BRB No. 06-0167

JAROSLAV VISEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	DATE ISSUED: 09/22/2006
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Karen P. Staats, District Director, United States Department of Labor.

Jennifer Kim (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Approval of Rehabilitation Plan and Award (No. 14-139411) of District Director Karen P. Staats 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 review the district director's implementation of the vocational rehabilitation plan under the abuse of discretion standard. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006).

Claimant was injured while working as a dock rigger. It is undisputed that he cannot return to that work and that he has a permanent disability as a result of his injury. Claimant worked with Mr. Richards, a vocational rehabilitation specialist, to develop a retraining plan with the ultimate goal of becoming a mechanical or architectural drafter.[1] Mr. Cope, the Office of Workers' Compensation Programs (OWCP) Rehabilitation Specialist, recommended approval, and on October 12, 2005, the district director approved claimant's plan. Employer appeals the decision approving vocational retraining, asserting that claimant is not a proper candidate for retraining because it identified suitable alternate work for him. Employer asks the Board to vacate the decision and remand the case for further consideration of this evidence by the district director. The Director, OWCP, responds, arguing that the district director did not abuse her discretion in approving the plan. Claimant has not responded to employer's appeal.

Section 39(c)(2) gives the Secretary the discretionary authority to direct "the vocational rehabilitation of permanently disabled employees. . . ." 33 U.S.C. §939(c)(2); *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006), *aff'g* 37 BRBS 65 (2003); *see also Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). The regulations at 20 C.F.R. §§702.501-702.508 implement Section 39(c)(2), and Section 702.506 states in pertinent part:

> Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially.

The review of a district director's implementation of a claimant's vocational rehabilitation plan requires the Board to consider whether the district director addressed the relevant regulatory factors and whether there has been a clear error of judgment.

[1]A pre-vocational training program in basic English and math was also included in the overall plan.

Meinert, 37 BRBS 164. The factors for determining the propriety of a rehabilitation plan are: 1) the employee must be permanently disabled; 2) the plan must return the employee to remunerative employment within a "short" period; and 3) the plan must restore or increase the claimant's wage-earning capacity.

In this case, Mr. Richards sent a plan to Mr. Cope requesting approval of claimant's request to enroll in a Design Drafting Technology program that would take less than two years to complete and would prepare him for work as a mechanical or architectural drafter at an entry-level wage ranging from $12 to $18 per hour. Claimant was active in the development of his program. Employer was provided a copy of the plan and filed its objections with OWCP. Mr. Cope recommended that the district director reject employer's objections to the program, explaining that the plan expected to return claimant to remunerable employment and stating that the jobs identified in employer's labor market survey do not represent a reasonable labor market for claimant because he has not been released to return to that work and he has not had any experience in those fields.[2] The district director adopted Mr. Cope's reasons, also noting that the plan anticipated returning claimant to work at an average wage near his prior average weekly wage. Having considered all the evidence before her, the district director approved the plan.

As claimant's disability is permanent, the plan expects to return claimant to paid employment in less than two years, and claimant could restore or surpass his wage-earning capacity following completion of the program, the plan satisfies the requirements of the regulations.[3] Accordingly, employer has not established any abuse of discretion in the district director's decision to approve claimant's rehabilitation plan. *Meinert*, 37 BRBS at 166-167.

Contrary to employer's argument, the mere fact that it identified alternate employment its vocational expert believed is suitable for claimant is insufficient to establish that the district director abused her discretion in approving claimant's rehabilitation plan. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment . . . through a program of reevaluation or redirection of their abilities, *or* retraining in another occupation, *or* selective job

[2]The functional capacities evaluation recommended light- to medium-duty work. Employer argues that the jobs it identified are entry-level and do not require prior experience.

[3]Although the district director did not specifically mention all three criteria, the information is in Mr. Cope's recommendation, and it is clear the district director considered and relied on this report.

placement assistance." 20 C.F.R. §702.501 (emphasis added). The Act and regulations do not provide employers a specific role in the vocational rehabilitation process. *Meinert*, 37 BRBS at 166; 20 C.F.R. §§702.502-702.506. The mere identification of alternate jobs by employer does not preclude claimant from participating in a retraining program, make his retraining program unnecessary, or make him "ineligible" for such a program. *See Meinert*, 37 BRBS at 166. Moreover, as the issue of employer's liability for disability benefits during the period of vocational rehabilitation is not properly before the district director, employer's argument regarding the availability of suitable alternate employment is premature.[4] *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Meinert*, 37 BRBS 165; *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Accordingly, the district director's Approval of Rehabilitation Plan and Award is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[4]Indeed, there has been no factual finding by an administrative law judge that the jobs identified by employer constitute suitable alternate employment.