BRB No. 98-0155

NUNZIO MADDIONA	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
AMERICAN STEVEDORING, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Betty J. O'Shea, New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-0461) of Administrative Law Judge Robert D. Kaplan 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, a laborer, injured his right knee in a work-related accident on September 19, 1994. Employer paid temporary total disability benefits from October 1, 1994 through July 31, 1995, and various periods of permanent partial disability benefits. The parties stipulated that claimant is permanently disabled due to his knee injury and cannot return to his usual pre-injury employment. Claimant contended that he is totally disabled due to his knee injury and from a work-related back injury.

The administrative law judge found that claimant did not suffer a work-related back injury, that claimant's knee injury reached maximum medical improvement on August 1, 1995, and that employer established the availability of suitable alternate employment. The administrative law judge thus awarded claimant benefits for a 30 percent impairment of the leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant contends that the administrative law judge erred in rejecting his claim of a causally related back injury, and in finding that employer established suitable alternate employment. Employer responds, urging affirmance.

Contrary to claimant's contention, the administrative law judge rationally found that claimant did not sustain a work-related back injury. The administrative law judge found the opinion of Dr. Hochberg that claimant does not have a work-related back condition outweighed the conflicting opinion of Dr. Post, who placed substantial reliance on claimant's subjective complaints of pain in the low back, which the administrative law judge found not to be credible. In refusing to credit claimant's complaints of low back pain, the administrative law judge found that claimant's testimony that he began to have back pain shortly after his work-related knee surgery on February 15, 1995, is undermined by the absence of any complaints by claimant in the medical records until January 16, 1996. Such a determination is within the administrative law judge's discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Consequently, we affirm the administrative law judge's finding as supported by

substantial evidence.

Claimant correctly contends, however, that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. When, as here, claimant establishes his inability to return to his pre-injury employment, the burden shifts to employer to establish the availability of suitable alternate employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). The United States Courts of Appeals for the Fourth and Fifth Circuits have addressed the issue of whether a single, identified job opportunity may satisfy employer's burden of proof, an issue which the Second Circuit, within whose jurisdiction the present case arises, has yet to resolve. In *Lentz v. Cottman Co.,* 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), the Fourth Circuit held that, once the burden shifts to employer to demonstrate the availability of suitable alternate employment, employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. Identification of a single job opening does not satisfy employer's burden under this standard. The Fifth Circuit held in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity, where it also establishes the general availability of other suitable positions or that the employee has a realistic likelihood of obtaining such a single employment opportunity under appropriate circumstances. To satisfy its burden, therefore employer must show more than the existence of a single job which claimant can perform; specifically, in a case where one specific job has been identified and no general employment opportunities have been proffered, which are suitable alternatives for claimant, employer must establish a reasonable likelihood that claimant could obtain the single job identified.[1] *See, e.g., Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

[1]The court stated that such a likelihood could exist where, for example, the employee is skilled, employer identifies a specialized job and the number of qualified employees is small.

The Board recently held in *Holland v. Holt Cargo Systems, Inc.*, BRBS , BRB No. 97-1513 (July 28, 1998), that it need not address whether one job standing alone is sufficient as a matter of law to establish suitable alternate employment in a case arising outside the Fourth and Fifth Circuits where the employer failed to meet its burden under the standards of either *Lentz* or *P & M Crane*.[2] In the instant case, as in *Holland*, we need not decide whether the Fourth or Fifth Circuit precedent should be controlling, because employer has not presented sufficient evidence to establish suitable alternate employment under either standard. Here, employer's rehabilitation consultant identified several positions which were deemed to be suitable for claimant. EX 6. The administrative law judge found all but one of these to be either physically or vocationally unsuitable, recognizing that in addition to claimant's physical disability from his knee injury, claimant, an Italian immigrant, was limited in education and in his ability to speak, read and write English.[3] Decision and Order at 8-9. The administrative law judge found only the position of embossing machine operator, which involved 95 percent sitting, walking and standing as needed, and good hand/motor/manual dexterity, to be suitable, available and within claimant's restrictions.[4] As the identification of a single job opening does not satisfy employer's burden of establishing the availability of suitable alternate employment under Fourth Circuit precedent, employer has not met its burden under that standard. *Holland,* slip op. at 3-5.

Employer's evidence also does not establish the availability of suitable alternate employment under the Fifth Circuit standard. It is uncontroverted that employer did not proffer any evidence of the general availability of jobs which claimant could perform, in addition to the single job opening for embossing machine operator. Thus, employer was required to show under *P & M Crane* that there was a "reasonable likelihood," under the circumstances of the instant case, that claimant could obtain the single identified position. As employer did not introduce any evidence on this point, but simply identified only one employment opportunity found suitable for claimant, employer has failed to meet its burden of establishing the availability of suitable alternate employment under the standard set forth by the Fifth

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[2]The *Holland* case arose in the Third Circuit, which also has not addressed the issue.

[3]Employer has not challenged the administrative law judge's findings that the other positions identified in the labor market survey performed by employer's vocational rehabilitation specialist do not constitute suitable alternate employment.

[4]The administrative law judge credited the less severe restrictions of Drs. Wolpin and Hochberg which provided that claimant was able to walk and stand a reasonable amount of time in an eight-hour day, although not continuously.

Circuit.[5] *Holland, id.* Therefore, employer has failed to establish suitable alternate employment under either Fourth or Fifth Circuit precedent. Consequently, we reverse the administrative law judge's finding that employer established the availability of suitable alternate employment and his award to claimant of permanent partial disability compensation. The administrative law judge's decision is modified to reflect claimant's entitlement to ongoing payments of permanent total disability compensation.

Accordingly, the administrative law judge's finding that claimant did not sustain a work-related back injury is affirmed. With regard to the work-related knee injury, the administrative law judge's finding that employer established the availability of suitable alternate employment is reversed, and the decision is modified to reflect claimant's entitlement to continuing permanent total disability compensation.

SO ORDERED.

BETTY JEAN HALL

[5]In finding that the position of embossing machine operator constituted suitable alternate employment, the administrative law judge relied on *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), for the proposition that it is irrelevant that the printing company position moved from Brooklyn to another state eight months after it was identified as suitable. This decision was reversed on appeal by the Ninth Circuit. *Edwards v. Director, OWCP,* 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied, U.S. ,* 114 S.Ct. 1539 (1994). Our decision herein renders moot any error committed by the administrative law judge in this regard, and further, we need not address claimant's contention that he diligently sought but was unable to obtain the identified position.

Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge