr. Marton examined claimant on May 20, 1998; he reported that claimant's injuries had resolved and that claimant may engage in full activities. EX 4.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991). In the instant case, the administrative law judge's comparison of Mr. Bolcar's job description of the duties of a TIR man with the opinions of Drs. Nehmer, Merton, and Head, supports the administrative law judge's conclusion that claimant is capable of working as a TIR man. Moreover, the administrative law judge acted within his discretion in crediting the specific work restrictions of Dr. Krishna over Dr. Krishna's opinion that claimant is totally disabled. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Thus, the administrative law judge's finding that claimant is physically able to return to work as a TIR man is rational, is supported by substantial evidence, and is affirmed. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001). We therefore affirm the administrative law judge's finding that claimant's entitlement to temporary total disability benefits terminated on February 8, 2000.

Claimant further contends that employer's job offer does not establish the availability of suitable alternate because employer failed to establish the wage rate claimant would earn if he returned to work as a TIR man. Moreover, claimant contends that the administrative law judge erred by denying claimant's motion for reconsideration on the basis that claimant has the burden of proof to show a loss of wage-earning capacity from employment as a TIR man. In his initial decision, the administrative law judge stated that claimant could request modification should employer's job offer not be honored in any material way. *See* 33 U.S.C. §922. On reconsideration, the administrative law judge rejected claimant's contention that the administrative law judge must determine whether employment as a TIR man resulted in a loss of wage-earning capacity.[3] The administrative law judge stated that claimant has the

[3]Alternatively, claimant requested that the administrative law judge grant modification and reopen the record, or remand the case to the district director for further proceedings, to determine the wages claimant would earn as a TIR man.

burden to establish any loss in wage-earning capacity, and that claimant failed to present any such evidence. The administrative law judge also declined to re-open the record for purposes of entering evidence of a wage loss, finding that claimant could reasonably have anticipated the need to garner evidence on this issue prior to the hearing.

We agree with claimant that the administrative law judge erred by not determining the wages paid by the job as a TIR man. The mere fact that employer establishes the availability of suitable alternate employment as a TIR man does not establish that claimant does not have a loss in wage-earning capacity. As part of its burden of demonstrating suitable alternate employment, employer must establish the general number of hours claimant would be expected to work and a general rate of pay for the position. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). Moreover, we agree with claimant's contention that the administrative law judge erred on reconsideration by placing the burden of proof on claimant to establish a wage loss resulting from the job offer as a TIR man. It is well-established that the party contending that the employee's actual post-injury earnings are not representative of his residual wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See*, *e.g.*, *Guidry*, 967 F.2d at 1043-1046, 26 BRBS at 32-35(CRT); *see also Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990). In the instant case, claimant has no post-injury wages as he has not returned to work since his injury. Employer, therefore, must establish, in conjunction with its burden of establishing the availability of suitable alternate employment, that claimant's post-injury wage-earning capacity is greater than zero.[4] The wages which the TIR man job would have paid at the time of claimant's

[4]This evidentiary scheme is consistent with the Section 8(h) of the Act, 33 U.S.C. §908(h). Section 8(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. 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, industrial history, and availability of employment which he can do post-injury. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The administrative law judge erred by reasoning on reconsideration that the Supreme Court's holding in *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), which requires the proponent to bear the burden of persuasion, necessitates a finding against claimant when both parties fail to carry their burden of proof. As employer here seeks to establish that claimant's absence of post-injury wages does not represent his

injury should be compared to claimant's pre-injury average weekly wage to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. *See* 33 U.S.C. §908(c)(21), (e); *see also Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Inasmuch as the administrative law judge did not discuss the wages paid by the position offered by employer or analyze claimant's wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), we must vacate the administrative law judge's denial of additional benefits and remand this case for the administrative law judge to determine claimant's post-injury wage-earning capacity, and any loss thereof.[5] 33 U.S.C. §908(c)(21), (e); *see generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

Accordingly, the administrative law judge's finding that claimant is not entitled to an award of partial disability benefits is vacated, and the case is remanded for additional findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Order of Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

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residual earning capacity, it properly bears the burden of persuasion on this issue. *See Avondale Shipyards v. Guidry*, 967 F.2d 1039, 1043-1046, 26 BRBS 30, 32-35 (CRT)(5th Cir. 1992).

[5]We note that the administrative law judge's finding on reconsideration that claimant should have developed evidence regarding any loss of wage-earning capacity prior to the hearing is inconsistent with the administrative law judge's finding that employer did not establish suitable alternate employment until it made claimant a job offer at the formal hearing.

NANCY S. DOLDER
Administrative Appeals Judge